

**, THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
600 WASHINGTON STREET
BOSTON, MASSACHUSETTS 02111**

LINDA S. SPEARS
Commissioner

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(IN THE MATTER OF)
(LB)
()
(FH # 2017-0503)
()

HEARING DECISION

Procedural History

The Appellant in this Fair Hearing was LB (hereinafter "LB" or "Appellant"). The Appellant appealed the Department of Children and Families' (hereinafter "the Department" or "DCF") decision to remove a Department foster child, D, (hereinafter "D" or "the child") from the home of an approved pre-adoptive parent LB.

On April 24, 2017, the Department gave written notice to LB of its decision to remove D from her home and of her right to appeal. The Appellant made a timely request for a Fair Hearing pursuant to 110 CMR 10.06. The first session of the Fair Hearing was held at the Department's [REDACTED] Area Office in [REDACTED] Massachusetts on June 8, 2017. The second session of the Fair Hearing was held at the Department's [REDACTED] Area Office in [REDACTED] Massachusetts on September 14, 2017. The record closed after the submission of additional evidence from the Appellant.

The following persons appeared at the Fair Hearing on June 8, 2017:

DH	Fair Hearing Officer
OM	Interpreter
WC	Appellant's attorney
LR	DCF Response Worker
RC	Family Resource Supervisor

The following persons appeared at the Fair Hearing on September 14, 2017:

NH	Administrative Hearing Officer
RC	Family Resource Supervisor
PB	DCF Adoption Social Worker
LR	DCF Investigator

BC
WC
LB
CR
LC

Witness
Appellant's Attorney
Appellant
Interpreter
Family Resource Worker

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

All witnesses were sworn in to testify under oath.

The Fair Hearing was recorded on a digital voice recorder, pursuant to 110 CMR 10.26.

The following documentary evidence was entered into the record for this Fair Hearing:

For the Department:

- Exhibit A: 51A #3730656, dated 4/26/1751(pp. 1-7)
51B #1983663, dated 5/17/17 (pp. 8-17)
51A #3729061, dated 4/21/17 (pp. 18-23)
51B #1983090, dated 5/12/17 (pp. 24-32)
51A #3729634, dated 4/24/17 (pp. 33-36)
51B # 1983134, dated 5/1/17 (pp. 37-45)
Exhibit B: 51A # 3762010, dated 8/11/17

For the Appellant:

- Exhibit 1: Notice of Removal of D from Appellant
Exhibit 2: Printout of 110 CMR 7.116
Exhibit 3: Printout of 110 CMR 7.113
Exhibit 4: Foster/Pre-adoptive Reassessment of Appellant's home, dated 1/11/2017
Exhibit 5: Foster/Pre-adoptive Reassessment of Appellant's home, undated
Exhibit 6: Foster/Pre-adoptive Reassessment of Appellant's home, dated 9/3/2014
Exhibit 7: Foster/Pre-adoptive personal reference, dated 2/28/2011
Exhibit 8: Foster/Pre-adoptive personal reference, dated 7/17/2014
Exhibit 9: Leominster Housing Authority lease addendum
Exhibit 10: Letter from BC (submitted after Fair Hearing)

The Hearing Officer need not strictly follow the rules of evidence...Only evidence which is relevant and material may be admitted and form the basis of the decision. 110 CMR 10.21

Statement of the Issue

The issue presented in this Hearing is whether, based upon the evidence and the Hearing record as a whole, and on the information available at the time of and subsequent to the

response, the Department's decision or procedural action, to remove the subject child from the Appellant's pre-adoptive foster 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, 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 10.05

Findings of Fact

1. LB's home had been established by the Department as a pre-adoptive home for D. (Testimony of RC; Testimony of Appellant)
2. At the time of the initial 51A reports relative to this Fair Hearing, D was three (3) years old. (Exhibit A p.19; Testimony of RC; Testimony of Appellant)
3. D was placed in the Appellant's home on March 5, 2017, as a pre-adoptive placement. (Exhibit A pp.35-37; Testimony of RC; Testimony of Appellant)
4. Prior to the 51A reports, the Appellant babysat two (2) other children, J (hereinafter "J") and A (hereinafter "A"). (Exhibit A pp.3, 10-11, 25-29; Testimony of RC; Testimony of Appellant)
5. At the time of the 51A reports, the Appellant's grandson, JC (hereinafter "JC") resided with her. In the past, the Appellant also acted as JC's guardian until he turned twenty-one (21) years old. The Appellant had been a kinship-specific placement for JC when he was a minor. At the time of the 51A reports, JC was twenty-two (22) years old. (Exhibit A pp. 3,9,19,25,30-31,34,38; Testimony of RC; Testimony of Appellant)
6. On April 21, 2017, the Department received a 51A report alleging JC as a perpetrator of sexual abuse, against J. This allegation was subsequently supported on April 25, 2017. (Exhibit A pp.18-31; Testimony of RC; Testimony of LR)
7. On April 24, 2017, the Department received a 51A report alleging a risk of sexual abuse of D by JC. The Department had concerns for the safety of D due to the prior allegations of sexual abuse of A and J by JC and D being in the home. During the course of the 51B Emergency Response, the allegation of sexual abuse was not supported; however an allegation of physical abuse of D by JC was added. The allegation of physical abuse of D by JC was supported on the same day April 24, 2017. The Response Worker continued working on the 51B response after the support decision was made. (Exhibit A pp.33-45; Testimony of RC; Testimony of LR)
8. On April 24, 2017, the Department and the Appellant created a safety plan with the following provisions: 1) JC cannot be the sole caretaker of any child; 2) D cannot be left alone with JC; 3) JC cannot walk any child anywhere; 4) There are to be no other

- children at the foster home other than D. (Exhibit A p.11; Testimony of RC; Testimony of LR; Testimony of Appellant)
9. On April 24, 2017, as a result of the supported allegations against JC, a household member of the Appellant's residence, the Department removed D from the Appellant's home on an emergency basis. (Exhibit A pp.4-5; Exhibit 1; Testimony of RC; Testimony of LR)
 10. During the course of the 51B responses, the Appellant spoke with her Family Resource social worker. At their request, the Appellant had JC leave her household in order to address concerns the Department raised. JC no longer resided with the Appellant. (Exhibit A p.11; Testimony of RC; Testimony of LC; Testimony of Appellant)
 11. On April 26, 2017, the Department received a 51A report alleging sexual abuse and neglect of A by JC. These allegations were not supported. (Exhibit A pp.1-15; Testimony of RC; Testimony of LR)
 12. None of the related 51B responses found that the Appellant had abused or neglected D or any of the children. (Exhibit A; Testimony of RC; Testimony of LR; Testimony of Appellant)
 13. During the course of the Department's 51B responses, the Appellant stated she never left JC alone with any of the children and he was never in a caregiver role. However J and A stated to the Department's Response Worker there were times they were alone with JC. J disclosed that it was during these times that JC would "touch her private part". JC regularly walked J and A to their school across the street from the Appellant's home. (Exhibit A pp.12-13, 27-29; Testimony of LR)
 14. There was no evidence that the Appellant knew of any actions JC might have been taking that would have been construed as abusive or neglectful to any of the children who frequented her home, including D. (Exhibit A; Testimony of RC; Testimony of LR; Testimony of Appellant)
 15. At the Fair Hearing, RC testified the Department was in the process of conducting a limited re-evaluation of the Appellant's home as indicated by 110 CMR 7.113 and 110 CMR 7.116. However, the Appellant had not been notified of the limited re-evaluation, and no interviews or other related materials had been requested or obtained. RC acknowledged that the limited re-evaluation was not done immediately after the Department removed D; nor did the Department contact the Appellant in regards to any issues that might need to be resolved in order to continue the Appellant's foster/pre-adoptive license; nor did the Department attempt to develop a plan with the Appellant to meet any identified outstanding issues needing resolution as outlined in 110 CMR 7.113 (1)(b)(9,10) (Testimony of RC; Testimony of LR; Testimony of Appellant) I find that the Department did not comply with the regulations and policies requiring the Department to conduct a limited re-evaluation

of the Appellant's home after the related 51A's and 51B's pursuant to 110 CMR 7.113.

16. At the Fair Hearing, the Appellant submitted three (3) previous Pre-adoptive Family Re-assessments each determined that the Appellant was providing excellent care to D and that the Appellant communicated well with the Department. The Appellant also Appellant submitted two previous personal references authored by her pastor. (Exhibit 4; Exhibit 5; Exhibit 6; Exhibit 7; Exhibit 8; Testimony of RC; Testimony of PB)
17. The Appellant testified D was never alone with JC; either she or her sister, BC, (hereinafter "BC") were always present. BC generally stayed on the couch in the living room and could not go up or down stairs. (Testimony of Appellant; Exhibit 10)
18. Based upon the totality of the evidence in this case, I find that the Department did not act in accordance with the applicable regulations and policies regarding the removal of D from the Appellant's home for the following reasons:
 - a. The Appellant was not found to have abused or neglected D.
 - b. Both the Family Resource regulations and policy indicated that the 51B support decisions against JC mandated a limited re-evaluation of the Appellant's home to determine if D could remain in the home. Yet, there was no evidence the Department conducted or began to conduct a limited re-evaluation of the Appellant's home for over four (4) months following D's removal.
 - c. The Appellant agreed to a safety plan created by the Department and herself, in regards to D and JC.
 - d. The Appellant had JC leave her residence on April 24, 2017, at the Department's request. JD has a separate residence.
 - e. There was no evidence the Appellant knew of any actions JC might have been taking that would have been construed as abusive or neglectful to any of the children who frequented her home, including D.
 - f. The Appellant had a history of being cooperative with the Department.

Applicable Standards

110 CMR 7.101: Out of Home Placements

- (1) All out-of-home placement decisions shall be made in the best interests of the child, based upon safety, well-being and permanency of the child and the child's individual needs...
- (2) The Department shall consider, consistent with the best interests of the child, the following placement resources in the following order:
 - (a) placement with a kinship family;
 - (b) placement with a child-specific family;
 - (c) placement in a family foster care home where the child was previously placed;

- (d) placement in family foster care;
- (e) placement in a shelter/short term residential or group home;
- (f) placement in community residential care.

Every reasonable effort should be made to place a child in accordance with 110 CMR 7.101 (1) and (2).

7.113: Reassessment and License Renewal of Foster/Pre-Adoptive Parents and Foster/Pre-Adoptive Homes

(1) The Department shall annually re-assess foster/pre-adoptive parents and foster/pre-adoptive homes whether unrestricted, kinship or other child-specific, in accordance with the procedure set forth in 110 CMR 7.113(1)(a). Every two years a license renewal will be conducted in place of the annual reassessment.

(a) The Department shall send re-assessment materials to the foster/pre-adoptive parent 45 working days prior to the re-assessment due date:

(b) The Department will thereafter:

1. interview the foster/pre-adoptive parents and other household members in the foster/pre-adoptive home;
2. obtain information from any Department social worker who has had a child in his/her caseload placed in the home in the previous year, and include information from any foster child then placed in the home, and thereafter enter a written summary of the interview results in the foster/pre-adoptive parent file;
3. review the foster/pre-adoptive parent file to examine written correspondence between the Department and the foster/pre-adoptive parent during the preceding year to review the Child Placement Agreements for children in the home in the year preceding the re-assessment, to determine the foster/pre-adoptive parent's compliance with training requirements established by the Department; and determine the nature and extent of the foster/pre-adoptive parent's involvement in the implementation and review of the service plan for foster children placed in the home during the preceding year;
4. prepare a written evaluation of the foster/pre-adoptive parent(s) which may include a general description of the foster/pre-adoptive parent's performance in providing foster care; identification of the foster/pre-adoptive parent's particular strengths and weaknesses in providing foster care; and recommendations for eliminating weaknesses and capitalizing on strengths identified;
5. request criminal record and Central Registry checks and other background checks as required by Department Background Record Check Policy and 110 CMR 18.00 *et seq.* for all household members, other than foster children;
6. contact references seen by Department staff as useful to the re-assessment;
7. review and update of the foster/pre-adoptive parent professional development plan;

8. review of the physical standards for foster/pre-adoptive homes, as set forth in 110 CMR 7.105 and Department Family Resource Policy, to ensure the home continues to meet these standards;
9. notify the foster/pre-adoptive parent, at least 15 working days prior to the re-assessment due date, of any issues that need resolution to continue the foster/pre-adoptive parent license;
10. develop with the foster/pre-adoptive parent a plan to meet the identified outstanding issues needing resolution and a time frame for completion.

(c) Within ten days of completing the re-assessment, the Department shall reach one of the following decisions, shall notify the foster/pre-adoptive parents and shall enter a copy of the notification in the foster/pre-adoptive parent file:

1. The foster/pre-adoptive parent and foster/pre-adoptive home license is continued on the same terms, and with the same conditions, as existed prior to the re-assessment. For kinship or child-specific placement this means the child currently in the home remains.
2. The foster/pre-adoptive parent and foster/pre-adoptive home license is continued on terms, and with conditions, different from those which existed prior to the re-assessment, which new and different terms and conditions shall be set forth in writing. For kinship or child-specific placements this may mean that the home was licensed for a different or additional specific child.
3. The foster/pre-adoptive parent and/or the foster/pre-adoptive home license will not be continued unless specific changes in circumstances or conditions are effected within a specified time period, not to exceed 14 days, and that if such changes are not effected within the time allotted, the child or children currently placed in the foster/pre-adoptive home will be removed from the placement and the placement will cease to be approved.
4. For an unrestricted foster/pre-adoptive parent the license continues but the home's status is changed to a child-specific home.
5. The foster/pre-adoptive parent and/or foster/pre-adoptive home will not be reapproved, and all foster children residing in the home shall be removed.

(d) In any case in which the Department is delayed in completing the annual re-assessment, the unrestricted foster/adoptive parent(s) and home shall continue to be licensed, until the Department completes the re-assessment and sends notice of its decision to the foster/adoptive parent(s).

If the foster/pre-adoptive parent(s) appeal the revocation of their license via the fair hearing process, the license shall remain in effect until the fair hearing decision is issued.

(e) The foster/pre-adoptive parents shall receive a copy of the written evaluation upon request.

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

(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:

- (a) the foster/pre-adoptive home shall be closed to any future placements of children.
- (b) The license shall be changed and, pending a determination under 110 C.M.R. 7.116(3)(b) or (c), the placement will be deemed a child specific placement for any children who remain in the foster/pre-adoptive home.

(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. The foster/pre-adoptive parent shall be given verbal notice as soon as possible after the child is removed, and written notice within five days after the removal. The written notice shall include at least the following information:

1. the reason(s) for the removal;
2. notice of the foster/pre-adoptive parent's right to appeal the removal decision, and the procedures for taking such an appeal;
3. notice that the Department intends to perform a limited re-assessment of the foster/pre-adoptive parent(s) and the foster/pre-adoptive home.

A copy of the written notice shall be entered in the foster/pre-adoptive parent file. The Department shall then conduct a limited re-assessment of the foster/pre-adoptive parent(s) and foster/pre-adoptive home in accordance with the provisions of 110 CMR 7.113(1).

(d) If the Department determines that the foster child's physical, mental or emotional well-being would not be endangered by leaving the child in the foster/pre-adoptive home, it shall not remove the foster child, and shall proceed to perform a limited re-assessment of the foster/pre-adoptive parent(s) and the foster/pre-adoptive home. If the limited re-assessment is satisfactory, the placement shall become a child-specific placement as to the foster child remaining in the home.

(e) The limited re-assessment performed for purposes of 110 CMR 7.116(3) shall be conducted for the purpose of determining:

1. whether the removal of the foster child should be sustained if the foster child has already been removed; and
2. whether any other foster children in the foster/pre-adoptive home should be removed.

(f) If the limited re-assessment results in a decision to remove one or more foster children from the foster/pre-adoptive home, the Department shall make arrangements for removing any of those children still remaining in the foster/pre-adoptive home and moving them to new placements. If the limited re-

assessment does not result in a decision to remove one or more foster children from the foster/pre-adoptive home, the reason(s) for said determination shall be recorded in writing in the case file and approved in writing by the Hosting Area Director.

(4) Whenever the Department has received, investigated, and supported a report of abuse or neglect of any child and a member of the foster/pre-adoptive household, other than the foster/pre-adoptive parent(s), is named as the person believed to be responsible for the abuse or neglect, the Department shall conduct a limited reassessment in accordance with 110 CMR 7.116(3).

As part of the limited reassessment the Department will determine whether the home will remain open to future placements, whether the home should be restricted to a child-specific home for any children remaining in the home and whether it is in the best interest of the children placed in the home to remain in that home.

From the Family Resource Policy #2006-01 (revised 7/8/2008)

Procedures for Removing Children from a Foster / Pre-Adoptive Family

Supported 51B in which a Foster/Pre-Adoptive Parent or Other Household Member is Identified as the Person Alleged to be Responsible for the Child Abuse/Neglect

1. Removal Decision Following a Supported 51B. Following a supported 51B investigation of a foster/pre-adoptive family, regardless of who is identified as the person alleged to be responsible for the child abuse or neglect, the Department determines whether the child's physical, mental, or emotional well-being would be endangered by remaining in the foster/pre-adoptive home. If yes, the child's Social Worker immediately removes the child on an emergency basis.
 - If a foster/pre-adoptive parent is identified as a person alleged to be responsible for a child's abuse and/or neglect: the Department immediately suspends future placements to the home and conducts a Limited Reassessment to determine whether it is in the best interests of each child placed with the family to remain there. If the Department determines that a child should remain placed with the family, the home must be restricted (i.e., as "kinship" or "child-specific") for that child only.
 - If a household member other than a foster/pre-adoptive parent is named as a person alleged to be responsible for a child's abuse and/or neglect: the Department conducts a Limited Reassessment to determine:
 - whether it is in the best interests of each child placed with the family to remain there;
 - whether the home will be open to future placements; and
 - whether the home needs to be restricted (i.e., as "kinship" or "child-specific").

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.

Analysis

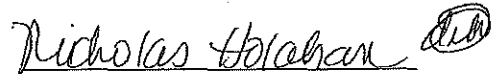
In this case, the Department conducted an emergency removal of D from the Appellant's home due to three (3) 51A's filed against her grandson, JC, who resided with the Appellant. As indicated above, when a household member was the subject of a supported allegation, the Department must conduct a limited re-evaluation of the home in question. The Department failed to undertake this limited re-evaluation, which could have been used to assess the potential safety concerns raised by the ongoing 51A/B reports and responses. By failing to undertake a limited re-evaluation, the Department was not able to adequately ascertain if remaining in the Appellant's home was in D's best interests.

The Department's removal was based on the related 51A/B's regarding JC and their theory that the Appellant was making poor decisions regarding the safety of the children in her home. However, the Department provided no proof of any poor decision making by the Appellant. Indeed, the Appellant's previous record as a foster parent indicated that she provided excellent care to D, by the Department's own standards. Further, there was no evidence that the Appellant had knowledge of potential actions that JC was taking that might have been construed as abusive or neglectful to any of the children in her home. When apprised of these concerns, the Appellant participated in a safety plan with the Department and had JC leave her residence. Thus, it was apparent the Appellant was willing to take reasonable steps suggested by the Department in order to address the safety concerns raised. Yet, without providing any rationale beyond what the Department authored safety plan was designed to address, the Department removed D. This decision by the Department did not comply with the stated regulations and policies, and was not made on a reasonable basis.

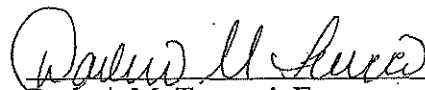
During the course of the Fair Hearing, the Appellant objected to the Department's submission of the 51B's into evidence. While strictly speaking the related 51B's were not the subject of this Fair Hearing, they contained information the Department used a basis for the removal. Therefore, this hearing officer allowed these documents to be considered. It was notable that when the Department supported the 51B of physical abuse of D by JC; the Department did not cite any specific actions of JC that created a substantial risk of injury to D. Thus, the Department's use of these documents failed to support the removal of the child from the Appellant's home.

Conclusion and Order

The Department's decision to remove D from the Appellant's home is hereby
REVERSED.


Nicholas Holahan
Administrative Hearing Officer

10/9/18
Date


Darlene M. Tonucci, Esq.
Supervisor, Fair Hearing Unit

Date

Linda S. Spears
Commissioner