



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

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Lieutenant Governor

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September 5, 2008

James G. Nelligan, Esq.
MEDLAW
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. 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/cw

cc: Sara MacKiernan, Hearing Officer
Richard O'Meara, Regional Director
Marianne Meacham, General Counsel
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.

PROCEDURAL HISTORY

This matter was originally heard on November 3, 2006 at a Fair Hearing held at the Department of Mental Retardation's Central Office in Boston. At that hearing, the only issue raised was whether or not _____ was domiciled in Massachusetts. The Hearing Officer upheld the Department's determination of ineligibility based on Mr. _____ failure to show by the preponderance of the evidence that he was domiciled in Massachusetts.

An appeal was filed in Suffolk Superior Court (SUCV2007 -- 0414) and a hearing was held on January 15, 2008 before Justice Brassard.

Justice Brassard remanded the case to the Department's Fair Hearing process to address (1) whether or not Mr. _____ was capable of deciding his own domicile, (2) if he was not could his guardian make that determination and if so,(3) had she?

After a meeting of the parties on May 7, 2008 this matter was argued and additional evidence submitted in writing as follows:

ON BEHALF OF _____

1. Memorandum in Support of Appellant's Request for Rulings of Law dated May 6, 2008
2. Appellant's Request for Findings of Fact and Rulings of Law dated May 6, 2008
3. Letter from Andrea Weiss, Psy.D., Guardian of _____ dated March 25, 2008
4. Medical Report from Vincent Panetta, Ph.D. and Curriculum Vitae dated April 29, 2008
5. Medical Report from Ronald S. Ebert, Ph.D. – independent evaluation dated April 30, 2008
6. Transcription of hearing dated January 15, 2008 (Suffolk Superior Court)
7. Letter from Vincent Panetta, Ph.D, re David Sollar May 13, 2008
8. Appellant's Reply Brief dated June 20, 2008

ON BEHALF OF THE DEPARTMENT OF MENTAL RETARDATION

1. Brief of the Department of Mental Retardation dated June 3, 2008

ISSUE PRESENTED

/whether _____ s domiciled in Massachusetts as set out in 115 CMR 6.04(1).

ISTORY

_____ ; now forty-six years old. In 1986, twenty-two years ago, when Mr. _____ was twenty-three years old, he came to live in Massachusetts. His parents placed him at New England Villages, a residential program for adults with mental retardation. His parents chose New England Villages for their son and they paid his tuition there. Mr. and Mrs. _____ lived in New York state in 1986 and continue to live in New York state.

In 1990 Mr. _____'s mother was appointed his guardian by a New York Court. In November 2005, Andrea Weiss, Psy.D. was appointed Mr. _____'s guardian by the Plymouth County Probate Court in the Commonwealth of Massachusetts. On September 12, 2004 Mr. _____'s mother applied for services from the Department of Mental Retardation, on his behalf. The application process culminated in a Fair Hearing on the issue of Mr. _____'s domicile on November 3, 2006. The Hearing Officer ruled that Mr. _____ had not proven by a preponderance of the evidence that he was in fact domiciled in Massachusetts. That decision was appealed to the Suffolk Superior Court who, after hearing, remanded the matter.

DETERMINATION OF DOMICILE

115 CMR 6.04 (2)(b) states:

(2) Domicile

(a) For purposes of 115 CMR 6.04 (1)(a), 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.

(b) There shall be a presumption that the following individuals are not domiciled in Massachusetts:

1. Persons who reside in a home or other setting subject to licensure or regulation by the Commonwealth, which residence was arranged or is being funded by another State, including any agency or political subdivision thereof and any entity under contract with the other State for such purposes;

2. 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;

3. Persons, other than those covered under 115 CMR 6.04(2)(b) 1. or 2., ages 18 through 21, who reside in a residential special education program and whose parent or guardian is not domiciled in Massachusetts.

At the time of Mr. _____'s placement at New England Villages, 115 CMR 6.04 (2)(b)(2)2 would clearly have applied to him. He was placed at New England Village by his parents who lived in New York State. His parents paid for Mr. _____'s placement and there is no evidence that he had any input into the decision to come to Massachusetts.

Since 115 CMR 6.04 (2)(b)(b) clearly states that there shall be a presumption the persons described in the following sections are not domiciled in Massachusetts, the proper forum in which to attempt to rebut that presumption is an Administrative Hearing. A presumption is rebuttable in that it can be refuted by factual evidence.¹ The presumption that certain persons are not domiciled in Massachusetts and therefore not eligible for services from the Department of Mental Retardation has been treated as rebuttable in this case and in others.² Regardless of the circumstances under which Mr. [REDACTED] came to be in Massachusetts, he has the opportunity to present evidence to rebut the presumption that he is not domiciled in Massachusetts and therefore not eligible for services and supports from the Department of Mental Retardation.

The issue now becomes whether or not Mr. [REDACTED] has provided sufficient evidence to rebut the presumption that he is still not domiciled in Massachusetts. The Department's Regulations define *persons who are domiciled in Massachusetts as those who reside in Massachusetts with the intention to remain here permanently or for an indefinite period.*³

Mr. [REDACTED] is under guardianship and has been found to be incompetent to make decisions for himself.⁴ In Massachusetts, a court may appoint a guardian for a mentally retarded person if *"the court finds that the person is mentally retarded to the degree that he is incapable of making informed decisions with respect to the conduct of his personal and financial affairs, that failure to appoint a guardian would create an unreasonable risk to his health, welfare and property, and that appointment of a conservator pursuant to section sixteen B would not eliminate such risk."*⁵ Under Massachusetts law, a guardian of a mentally retarded person has the right to choose where the ward will live. A guardian of a mentally retarded person has the obligation to protect the interests of the ward and to obtain appropriate services for the ward.

A guardian would also consider the ward's wishes in making choices for him. She need not agree with what the ward wants but his desires are one of the factors a guardian considers in making decisions about what is in the interests of the ward. In this case, Mr. [REDACTED] has expressed wishes which should be considered.

On March 25, 2008 Andrea Weiss, Psy.D., in a letter to the Department of Mental Retardation wrote "I can state unequivocally that it is in David's best interest to continue to reside at the New England Village community, and – as his guardian – it is my intention to have him reside there indefinitely." (A – 3) Clearly, Mr. [REDACTED] present guardian has chosen Massachusetts as his domicile.

Mr. [REDACTED] has introduced three documents that address his ability to choose his own domicile. These are a letter from Vincent Panetta, Ph.D., accompanied by his Curriculum Vitae, and dated April 29, 2008; a second letter from Dr. Panetta dated May 13, 2008 (A – 4,7,) a medical Report from Ronald S. Ebert, Ph.D. dated April 30, 2008 (A – 5), (Dr. Panetta's May 13, 2008 letter has been marked A – 7 by me.)

¹ www.law.com\dictionary
² Hearing Officer's Decision 11/6/06
³ 115 CMR 6.04 (2)(a)

⁴ In 1990 Mr. [REDACTED] mother was appointed his guardian by a New York Court. In November 2005 A.. Weiss, Psy. D. was appointed guardian in the Plymouth Probate Court.

⁵ M.G.L. c201, section 6A(a).

On April 30, 2008 Ronald Ebert, Ph.D. met with Mr. [redacted] to "chat with Mr. [redacted] for the very limited purpose of whether he can, in the words of the SJC, choose his home,". Before meeting with Mr. [redacted] Dr. Ebert spoke with his parents, reviewed the record of the November 2006 Administrative Hearing and the transcript of the hearing in Superior Court before Justice Brassard.

Dr. Ebert's interview with Mr. [redacted] was conducted in his group home. A colleague of Dr. Ebert's and one of Mr. [redacted] direct care staff were present during the interview. After interviewing Mr. [redacted] for approximately one hour, Dr. Ebert asked the direct care staff to try to elicit information from Mr. [redacted] while he observed.

Dr. Ebert concluded that Mr. [redacted] was not capable of choosing his home. He did not believe that Mr. [redacted] was capable of making a choice about where he should live. Dr. Ebert did think that Mr. [redacted] was quite comfortable in his present residence which he referred to as "housie 1".

Vincent Panetta, Ph.D. has been providing psychotherapy services to Mr. [redacted] for many years. He has known Mr. [redacted] since he came to New England Villages. Dr. Panetta sees Mr. [redacted] weekly for forty-five minute sessions. Mr. [redacted] brings up whatever is on his mind at these sessions. Dr. Panetta describes Mr. [redacted] as being able to form relationships with people, knows what he likes and does not like and has preferences which are stable over time for certain people, places and activities. Mr. [redacted] is capable of complaining about things he does not like and can press for changes in his environment. Mr. [redacted] has told Dr. Panetta about visiting his parents, knows whether he has gone to New York or Florida and can relate that he traveled by plane. Dr. Panetta does not doubt that Mr. [redacted] knows that New York, Florida and The Village where he lives are different places. Dr. Panetta has known Mr. [redacted] for a long time and has learned to interpret his moods and his communication style. Mr. [redacted] has stated that he wants to remain in the Village and Dr. Panetta believes that Mr. [redacted] considers New England Villages to be his home.

FINDINGS AND CONCLUSIONS

1. [redacted] has resided in Massachusetts at New England Villages in Pembroke since 1986.
2. [redacted] has formed the intent to remain at New England Villages indefinitely. He knows the difference between his home and his parents home. He may not be able to state his address or even know the name of the state he is in but he can and I find that he has found a home at New England Villages and that he intends to remain there indefinitely. Even if Mr. [redacted] intention were not clear and one found that he was not capable of making this decision, he has a guardian who has reached the same conclusion as to where Mr. [redacted] home is.
3. [redacted] guardian intends for Mr. [redacted] to remain at New England Villages indefinitely.
4. [redacted] is domiciled in Massachusetts for the purposes of CMR 6.04 (1),(2).

I find that [redacted] is domiciled in Massachusetts and has proven by the preponderance of the evidence that he meets that criteria for services and supports from the Department of Mental Retardation.

While the parties in this matter have raised and argued interesting Constitutional issues relative to the Department's Regulations, I find that this is not the proper forum in which to address those issues.

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: 4/2/08

Sara Mackiernan

Sara Mackiernan
Hearing Officer