

The Commonwealth of Massachusetts
Executive Office of Health & Human Services
Department of Mental Retardation
500 Harrison Avenue
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Governor

Kerry Healey
Lieutenant Governor

Timothy Murphy
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Gerald J. Morrissey, Jr.
Commissioner

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December 28, 2006

James G. Nelligan, Esq.
M.E.D.L.A.W.
Metro Elder and Disability Law
440 Broadway
Somerville, MA 02145

Re: Appeal of _____ - Final Decision

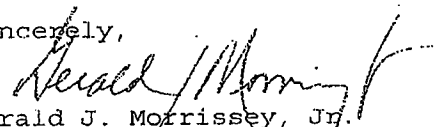
Dear Attorney Nelligan:

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: Kathleen Bown, Hearing Officer
Richard O'Meara, Regional Director (observe)
Marianne Meacham, General Counsel
Elizabeth Moran Liuzzo, Regional Eligibility Manager (observe)
John Mitchell, 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 or Department), (115CMR 6.30-6.34) and the M.G.L.c.30A. A fair hearing was held on November 3, 2006, at the Department of Mental Retardation's Central Office in Boston, Massachusetts.

Those present were:

James Nelligan Attorney for Appellant
John Mitchell Attorney of the Department of Mental Retardation
Beth Moran Liuzzo Regional Eligibility Manager, DMR (observe)
Richard O'Meara Regional Director, DMR (observe)

ISSUE PRESENTED

Whether the Appellant is domiciled within the Commonwealth of Massachusetts and is eligible to receive services from the Department of Mental Retardation. Eligibility by reason of mental retardation is not part of this hearing.

The evidence consists of the following exhibits and approximately 40 minutes of testimony. Exhibits submitted by the Appellant are numbered A1-16 and exhibits submitted by the Department of Mental Retardation are numbered D17 and 18. Two of the Appellant's exhibits are included within the Department's submission, and I have noted these in the list below.

- A1. Joint Stipulation of Undisputed Facts
Also submitted by DMR
- A2. Appellant's Request for Rulings of Law
Also submitted by DMR
- A3. Copy of Guardianship Petition-Plymouth Probate Court
- A4. Copy of Appointment of Dr. Andi Weiss as permanent guardian of the person of _____
- A5. Representative Payee letter from the Social Security Administration
- A6. Voter Registration Card (Town of Pembroke)
- A7. Copy of Massachusetts Identification Card
- A8. Copy of Pembroke Library Card
- A9. Letter from Rabbi Lawrence Silverman
- A10. Letter from Brookside Community Health Center regarding dental care
- A11. Letter from Dr. Gary Trey (Beth Israel Deaconess Medical Center)
- A12. Letter from Sovereign Bank regarding transfer of bank accounts
- A13. Copy of MassHealth card and Massachusetts General Hospital card

- A14. Letter from Gary Trey, M.D. dated October 23, 2006 (Beth Israel Deaconess Medical Center)
- A15. Letter from Vincent Panetta, PhD dated October 25, 2006
- A16 Curriculum vitae for Vincent Panetta, PhD
- D17 Department of Mental Retardation's Opposition To The Appellant's Request For Rulings Of Law
- D18 Guardianship/Conservatorship Of Mentally Retarded Person. Clinical Team Report

BACKGROUND

Mr. _____ is a 43 year old man who resides at New England Village, a residential program for mentally retarded adults located in Pembroke, Massachusetts. Mr. _____ resided in New York until 1986 when he moved to New England Village. Arrangements, including tuition, were made by Mr. _____ parents who were not residing in Massachusetts at the time. They continue to reside in New York.

Mr. _____ did not have a guardian at the time of his move to New England Village. In 1990 his mother was appointed guardian by a New York Court. She remained as guardian until November 21, 2005 when Dr. Andi Weiss was appointed permanent guardian by a Massachusetts court. Dr. Weiss was appointed guardian subsequent to the application, denial of eligibility, and appeal which is the subject of this Fair Hearing.

New England Village provides assistance with activities of daily living, vocational training and placement, fitness and arts programs and social and recreational activities. On or about September 12, 2004, Mr. _____ by his mother as his then guardian, applied to the Massachusetts Department of Mental Retardation for eligibility for support services. The Department of Mental Retardation denied Mr. _____ application based on their determination that Mr. _____ was not domiciled in Massachusetts.

Mr. _____ timely appealed the denial of eligibility. The Department of Mental Retardation held an informal conference with the Appellant. The Department upheld its original decision and so informed the Appellant. The Appellant requested a Fair Hearing. The hearing was held on November 3, 2006 pursuant to M.G.L.30a and DMR regulations at 115CMR 6.33(2).

SUMMARY OT THE EVIDENCE

Introduction of all present included a statement by Attorney Nelligan that in addition to representing _____ he is also Special Assistant Attorney General employed by the Department of Public Health and attended the hearing with permission of the Department of Public Health.

The Appellant submitted a revised set of documents that included two additional letters regarding Mr. _____ ability to decide where he would like to live. (A-14, 15). Attorney

Mitchell asked that both letters be excluded based on the lack of qualifications of both individuals to assess Mr. _____ competency to decide where he would like to live. Attorney Mitchell stated that as Mr. _____ Gastroenterologist, Dr. Gary Trey was not qualified to assess Mr. _____ cognitive abilities. Attorney Nelligan responded that applications for guardianship requires only certificate of M.D. A psychiatrist is not required. The court allows anyone to testify as to competency. I agreed to allow this letter but stated that I would not give it much weight.

Attorney Mitchell also asked that the letter from Vincent Panetta also be stricken because he was not a licensed psychologist. No resume was submitted and therefore it is unknown what his qualifications were to assess Mr. _____ cognitive ability. I agreed to keep the record open until I received Dr. Panetta's curriculum vitae by mail. I have since received it and will allow the letter. As no formal clinical review was included or referenced, I will give this letter minimal weight.

As the case is being kept open, Attorney Mitchell asked that an evaluation regarding Mr. _____ capacity be completed. He suggested that the person who evaluated him for the guardianship be used. Attorney Nelligan expressed his concern over the delay in the hearing and the new request for an evaluation. Through the submissions on behalf of _____ Attorney Nelligan stated he believed that domicile in Massachusetts had been established. The Department responded that there is no evidence that _____ is capable of choosing where to live. He lacks the ability to form the intent to live in Massachusetts.

It was agreed that the case would remain open and a mutually acceptable clinician be identified to evaluate Mr. _____ capacity to make the above referenced decision. Should there be no agreement and an evaluation not completed, the case will stand as is. The hearing will be rescheduled in one month.

On November 21, 2006, I received an email from Attorney Mitchell stating that he and Attorney Nelligan had agreed that no additional evaluation would be conducted and the case is considered closed. I confirmed this by phone conversation with Attorney Mitchell. On or about November 21, 2006, I received a copy of Dr. Panetta's curriculum vitae as well as a letter from Attorney Nelligan stating the agreement not to pursue further evaluation of Mr. _____. The record is considered closed and there is no need for a continuation of the hearing.

FINDINGS AND CONCLUSIONS

After careful review of all testimony and submissions, I find that Mr. _____ does not meet the eligibility requirements for services by the Department of Mental Retardation as he is not domiciled in Massachusetts. I find that the Appellant has failed to show by preponderance of the evidence that he is domiciled in Massachusetts and intends to remain in the state permanently or for an indefinite period of time.

Questions raised by the Appellant regarding constitutional issues relating to DMR's regulations were not considered in my conclusions. I believe this to be beyond the purview of this Fair Hearing.

The specific reasons for my conclusions are as follows.

In order to be eligible for DMR supports, an individual who is 18 years of age or older must meet the criteria set forth in 115CMR6.04(1).

- a) is domiciled in the Commonwealth
- b) is a person with mental retardation as defined in 115CMR2.01, and
- c) must be in need of specialized supports in three or more of the seven adaptive skill areas: communication, self care, home living, community use, health and safety, functional academics and work.

The question of Mr. [redacted] as a person with mental retardation and in need of specialized services is not an issue for this hearing. Only the issue of whether he is domiciled in the Commonwealth is being considered as it relates to his eligibility.

DMR's eligibility regulations clearly state that a person seeking eligibility for services provided by DMR must be domiciled in the Commonwealth, 115CMR6.04(1). Additionally, the regulations state that an individual is "domiciled in the Commonwealth if he or she resides in Massachusetts with the intention to remain here permanently or for an indefinite period." 115CMR6.04920. The regulations also state that "there shall be a presumption that the following individuals are not domiciled in the Commonwealth: persons who reside in a home or other setting subject to licensure or regulation by the Commonwealth which residence was arranged by a parent, guardian or family member who is not domiciled in Massachusetts and was not so domiciled at the time of the person's placement" 115CMR6.04(2)(b).

New England Village is a residential program serving mentally retarded adults and is subject to licensure or licensed by the Commonwealth. Mr. [redacted] moved there from New York in 1986. The move was arranged by his parents who were residents of New York and not domiciled in Massachusetts. Although not stated, I assume that his parents are also funding this placement. In applying the Departments regulations to the facts, Mr. [redacted] is not domiciled in the Commonwealth.

Another aspect to be considered in this case is Mr. [redacted] intention to remain in Massachusetts. Copies of voter registration card, library card, Massachusetts Identification card and other documents were submitted as evidence of Mr. [redacted] domicile in Massachusetts and intention to remain in the state. A4-13. I find no clinical evidence that Mr. [redacted] has the cognitive ability to understand the benefits and use of such documents as a resident of Massachusetts. The Clinical Team Report dated September 19, 2005, and filed with the petition of guardianship states that Mr. [redacted] is 'unable to maintain his own safety in the community, he is unable to make decisions regarding his own medical care or financial issues. He cannot handle money or even simple transactions and requires assistance in most of his activities of daily living

including cooking and dressing himself." D-18 Apparently, Mr. [redacted] requires assistance in completing the most basic tasks and it is difficult to think he has the cognitive ability to reasonably obtain or utilize these documents. I do not accept submissions A4-13 as indicators of domicile and therefore Mr. [redacted] intent to remain in Massachusetts.

Letters from Gary Trey, M.D., Mr. Sollar's Gastroenterologist, and Vincent Panetta, Ph.D, Mr. [redacted] individual therapist (A14,15) were submitted stating that Mr. [redacted] has the ability to decide where he wants to live. The letters respectively stated that he has the "mental capacity" and "mental ability". However, there is no evidence that either conducted a formal evaluation of Mr. [redacted] cognitive ability. I also question the qualifications of both to conduct such an evaluation. Mr. [redacted] has been found incompetent and appointed a full guardian by Plymouth Probate Court on November 25, 2005. His mother had previously been appointed guardian by a New York court. While the appointment of a guardian does not absolutely prove that Mr. [redacted] does not have the ability to decide where he wants to live, I find no evidence of a formal clinical evaluation of his competency to make this decision. The only submission presented was the Clinical Team Report as part of the guardianship petition and determines Mr. [redacted] to be incompetent.

Without clinical evidence from a qualified clinician that Mr. [redacted] is the cognitive ability to form the intent to remain in Massachusetts, I find that the Appellant has failed to show by a preponderance of the evidence that he is domiciled in Massachusetts. The determination of ineligibility is upheld.

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[115CMR6.34(5)]

Date: December 6, 2006

Kathleen Bown
Kathleen Bown, Hearing Officer