

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
600 WASHINGTON STREET
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Linda S. Spears
Commissioner

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IN THE MATTER OF)	
)	
AJ)	FAIR HEARING DECISION
)	
FH # 20190705)	
&)	
20190809 ¹)	

Appellant, AJ, appeals the decision of the Department of Children and Families (hereinafter DCF or the Department), to remove N from her kinship foster home, pursuant to 110 C.M.R. §7.116, to revoke her license to provide foster/pre-adoptive care, and to deny her request to be N's Pre-adoptive resource, pursuant to 110 C.M.R. §7.118.

Procedural History

The J kinship foster home opened in 2013 with the placement of a niece who was in need of care. At that time, DJ, the Appellant's mother, was the named foster parent and the Appellant and her sister were household members assisting with providing care. DJ and her daughters owned and operated a family-based daycare out of their home which had been open for many years. In 2016, a second kinship placement was made, as a nephew was placed in the kinship foster home. In 2016, DJ's health was declining, and a decision was made to close the daycare so the Appellant and her sister could become full time caregivers of their mother and their nephew. The nephew left the home, and in February of 2017, newborn N was the third kinship placement to be made in the J foster home. Within one (1) year of N's placement DJ's health had worsened, and the Department made the Appellant the designated foster parent of the home, with her sister being a caregiver. Unfortunately, DJ passed away during the summer of 2018, which was a considerable loss to the entire family. The Appellant and her sister continued to foster N and work cooperatively with the Department. The court case regarding N proceeded and the Department was awarded permanent custody of N; however, in March of 2019 the judge ruled and did not terminate parental rights. As N's goal was Permanency through Adoption, the Department utilized Family Find and other means to find N a permanent home. The Appellant expressed her willingness to adopt N; questions had arisen as N's siblings' goals were guardianship. The

¹ Fair Hearing #2019-0809 was regarding the issue of revocation of the Appellant's foster care license. That issue was settled prior to the end of the entirety of the fair hearing proceedings. (See, herein)

Department made a referral for a Child Specific Adoption Homestudy through MSPCC, a contracted agency. The Appellant was not recommended to be the adoptive parent for N, due to concerns relative to lack of income. The Department completed its annual reassessment of the J foster home and revoked the license because the home did not have income to provide for N. A decision was then made to remove N from the home. The Department sent written notice to Appellant of its decisions and of the Appellant's right to appeal.

The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06. The hearing was held on August 27, 2019, at the DCF Plymouth Area Office. All witnesses were sworn in to testify. The record remained open at the conclusion of the hearing through September 10, 2019. In October of 2019, the record on this matter was reopened with a remand back to the area offices for the reassessment of the financial situation of the J home, and for an updated home study with all of the new information/evidence presented at hearing to be considered. The area offices were afforded six (6) weeks to reconsider the matters under appeal.

The following persons appeared at the Fair Hearing on August 27, 2019:

Lauren Decas	Fair Hearing Officer
AJ	Appellant
AJ	Household member
DF	Witness
AJ	Department Adoption Social Worker (Plymouth)
MV	Department Adoption Supervisor (Plymouth)
SD	Department Area Program Manager of Family Resource (Cape)

On December 13, 2019, the DCF Cape Cod Area Office submitted an updated Reassessment, which licensed the J foster home, rendering the licensing decision settled. The DCF Plymouth area office did not respond to the remand regarding that offices' decisions relative to the Foster Parent Denial and Removal of N. The matter was reconvened on February 27, 2020, for all updated information/evidence to be submitted. The hearing was held on February 27, 2020, at the DCF Plymouth Area Office. All witnesses were sworn in to testify. The record remained open at the conclusion of the hearing for two (2) weeks to allow the Department the opportunity to complete the updated Child Specific Homestudy and submit it to the Fair Hearing Unit. This was not submitted or received by the Fair Hearing Unit.

The following persons appeared at the Fair Hearing on February 27, 2020:

Lauren Decas	Fair Hearing Officer
AJ	Appellant
AJ	Household member
JCH	Witness
PM	Support
PG	Department Deputy Regional Counsel (Southeast)
AJ	Department Adoption Social Worker (Plymouth)
PS	Department Adoption Area Program Manager (Plymouth)
KT	Department Family Resource Supervisor (Cape)

JM
EL

Department Family Resource Social Worker (Cape)
Department Intern-Observer (Cape)

In accordance with 110 C.M.R. 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.

The Fair Hearing was recorded on four (4) compact disks pursuant to Departmental regulation 110 CMR 10.26.

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

For the Department:

- Exhibit A: Family Resource Limited Reassessment dated 5/17/19
- Exhibit B: Child Specific Adoption Homestudy dated 4/24/19
- Exhibit C: Family Resource Dictation 1/1/19-8/7/19
- Exhibit D: License Denial Letter dated 5/13/19
- Exhibit E: Letter to Appellant dated 12/12/19 from Plymouth AO
- Exhibit F: Letter to Appellant dated 1/29/20 from Plymouth AO
- Exhibit G: Family Resource Updated Reassessment dated 12/19

For the Appellants:

- Exhibit 1: DCF vendor payment
- Exhibit 2: Letter from outpatient therapist
- Exhibit 3: Massachusetts Standard Rental Agreement
- Exhibit 4: Foster Care Review Report dated 7/2018
- Exhibit 5: Note from ASW to Appellant
- Exhibit 6: DCF vendor payment
- Exhibit 7: Letter from ASW
- Exhibit 8: Medical reference
- Exhibit 9: 2020 Actual Real Estate Tax Bill Summary
- Exhibit 10: December 2019 Financial Information of Appellant
- Exhibit 11: Approved 2019-2020 fuel assistance notification
- Exhibit 12: Occupancy Permit dated 9/3/19
- Exhibit 13: Notarized Letter
- Exhibit 14: Copy of rent receipts
- Exhibit 15: Copy of check
- Exhibit 16: TD Bank December 2019 and January 2020 deposits
- Exhibit 17: TD Bank statements from July 2019-February 2020
- Exhibit 18: Removal letter dated 5/17/17

Issue to be Decided

The issue for resolution is whether the Department's decision to remove this child from this kinship foster home, and the decision to deny the foster parent as an adoptive resource was in conformity with the Department's policies and/or regulations and, if not, whether any regulatory

violation resulted in substantial prejudice to Appellant. 110 C.M.R. §10.06(8) (c).

Findings of Fact

1. At the time of the subject decisions, N was two (2) years old. N had been placed in the J kinship foster home as a newborn, who entered foster care when she was substance exposed at birth. N had three (3) older siblings who were in care. (Fair Hearing Record)
2. The Department was aware DJ was in ill health and that the Appellant and her sister were the primary caregivers of N. "We knew DJ couldn't do it and that we had to identify someone else from the beginning." (Testimony of MV)
3. In February of 2018, the Department's family resource supervisor visited the J kinship foster home and the identified foster parent became the Appellant. Foster care payments were switched to the Appellant's name. In the summer of 2018 DH passed away, and the Appellant continued to provide foster care to N. (Testimony of AJ, Exhibit 1)
4. After DJ's death, her will was filed with probate court, which was a lengthy and involved process. The Appellant learned MassHealth had placed a Betterment Loan on the property for fees associated with DJ's end of life care. The Appellant's sister was appointed as legal representative to the will, after a hardship waiver was eventually obtained. (Fair Hearing Record)
5. Neither the Appellant nor her sister ever obtained a license to drive. They utilize public transportation, PT One forms, and family for rides. (Testimony of AJ)
6. The Appellant and her sister had most recently been employed by the family-based daycare they ran with their mother for over twenty (20) years. The Appellant's sister had previous work experience in a daycare on the local military base and had worked in a retail store. (Testimony of AJ)
7. Since their mother became ill, the Department was aware neither the Appellant nor her sister had an income. They did not have a mortgage on the family property, received fuel assistance and food stamps as well as foster care payment for N. (Testimony of the Appellant, Exhibit 11)
8. During the time after DJ passed and her will was filed in probate, the Appellant and her sister were undecided on how they would obtain income. There was talk one of them would obtain a retail job while one remained home with N; ultimately, they made the decision to begin renovations on their property to rent out the space that was previously used for daycare. (Fair Hearing Record)
9. The Department offered to place N in daycare; the Appellant declined as she and her sister were experienced daycare providers. (Testimony of SD) This remained a topic of conversation at home visits, and as recently as the week prior to the February Fair Hearing date, part time daycare from 9a-12pm was being considered. (Testimony of AJ)
10. The Department adoption social worker addressed concern with the Appellant about

socialization of N. The Appellant ensured N spent time with a three (3) year old cousin, as well as other young family members. The Appellant had children to her home from Friday to Sunday every weekend. The social worker told the family she was "very happy" N was visiting with children and spending time with peers; she did not express at any time this was not enough socialization for N. (Testimony of AJ)

11. N was evaluated by Early Intervention Services and determined not to be eligible for services. She was developing on target with no special needs. (Testimony of DCF adoption SW)

12. When asked if income was the sole concern for the Department regarding the J foster home, it was disclosed that originally a physical was needed for the Appellant's sister, but that had since been obtained. (Testimony of MV, Exhibit 8)

13. On April 24, 2019, MSPCC Adoption Services completed a Child Specific Adoption Homestudy on behalf of the Appellant. The following was noted in the Assessment Summary/Recommendation section: "It is important that N continue to live with her Aunts...She has lived with them since birth and she has established a significant bond with them....Moving her from the only parents she has ever known will be experienced as another loss and could lead to disruptions in care and could impact her overall development. Based on the information above MSPCC is not able to recommend AJ as an adoptive parent for N at this time. There is no income coming into the home currently....If further information is obtained that changes the family's financial picture in the future, MSPCC would be happy to review the recommendation as there were no identified clinical concerns in AJ's care of N." (Exhibit B)

14. On May 17, 2019, the Department completed its Annual Reassessment of the J foster home and revoked the license to provide kinship foster care citing, "the license of the J home is being revoked because the home does not meet criteria as they do not have income to provide for themselves or the child." (Exhibit A)

15. The Appellant was able to rent out her in-law apartment to a longtime family friend, who signed a rental agreement on August 23, 2019, agreeing to pay \$1,400.00 a month. The town of Bourne re-issued an occupancy permit on September 3, 2019.² (Exhibit 3, Exhibit 12 Testimony of Appellant)

16. At no time did the Department inform the Appellant her tenant must reside in the in-law apartment full time. (Testimony of Appellant)

17. The tenant resided full time in Taunton, MA and worked in Boston, MA. She had immediate family on Cape Cod and wanted to rent a place she and her children could go to on weekends and vacations. (Testimony of Appellant)

18. The two DCF office's working with the Appellant, the Cape and Plymouth Area Offices, disagreed on whether or not a home visit must be made to the rental property. Ultimately, the Plymouth office requested a walk-through of the tenant's apartment along with bank statements

² The License revocation decision became moot upon the remanded decision being updated with the information offered at Fair Hearing and the License to provide foster/pre-adoptive care approved in December of 2019.

of the Appellant's to corroborate rental income was received by the end of December 2019. The bank statements were provided. The walk-through was scheduled and cancelled, once by the Department and once by the tenant, who wanted to be present when her rental unit was visited and needed twenty-four (24) hour notice. A walk-through did occur in January of 2020. (Testimony of Appellant, Testimony of JM, Exhibit 16)

19. The Appellant had always used a receipt book for receipt of payment dating back to the time of the family-based daycare. The Plymouth DCF office was provided copies of the receipt book slips the Appellant had written for receipt of the rent payment, but in December of 2019, told the Appellant she needed to show proof of the income. She did so by providing copies of her bank account statements.³ (Exhibit 14, Exhibit 15, Exhibit 16)

20. In a letter dated January 29, 2020, the manager over adoptions at Plymouth DCF wrote the following in a letter to the Appellant:

“Although you have submitted bank statements they do not verify the income you have claimed verbally. We continue to be concerned that you do not have appropriate income and resources to support N as she grows and matures, and we are unable to update your Pre-Adoptive Licensing Study.....We do not have a clear budget of your monthly expenses, and have been unable to verify your income.....In order to continue in our effort to verify your income we are requesting the following documentation: 2018 and 2019 income taxes and 2019 Fuel Assistance Application.” (Exhibit F)

21. On February 3, 2020, a notarized letter was provided documenting no income for most of 2019 until the rental income began in September of 2019. (Exhibit 13)

22. A copy of the 2019-2020 fuel assistance approval was provided; it was dated 11/21/19. (Exhibit 11)

23. A financial Information form with the date of December 2019 regarding the Appellant was completed. (Exhibit 10)

24. The Appellant was not able to provide the Department with a copy of her 2018 taxes, as she did not file 2018 taxes. She had a scheduled appointment to have her 2019 taxes completed on April 1, 2020. (Testimony of Appellant)

25. The Plymouth Office Area Program Manager was hoping for new information when she asked for the Appellant's bank statements and taxes but did not receive anything that would alter her decision to remove N from the home. She has had twenty-five (25) years' experience with adoption and would need to have a plan for the Appellant to have predictable, reliable income for the future. The Appellant stated her income would be from her tenant, and if the rental unit was not rented at a future date, she would get a job. (Testimony of PS, Testimony of Appellant)

26. Both the family resource and adoption managers for DCF testified at hearing that the

³ The Department argued proof of income was not provided, as not every month was the same amount deposited. The Appellant had never been instructed by DCF that she had to deposit the exact amount monthly, so some months she kept some cash out and some months the exact amount was deposited. (Testimony of Appellant)

standards for licensing a foster home and an adoptive home were “two very different things.” This is not accurate per 110 CMR 7.104, 7.105. (Testimony of SD, Testimony of PS)

27. An additional concern arose for the Department in February of 2020 during AJ’s cooperative work with an ICWA⁴ social worker. AJ agreed to assist the ICWA social worker and allow a family members’ children to spend a few days at the family home. The social worker dropped off the children, along with their mother to the home. AJ made repeated attempts to contact the social worker and was aware if they had a frequent visitor DCF should be informed. She failed to do so, and only communicated with the ICWA social worker, not DCF. A 51A report was not filed regarding this issue. (Testimony of AJ)

28. In light of the totality of the evidence in this case, I find the removal decision and pre-adoptive denial decision was not made in conformity with Departmental policies and regulations nor with a sound, reasonable clinical basis. These decisions do not reflect the best interest of N.

Applicable Standards

Department decisions regarding application, eligibility, recruitment, assessment/reassessment, approval and licensing/re-licensing of foster/pre-adoptive parents, and placement of children are governed by 110 CMR 7.100 et seq.

Regulations governing reassessment and licensing renewal of Foster/Pre-Adoptive Parents and Foster/Pre-adoptive Homes are governed by 110 CMR 7.113.

110 C.M.R. §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. Placement decisions should be made in a manner conducive to permanency planning and the safe and timely return of children to their homes or their placement into a new permanent setting. The following factors shall be taken into consideration:

...

(d) the child’s individual needs including those related to his/her physical, mental, and emotional well-being and the capacity of the prospective foster or pre-adoptive parents to meet those needs....

(2) The Department shall consider, consistent with the best interests of the child, the following placement resources:

(a) placement with kinship family;

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

(3) When considering a relative or extended family member or any individual chosen by parent(s) to be utilized to provide substitute care for a child, the Department shall require that the relative or extended family member or individual chosen by parent(s) meet the Department’s requirements for child - specific placements, as set forth at 110 CMR 7.108.

⁴ Indian Child Welfare Act

110 C.M.R. §7.108: Kinship or Child-Specific Placements

Kinship or child-specific placements may occur when a specific child is to be placed into a specific home, and that home is not available for other foster children.

(2) Non-Emergency Placements. Where the Department does not deem an emergency placement to be necessary, the Department shall conduct an initial eligibility screening of the proposed caregivers in accordance with 110 CMR 7.100(3) and (4). If as a result of the initial eligibility screening the proposed caregivers are determined to be ineligible, that determination shall be final, and there shall be no right of appeal. See 110 CMR 7.100(7). If the proposed caregivers are determined to be eligible, they shall submit a completed foster/pre-adoptive application to the Department, and the Department shall complete a foster/pre-adoptive assessment within 40 working days after receiving the completed application.

If the assessment reveals compliance with the standards set forth at 110 CMR 7.100, 7.104 and 7.105, the applicant shall be approved as a kinship or child-specific placement for the child(ren) named in the foster/pre-adoptive application, and the child(ren) may be placed in the home. The kinship or child-specific placement parent(s) shall be notified in writing, of the outcome of the comprehensive assessment, within ten working days after completion of the comprehensive assessment. Applicants may appeal the denial of a foster/pre-adoptive application via the Department's fair hearing process, set forth at 110 CMR 10.00 et seq.

110 C.M.R. §7.116 Removal of Foster Children from Foster/Pre-adoptive Homes

(2) Whenever the Department determined that a foster child should be removed from a foster/pre-adoptive home for the purposes of achieving a more suitable placement for permanency, safety or well-being, and not because of a request made by the foster/pre-adoptive parent for removal of the foster child nor because of the occurrence or threat of abuse or neglect of the child in the foster/pre-adoptive home, the Department shall do the following:

(a) give written notice to the foster/pre-adoptive parent as soon as the determination is made but absent an emergency at least 14 days prior to the intended removal of the foster child.

e. in one of the following placements, if the current placement is not such a placement, unless the foster parent has applied to be a pre-adoptive or guardian placement for the child and has been rejected by the Department as a pre-adoptive or guardian placement for the child, or there is a fair hearing pending challenging the denial of the current foster parent as the child's pre-adoptive or guardian placement:

- i. in a pre-adoptive home;
- ii. with a legal guardian;
- iii. in a home where one or more of the child's siblings is residing; or
- iv. in a kinship home of the foster child if the current foster placement is not a kinship home of the foster child.

110 C.M.R. §10.05

A Fair Hearing shall address (1) whether the Department's or provider's decision was not in conformity with its policies and/or regulations and resulted in substantial prejudice to the aggrieved party;.... In making a determination on these questions, the Fair Hearing Officer shall not recommend reversal of the clinical decision made by a trained social worker if there is

reasonable basis for the questioned decision.

Analysis

To prevail, the Appellant must show by a preponderance of the evidence that the Department's decision to remove the child from their home was not in conformity with its policies and/or regulations and resulted in substantial prejudice to the Appellant. If there is no applicable policy, regulation or procedure, the Appellant must show by a preponderance of the evidence that the Department acted without a reasonable basis or in an unreasonable manner, which resulted in substantial prejudice to the Appellants. 110 CMR 10.23.

The Department's regulations mandate that the Department take into consideration the individual needs of the child in question including those needs relating to their mental, physical, and emotional well-being *and the capacity of the prospective adoptive parents* to meet those needs. (Emphasis added) 110 CMR §7.101 (1) (d). The Appellant and her sister live a simple life off of generational family land in a community they are proud of. Although they do not have a lot of "extras", they have demonstrated their ability to provide for foster children on what they do have since 2013, and have opened their home, bank accounts, and personal matters to the continued scrutiny of the Department, while managing family deaths, losses, and while caring for N. No protective concerns have been noted by DCF staff, and no reports of abuse/neglect have been supported regarding the Appellant. The nurturing and love these women have for N is palpable immediately on being in their presence.⁵ It is abundantly clear the Appellant and her sister have an immense amount to offer N in their care, not necessarily monetarily but in faith, family, love and nurturing. Accepting that the Department's tasks are difficult and that the process is often protracted, it is incumbent on the Department to remember its mandate and to serve the best interests of the children in our care, from the beginning and throughout case involvement. The Appellant's income and financial situation had not much changed since N's placement in the home in 2017. The Department was aware the family home-based daycare had closed the year prior, aware the Appellant and her sister were the primary caregivers for N and that neither was employed. Despite testimony offered at hearing from two (2) managers of the Department, all foster/pre-adoptive foster parents are held to the same standards, standards which the Appellant has met, albeit in an elongated time period.

The Department's ultimate decision to deny the Appellant as a pre-adoptive resource for N and to remove N from the home was the culmination of decisions that seemed to be at odds with the Department's mandate, that is, to make every reasonable effort to place a child in a kinship home, in close proximity to the child's family, and with siblings. The Appellant has shown, by a preponderance of the evidence, that the Department failed to comply with its regulations and that its ultimate decision was not reasonable. Consideration of the child's best interests, with regard to permanency planning, should have been ongoing, and a plan instituted to address Departmental concerns without denial of the resource and forcing the removal of N from her only home since birth.

The Department relied on speculation of future behaviors when making its decision to remove N.

⁵ The Appellant brought N to both days of hearing and provided a sitter while she and her sister were not available. This hearing officer repeatedly heard and observed N asking and crying for her aunts and wanting to be with them.

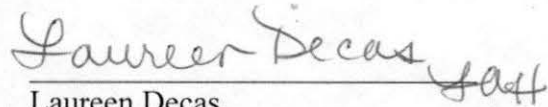
There were no known concerns for the Appellant's care of N, rather concerns that N might benefit from additional socialization with same age peers, and that the Appellant might not accept community and family assistance to bring N to social events in the future since she did not want her to attend daycare. The Department offered unrealistic suggestions to the Appellant of toddler community events, such as walking to the library, which they guessed would be a few miles, but in reality, was over five (5) miles on a very busy road. (Fair Hearing Record)

The Department must consider the entire record when making such decisions, not guesses or concerns for the future. A thorough review and consideration of all of the evidence presented, in its totality, shows there was no independent evidence presented to corroborate the concerns which generated the removal letter/decision. The Department requested intrusive information from the Appellant about her financial status, and then aggressively questioned the manner in which she deposited the rent she received after reviewing a signed/dated rental agreement and receipts of payment. At times, it appeared the Department lost track of the critical importance in the Department's work with families that the agency and the foster parent have an open and honest exchange of information so that *collective* decisions in the best interest of the child are made. Rather, the Department presented at hearing as advisories of the Appellant, rather than supporting the good work she had done with the agency for seven (7) years in promoting the safety and well-being of the Commonwealth's most vulnerable children, foster children.

Removal of N from her only home is not in her best interest. The Appellant has met the standard necessary to provide financially for herself and N. The Department's decisions are not supportive of sound clinical decisions on behalf of N.

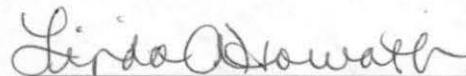
Conclusion and Order

The Appellant has shown, by a preponderance of evidence, that the Department's decisions to not support the pre-adoptive placement of N with the Appellant and to remove N from the kinship foster home was not made in conformity with Department regulations and with a reasonable basis, and therefore, the Department's decisions are REVERSED.



Lauren Decas,
Administrative Hearing Officer

Date: 7/2/2020



Linda A. Horvath, Esq.
Supervisor, Fair Hearing Unit

Date: _____

Linda S. Spears,
Commissioner