



The Commonwealth of Massachusetts
Executive Office of Health & Human Services
Department of Mental Retardation
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May 16, 2007

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Re: Appeal of [REDACTED] Final Decision

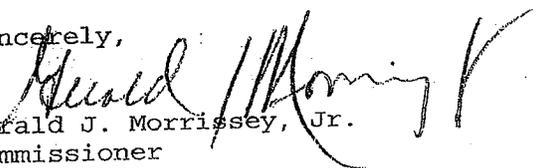
Dear Attorney Durkee:

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
Terry O'Hare, Regional Director
Marianne Meacham, General Counsel
Damien Arthur, Regional Eligibility Manager
John Geenty, Assistant General Counsel
Victor Hernandez, Field Operations Senior Project Manager
File

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF MENTAL RETARDATION

In Re: Appeal of _____

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 January 26, 2007 at the Department of Mental Retardation's Worcester Area Office. Those present were:

Paul L. Durkee, Esq.
Geenty
Richard F. Costigan, Psy.D.

Appellant's mother
Appellant's father
Appellant's counsel
DMR Assistant General Counsel
DMR Eligibility Psychologist

The evidence consists of the following exhibits and approximately one and one quarter hours of oral testimony:

1. Letter of Dr. Paul C. Marshall, undated
2. Psychological Evaluation dated 10/16/97
3. Neuropsychological Evaluation of David. S. Mishkin, dated 12/9/99
4. Judge Rotenberg Quarterly Progress Report dated 8/23/00
5. Psychological Evaluation dated 8/26/04
6. Kaufman Test of Educational Achievement dated 0/26/04
7. Letter of Susan Brown dated 5/23/06
8. Psychological Evaluation of Marcel Fajnzylber dated 8/30/06
9. Eligibility Report of Richard Costigan, Psy.D. dated 3/30/06

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, [REDACTED] is a 22 year old woman who attends the Judge Rotenberg Center in Canton, Massachusetts. She has been a student at this facility since 2000. Prior to that, and since she was eight years old, Ms. Chisholm has lived in at least twelve different residential settings.

[REDACTED] and [REDACTED] adopted [REDACTED] when she was an infant. At the age of six months, her head began to enlarge. Two months later she was diagnosed as having hydrocephalus. Her mother testified that [REDACTED] was a very difficult child who was hard to satisfy even as an infant. In a letter from Dr. Paul C. Marshall, who evaluated the Appellant when she was six years old, she was described as having extreme oppositional behavior (Exhibit #1), which included throwing temper tantrums, and screaming and crying to the point of vomiting. She also exhibited various self injurious behaviors such as biting and scratching herself, and head banging. By the time she was eight years old, she was placed in a residential program by the Dudley-Charlton Regional School District. She was removed from this and approximately eleven other subsequent residential placements because of the extreme nature of her behavioral problems. When she was at home, she engaged in violent behavior to others, and on one occasion stabbed her brother. Her history is also notable for several admissions to psychiatric hospitals.

In 1999, she was accepted at the Latham School in Brewster, Massachusetts. However, the staff at this facility was unable to manage her behavior, and after a suicide attempt, she was sent to Westwood Lodge, a psychiatric hospital, where she remained for approximately six months. Her mother described her as combative and irritable during her stay there. Finally, in 2000, she was placed at the Judge Rotenberg Center. According to her mother, the Rotenberg Center was the only facility in Massachusetts that was willing to accept her daughter as a student. The school is an extremely restrictive residential setting which employs mild electrical shocks delivered by a Graduate Electronic Decelerator to inhibit aggressive and/or inappropriate behavior such as that manifested by the Appellant. Reportedly, the Center has had some success at modifying [REDACTED] behavior, but these improvements have not been maintained.

There have been various diagnoses of Ms. [REDACTED], including ADHD-Combined Type, Dysthymia, Psychotic Disorder NOS, Bipolar Disorder with Psychotic Symptoms, Intermittent Explosive Disorder, and Nonverbal Learning Disability.

SUMMARY OF THE EVIDENCE

The first neuropsychological evaluation of the Appellant in the record was conducted on October 16, 1997, when [REDACTED] was 12 years old (Exhibit #2). She appears to have been hospitalized at the Charles River Hospital in Chicopee, Massachusetts, at the time, and was referred for testing because of "continued out-of-control behavior while on the unit" (Exhibit #2, p.1) The test administered, among others, was the Wechsler Intelligence Scale for Children-Third Edition (WISC-III). She received the following scores:

Verbal IQ	93
Performance IQ	73
Full Scale IQ	82

The significant discrepancy between her verbal and performance scores was noted by the clinician who conducted the assessment, Deane Zarvis, Psy.D. Nevertheless, a full scale IQ was computed, even though it is not the practice to do so when there is such a substantial difference between the verbal and performance scores. In addition to the WISC-III, the Appellant underwent several psychological tests. According to Ms. Zarvis, [redacted] had a tendency to give up easily when faced with any complexity. She also wrote that although it was her opinion that [redacted] was not psychotic, she "appears psychologically organized on an immature, borderline level of personality" (Exhibit #2, p. 5). She recommended that [redacted] be placed in a "highly structured residential placement with close supervision" upon discharge (Exhibit #2, p. 6).

[redacted] was next assessed on December 2 and 9, 1999, when she was fourteen years and eight months old and a student at the Latham School in Brewster, Massachusetts (Exhibit #3). The Kaufman Brief Intelligence Test (K-BIT) was used to measure her cognitive abilities. Her scores were as follows:

Vocabulary	83
Matrices	77
Composite	78

According to Dr. Richard Costigan, who made the Appellant's eligibility determination and testified for the Department at the hearing, the vocabulary, matrices and composite categories of the K-BIT are roughly equivalent to the verbal IQ, performance IQ and full scale IQ categories of the WISC-III. Thus, her cognitive profile in 1999 was similar to that of 1997.

On August 26, 2004, the Appellant was evaluated by Mark Nacht, consulting psychologist to the Judge Rotenberg Center, as part of her three year Chapter 766 reevaluation (Exhibit #5). [redacted] had been a student at the Rotenberg Center since 2000. Although she was nineteen and a half years old at the time and thus beyond the eligibility period, I have included the results to show that her IQ scores have been consistently above the range where DMR could have found that she was mentally retarded. She achieved the following results on the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III):

Verbal IQ	79
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Performance IQ 76

Full Scale IQ 76

According to Mr. Nacht, "... [redacted] exhibited an appropriate affect throughout the testing, seemed to give her best effort and showed no signs of fatigue" (Exhibit #5). He concluded that the results were both reliable and valid measures of her cognitive abilities.

The final evaluation of Ms. [redacted] in the record occurred on August 30, 2006 (Exhibit #8). This assessment was also carried out beyond the eligibility period. Her scores at this time, as measured by the WAIS-III, were as follows:

Verbal IQ 74

Performance IQ 67

Full Scale IQ 68

Clearly, these scores were significantly lower than those the Appellant had achieved during the eligibility period (up to and including 18 years of age). The clinician who conducted this assessment, Marcel Fajnzylber, Ed.D., noted that her scores were inconsistent with the fact that [redacted] had completed GED preparatory courses at a junior college and subsequently passed the GED (Exhibit #8, p. 3). In addition, he wrote that "the quality of her responses to the clinical questions shows greater sophistication and insight than these verbal results would predict" (Id., 10).

There was testimony at the hearing that [redacted] is an avid reader, and the record includes a progress report from the Rotenberg Center listing the books she had read during one month in 2005 (Exhibit #4). These included Of Mice and Men, One Flew Over the Cuckoo's Nest, and five other novels of similar difficulty. According to the progress report, [redacted] was required to write a comprehensive essay of a teacher-selected grade level novel each month as part of her Individual Education Plan (IEP) (Exhibit #4). The report states that she "continues to do extremely well on this objective... [although] she often struggles with the content ... grammar and punctuation" (id.). Overall, the report paints a picture of an academically motivated young woman, an impression confirmed by her mother's testimony.

The Appellant's situation is very unsettling. Even if her behavior could be managed outside of the highly structured environment in which she now lives (and there was nothing in the record to suggest that it could), her parents cannot possibly care for her. Both are elderly, and her mother is gravely ill. In a letter to the Department of Mental Retardation, Susan P. Brown, the Administrator of Special Needs for the Dudley-Charlton Regional School Department, wrote that "[a]lthough it sounds melodramatic, [redacted] will become homeless if she does not obtain adult services" (Exhibit #7). All of the evidence in the record, including the testimony received at the fair hearing, supports her description of [redacted] as one of the "neediest and most impaired students I have every

encountered" (*id.*). Nevertheless, I find that the evidence supports the Department's determination that, based on her IQ scores, and supported by her academic abilities, the Appellant is not "mentally retarded" as that term was defined in the regulations in effect at the time DMR made its decision, that is, an IQ score of approximately 70 to 75 or below.¹

FINDINGS AND CONCLUSIONS

After a careful review of all of the evidence, and despite Ms. [REDACTED]'s obvious need for a highly structured residential setting, I find that she has failed to show by a preponderance of the evidence that she 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) she must be domiciled in the Commonwealth,
- b) she must be a person with Mental Retardation as defined in 115 CMR 2.01, and
- c) she 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 she meets that criterion. However, I find that she is not mentally retarded as that term was defined at 115 CMR 2.01 when she applied for Department of Mental Retardation services (see footnote 1 below).

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 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," and the AAMR standard was in effect when Ms. Chisholm applied for DMR services. 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,

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 CMR 2.00.

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.

For the reasons stated previously, I concur with the Department of Mental Retardation that the Appellant does not have "inadequately developed or impaired intelligence," as evidenced by her IQ scores and academic accomplishments, and is thus 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)].

Date: April 23, 2007

Deirdre Rosenberg
Deirdre Rosenberg
Hearing Officer