



The Commonwealth of Massachusetts
Executive Office of Health & Human Services
Department of Mental Retardation
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Timothy Murphy
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Gerald J. Morrissey, Jr.
Commissioner

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January 4, 2006

[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,


Gerald J. Morrissey, Jr.
Commissioner

GJM/ecw

cc: Deirdre Rosenberg, Hearing Officer
Amanda Chalmers, Regional Director
Marianne Meacham, General Counsel
Veronica Wolfe, Regional Eligibility Manager
Kim LaDue, Assistant General Counsel
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" or "the Department"), (115CMR 6.30 – 6.34) and M.G.L. c. 30A. A fair hearing was held on September 23, 2005 at the Fernald Development Center in Waltham, Massachusetts. Those present were:

[REDACTED]
John Mitchell
Elaine Cockroft
Randine Parry, Ph.D.

Appellant
Appellant's Mother
Appellant's Father
Attorney for DMR
Attorney for Appellant
DMR Psychologist

The evidence consists of the following documents, and approximately one and one quarter hours of oral testimony.

- Exhibit #1 Curriculum Vita of Randine Parry
- Exhibit #2 DMR Eligibility Determination
- Exhibit #3 2004 IEP Documents, [REDACTED] Public and [REDACTED] Schools
- Exhibit #4 2003 Chapter 766 Re-evaluation of Appellant, [REDACTED] Public and [REDACTED] Schools
- Exhibit #5 2002 Chapter 766 Re-evaluation of Appellant, [REDACTED] Public and [REDACTED] Schools
- Exhibit #6 Basic Skills Assessment, [REDACTED] College
- Exhibit #7 Progress Report, [REDACTED]
- Exhibit #8 Guardianship Decree

Exhibit #9 2000 Intellectual Assessment, [REDACTED] Public and [REDACTED]
[REDACTED] Schools

Exhibit #10 Letter of Andre P. Bessette, [REDACTED]

ISSUE

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

BACKGROUND

Mr. [REDACTED] is a 20 year old man who currently attends the [REDACTED], which is a residential school located in [REDACTED] Connecticut. Mr. [REDACTED] has attended the [REDACTED] since September, 2000. The Appellant attended the [REDACTED] for two years prior to transferring to his present school, and attended [REDACTED] public schools before that. When he is not in residence at the [REDACTED] he lives with his mother, [REDACTED] in [REDACTED] Massachusetts. He has been diagnosed with pervasive developmental disorder, NOS, attention deficit hyperactive disorder, inattentive type and dysthymic disorder. (Exhibit #4)

[REDACTED] currently receives educational services, including his placement at [REDACTED] pursuant to Chapter 766, the Massachusetts Students with Disabilities Act. Under Chapter 766, a child who is deemed to have special needs is entitled to receive educational services that meet his or her needs as a result of his or her disability. Chapter 766 does not provide any services after a special needs student reaches the age of 22.

The Appellant applied for DMR supports in February, 2005. By letter dated March 16, 2005, the Department denied his application. [REDACTED] mother, [REDACTED] requested a formal hearing on March 29, 2005. That hearing was held on September 23, 2005.

SUMMARY OF THE EVIDENCE

The earliest cognitive testing of the Appellant in the record before me is a January 21, 2000 Intellectual Assessment administered by Susan Serino, MA/CAGS, a school psychologist with the [REDACTED] Public Schools (Exhibit #9). [REDACTED] was 14 and a half at the time of this evaluation. The test administered was the Wechsler Intelligence Scale for Children-Third Edition (WISC-III). [REDACTED] earned the following scores:

Verbal IQ	91
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Performance IQ	68
Full Scale IQ	77

According to his examiner, [REDACTED] scores at this time were "drastically" lower than what he had achieved in 1995, when he was about ten years old. At the 1995 testing, [REDACTED] Verbal IQ was 108, his Performance IQ was 98, and his Full Scale IQ was 104. Ms. Serino stated that she believed that the 1995 scores "more closely reflect his ability," and that she "has serious questions about the validity of the present [2000] scores." She suggested that the change in his performance might be attributed to his medications, noting that he was extremely lethargic, his gait was unsteady, and his speech was slurred and slow.

[REDACTED] was again evaluated on 11/8/02 and 11/22/02, when he was 17 years old. The tests (WAIS-III) were administered by Marcel Fajnzyblber, Ed D., Consulting Psychologist for the [REDACTED] School District (Exhibit #5). At this time he achieved the following scores:

Verbal IQ	91
Performance IQ	77
Full Scale IQ	84

Mr. Fajnzyblber reported that these scores may underrepresent his cognitive abilities because the WAIS-III is effort sensitive, and, as in the 2000 evaluation, the Appellant "manifested problems with test demands and the [length] of [the] session because they exceeded his attention span and area of interests." The evaluator also states that [REDACTED] demonstrated "limited effort and inadequate self-correcting behaviors."

As part of the 11/8/02, 11/22/02 evaluation, [REDACTED] was given selected achievement tests from the Woodcock-Johnson Psycho-Educational Battery-III. These tests were administered by Anne McNeece, M.Ed. In her report, she stated that "when compared to others at his age level, [REDACTED]'s academic skills and his ability to apply them are within the average range." (Exhibit #5).

Other evidence of the Appellant's cognitive/academic abilities is contained in DMR's Eligibility Determination report, prepared by Joel J. Match, Ph.D., (Exhibit #2), in which Dr. Match notes that James has passed the MCAS (Massachusetts Comprehensive Achievement System tests), although his mother testified that it took James seven attempts before he passed that test. Also in evidence was the Appellant's application to [REDACTED] College. (Exhibit #6) Among other things, the application contains a writing sample by the Appellant, the quality of which suggests that the writer has substantial cognitive abilities not consistent with a mentally retarded person.

_____ Randine Parry, Ph.D., Clinical Psychologist, testified for the Department regarding _____ cognitive abilities, although she was not the person who made the original eligibility determination. As part of her assessment, she reviewed the 2002 evaluation discussed above. (Exhibit #5) She stated that _____ verbal IQ score of 91 was in the average range, his performance IQ of 77 was in the low average range, and his full scale IQ score of 84 was in the upper borderline range. Dr. Parry also reviewed the results of Appellant's Woodcock-Johnson testing. She testified that his math scores were in the average range, while he tested in the average to high average range on the reading subtests. She observed that his academic abilities (as measured on the Woodcock-Johnson) appeared to be slightly above his cognitive results.

_____ mother testified about her concerns regarding her son's adaptive skills. Specifically, she is worried about _____ lack of judgment concerning certain life skills. For instance, she stated that he is not able to judge safety issues, and puts himself at risk as a result. In a 2002 report of _____ (Exhibit #7), Linda Baade, one of the Appellant's teachers, stated that _____ "still does not consistently demonstrate that he can negotiate movement around traffic." Safety issues are also referenced in a letter from Andre Bessette, Ph.D., TLC Psychology Resident, dated 1/12/05, in which he writes that _____ "deficient visual-spatial/kinesthetic awareness and poor self-estimation led him to walk out into traffic on several occasions, resulting in his nearly being struck and causing traffic to come to a halt." (Exhibit #10). Dr. Bessette also stated that _____ "has accidentally injured himself on several occasions but failed to identify and seek out proper first aid assistance."

_____ also said that her son cannot accurately "read" people, and does not sense those who might want to take advantage of him. In addition, she testified that _____ is indiscreet about financial information. She and her husband have been happy with their son's placement at _____ because of, among other things, the support and structure it provides for _____.

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 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,
- j) he must be a person with Mental Retardation as defined in 115 CMR 2.01, and

- k) 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 criterion and I specifically find that he meets that criterion. However, I find that he is not mentally retarded as that term is defined at 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 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.

Applying those standards, I find that Mr. [REDACTED] does not have significantly sub-average intellectual function in that all of his IQ scores were above the 70-75 range, which is the IQ range in which it is permissible under DMR standards to conclude that mental retardation exists. Furthermore, all his scores from the 1995 evaluation were in the range of average intelligence. In addition, his performance on the Woodcock-Johnson Psycho-Educational Battery-III in 2002 is not consistent with mental retardation. No contrary evidence was presented by the appellant or his witness. Therefore, 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 also presented evidence relative to his adaptive functioning. Because the Appellant failed to show that he has significantly sub-average intellectual functioning, it was not necessary for me to consider his adaptive functioning in order to reach my decision.

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:

Nov 29, 2005

Deirdre Rosenberg
Deirdre Rosenberg
Hearing Officer