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Legislative Report on Fair Hearings in the Department of Children and Families

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LEGISLATIVE REPORT ON FAIR HEARINGS IN THE
MASSACHUSETTS DEPARTMENT OF CHILDREN AND FAMILIES

The Fair Hearing process fills a vital role within the Department of Children and Families (DCF): to ensure that a consumer who disagrees with certain actions or clinical decisions by the Department are able to present their appeal to an impartial Hearing Officer and ensure the agency's compliance with DCF policy, regulations, and statutory obligations.

This report reflects the recommendations of the Data Work Group¹ relative to DCF legislative report requirements. The Data Work Group membership includes key staff from DCF, Cambridge Family & Children's Service, Children's League of Massachusetts, the Committee for Public Counsel Services, Harvard Kennedy School, Massachusetts Law Reform Institute, Massachusetts Society for the Prevention of Cruelty to Children, the Office of the Child Advocate, and the Joint Committee on Children, Families & Persons with Disabilities.

This report includes information on all Fair Hearing requests open at any time during Fiscal Year (FY) 22, which spans July 1, 2021 through June 30, 2022.

For any Fair Hearing request open at any time during FY22, the following is reported:

- the subject matter of the appeal
- outcomes of cases resolved prior to a Fair Hearing decision
- number of days between the hearing request and first day of hearing
- number of days between the close of evidence and the Hearing Officer's decision
- number of days of continuance granted at the appellant's request
- number of days of continuance granted at the request of DCF or the Hearing Officer
- the outcome of the hearing: reversal or affirm

The report also includes information on hearing requests pending more than 180 days at any time during FY22, except Fair Hearing requests that have been stayed by the District Attorney, as follows:

- the number of cases

¹ Child Welfare Data Workgroup: <https://www.mass.gov/child-welfare-data-work-group>

- how many have been heard but not decided
- how many have been decided by a hearing officer but not finalized

The Fair Hearing process is governed by M.G.L. c.30A, and by 110 CMR 10.00 et. seq. of the Department's regulations. Appellants may employ an attorney to assist them during this process, but it is not required as a function of a Fair Hearing and most individuals do not retain an attorney in the defense of their claim. These informal hearings do not follow the Massachusetts Rules of Evidence; therefore, the rules regarding what can or cannot be admitted are more flexible. The hearings are not as formal as a court proceeding. Upon issuance of the Fair Hearing decision, the Appellants also have an additional right of appellate review to the Superior Court pursuant to M.G.L. c.30A.

It is important to note that while the Fair Hearing process is occurring, in some cases there may be a parallel but separate process occurring in the Juvenile or Probate and Family Court which relates to the custody of the child or children. The two processes are separate and distinct. The Juvenile or Probate and Family Court judge is the arbiter of all custody and placement decisions relative to a child, based upon a finding regarding the parental fitness of the child's parents, as well as a determination as to what is in the best interest of the child. The scope of a Fair Hearing decision is limited; it does not supersede the court's authority in determining whether placement is in the best interest of a child, whether that placement is at home with parents or in a foster or adoptive home.

To assist consumers seeking an appeal through the Fair Hearing process, the Fair Hearing Office uses an online appeal request form located on the DCF website at <https://www.mass.gov/fair-hearing-unit>. This allows an Appellant to "e-file" an appeal request directly to the Fair Hearing Office. The "e-file" requests are reviewed on the business day filed, or on the next business day if filed during not working hours. In FY22, 849, or 49%, of the appeal requests were filed through the "e-file" process. The majority of the remaining 882 appeal requests were filed through email directly to the Fair Hearing Office mailbox. The use of electronic means for filing appeal requests has contributed to the efficiency of the filing and scheduling process.

The Fair Hearing Office continues to explore ways to increase the number of electronic filings through tailored communications for consumers with limited English proficiency. During FY23, the Fair Hearing Office plans to work with its information technology department to modify the existing "e-file" form to allow consumers to identify a preferred language when filing a request and with a future goal to create additional "e-file" request forms in alternate languages to increase access for limited or non-English speaking consumers seeking an appeal.

The Fair Hearing Office continues to schedule Fair Hearings on a timely basis. Currently, a Fair Hearing date is scheduled by the Fair Hearing Office and notice is sent by mail to the Appellants. The Fair Hearing Office will be exploring the ability to modernize the scheduling process through an electronic system in the future. Standard documents used by the Fair Hearing Office are available in five (5) different languages: Spanish, Haitian Creole, Brazilian Portuguese, Traditional Chinese, and Cape Verdean Creole. DCF continues to collaborate with the Massachusetts Commission for the Deaf and Hard of Hearing to authorize and arrange ASL and CART interpreters for individuals who are Deaf, Hard of Hearing, or Deafblind and request

accommodations. Additionally, DCF contracts with telephonic interpretation services which can be utilized in hearings at a moment's notice. As such, if an interpreter has not been arranged in advance or was arranged and becomes unavailable, the Appellant can proceed with the Hearing on the scheduled date. The Fair Hearing Office remains committed to developing and incorporating language access aids and tools to effectively serve the needs of all consumers seeking an appeal.

Prior to March 2020, Fair Hearings were held in person at the Department's 29 area offices throughout Massachusetts. However, as a result of the COVID-19 pandemic, the hearings shifted to a virtual platform. In FY22, most hearings occurred by videoconference via the Microsoft Teams platform, but since the statewide re-opening of the Department's Area Offices in September 2021, in-person hearings have occurred when requested by the Appellant. In FY22, the Fair Hearing Office scheduled twenty (20) in-person hearings. Appellants are also offered the ability to have the hearing conducted via "paper review" where parties submit documentary evidence and written arguments in support of their case to the assigned Hearing Officer and the evidence is considered by the Hearing Officer in rendering a decision. The Fair Hearing Office will continue to offer hearings through a virtual platform, by "paper review" or in-person, as the varying options provide an inclusive approach for Department consumers requesting an appeal through the Fair Hearing process.

Table 1 (below) details the number of Fair Hearing requests filed by fiscal year. The number of requests in FY22 increased by 199, from those filed in the prior year, returning to the volume of requests filed in FY19, prior to the Covid-19 pandemic. It is believed that the volume correlates directly with the pandemic-related decrease in abuse and neglect reporting in FY20 and FY21, as the majority of Fair Hearing filings are appeals of supported reports of abuse or neglect.

Table 1: Number of Fair Hearing Requests by Fiscal Year

Fiscal Year	Number of Filings
2017	1,639
2018	1,666
2019	1,733
2020	1,594
2021	1,532
2022	1,731

Summary of Data:

(i) Subject matter of the appeal

The overwhelming majority of Fair Hearings open during FY22 are appeals of supported abuse and/or neglect findings, (a combined 2,291² requests, or 92%). [See Table 2 (below) and Columns AB through AU on the attached spreadsheet]

The second most common subject matter for appeal was case closing (41 requests)³ followed by foster care review goal determination (35 requests). A full listing of the allowable grounds for appeal can be found in 110 CMR 10.06.

**Table 2: Subject of DCF Fair Hearing Request – Supported Report of Abuse or Neglect
All Cases Open During FY22**

Type of Supported Report of Abuse or Neglect	Number of Appeals
Support on a caregiver	2,168
Support in an institutional facility	95
Support on a foster parent	28
Total	2,291

² This is the total of supported abuse/neglect findings for a caregiver, an institution and foster parents.

³ Requests of both case closing and case closing young adult, combined.

**Table 3: Subject of DCF Fair Hearing Request – All other request types
All Cases Open During FY22**

Request Type	Number of Appeals
Case closing	41
Case closing of a young adult	7
Removal of a child from a foster parent	32
Revocation of license to provide foster care	26
Denial of foster parent license study	31
Foster care review goal determination	35
Alleged perpetrator listing	2
Denial of an adoptive parent license study	7
Termination of service	1
Reduction of service	3
Interstate compact	0
Removal of child from pre-adoptive home	2
Closing of foster home	2
Adoption subsidy	1
Denial of childcare services	0
Failure by DCF to follow regulations	0
Total	190

(ii) Outcomes of cases resolved prior to a Fair Hearing decision

Table 4 summarizes the 627 appeals resolved before a Fair Hearing took place. [See Column V on attached spreadsheet]

**Table 4: Pre-Hearing Outcomes
All Cases Open During FY22**

Outcome	Number of Cases
Settled Cases where the underlying decision on appeal is overturned prior to hearing, after an administrative review by an area office manager	28
Withdrawal Withdrawn by the appellant as documented in the Fair Hearing file via a written request by the appellant	128
Closed for Other Reason Including, but not limited to, appellant failed to appear at the hearing, Fair Hearing request as filed was not a proper subject for appeal and therefore was dismissed at the outset, or that the Fair Hearing request as filed was well beyond the regulatory 30-day timeframe in which to file an appeal and therefore was dismissed	471

(iii) The number of days between the hearing request and the first day of the hearing

[See Columns K and L on the attached spreadsheet]

**Table 5: Number of Days between Fair Hearing Request and Fair Hearing
All Cases Open During FY22**

	Average Number of Business Days all cases reported	Business Days Allowed under Regulations
Number of days between the Fair Hearing request and the first <i>scheduled</i> hearing	56	65
Number of days between the Fair Hearing request and the date of the <i>actual</i> first hearing	76*	

*Continuances account for most cases that extend beyond the 65 days outlined in the regulations. As shown in Table 7, the majority of the continuance requests allowed by the Fair Hearing Office are at the request of the Appellant. In most of those cases, the Appellant is seeking additional time to prepare for the Hearing or to hire counsel.

The Department schedules hearings in a timely manner. On average, hearings are scheduled nine business days before what is allowed by regulation.

(iv) The number of days between the close of evidence and the hearing officer's decision

[See Column T on the attached spreadsheet]

Table 6: Close of Evidence to Hearing Officer's Decision

	Average Number of Business Days between close of evidence and hearing officer's decision	Business Days Allowed under Regulations
Cases filed in FY22	55	60
All cases open during FY22	97	60

The Fair Hearing regulations require a decision to be written within 60 business days from the close of evidence. During FY22, the Department remained in compliance with regulatory time standards for any cases filed during the fiscal year. For all cases open in FY22, the average number of days between the close of evidence and the Hearing Officer's decision was impacted by intervening factors that increased the number of days before a decision was written and as a result, placed the average number outside of the regulatory time frames. Specifically, since April 2021, the office has been challenged by staffing shortages which impacted the work of the office; the office was operating with two vacant hearing officer positions and three vacant paralegal positions.

(v) The number of days of continuance granted at the Appellant's request

Table 7 (provides a summary of the continuances granted on Fair Hearings for all cases open in FY22, based upon who requested the continuance.)

(vi) The number of days of continuance granted at the request of the Department of Children and Families or the hearing officer's request, specifying which party made the request

[See Columns N, O, P on the attached spreadsheet]

**Table 7: Number of Continuances Granted
All Cases Open in FY22**

	Number of Continuances Granted	Average Length of Continuance (business days)
Granted at Appellant's Request	290	69
Granted at Fair Hearing Officer's Request	72	35
Granted at Area Office's Request	62	41

For open cases in FY22, requests to continue a Fair Hearing decreased slightly overall. This continued trend may be related to the Department's ability to offer hearings using teleconferencing and videoconferencing, which allows the Appellants greater accessibility and the Fair Hearing Office more flexibility when scheduling hearings and assigning Hearing Officers. The use of teleconferencing and videoconferencing also avoids the need to cancel hearings due to weather conditions. The Hearing Office strives to reduce the number of continuances granted in an effort to resolve all pending Fair Hearing cases within the 180-day regulatory time frame. The number of requests to continue a scheduled Fair Hearing remained highest among the Appellants. The Appellant requests⁴ averaged 24 requests per month, due to Appellant scheduling conflicts or because they had recently hired counsel who needed time to prepare or had a scheduling conflict. When a continuance is allowed, the matter is scheduled on the next available date, and if possible, with consideration given to dates offered by Appellant's counsel to avoid future scheduling conflicts and to reduce the time that the case remains open.⁵ 68% of the requests for continuances were made by the Appellant in FY22.

⁴ This reflects requests made by an Appellant or by an Attorney, on behalf of an Appellant.

⁵ A request for a continuance directly correlates to the amount of time that a case remains open. The Fair Hearing Office carefully considers each request, on a case-by-case basis, taking into account the impact of the delay and its relation to the timeliness of rendering the Fair Hearing decision, while also balancing the Appellant's right to due process.

(vii) Whether the Department’s decision that was the subject of the appeal was affirmed or reversed

[See Columns Y, Z, AA of attached spreadsheet]

Of the cases open in FY22, the Fair Hearing Office issued 444 decisions which affirmed the Department’s decision, 36 decisions which partially reversed⁶ the Department’s decision, and 443 decisions that reversed the Department’s decision. The Hearing Office issued less decisions in FY22 than in FY21 due to a decrease in staffing. In FY22, two experienced Hearing Officers transferred out of the Fair Hearing Office which directly impacted the number of Fair Hearing decisions that were written and issued.

**Table 8: Status of Fair Hearing requests pending more than 180 days
All Cases Open During FY22**

[See Columns E, I, J, U, W, X on the attached spreadsheet]

Status	Number of Cases
Fair Hearing Requests Heard but not decided by a hearing officer	373 ⁷
Fair Hearing Requests Decided by a hearing officer but no final decision	136
Fair Hearing Requests scheduled but not heard	58
Total number of open cases pending more than 180 days	549
Number of closed cases pending more than 180 days	821
Total number cases pending more than 180 days, excluding DA stays	1,204
Requests stayed by the District Attorney	112 open requests, 54 closed requests

Specific attention is given to any case pending for more than 180 days, because the required regulatory timelines from filing of the Fair Hearing request to issuance of the decision totals approximately 180 calendar days. This means that even one continuance request, allowed for justifiable cause, can result in a case remaining open beyond 180 days. category. Often a continuance requested by the Appellant is determined necessary to accommodate their scheduling needs, and if so, the continuance is allowed. Similarly, when a hearing that has a pending criminal court matter is delayed, or “stayed”, at the District Attorney’s (DA) request, for the required minimum 6-month regulatory time period, the additional time extends the appeal process beyond 180 days where it remains until the DA stay expires. According to DCF regulations, the DA’s office can request an extension of the DA stay, in six-month intervals.

⁶ Partial reversal decisions include both an affirm and a reversal.

⁷ 70 of these cases have been heard, but the decision was not due as of the end of FY22.

In FY 22, the Fair Hearing Office continued its efforts to reduce the number of cases pending for more than 180 days and closed 821, or more than half (68%) of the 1,204⁸ pending cases in that category. To accomplish this the Fair Hearing Office recently expanded staffing from five to eight paralegals and from 14 to 16 Fair Hearing Officers. The increased staffing allowed for a re-organization of the Hearing Office and a restructuring of duties, with an intended goal of streamlining the hearing process and decreasing the remaining pending cases open for more than 180 days. The re-organization includes a dedicated paralegal unit that manages the pre-hearing process and activities from beginning to end, working with the Appellants and the Area Offices to reduce the number of continuances requested due to lack of discovery, which can translate to fewer days that a case remains open. Additionally, the re-organization allows the hearing officers additional time to prepare for hearings and write decisions and is intended to maintain timelines for pending decisions and ultimately reduce the pending cases open for more than 180 days.

In its continuing effort to target the areas of need, the Fair Hearing Office uses monthly data reports to monitor the productivity of the Hearing Office staff and to identify those Hearing Officers in need of increased supervision and training. Currently, hearing officers with pending cases open for more than 180 days are meeting weekly with their supervisors to monitor progress as well as meeting monthly with the supervisor and the Director of Fair Hearings to increase compliance with the timely issuance of decisions. Future planning includes a transition to a new cadence for hearing weeks and writing weeks. For at least 15 years, hearing officers had a writing week every 5th week. In April 2022, the Unit transitioned to a writing week every 4th week. Over time, we will continue to move to transition to a writing week every 3rd week, with the goal of moving to every other week as long as it does not impact the timeliness of scheduling. This new cadence will provide hearing officers with additional dedicated writing time on a more frequent basis.

During FY23, the Fair Hearing Office will continue its commitment to schedule, convene and issue current decisions in a timely fashion, while also continuing its focus on reducing the number of pending cases open for more than 180 days.

Attachments:

- Spreadsheet/docket

⁸ This number excludes 166 DA stays, as the Fair Hearing has no control over the outcome until the expiration of the stay.