



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

Area Code (617) 727-5608
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May 23, 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
Enclosure

cc: Deirdre Rosenberg, Hearing Officer
Terry O'Hare, Regional Director
Marianne Meacham, General Counsel
Damien Arthur, Regional Eligibility Manager
Cynthia Gagne, 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, [REDACTED], was denied DMR supports on December 23, 2004, on the grounds that he did not meet its definition of mental retardation, as set forth at 115 CMR 2.01. He appealed that decision, and a fair hearing was held on January 26, 2006, at the Department of Mental Retardation's Monson Developmental Center in Palmer, MA. Those present were:

[REDACTED]
Christopher Pike

C. J. Gagne

Richard P. Costigan

Appellant's mother

Appellant's father

Appellant's stepfather

Associate Director, [REDACTED]

Behavioral Program

Counsel for DMR

Eligibility Psychologist for DMR

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

1. Psychoeducational and Adaptive Living Evaluation, dated 9/13 and 27/04
2. Competence to Stand Trial Evaluation, dated 1/11/00
3. Letter of Doreen L. Donnelly, dated 12/06/05
4. Individualized Education Plan of December, 2005
5. Evaluation of Craig Latham, Ph.D., dated 11/30/05
6. Curriculum Vitae of Richard P. Costigan, Psy.D.
7. DMR Eligibility Report, dated 11/17/04
8. DMR Eligibility Report, dated 1/14/04
9. [REDACTED] Centers Psychological Test Report, dated 10/23/02

10. Psychological Evaluation of William A. Goodman, Psy.D., dated 5/1/99
11. Baystate Medical Center, Neuropsychological Evaluation, dated 4/7/95
12. Baystate Medical Center, Psychological Evaluation, dated 12/12/90
13. Baystate Medical Center, Neurodevelopmental Evaluation, dated 12/13/90
14. ██████████ Centers Summary, dated 11/8/05

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 is currently a residential student at the ██████████ in ██████████ Massachusetts. He has been in this placement since 2001. Prior to attending ██████████, the Appellant attended public schools in ██████████ Massachusetts. When not at school, his primary residence is in ██████████ where he lives with his mother and step-father. He has been diagnosed with multiple learning disabilities, attention deficit disorder, and oppositional defiant disorder.

SUMMARY OF THE EVIDENCE

██████████'s earliest cognitive evaluation in the record is from 1990, when he was five years old (Exhibit #12, Baystate Medical Center Psychological Evaluation). At that time he was administered the Wechsler Preschool and Primary Scales of Intelligence-Revised (WPPSI-R). His scores from that test were as follows:

Verbal IQ	81
Performance IQ	82
Full-Scale IQ	80

The clinician who administered the tests attributed his delays to "cerebral dysfunction of unknown etiology." (Exhibit #12). A neurodevelopmental evaluation performed concurrently with the cognitive assessment (Exhibit #13) diagnosed his primary problem as "a severe developmental language disorder...clearly neurological in origin."

██████████ was next tested in 1995, when he was nine years, seven months old. This assessment was also performed at the Baystate Medical Center (Exhibit #11). The

test administered was the Wechsler Intelligence Scale for Children-III (WISC-III). He achieved the following results:

Verbal IQ	70
Performance IQ	78
Full-Scale IQ	71

Bradley J. Crenshaw, Ph.D., who conducted the evaluation, concluded that [REDACTED] "performance on this battery of tests is consistent with an attention deficit disorder," and with a verbal learning disability. (Exhibit #11) In addition, he wrote that the Appellant exhibited oppositional behavior, as reported by his parents, including repeatedly urinating in his room. The report also states that [REDACTED] behavior had become increasingly aggressive; he had slammed his teacher's hand in his desk, and hit his dog with a hammer. Dr. Crenshaw concluded that "his behavior merits a diagnosis of an oppositional defiant disorder."

In 1999 [REDACTED] was tested by William A. Goodman, Licensed Clinical Psychologist, in connection with a three-year re-evaluation under Chapter 766. (Exhibit #10) At the time, the Appellant was 13 years old and a seventh grader at the [REDACTED] Middle School in [REDACTED]. On the WISC-III, Nicholas obtained the following scores:

Verbal IQ	63
Performance IQ	83
Full-Scale IQ	71

A review of his sub-test scores, which revealed a "highly significant difference between his Verbal Comprehension index score of 67 and a Perceptual Organization index score of 93." (Exhibit #10), suggested to Dr. Goodman that [REDACTED] suffered from a learning disability primarily in the areas of language function in both expressive and receptive abilities, as well as in verbal memory.

[REDACTED] was also administered the Woodcock-Johnson Psychoeducational Battery--Revised, which measures academic achievement. His performance revealed profound academic delays, with most of his grade equivalency scores not above the second grade level.

The final cognitive evaluation of [REDACTED] administered before he was 18 years old, was performed by [REDACTED] school psychologist at the [REDACTED] [REDACTED] (Exhibit #9). [REDACTED] was 17 years old at the time, and a residential student at [REDACTED]

[REDACTED] The test results were as follows:

Verbal IQ	66
Performance IQ	79
Full Scale IQ	70

As can be seen, the Appellant's scores were similar to his previous ones, in that his performance IQ was higher than his verbal IQ. Although [REDACTED] did not offer a diagnosis in her report, she did state that "[REDACTED] mental ability is higher than his academic level and Adaptive Behavior Scale results would indicate." (Exhibit #9)

The Appellant was also evaluated in 2004, by William Goodman, Psy.D. (Exhibit #1). Because DMR's regulations require that mental retardation be established before an applicant for adult services has reached the age of 18 (115 CMR 2.01), I did not take the results of this report into consideration in reaching my decision. That being said, [REDACTED] IQ scores from the 2004 evaluation were consistent with previous test results.

Except for the 1990 evaluation (Exhibit #12), when his full scale IQ was 80, the Appellant's full scale IQ scores have been in the range of "approximately 70 to 75 or below," which is the range in which it is possible to conclude an individual is mentally retarded. Dr. Richard Costigan, the Department's expert, apparently relied on Dr. Crenshaw's assessment (Exhibit #11) that [REDACTED] performance was consistent with an attention deficit disorder and a verbal learning disability, on Dr. Goodman's opinion that [REDACTED] suffered from a learning disability (Exhibit #10), and on the results from [REDACTED] 1990 IQ test (Exhibit #12), when [REDACTED] full scale IQ was 80, in concluding that [REDACTED] was not, in fact, retarded. He also testified that the Appellant's test profile was not consistent with mental retardation (in spite of his achieving very low scores on the sub-tests of block design and vocabulary, which are the sub-tests most highly correlated with IQ).

Although I did not find the evidence supporting the Department's decision entirely compelling, I do find that the Appellant has failed to show by a preponderance of the evidence that it was wrong. Having made this decision, it is unnecessary for me to discuss [REDACTED] adaptive living skills. Nevertheless, since it was not clear at the time of the hearing whether the Department's position would be upheld, extensive testimony was offered regarding [REDACTED] living skills, and in the interest of presenting an accurate picture of the Appellant, I am including it.

Christopher Pike is the Associate Executive Director of [REDACTED] behavioral program and has worked with [REDACTED] for approximately three years. He testified that the Appellant needs the highly structured environment which [REDACTED] provides in order to function appropriately. In spite of the staff's vigilance,

however, [REDACTED] has managed to steal from stores on school outings. On campus, he frequently steals CD's, movies and money from other students. Mr. Pike stated that [REDACTED] can't perform any kind of daily living task without the oversight and structure provided by the staff at the school. In addition, he requires cuing to attend to his personal hygiene, and has difficulty respecting the boundaries of others. He no longer has roommates because the staff is uncomfortable leaving him alone with other students.

[REDACTED] mother, [REDACTED] had similar concerns regarding her son's ability to live outside a highly structured setting. In addition, she testified that he is functionally illiterate, which was confirmed by certain recent evaluations of [REDACTED]. (For example, Dr. William Goldman, who evaluated the Appellant in 2004, when he was 19 years old, Exhibit #1, reported that he is "essentially unable to read, write, or engage in mathematical operations," with academic skills "at the first to second grade level.") Mrs. [REDACTED] said that [REDACTED] doesn't understand the consequences of his behavior, making it easy for others to take advantage of him. In 1999, some friends convinced him to be a lookout during a house burglary, which led to his arrest. (He was subsequently found not competent to stand trial because of his inability to understand even the most rudimentary aspects of the court system. Exhibit #2)

The testimony of the Appellant's father, [REDACTED] was largely focused on his son's hypersexual behavior. He was particularly concerned about discovering that [REDACTED] during a school vacation visit to his home, had searched numerous pornography sites on the internet, and had downloaded pornographic pictures and video clips. On another occasion, he testified, [REDACTED] had been discovered masturbating in his (Mr. [REDACTED]) girlfriend's underwear. Both [REDACTED] mother and Mr. Pike also testified that [REDACTED]'s sexual behavior was troubling. Mrs. [REDACTED] informed the forensic psychologist who prepared [REDACTED]'s competency evaluation for the Court, that he cuts open the genital areas of stuffed animals and masturbates inside. (Exhibit #2) Mr. Pike expressed concern regarding the Appellant's intense interest in very young girls.

While his sexual behavior has no bearing on his eligibility for DMR services, it is a significant part of his profile that deserves mention.

FINDINGS AND CONCLUSIONS

After a careful review of all of the evidence, and despite the Appellant's obvious need for continuing support, I find that he 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,

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

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.

Based upon the testimony of Dr. Richard Costigan, the Department's expert psychologist, that the Appellant's test profiles suggest that he has a learning disability rather than mental retardation, I find, with considerable reluctance, 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: May 3, 2006

Deirdre Rosenberg
Deirdre Rosenberg
Hearing Officer