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Executive Office of Health & Human Services
Department of Mental Retardation
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Gerald J. Morrissey, Jr.
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January 3, 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: Deidre Rosenberg, Hearing Officer
Amanda Chalmers, Regional Director
Marianne Meacham, General Counsel
Veronica Wolfe, Regional Eligibility Manager
Douglas White, Assistant General Counsel
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 October 28, 2005 at the Hogan Regional Center in Hathorne, Massachusetts. Those present were:

[redacted]	Appellant's Father
Douglas White	Attorney for Appellant
Sandra Brennan	Attorney for DMR
Patricia Shook, Ph.D.	Region III Eligibility Coordinator Eligibility Psychologist

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

Exhibit #1A	2001 Neuropsychoeducational Evaluation, CNS Pathways Academy
Exhibit #2A	2004 Neuropsychological and Psychodiagnostic Evaluation, Learning Evaluation Clinic
Exhibit #3D	DMR Ineligibility Letter
Exhibit #4D	Letter of Karen Bresnahan, MD
Exhibit #5D	1996 Neuropsychological Evaluation
Exhibit #6D	1998 Psychological/Personality Assessment, The Floating Hospital for Children
Exhibit #7D	Resume of Patricia H. Shook, Ph.D.

ISSUE

Whether the Appellant meets the eligibility requirements 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] in [redacted] Massachusetts.

According to the Appellant's father, who testified on his son's behalf at the Fair Hearing, school has always been extremely problematic for his son. He entered the [redacted] Public School system when he was five years old. After one year there, the family moved to [redacted] Massachusetts, and [redacted] attended the public schools in that town for the first grade. His first special education placement occurred in the second grade, when the Appellant was placed at [redacted], also in [redacted]. According to his father, [redacted] struggled at [redacted] and was expelled in the fourth grade. He attended the [redacted] in [redacted] Massachusetts for the next two and one-half years. However, his father reported that his son began to stumble in this setting after the first year, and stated that [redacted] was "suspended every other week." Eventually, he was expelled.

Following the [redacted] placement, the Appellant attended the [redacted] for two days, but ended up shortly thereafter at the Center for Neurointegrative Services at McLean Hospital, where he remained for five years. This has been his longest placement to date. For the last fifteen months he has attended the [redacted], described above. While his previous educational placements were all day programs, his current school is residential, and provides its students twenty-four hour a day supervision.

[redacted] currently receives educational services, including his placement at the [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. His family is seeking DMR supports for their son when he turns 22 and is no longer eligible for Chapter 766 services.

By letter dated August 4, 2004, the Department of Mental Retardation denied the Appellant's application for supports on the basis that he did not meet its definition of mental retardation. (Exhibit #3D) His family requested a formal hearing to appeal the Department's decision, and that hearing was held on October 28, 2005.

SUMMARY OF THE EVIDENCE

The earliest cognitive testing of the Appellant in the record before me is a Neuropsychological Evaluation conducted by Cheri Geckler, Ph.D. in 1996. (Exhibit #5D). At the time, [redacted] was 10 years old and enrolled in a fourth grade special needs class at the [redacted] in [redacted] Massachusetts. The Wechsler Intelligence Scale for Children-Third Edition (WISC-III) was administered, among other tests. Bruce earned the following scores:

Verbal IQ	84
Performance IQ	79
Full Scale IQ	80

According to Dr. Geckler, [redacted] subtest scores revealed significant variability, with some test results measuring near average. Dr. Geckler also reported that his then current teacher described [redacted] as "fairly disruptive, labile and anxious." This was consistent with what his father reported at the time on the Child Behavior Checklist, where "he indicated a number of problematic externalizing behaviors, including restlessness, acting out, demands for attention, and impulsivity." (Exhibit #5D)

[redacted] was next evaluated on April 2, 1998, by Lois Carra, Ph.D., of the Center for Children with Special Needs at The Floating Hospital for Children in Boston, Massachusetts, when he was 12 and a half years old. (Exhibit #6D) This clinician stated that [redacted] carried several psychiatric/neurologic diagnoses, including Bipolar Disorder, Pervasive Developmental Disorder, Tourette Syndrome, and Attention Deficit Hyperactivity Disorder. Much of Dr. Carra's report deals with [redacted]'s behavioral problems. She stated that "his Pervasive Developmental Disorder was evident throughout the testing and responses (sic) indicated great immaturity, oppositional tendencies, perseveration and almost total inability to see things as others see them." The WISC-III was again administered, with the following results:

Verbal IQ	80
Performance IQ	81
Full Scale IQ	82

As can be seen, these results are very similar to those of the 1996 Neuropsychological Evaluation. However, Dr. Carra concludes that "while [redacted] has some normal reasoning abilities, he is emotionally handicapped. He is disturbed in his experience of emotions and disordered in his interpersonal interactions." (Exhibit #6D)

The Appellant relies on his two most recent cognitive tests--the 2001 Neuropsychoeducational Evaluation conducted by the Center for Neurointegrative services at McLean Hospital (Exhibit #1A), and the 2004 Neuropsychological and Psychodiagnostic Evaluation by the Learning Evaluation Clinic (Exhibit #2A)--to support

his contention that he meets DMR's definition of mental retardation. Both tests show significant declines in his IQ. In 2001, the Appellant's verbal IQ was 76, and his performance IQ was 70 (his full scale IQ was not reported, for reasons discussed below), while in 2004 his verbal IQ was 71 and his performance IQ was 75.

Regarding the 2001 test, the clinician who tested the Appellant, Liana Pena Morgens, Ph. D., did not report a full scale IQ because she considered certain index scores (which I take to be subtests) to be more relevant. For example, Dr. Morgens reported that [redacted] achieved a score of 80 in verbal comprehension, and 78 in perceptual organization skills (both of which are index scores), which she describes as "more stable patterns" (but represent declines from previous test results, nevertheless). (Exhibit #1A) In her testimony as DMR's expert, Dr. Patricia H. Shook, Ph.D., agreed with Dr. Morgens that [redacted]s IQ scores do not accurately represent his cognitive skills, and that the index scores described above give a better sense of his abilities.

Dr. Morgens also stated that [redacted]s learning style (and by implication, his IQ scores) are negatively affected by his impulsivity and poor organizational abilities, both of which she attributes to his ADHD. Furthermore, this clinician states that because [redacted]s fine coordination is deficient, making writing tasks a laborious chore, he is left "with little resources to apply to other types of processing (i.e., learning)." (Exhibit #1A)

The last evaluation in the record before me is that of 2004, when the Appellant was 18 years, seven months. It should be noted that in accordance with DMR regulations, mental retardation must be established before an individual reaches eighteen years of age. (115 CMR 02.01) Susan Parks, Ph.D., administered the WAIS-III. [redacted] achieved the following results:

Verbal IQ	71
Performance IQ	75
Full Scale IQ	70

Dr. Parks stated that [redacted] "put forth adequate effort, thus suggesting that his scores are an adequate reflection of his strengths and limitations." (Exhibit #2A) However, she also said that he had difficulty with anxiety and behavioral disturbances, and when he had difficulty with a task, he refused to continue with the testing. Since [redacted] was beyond the determination age of 18 at the date of this test, I did not give his IQ scores much weight in reaching my decision.

More revealing to this hearing officer were the results of the section of the evaluation entitled Emotional Testing, from which I quote at length.

"[redacted]'s verbal scores have consistently declined over the past decade. A comparison of his most recent two evaluations indicate that scores pertaining to

the information, Arithmetic, and Letter Span have remained rather consistent whereas his vocabulary scores have declined. This may be attributed to several factors including increased behavioral disturbance and increased psychiatric symptoms. This combination has likely created a situation where [redacted] has difficulty attending to the information provided to him in school, thus negatively impacting his ability to learn new information at the rate of a child without these vulnerabilities. Therefore, because verbal IQ scores are partially attributed to school-based learning, he may have fallen behind in the adequate development of verbal skills.

"The Similarities subtest is considered to represent a person's overall verbal intelligence while the Information subtest is highly dependent on school-based learning. Because his score on the Similarities subtest was the highest of the three verbal subtests. . . .while his Information subtest score was the lowest of the three, it may suggest that his verbal potential is higher than his verbal scores actually reflect at this time. However, his current behavioral and p[sychiatric symptoms most likely undermine the ability to learn and perform at his optimal level. . ."

"In sum, [redacted]s overall diagnostic profile is quite complicated due to overlapping features of his mood, cognitive, and pervasive developmental disorder."

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,

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 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 both the 1996 (Exhibit #5D) and 1998 (Exhibit #6D) cognitive tests, [redacted]'s full scale IQ was in the low average range (80 and 82, respectively). In addition, the clinician who administered the 1996 tests reported that some subtest results measured near normal, which would be unusual for a mentally retarded person.

As previously noted, his tests from 2001 (Exhibit #1A) and 2004 (Exhibit #2A) both reveal significant declines in the Appellant's IQ scores. I am persuaded, however, that the decline in his performance on his IQ tests is less due to any real deterioration in his cognitive abilities than it is to his serious behavioral and psychological problems. Indeed, these problems are a common theme running through all of the evaluations before me, and may have also depressed his scores on the 1996 and 1998 assessments, when he managed to score in the low average range. In addition, the clinician who administered the 2001 test suggested that because writing tasks were a laborious chore for [redacted], he was left with little resources to apply to.....learning." 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.

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: 12/23/05

Deirdre Rosenberg
Hearing Officer