



The Commonwealth of Massachusetts
Executive Office of Health & Human Services
Department of Mental Retardation
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October 5, 2007

Re: Appeal of [REDACTED] - Final Decision

Dear Mr. & Mrs. [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,

Elin M. Howe
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

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) (115CMR 6.30 – 6.34) and M.G.L. c. 30A. A fair hearing was held on May 11, 2007 at the Department of Mental Retardation's Hogan Regional Center in Hathorne, Massachusetts. Those present were:

[REDACTED]
Tim Sindelar, Esq.
Douglas White, Esq.
Veronica Wolfe
Patricia Shook, Ph.D.

Appellant's Mother
Appellant's Attorney
Attorney for DMR
Regional Eligibility Manager
DMR Regional Psychologist

The evidence consists of the exhibits listed below and, and approximately one and one half hours of oral testimony.

- 1) Neuropsychological Testing Report of Steffen Fuller, 3/20/1997
- 2) Psychological Testing, 9/9/03
- 3) Adaptive Behavior Assessment System (ABAS-II), 5/10/06
- 4) ICAP Computer Scoring, 5/10/06
- 5) Educational Evaluation of Sherry Coughlin, 9/2003
- 6) IEP, 9/2005 to 6/2006
- 7) Eligibility Letter, 6/15/06
- 8) Eligibility Determination, 6/6/06
- 9) Excerpt from AAMR "Mental Retardation Definition....," 9th Edition (1992)

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 21 year old man with a diagnosis of Pervasive Developmental Disorder-NOS who lives with his family in Lexington, Massachusetts. He has received special education services throughout his schooling in a full inclusion model, with tutor support and other modifications provided. Although [REDACTED] completed the requirements for graduation when he was eighteen, including passing the MCAS, he chose not to accept his diploma. Since high school he has been working with an organization called Work Opportunities Unlimited, whose mission is to develop jobs for its clients. [REDACTED] currently has a job at a local restaurant prepping food. By letter dated June 15, 2006 (Exhibit #8) he was denied his application for DMR supports. He timely appealed the Department's decision.

SUMMARY OF THE EVIDENCE

On March 20, 1997, when the Appellant was eleven years old, he was evaluated by Steffen Fuller, Ph.D. (Exhibit #1). Dr. Fuller administered the Wechsler Intelligence Scale for Children-Third Edition (WISC-III), among other tests. As documented in the record, he received the following IQ scores:

Verbal IQ 67

Performance IQ 77

Full Scale IQ 70

According to the examiner, the ten point differential between the Appellant's verbal IQ score and performance IQ score is not statistically significant. Dr. Fuller stated that the results from this test were a valid measure of Alex's then current intellectual functioning.

The second cognitive evaluation in the record was performed on September 8 and 9, 2003 by Betsy Speicher, Ed.D., Certified School Psychologist with the Lexington Public Schools. [REDACTED] was seventeen years old at the time of the assessment and in the eleventh grade at Lexington High School. Ms. Speicher administered the Wechsler Adult Intelligence Scale, Third Edition (WAIS-III). His scores were as follows:

Verbal IQ 76

Performance IQ 76

Full Scale IQ 74

As can be seen, there was no difference between the Appellant's verbal and performance IQ scores, indicating that his verbal and nonverbal processing skills are evenly developed. There was no significant spread among any of his subtest scores, either in the

verbal or the performance scale. He was described by this clinician as a "happy young man who is comfortable in his home and school environments" (Exhibit #2, p. 6).

Dr. Patricia Shook, who is the Eligibility Psychologist for the Department's Northeast Region, appeared as DMR's expert witness. She testified that when she made her determination that [REDACTED] was not eligible for DMR supports, the only cognitive assessment she had was that performed by Betsey Speicher in 2003 (Exhibit #2). In her report, Ms. Speicher had stated that both the Appellant's verbal and performance IQ scores (76) were in the borderline range, and Dr. Shook testified that she agreed. Furthermore, she said that a number of his subtest scores were in the average or low average range, which was not consistent with mental retardation. According to Dr. Shook, her opinion regarding [REDACTED] eligibility did not change after she was provided with the results of the 1997 IQ tests (Exhibit #1)--which she received approximately one week before the hearing--largely because of the "tremendous" scatter in his sub-test scores. (His full scale IQ was 70.). His scores ranged from 1 to 12 in the verbal sub-tests, and from 1 to 10 in the performance subtests.

Dr. Shook also testified that she had reviewed the results of the one Adaptive Behavior Assessment System test (ABAS-II) in the Appellant's file (Exhibit #3). The ABAS measures an individual's proficiency in daily living skills. [REDACTED] received a score which was two standard deviations below the mean in only one area, "health and safety." Under the Department's regulations, an applicant for its supports must receive scores in this range in two or more adaptive skill areas, in addition to having "significantly sub average intellectual functioning," to qualify for its services. Thus, even if Dr. Shook had concluded that the Appellant's intellectual functioning was sub average, he would not have been eligible because he did not meet DMR criteria regarding adaptive skill deficits.

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 2.01.¹

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."

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.

As Dr. Shook testified at the Fair Hearing, [REDACTED] IQ scores place him "on the cusp" of the IQ range where an individual may be classified as mentally retarded by the definitional standard then used by DMR ("an IQ score of approximately 70-75 or below"). Although it is a close call, I defer to Dr. Shook's professional opinion that in this Appellant's case, his sub-test scores give a more accurate picture of his intellectual abilities than do his full scale IQ numbers, and thus uphold her determination that he is ineligible for the Department's services. Even if I disagreed with Ms. Shook's conclusion regarding the Appellant's intellectual abilities, I would uphold the Department's decision regarding his eligibility because he does not demonstrate the necessary related limitations in adaptive skills. That was evidenced not only by his performance on the ABAS-II, but also by the testimony of his mother that [REDACTED] can use the stove; do chores such as setting the table, vacuuming, laundry, and certain yard work; and use public transportation. Therefore, I do uphold DMR's determination that [REDACTED] is ineligible for its services.

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)].

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. Mr. Traniello filed his appeal before the new definition was adopted.

Date: Sept 23, 2007

Deirdre Rosenberg
Deirdre Rosenberg
Hearing Officer