



The Commonwealth of Massachusetts
Executive Office of Health & Human Services
Department of Mental Retardation
500 Harrison Avenue
Boston, MA 02118

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Lieutenant Governor

JudyAnn Bigby, M.D.
Secretary

Elin M. Howe
Commissioner

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November 17, 2008

Lisa M. Cukier, Esq.
Burns & Levenson, LLP
125 Summer Street
Boston, MA 02110

Re: Appeal of _____ - Final Decision

Dear Attorney Cukier:

Enclosed please find the recommended decision of the hearing officer in the above appeal. A fair hearing was held on the appeal of your client's eligibility determination.

The hearing officer 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. Your appeal is therefore approved.

You, or any person aggrieved by this decision may appeal to the Superior Court in accordance with Massachusetts General Laws, Chapter 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
Commissioner

EMH/ecw

cc: Sara Mackiernan, Hearing Officer
Richard O'Meara, Regional Director
Marianne McEacham, General Counsel
Patrick Murphy, Assistant General Counsel
Elizabeth Moran Liuzzo, Regional Eligibility 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)(115 CMR 6.30 – 6.34) and M.G.L. Chapter 30A. A hearing was held on September 10, 2008 at the Department's Regional Office in Carver Massachusetts.

Those present for all or part of the proceedings were:

Lisa Cukier, Esq.	Counsel for _____ and parent
_____	Applicant
Joshua Davidson	Consultant to family
Richard J. O'Meara	Regional Director Department of Mental Retardation
Patrick Murphy, Esq.	Assistant General Counsel Department of Mental Retardation
Sigmund R. Kozaryn	Cardinal Cushing Centers Chief Financial Officer

The evidence consists of documents submitted by the Appellant numbered A 1 - 15, documents submitted by the Department of Mental Retardation numbered D 1 - 4, and approximately 3 hours of oral testimony.

DESCRIPTION OF EXHIBITS

- A1 Superior Court Order SUCV2008 – 01289 – H
- A2 Memorandum in Support of _____'s Massachusetts Domicile
- A3 Plaintiff's Opposition to Defendant's Motion to Dismiss Complaint for Failure to Exhaust Administrative Remedies (filed in Superior Court)
- A4 _____; 2007 Massachusetts Tax Return
- A5 Voter Registration Receipt
- A6 Cardinal Cushing Center's Adult Golf Schedule
- A7 Cardinal Cushing Center's Soccer Program 2008
- A8 Flyer for Country Hoedown
- A9 Flyer for Special Olympics Night and Fundraiser
- A10 Cardinal Cushing Center's Adult Athletic Program 2008 – 2009 – Bowling
- A11 South Shore YMCA Identification Card for _____
- A12 Mass Health Card for _____
- A13 Bank Book from Sovereign Bank with _____'s name on it
- A14 Identification Card from Massachusetts Registry of Motor Vehicles for _____
- A15 Pharmacy bill for _____

- D1 Certification from Pupil Personnel Services Administration Hanover Public Schools stating that they had no record of _____
- D2 Cardinal Cushing Center's License from Massachusetts Department of Education
- D3 St. Coletta and Cardinal Cushing Center's Admission Forms
- D4 Cardinal Cushing Center's records of _____ payments for placement; payment agreements and invoices

ISSUE PRESENTED

The only issue at this hearing is whether or not _____ is domiciled in Massachusetts within the meaning of 115 CMR 6.04.

SUMMARY OF THE EVIDENCE PRESENTED

_____ is now twenty-four years old (dob 7/1/84). While _____ lived with his parent(s), he lived first in Massachusetts and then in New Hampshire. When _____ was fifteen years old, his mother arranged placement at Cardinal Cushing Center for him. At the time _____ and his mother were living in Windham, New Hampshire.

Over the nine years that _____ has been at Cardinal Cushing his maternal grandfather has paid most of the costs of his placement. The Windham School Department did contribute to _____ educational program until 2003. _____ Social Security benefits have been used to pay for part of his rent and utilities in his residential program since February 2007.

_____ mother was appointed his legal guardian by a New Hampshire Court when _____ was eighteen. In June 2006, _____ mother, _____ and his aunt, Patricia Armando were appointed co-guardians in the Plymouth County Probate Court in Massachusetts.

_____ mother continues to live in New Hampshire. His maternal grandfather who provides his primary financial support lives in Naples, Florida. _____ as never received special education services from any Local Educational Authority in Massachusetts. When Windham New Hampshire School Department stopped contributing to his education because he was eighteen years old, his parent and guardian did not request special education services from Hanover Massachusetts where he was then living. In Massachusetts _____ would be eligible for special education services until age twenty-two.

_____ applied for supports from the Department of Mental Retardation in January 2007. He was then twenty-three years old and living in a group home operated by the Cardinal Cushing Centers and licensed by the Massachusetts Departments of Mental Retardation and Education.

FINDINGS AND CONCLUSIONS

1. 115 CMR 6.02(2)(a) states that a person who lives in Massachusetts and intends to stay in Massachusetts permanently or for an indefinite period is domiciled in Massachusetts.
2. 115 CMR 6.02(2)(b)(2) states that a person who is living in a residence licensed by the Commonwealth of Massachusetts and was placed in the program by a guardian or family member who was not living in Massachusetts at the time of the placement, is presumed to be not domiciled in Massachusetts.
3. The regulations clearly state that the scenarios set out in 115 CMR 6.02(2)(b) are presumptions. Presumptions can be rebutted by evidence of a person's intent to remain in Massachusetts.
4. Clearly, at the time of his initial placement in Massachusetts in 2000, [redacted] remained domiciled in Windham New Hampshire where his mother lived. That remained true as long as Windham New Hampshire was contributing to the costs of [redacted] education, regardless of the size of their contribution. As long as [redacted] was benefiting from being a domiciliary of one state, he could not claim domicile in another state. (D4)
5. [redacted] presented a number of exhibits which described athletic and social activities, some of which are conducted by the Cardinal Cushing Center. In order to participate in these activities one needs only to live in a residence operated by the Cardinal Cushing Center. Many of the community activities are open to anyone who happens to be living in the community, regardless of where their true domicile may be. Although [redacted] participation in these activities contributes to the idea that he plans to stay in the community, because they are available to anyone they cannot stand alone as indications of intent to make Massachusetts home. (A 6 - 11)
6. [redacted] has registered to vote in Massachusetts and has voted here. (A5)
7. [redacted] has filed income tax returns in Massachusetts. (A4)
8. [redacted] testified and also filed an affidavit stating that he intends to remain in Massachusetts indefinitely and that he considers Massachusetts his home.
9. [redacted] testified that he has chosen to live in his group home and to avail himself of Cardinal Cushing Centers adult programs. He testified that he intended to stay in Massachusetts until he retired and then go to the Cayman Islands.
10. [redacted] works at several jobs in Massachusetts. Some of them are in sheltered situations some not. [redacted] saves his money in a Massachusetts bank. (A 13)
11. [redacted] mother testified that he does not keep any belongings in New Hampshire and when he comes to visit he packs a suitcase.
12. Although [redacted] under guardianship, his testimony made it clear that he had made the decision to stay here in Massachusetts on his own. The fact that his guardian and family agreed with his decision, does not negate his ability to decide for himself.

13. The Department argues that the circumstances surrounding the initial moving into Massachusetts should remain determinative of the domicile of the applicant. If the initial determination of domicile is based on a presumption, then there must be an opportunity to rebut that presumption.

14. The Department also argues that since its services are subject to appropriation, the bar for overcoming a presumption against domicile must be extremely high. I agree that the services of the Department of Mental Retardation are subject to appropriation but that argument is premature when looking at eligibility. An applicant may be found eligible but still not be offered specific services that they might want because there is simply no funding for such services. The Department may offer services which will meet the needs of the person but not necessarily be what the applicant considers ideal.

I find that _____ has by a preponderance of the evidence met the burden of rebutting the presumption against his domicile being Massachusetts.

APPEAL

Any person aggrieved by a final decision of the Department may appeal to the Superior Court in accordance with M.G.L. c30A (115 CMR 6.34[5]).

Date: October 3, 2008

Sara Mackiernan

Sara Mackiernan
Hearing Officer