

**Executive Office of Health and Human Services
Department of Children and Families
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**IN THE MATTER OF:
L.L. & T.L.
FH #2017-0107**

FAIR HEARING DECISION

Appellants, L.L. and T.L., appeal the decision of the Department of Children and Families' ["Department" or "DCF"], to remove M and N from their kinship foster-pre-adoptive home.

Procedural History

The Department verbally notified the Appellants of the removal decision on September 7, 2016.¹ The Appellants filed for a timely request for Fair Hearing ["Hearing"] on October 3, 2016, pursuant to 110 CMR 10.06 & 10.08. The Appellants' request for appeal was granted and their Hearing held on March 2, 2017 at the Department's North Central Area Office in Leominster, MA. Participants included the DCF Family Resource Supervisor, R.C.; the DCF Adoption Social Worker for the Children, T.C.; the DCF Social Worker Intern/Observer, J.A.; and the Appellants. All, minus the social worker intern, were sworn in under oath and testified. The proceedings were digitally recorded, pursuant to 110 C.M.R. 10.26, and downloaded to a CD. Admitted into evidence for the Department were the DCF 51A Report of August 30, 2016 [Exhibit A], the corresponding DCF 51B Response Supported on September 14, 2016 [Exhibit B]; the DCF Case Dictation Report [Exhibit C]; E-Mail Correspondence between the Director of the Children's Day Care and the Children's Adoption Social Worker [Exhibit D]; E-Mail Correspondence Concerning a Referral for a Positive Parenting Coach for the Appellants [Exhibit E]; a Safety Plan for External Visitors to the Appellants' Home signed by the Appellants [Exhibit F]; a CD of a Video of the Children with Mother and her Brother in a Car, found by the Department on Mother's Facebook [Exhibit G]; and, Notification of the Removal of the Children to the Appellants [Exhibit H]. Admitted into evidence, on behalf of the

¹ Pursuant to 110 CMR 7.116, the Department notified the Appellants of the removal decision, the reasons for the removal, and their appeal rights by letter dated September 8, 2016. This letter was mailed to the Appellants on March 24, 2017. The Appellants were not substantially prejudiced by this late notice, because they were verbally informed of the removal on September 7, 2016, and earlier requested an appeal on the removal, which was granted.

Appellants, was the Appellants' Request for Appeal of the Removal and Notification of the Supported Finding of Neglect [Exhibit 1]. The Hearing record was closed on April 3, 2017, following receipt of Exhibits G and H.²

In accordance with 110 CMR 10.03, the Hearing Officer attests to impartiality in this case, having had no direct or indirect interest, personal involvement, or bias in this case.

Pursuant to 110 CMR 10.21 (1), the Hearing Officer need not strictly adhere to the rules of evidence. The Massachusetts Rules of Evidence do not apply, but the Hearing Officer shall observe any privilege conferred by statute such as social worker-client, doctor-patient, and attorney client privileges. Only evidence, which is relevant and material, may be admitted and may form the basis of the decision. Unduly repetitious or irrelevant evidence may be excluded.

Standard of Review

The issue presented in this Hearing is whether, based upon the evidence and the Hearing record as a whole, and giving due weight to the clinical judgments of the Department social workers, the Department's decision or procedural action, in making a decision to remove the children from the Appellants' kinship foster-pre-adoptive kinship home, violated applicable statutory or regulatory requirements, or the Department's policies or procedures, and resulted in substantial prejudice to the Appellants. If there is no applicable statute, policy, regulation or procedure, the issue is whether the Department failed to act with a reasonable basis or in a reasonable manner, which resulted in substantial prejudice to the Appellants. [110 CMR 10.00]

Findings of Fact

1. M and N were in the Department's custody and placed in the foster/pre-adoptive home of their maternal great grandmother, Appellant L.L., on October 3, 2013 and October 26, 2013, sequentially. M was 2.5 years-old at the time and N fifteen days-old. [Testimony of the Family Resource Supervisor]
2. The children's maternal aunt, Appellant T.L., moved into the maternal great grandmother's home in 2013, right after the maternal great grandmother was established as a kin resource. [Testimony of Appellant T.L./Maternal Aunt] The Department designated the maternal aunt as a secondary caretaker for the children, i.e. foster parent. The maternal aunt sought to become the primary caretaker and adoptive resource for the children, however, this process was derailed by the filing of the 51A Report of August 30, 2016 by the children's DCF adoption social worker. T.C. The adoption social worker was assigned to the children in January 2015

² The Hearing record was left open until April 3, 2017, in part, to receive a Fair Hearing Decision Related to the Appellants' Appeal of the Department's SIU decision, to Support for Neglect of the Children by the Appellants [FH Docket #2016-1569]. This appeal of the Appellants was held on January 27, 2017 by another Hearing Officer, and the evidence closed on that date. Because this supported decision was the underlying reason for the removal of the children, for the most part, a copy of the decision was requested by the Hearing Officer. As of April 3, 2017, the Hearing decision was not provided.

because the children had transitioned to the “legal risk”³ adoption track. [Testimony of the Family Resource Social Worker; Testimony of the Adoption Social Worker]

3. The 51A Report of August 30th was screened in for a 51B Response conducted by Special Investigation Unit [SIU] Response Social Worker, J. H., of the Department’s Central Office. On September 14, 2016, following the 51B Response, the Department supported the 51A Report for neglect of the two children by the Appellants because they had allowed contact between the children and their Mother, and between the children and their maternal grandmother, contrary to Department directive. The contents of the 51A Report and 51B Response, conveyed in part by the adoption social worker at the Appellants’ Hearing, represents the primary reason, though not the only reason, for the children’s removal from the Appellants’ home. These documents were also entered into evidence at the Appellants’ Hearing of March 2, 2017. [Exhibit A; Exhibit B; Exhibit 1; Testimony of the Adoption Social Worker; Testimony of the Family Resource Social Worker]
4. During the 51B response, specifically on September 7, 2016, the children, then five and two years-old, were removed from the Appellants’ home on an emergency basis, because of imminent risk to their safety, and placed in a hotline home. At the present time, the children are legally free for adoption. The children’s father, who was incarcerated, signed an open adoption agreement on December 5, 2016 and on Tuesday [February 28, 2017] their Mother’s parental rights were terminated. [Testimony of the Family Resource Social Worker; Testimony of the Adoption Social Worker]
5. The removal was precipitated by the Appellants non-compliance with Department directive that all contact between the children and their parents be supervised by the Department. This requirement was dictated by the Department due to Mother’s chronic substance abuse. This requirement was explained to the Appellants on an on-going basis. [Exhibit B; Exhibit C; Testimony of the Adoption Social Worker]
6. In addition, prior to the filing of the August 30, 2016 51A Report, specifically on March 19, 2016, the Appellants signed a safety plan pertaining to external visitors to the home and/or caretakers of the children. In signing this plan, the Appellants agreed to notify the Department of any frequent visitors to their home or of individuals around the children, which they also violated. [Exhibit F]
7. To back track, the parental termination trial scheduled for February 2016 was pushed back because the children’s mother, S.L., whose whereabouts had been unknown, had resurfaced. Mother entered a substance abuse program on February 7, 2016 and visits between mother and the children began again. Mother’s ongoing social worker visited Mother at the substance abuse program on July 4, 2016, but mother was absent, only her clothes were there. Sometime over the July 4th weekend, mother had left the program, whereabouts unknown. The last contact the Department had with mother was in June 2016. [Testimony of the Adoption Social Worker; Exhibit B, p.7]

³ Not legally free for adoption.

8. The adoption social worker for the children and the ongoing social worker for the parents tried to search for Mother. Due diligence was required for trial. The adoption social worker conducted a media search and discovered that mother had posted a video on her Facebook which, contrary to Department directive, demonstrated she had access to the children. This video was played at the Appellants' Hearing of March 2, 2016 on the family resource social worker's IPAD and later admitted into evidence after being burned to a CD. [Testimony of the Adoption Social Worker; Testimony of the Family Resource Supervisor; Exhibit G]
9. The Facebook video posted on June 4, 2016 depicts a man, later identified as D.J., who is mother's brother, driving a moving car. Mother is in the front passenger seat presumably taking the video and the two children are seated in the back of the vehicle dancing in their seats to the music coming from the radio. Each child had a seat belt across them, but neither was in a car seat. This video was reviewed with Appellant L.L, maternal great grandmother, during the 51B response, who remarked that mother looked like she was under the influence. The 51A Report was then filed with the Department. [Exhibit B; Exhibit A; Observation at Hearing; Exhibit G; Testimony of the Adoption Social Worker]
10. Mother's brother, D.J. who was driving the aforementioned vehicle, was not an approved visitor or caretaker of the children; had not undergone a required background record check; and, did not have the Department's permission to have access to the children. [Testimony of the Adoption Social Worker; Exhibit H; Exhibit B]
11. The Appellants reported that the incident [described in Finding #9 and seen on the video] must have occurred when they allowed the two children to go with their maternal grandmother, who in turn allowed access to Mother. However, credible evidence seen elsewhere in the record, specifically from child, M., demonstrates that the Appellants allowed Mother to have direct unauthorized access to their home and to the children on this and other occasions, despite having been told that this would jeopardize the children's placement with them and despite being told that all contact and visits were to go through the Department. [Adoption Social Worker; Testimony of the Family Resource Supervisor; Exhibit B; Exhibit C; Testimony of the Appellant(s)]
12. Although the Appellants acknowledged that the children had contact with their maternal grandmother, they were inconsistent in describing the frequency of that contact, i.e., from one contact to a few times. Although this contact had been occurring, maternal grandmother was not an approved visiting resource. She had not undergone the required background record check. [Testimony of the Adoption Social Worker; Testimony of the Appellant(s); Exhibit B]
13. The adoption social worker and the SIU response social worker visited the Appellants' home on September 8, 2016, during the 51B response. During their conversation with Appellant L.L, they learned that Mother had gained entry to the

Appellants' apartment during the past week and had assaulted Appellant L.L. in front of the two children. Appellant L.L. did not contact the police nor inform the Department of this domestic, until this visit. [Exhibit B; Testimony of the Adoption Social Worker; Exhibit H] This represents a lack of transparency. [Testimony of Family Resource Supervisor] The Department had earlier reminded Appellant L.L. to call the police and the Department, if Mother went to the home. [Exhibit C]

14. After the aforementioned site visit, it was decided to remove the children from the Appellants' home on an immediate basis because of imminent risk. The adoption social worker and two police officers went to the home on September 14, 2016, the same day that the SIU response social worker supported the 51B for neglect, removed the children, and put them into a hotline placement. (Testimony of the Adoption Social Worker; Exhibit B; Exhibit H)
15. The Department had other ongoing concerns about the Appellants' home that did not rise to the threshold of neglect. [Testimony of the Adoption Social Worker; Exhibit B; Exhibit D; Exhibit E]: (a) The children needed socialization. It took a long time to obtain child care for them. While in placement with the Appellants, notably in 2015 and 2016, the children were absent from their day care numerous times. (b) The Appellants were not effective foster parents. There was not a lot of structure in the home, which was an ongoing concern. Appellant L.L. was overwhelmed. The Department made a referral for a parent aide to help them with supervision of the children.

Conclusion

A foster parent has the right to appeal a decision, to remove a foster child from the foster home, minus some exceptions, which are delineated at 110 CMR 10.06 (4) (b). The Appellants' request in this regard was granted and their Hearing held on March 2, 2017 at the Department's North Central Area Office.

Applicable regulations and policies pertaining to the Appellant's appeal include, but are not limited to, the following:

Department decisions involving the recruitment and approval of foster/pre-adoptive parents, and placement and removal of children, are governed by 110 CMR 7.100, et seq.

Removal of Foster Children from Foster/Pre-Adoptive Homes – 110 CMR 7.116.

(3) Whenever the Department has received, investigated, and supported a report of abuse or neglect of a foster child and the foster/pre-adoptive parent is named as the person believed to be responsible for the abuse or neglect of the child, the following procedures shall be observed:

(c) As to any foster child(ren) already in the foster/pre-adoptive home, if the Department determines that the foster child's physical, mental or emotional well-being would be endangered by leaving the child in the foster/pre-adoptive home, it shall immediately remove the foster child from the foster/pre-adoptive home and arrange an alternative placement.

See also Removal of Children from Foster/Pre-Adoptive Homes in Family Resource Policy, Revised 7/8/2008.

Policy Regarding Emergency Removals from Foster/Pre-Adoptive Families [Family Resource Policy, Revised 7/8/2008]

Emergency removal of a child who is in the Department's care or custody from the care of a foster/pre-adoptive family occurs in a planful way, and appropriate notice must be given the foster/pre-adoptive parents. Emergency removal is used only when the Department has determined that the child is not safe in her/his current setting and is at immediate risk. ... The foster/pre-adoptive parent(s) must be directly notified of the removal through face-to-face—or, at least, direct—contacts. Messages are not to be left on answering machines or with someone other than the foster/pre-adoptive parent...

Continuation of Service or Placement Pending Appeal [110 CMR 10.09]:

(3) The filing of a request for a Fair Hearing regarding a decision to remove a child from a foster or pre-adoptive placement shall stay the effect of the challenged decision until after the final decision of the agency is made pursuant to 110 CMR. 10.00. A decision to remove a child from a foster or pre-adoptive placement on an immediate basis because the Director of Areas or Regional Director has determined that the child's physical, mental or emotional well-being would be endangered by leaving the child in the foster home, as provided by 110 CMR 7.116: *Removal of children from Foster/Pre-Adoptive Homes*, shall not be stayed by the filing of a request for a Fair Hearing regarding that decision.

Burden of Proof [110 CMR 10.23]:

To prevail, an Appellant must show based upon all of the evidence presented at the hearing, by a preponderance of the evidence that: (a) the Department's or Provider's decision was not in conformity with the Department's policies and/or regulations and/or statutes and/or case law and resulted in substantial prejudice to the Appellant, (b) the Department's or Provider's procedural actions were not in conformity with the Department's policies and/or regulations, and resulted in substantial prejudice to the aggrieved party, (c) if there is no applicable policy, regulation or procedure, that the Department or Provider acted without a reasonable basis or in an unreasonable manner which resulted in substantial prejudice to the aggrieved party; or (d) if the challenged decision is a supported report of abuse or neglect, that the Department has not demonstrated there is reasonable cause to believe that a child was abused or neglected.

Analysis

The Appellants challenge the Department's decision, to remove five year-old M and two year-old N from their kinship, foster/pre-adoptive home.

The burden is on the Appellants to show, by a preponderance of the evidence, that the Department's decision, to remove the children from their licensed foster/pre-adoptive foster home, was not in conformity with Department regulations and/or policy. A Hearing

Officer must defer to the clinical judgment of a trained social worker, if there is a reasonable basis for the questioned decision. [110 C.M.R. 10.00]

The aforementioned children, M and N, were placed in the Appellants' home in October 2013 and removed on September 14, 2016. Despite this substantially long placement, the Hearing Officer had no reason to doubt the clinical experience and judgment of the Department in the instant matter. I did not find any information offered by the Appellants to be substantial or compelling to such an extent that the Department acted unreasonably and/or abused its discretion in making its decision in this matter. Based upon a review of the evidence presented at the Hearing, including testimony from the parties and documents submitted, I find the decision was made in conformity with its regulations, supported by sound clinical judgment, and that there was a reasonable basis for the decision. The Appellants consistently failed to comply with the Department directive to not allow the children to be in the care of any individual not approved by the Department to be caretakers of the children. Despite this on-going directive and a signed safety plan of March 18, 2016, the Appellants knowingly allowed contact between the children and their mother on a number of occasions; between the children and Mother's brother, D.J., who was not an approved visitor or caretaker; and, between the children and their maternal grandmother, who was also not approved. Of paramount concern was Mother's direct contact with the children. All visits between the children and their Mother were to be supervised by the Department due to Mother's chronic substance abuse. Yet, the Appellants allowed Mother direct access to the children culminating in an incident where Mother gained entry to the home and, although told to leave, assaulted Appellant L.L. The children witnessed this incident. The Appellants failed to notify the police and the Department; thus, raising concern about the Appellants' transparency. It was only when the children's adoption social worker and the SIU response social worker visited the Appellants home on September 8, 2016, during the 51B response, that the information about the past week's domestic incident was unveiled. Appellant L.L. testified that she could not contact the Department because her phone was broken. I find this unlikely. Even if true, the Appellant could have availed herself of other alternative methods to notify the Department of the incident.


In addition to the above discussion, the Department conveyed concerns about the Appellants' ability to adequately care for the children. The children experienced numerous absences from their day care, which was needed to increase their socialization skills. They also lacked structured supervision during their placement with the Appellants, thus necessitating a DCF referral for a parent aide in the home. A review of the 51B response reveals that Appellant L.L. was overwhelmed with the children's care.

Based on a totality of the record, I find that the Appellants did not meet the required burden of proof to prevail in this matter. [110 CMR 10.23]

Order

The Department's decision of September 7, 2016, to remove M and N from the Appellants' DCF kinship foster/pre-adoptive home, is AFFIRMED.

This is the final administrative decision of the Department. If Appellants wish to appeal this decision, they may do so by filing a complaint in the Superior Court for the county in which they live, or in Suffolk County, within thirty (30) days of the receipt of this decision. [M.G.L. c. 30A, §14]



Frances I. Wheat, MPA
Administrative Hearing Officer
Office of the General Counsel

11-28-17

Date



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