



The Commonwealth of Massachusetts
Executive Office of Health & Human Services
Department of Mental Retardation
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April 6, 2007

Richard Ames, Esq.
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Attorneys At Law
22 Putnam Avenue
Cambridge, MA 02139

Re: Appeal of _____ - Final Decision

Dear Attorney Ames:

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
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 Department), (115CMR 6.30-6.34) and M.G.L. c. 30A.

The Appellant, Pierpaolo (Paul) Rufo, was found to be ineligible for DMR Adult Services on October 13, 2005. He appealed that decision, and a fair hearing was held on November 17, 2006, at the Department of Mental Retardation's Northeast Regional Office in Hathorne, Massachusetts. Those present were:

[REDACTED]

Mary McGuire
Richard Ames, Esq.
Veronica Wolfe
Patricia Shook, Ph.D.
Douglas White, Esq.

Appellant
Appellant's Father
Counselor, Curtis-Tufts Alternative School
Counsel for Appellant
DMR Regional Eligibility Manager
Eligibility Psychologist for DMR
Counsel for DMR

The evidence consists of the following exhibits, and approximately two hours of testimony:

1. DMR Eligibility Letter, 10/13/05
2. Psychological Evaluation, 05/24, 31/94
3. Psychological Evaluation, 11/1/96
4. Psychological Report, 03/13/03
5. Report of Margaret F. Marino, Ph.D., 07/11/05
6. Adaptive Behavior Assessment System II, 02/01/05
7. Adaptive Behavior Assessment System II, 02/21/06
8. Eligibility Determination, 07/21/05

ISSUE

Whether the Appellant is eligible 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 who lives with his parents and five siblings in Medford, Massachusetts. He has attended special education programs in the public schools of Boston and Medford, Massachusetts, since he began his schooling, and for the past four years has attended the Curtis-Tufts Alternative School. He has been variously diagnosed as having significant delays in language related areas, obsessive compulsive disorder, and ADHD. He currently takes Lithium and Abilify for a recently diagnosed psychological disorder.

SUMMARY OF THE EVIDENCE

There were four intelligence evaluations in the record before me. In 1994, when he was six years and eight months old, the Appellant was tested by Dr. Allen Cohen, a school psychologist for the Boston Public Schools (Exhibit # 2). The test administered was the Wechsler Intelligence Scale for Children, Third Edition (WISC-III). Dr. Cohen did not give Performance, Verbal and Full-Scale IQ numbers in his report. Rather, he wrote that Paul "obtained a Full Scale IQ in the Intellectually Deficient (1st percentile) range," which is where his Performance IQ also fell, "while his Verbal IQ was at the lower end of the Borderline (4th percentile) range." (Exhibit #2, p. 4) Dr. Cohen reported that testing the Appellant was problematic because it was difficult to get him to focus on the tasks at hand. Thus, according to Dr. Cohen, "the test results may possibly underestimate [redacted] actual level of cognitive functioning." (Exhibit #2, p. 3)

On November 1, 1996, the Appellant was evaluated by the Tri-City Health and Retardation Center, Inc., of Medford, Massachusetts, after being referred by the Medford Public Schools for a re-evaluation of his special education needs (Exhibit #3). [redacted] was nine years old at the time. He achieved the following scores on the WISC-III:

Verbal IQ	67
Performance IQ	65
Full Scale IQ	64

Michelle Friedman, Psy.D., who administered the test, stated in her report that [redacted]s attitude was very positive, although his "motor activity was excessive," and he was somewhat distractible (Exhibit #3, p. 2). "Therefore," she concluded, "while these results probably do not reflect his highest level of functioning, they appear to be a reliable sample of his current day to day cognitive and personality functioning" (Id.).

The Appellant was next tested on March 13, 2003, when he was fifteen years old and a ninth grade student at Medford Technical Vocational High School (Exhibit #4). Again, the WISC-III was used to evaluate his cognitive abilities. His scores were as follows:

Verbal IQ	67
Performance IQ	53
Full Scale IQ	56

The clinician who tested Mr. [redacted] Dr. David A. Steinhauer, described him as "remarkably cooperative and well motivated during the entire testing procedure" and "able to finish all tests in a timely fashion." Therefore, Dr. Steinhauer concluded that the test results were an accurate indicator of his current cognitive abilities and emotional functioning. In spite of the lack of distractibility and his eagerness to cooperate, the Appellant's scores were consistent with, and even lower than, his previous results, suggesting, perhaps, that the distractibility noted in the earlier testings did not affect his scores.

The final cognitive assessment of the Appellant took place on July 11, 2005, and was conducted by Margaret Marino, Ph.D. (Exhibit #5). Mr. [redacted] was seventeen years old at the time, and the Wechsler Adult Intelligence Scale (WAIS-III) was used to measure his intelligence. He achieved the following results:

Verbal IQ	77
Performance IQ	67
Full Scale IQ	70

Dr. Marino stated that Mr. [redacted] was "cooperative and appeared to be making his best effort." There was no mention of his being distractible or unable to focus.

Dr. Patricia Shook, eligibility psychologist for DMR's Northeast region, testified for the Department regarding her conclusion that Mr. [redacted] was not retarded. She stated that she agreed with the DMR clinician who actually made the eligibility determination, John Robert Higgins, Ed.D., that the Appellant was ineligible for DMR services as an adult. However, it is noteworthy that in his Eligibility Determination (Exhibit #8), Mr. Higgins initially stated, in regard to an ABAS-II administered in February, 2005, that although "[the Appellant's] scores on adaptive scales relevant to Department of Mental Retardation eligibility—such as Self-Care, Communication, Health and Safety, and Self Direction, are above what is seen in persons with retardation," "*early cognitive assessments are in the range of retardation.*" (emphasis added). Therefore, a further IQ test was administered on July 11, 2005 (Exhibit #5), the scores of which are set forth above. After reviewing the results of this test, Mr. Higgins concluded that Mr. [redacted] was ineligible for DMR services (although he did not use the word ineligible in the text of his report), writing that "*[i]n light of these results, particularly his typical subscale scores, and the results of the ABAS-II, there is no indication he has adaptive limitations related to cognitive limitations as outlined in Department of Mental Retardation criteria.*" (emphasis added), (Exhibit # 5) It appears to me that Mr. Higgins was ambivalent about

the Appellant's cognitive abilities, and I share that ambivalence. Therefore, I take no position on whether or not Mr. [redacted] is retarded as measured by the cognitive evaluations in the record. Indeed, his full scale IQ scores put him within the intelligence range in which DMR may conclude that an applicant is retarded (an IQ of approximately 70 to 75 or below)¹.

However, to be eligible for DMR services, a person must not only have significantly sub average intellectual functioning, as defined above, he must also be in need of specialized supports 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. I find that the Appellant does not have impairments significant enough to meet the department's requirements in this regard. For example, it was clear from testimony received at the hearing that Mr. Rufo regularly uses public transportation to travel from Medford to Boston for recreation, shops for his own clothing, gets himself ready for school, and cooks eggs for his breakfast. Furthermore, in answer to hypothetical questions posed by counsel for DMR, the Appellant clearly and accurately explained how he would respond if there was a fire in his house, and what he would do if he cut himself. His answers were consistent with the lack of testimony or evidence at the hearing regarding concerns about unsafe behavior on the Appellant's part. Although [redacted] does not have significant work experience, this did not appear to be due to inappropriate behaviors in the workplace or a lack of skills. Rather, the evidence indicated that obtaining a job seems not to have been given top priority, while concerns about transportation have complicated the issue. In addition, there was testimony that [redacted] is a talented woodworker, and this should enhance his job prospects. In sum, he does not need specialized supports in two or more of the adoptive skill areas enumerated above.

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 two or more of the following seven adaptive skill areas: communication, self-care, home living, community use, health and safety, functional academics, and work.

¹ Effective June 2, 2006, DMR changed its definition of "mental retardation" to "significantly sub-average intellectual function" as defined by "intelligence indicated by a score of 70 or below..." See 115 C.R. 2.00.

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.

I take no position as to whether Mr. [redacted] meets the Department of Mental Retardation's definition of mental retardation, for the reasons discussed above. However, the third prong of the test requires that the applicant, in addition to having an IQ score of approximately 70 to 75 or below, have related limitations in two or more of the above enumerated adaptive skill areas. I find that the Appellant does not have adaptive impairments severe enough to meet the Department's standards.

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:

3/20/07

Deirdre Rosenberg
Deirdre Rosenberg
Hearing Officer