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Executive Office of Health & Human Services
Department of Mental Retardation
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March 10, 2008

Frederick M. Misilo, Jr., Esq.
Counselors At Law
Fletcher, Tilton & Whipple, P.C.
370 Main Street, 12th Floor
Worcester, MA 01608-1779

Re: Appeal of Final Decision

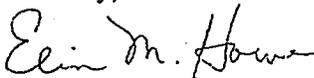
Dear Attorney Misilo, Jr.:

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 made findings of fact and proposed conclusions of law and issued a recommended decision. After reviewing the hearing officer's, 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 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: Marcia Hudgins, Hearing Officer
Gail Gillespie, Regional Director
Marianne Meacham, General Counsel
Kim LaDue, Assistant General Counsel
Elizabeth Silver, Hearing Officer (observing)
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. Chapter 30A. A hearing held was on November 30, 2007 at DMR's Metro Region Office located at the Fernald Center in Waltham, Massachusetts.

Those present for the proceedings were:

	Appellant
	Appellant's sister
	Appellant's father
	Attorney for the Appellant
Fred Misilo	Attorney for the Appellant
Emily Andrus	DMR Regional Eligibility Manager
Ellen Kilicarslan	Attorney for DMR
Kim LaDue	Hearing Officer (observing)
Elizabeth Silver	

The evidence consisted of Documents submitted by DMR numbered D1-9, documents submitted by the Appellant numbered A1-11 and approximately 1 hour and 15 minutes of oral testimony.

ISSUE PRESENTED

Whether the Appellant is domiciled in Massachusetts in accordance with 115 CMR CMR 6.04 (2).¹

SUMMARY OF THE EVIDENCE PRESENTED

1. This Appeal is based on the Appellant's denial of eligibility for DMR services. (D2)
2. The Appellant is a thirty-two year old man who currently resides in Framingham, Massachusetts (A3, D2)

¹ DMR revised its regulations effective June 2, 2006. Because the Appellant's application for DMR supports was filed after June 2, 2006, the new regulations apply.

3. The Appellant applied for DMR services on January 4, 2007. (D5)

The following documents were entered into evidence:

- The Appellant's Resume (A1)
 - A picture of the Appellant (A2)
 - The Appellant's Massachusetts Identification Card, his Mass Health Card and his Morse Institute Library Card (A3-5)
 - The Appellant's Letter of Appeal dated March 23, 2007 (A6, D3)
 - Two reports from the Children's Institute's Prader-Willi Syndrome Behavioral Disorders Program in Pittsburgh, PA (A7-8)
 - A letter from Daniel J. Driscoll, Ph.D. M.D., an Associate Professor of Pediatrics at the University of Florida College of Medicine (A9)
 - The Appellant's Durable Financial Power of Attorney (A10)
 - The Appellant's Durable Power of Attorney for Health Care (A11)
 - DMR's Eligibility Regulations with an effective date of June 2, 2006 (D1)
 - Denial of eligibility letter dated March 2, 2007 (D2)
 - Further denial of eligibility letter dated January 4, 2007 (D4)
 - The Appellant's Application for DMR eligibility and Adult Intake Form (D5-6)
 - Florida Department of Children and Families Support Plan dated August 28, 2006 (D7)
 - A Behavior Intervention Program prepared by the Alachua ARC. (D8)
 - A confidential psychological report dated September 26, 2006 (D9)
4. The Appellant's letter of appeal indicates that he moved to Massachusetts because he wanted to be closer to his siblings. He notes that he plans to live in Massachusetts permanently and states that he is happy to be back in New England because that's where he grew up. (A6, D3)

5. The Final Report of the Children's Institute's Prader-Willi Syndrome Behavioral Disorders Program states that upon admission, the Appellant had increasing behavior problems, inability to lose weight and increases in disruptive behaviors. It states that he carries a diagnosis of Prader-Willi Syndrome (Prader-Willi). (A8)
6. The Florida Department of Children and Families Support Plan dated August 28, 2006 states that the Appellant communicates verbally, and expresses himself clearly and articulately. It notes that he is fairly independent in his daily personal care and enjoys an active and social lifestyle with his housemates, peers and family members. The document also points out that the Appellant has a close relationship with his family and has traveled by plane on his own to visit his siblings. It states that his parents visit with him as much as they can. (D7)
7. The Appellant gave testimony concerning his history and his relocation to Massachusetts from Florida. He stated that he was born in 1975 and was thirty-two years of age. He testified that he lived in a group home in Framingham, Massachusetts. He stated that he lives with 4 other clients, a house manager and six staff members. He stated that all of the clients in the house have a disability known as Prader-Willi which is an eating disorder. He agreed that he has been aware of his diagnosis for a long time.

The Appellant stated that he is currently working at a candle company in Massachusetts. He said that this is something that he does in place of activities and a day program. He agreed that he is on the board of directors of the company and stated that he is a team leader as well.

The Appellant stated that he does not have a guardian. He stated that he has parents, _____ and _____ who live in New Hampshire as well as one brother, _____ who lives in Brooklyn, New York and two sisters, _____ and _____ who live in New Hampshire. He stated that he is particularly close to his sister, _____.

The Appellant identified a picture taken of himself in Georgia and stated that he weighed 335 pounds at that time. He stated that he currently weighs about 144 pounds. The Appellant stated that the reason that he was so overweight was that he wasn't getting the help and support that he needed. He testified that at that time he was living alone with a caregiver coming in about once a week. (A2)

The Appellant testified that individuals with Prader-Willi need support 24 hours a day and without such support, will eat until they die. The Appellant stated that he was approximately 330 pounds at his heaviest and that as a result went into repertory heart failure. He stated that he went to the Children's Institute in Pittsburg for six weeks where he got the help and the support that he needed. He

stated that his stay in Pittsburg was very successful in that he lost about 40-60 pounds and was told how to lose the weight and keep it off. He stated he was given a plan in Pittsburg to keep the weight off. He testified that the plan suggested three miles of walking, 40 laps of swimming and food management. The Appellant testified that after leaving Pittsburg, he went back to Georgia for 3-4 weeks but moved to Florida because he heard that a Prader-Willi program there was supposed to be better. He testified that the program was better and that he was successful for a short period of time. The Appellant went on to say that he went to a Prader-Willi conference in Miami and met Patrice Carroll who told him about the Advocates Program (Advocates) in Massachusetts. (A7-8)

The Appellant explained that both of his parents had health scares and that he wanted to live closer to his siblings who live in New Hampshire. When asked why he didn't move to a program in New Hampshire, the Appellant stated that he met Patrice Carroll at a conference and believed that her program in Massachusetts would provide him with the support he needed. The Appellant stated that he asked his sister to visit the Advocates program on his behalf. He testified that his sister found the program to be better than the one in Florida with more supportive staff. He stated that his sister also looked at a program on Cape Cod but did not think that it was as good as the one in Framingham. The Appellant stated that he visited the program in November of 2006. He testified that his parents dropped him off, and he visited the program on his own. The Appellant testified that the program offered a much better environment. He stated that staff seemed much more supportive than those in his previous program. He also stated that in this program the clients had no access food in the kitchen and that the staff did the cooking. The Appellant testified that following his visit he made the decision that he wanted to stay in Massachusetts and not move back to Florida. He stated that he moved to the Advocates program in December of 2006. The Appellant stated that if he weren't in a program like Advocates, he would eat junk food and eat until he died.

The Appellant stated that he intends to stay in Massachusetts. He noted that he has a Mass ID card, a Mass Health card, a library card and has registered to vote in Massachusetts. He stated that he applied for services in Massachusetts. He agreed that he was denied eligibility. He stated that he asked his sister, _____ to write the letter of appeal because he had difficulty writing. He agreed that he read the letter and that he signed it. (A3-6, D2-4)

8. _____ testified on behalf of the Appellant. She testified that after her brother received the letter saying that he was denied eligibility, she asked him if he wanted to appeal and assisted him in writing the letter of appeal. (D2-3, A6)

The witness testified that she lives in Hopkinton, New Hampshire. She stated that she is a licensed social worker and works for Wide Horizons for Children in Waltham, Massachusetts. She stated that she spends one to two days a week working in Massachusetts and that the Appellant's residence is about 10 minutes

from where she works.

Ms. _____ testified that the Appellant is nine years younger than she is. She stated that when her mother was working, she helped care for the Appellant. She testified that she is very close to him and that they confide in each other in a brother-sister sort of way. She stated that since she left for college, the Appellant has always visited her for one week a year. She testified that she tries to talk to the Appellant on the phone once a week, but they usually talk 2-4 times per month. Ms. _____ stated that she is the successor decision maker for the Appellant following her mother and father. She stated that she is very comfortable in taking on this role. She stated that she has started to act as an advocate for the Appellant and explained that she has begun to take on this role as her parents are aging and have had health issues. She stated that the Appellant wanted to move closer to her and to look at options closer to where she lives. She stated that she had looked for programs for him in the New England area but had stopped looking a few years ago. The witness testified that the Appellant contacted her and asked her to check out a program in Massachusetts for him. She stated that she did check out the program as well as one on Cape Cod, but noted that the program on Cape Cod would be farther away from her workplace. She stated that she was very impressed with the Advocates and reported her impressions to the Appellant telling him that it was worth checking it out further. She stated that she explained to the Appellant that the Advocates locks the food up and stated that he was fine with that. She opined that this practice of locking up the food takes the anxiety away. She stated that since the Appellant has been in the Advocates program he has gone from 190 pounds to 140-145 pounds.
(A10-11)

9. On cross-examination, the Attorney for DMR asked the witness how many times she had visited the Advocates program since June, Ms. _____ responded that she had visited in August. She stated that when her brother moved into the program, she visited him once or twice a week. She explained that her parent's weren't living in Massachusetts, and she was concerned about the Appellant's transition. She stated that she did not help him move from Florida, but that she helped him unpack and arrange his things.
10. _____ testified on behalf of the Appellant. He testified that the Appellant was diagnosed with Prader-Willi shortly after he was born. He stated that the Appellant attended special education classes beginning with infant stimulation classes when he was 8 months old. He testified that the Appellant finished high school when he was around 20. Mr. _____ testified that the Appellant had not lived with him since he was 19. He stated that at first the Appellant lived alone with minimum supervision and that he gained a great deal of weight. Following the weight gain, the Appellant went to Pittsburg where he attended a very intensive program. The witness testified that although the staff providing services

to the Appellant in Georgia was given information about the need for the Appellant to stay on the program developed in Pittsburg; they were not able to provide the Appellant with the structure and supervision that he needed. The witness testified that they contacted a national organization and received a recommendation for a program located in Gainesville, Florida. The witness testified that his employer allowed him to transfer to Florida with the understanding that he would commute to Georgia when necessary. Mr. _____ stated that the Appellant thrived in Florida program. The witness testified that he retired three years ago and his wife retired one year ago. He stated that he had never pursued guardianship for the Appellant, but consulted with an attorney and prepared Powers of Attorney for the Appellant. (D 7-8, 10-11)

Mr. _____ testified that in June of 2006 while the Appellant was living in Florida, he approached Mr. _____ and asked him why did he have to wait for him to die; why couldn't move closer to his sisters and brother. Mr. _____ said that he investigated programs in the greater New England area including Latham on the Cape and the Advocates in Framingham. He stated that he brought _____ to Massachusetts in November of 2006 and met with Advocates Clinical Director in the program's main office. He stated that the Appellant and the Clinical Director went their way and he and his wife went to New Hampshire. The witness stated that when he returned the Appellant didn't want to leave the program; however he did return to Florida. He stated that the Appellant moved back to Framingham in December of 2006. He could not recall if the Appellant came on his own, but said that it wouldn't have been unusual for him to be put on a plane and to have flown to Boston where his sister would meet him. The witness stated that at some point he and his wife decided to move to New Hampshire. Mr. _____ told the Advocates that he would pay for the cost of the program until the Appellant could qualify for funding.

11. On cross-examination, counsel for DMR asked the witness if he did anything to help the Appellant arrange for his placement at Advocates other than driving him to the home and talking to individuals that work for Advocates. He stated, "Not really", and then went on to explain how that once the Appellant had been stabilized in Florida, he began to make more of his own decisions. He testified that in the past few years he has given the Appellant advice but has not made decisions for him. He stated that he had attended some Prader-Willi conferences with the Appellant. He stated that the first contact he had with the Advocates was his meeting with Patrice at a Prader-Willi conference and concurred that this was a conference that the Appellant had attended with him.
12. Ellen Kilicarslan testified on behalf of DMR. Ms. Kilicarslan testified that she is the Regional Eligibility Manager and the Director of Family Supports. She stated that as the Regional Eligibility Manger she oversees the team of 6 people. She stated that she reviewed the Appellant's records including the Intake Application

which indicated that the Appellant was residing in Massachusetts and that the family wanted DMR residential money eventually. She noted that on the Adult Intake Information Form there was a comment relative to the family's finite resources. She testified that she also reviewed an evaluation of the Appellant done prior to his coming to Massachusetts and stated that the document indicated that the purpose of the evaluation was to assess the Appellant's level of intellectual functioning in preparation for his move to Massachusetts. She stated that she contacted the Appellant and his father telling them that the Appellant was ineligible for services on the basis of domicile. She stated that the Appellant wrote a letter requesting an appeal stating that he lived in Massachusetts and needed services and that he moved here because he wanted to be closer to his family. The witness stated that the next step was the Informal Conference. She testified that at the Conference, she gave the Appellant a copy of the DMR regulations and explained to him that it was her belief that his family had helped arrange his placement. She stated that the Appellant told her that his fear was that his parents were aging and that he wanted to move closer to his siblings and be in a program that would really meet his needs. He also shared his Mass Health card, his Mass ID and his bank account with her. She stated that she shared the information given to her by the Appellant with the Regional Director and stated that they weren't convinced that the Appellant's parents didn't arrange for his placement. (D2-4, 5-6, 9)

13. On cross-examination, the witness was asked if she were familiar with DMR's regulation on the presumption of competence found at 115 CMR 5.07 (1). She answered that she was not totally familiar with the regulation. She was asked to review the regulation to refresh her memory. After reviewing the regulation, Ms. Kilicarslan agreed the Department has established a presumption of competency. She further agreed that the Appellant is over the age of 18 and that the Department has taken the position he is legally competent to make decisions and that being competent includes the right to travel. She agreed that she made the determination that someone other than the Appellant arranged for his placement. She agreed that in her opinion this made the Appellant ineligible for services. She agreed that if the Appellant had flown up to Massachusetts on his own and made application for DMR services, he would be found to be eligible as to domicile. She also agreed that if his parents had moved to Massachusetts prior to him applying for DMR services, he would be determined to be domiciled in Massachusetts for purposes of DMR eligibility. She stated that the purpose of DMR's regulation on domicile is so that people don't move here presuming that they are going to get services.

FINDINGS AND CONCLUSIONS

After a careful review of all of the evidence, I find that the Appellant has shown by a preponderance of the evidence that he is domiciled in Massachusetts. 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 two criteria set forth at 115 CMR 6.04: (a) he must be domiciled in the Commonwealth and (b) he must be a person with mental retardation as defined in 115 CMR 2.01. The only issue before me is whether or not the Appellant meets the criteria to be considered domiciled in Massachusetts.

115 CMR 6.04 (2) (a) states that for purposes of eligibility for DMR supports, a person shall be considered to be domiciled in Massachusetts if he or she resides in Massachusetts with the intention to remain here permanently or for an indefinite period.

115 CMR 6.04 (2) (b) (2) states that there shall be a presumption that persons are not domiciled in Massachusetts 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.

Based on the evidence presented, I find that for purposes of eligibility for DMR supports the Appellant meets the criteria of 115 CMR 6.04 (2) (a) as he resides in Massachusetts and has the intention to remain here permanently.

Based on the evidence presented, I find that the presumption that the Appellant is not domiciled in Massachusetts as set out in 115 CMR 6.04 (2) (b) (2) has been rebutted. The evidence showed that the Appellant over the age of 18, is not under guardianship and is presumed competent. The evidence showed that the Appellant has been diagnosed with Prader-Willi and that he understands his condition and the need for support and supervision which a program like Advocates provides. The evidence showed that the Appellant wanted to move closer to his siblings due to his parents' health issues and due to his close relationship with his siblings, particularly his sister, [REDACTED]. The evidence showed that the Appellant found out about the Advocates when attending a Prader-Willi conference with his father and that the Appellant thought that this would be a good program for him. The evidence showed that although the Appellant's family assisted him in his move to Massachusetts, they did not arrange the placement. The evidence showed that the Appellant's father and his sister helped him by investigating the Advocates, by assisting him in traveling to Massachusetts and by helping him to pay for the cost of the program until such time as he was deemed eligible for DMR supports. There was no evidence submitted showing that the Appellant's parents or family members located the Advocates, introduced the Appellant to the program or brought him to the program without his expressing his desire to investigate the possibility relocating to Massachusetts. I find that assisting is not the same as arranging. I am convinced that the

Appellant wanted to move to closer to his siblings, found a program that appeared to meet his needs and made his wish to relocate a reality with the assistance of his family.

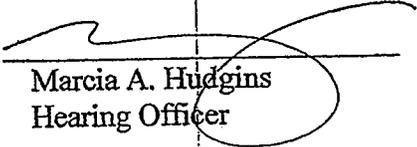
DMR presented no evidence to show what the Appellant's parents or family members had done to arrange for the placement. The fact that the family indicated that they were assisting the Appellant by paying for his placement at the Advocates and had finite resources does not lead to the conclusion that they arranged the placement. Many parents and family members assist their children or siblings financially when such individuals move to a new location.

Because I find the Appellant to be domiciled in Massachusetts, it is unnecessary for me to rule on the constitutionality of DMR's regulation on domicile.

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: January 16, 2008



Marcia A. Hudgins
Hearing Officer