

FAIR HEARINGS BEFORE THE MASSACHUSETTS DEPARTMENT OF CHILDREN AND FAMILIES: THE HEARING PROCESS

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What must one prove at a Massachusetts Department of Children and Families (DCF) fair hearing?

At a fair hearing, DCF must establish that the initial investigator's decision was supported by "substantial evidence."¹ In other words, DCF must prove that the investigator(s) had *reasonable cause* to support a finding of abuse or negligence.²

A fair hearing determines:

- whether DCF's decisions or action violated the regulations or DCF policies resulting in substantial prejudice to the appellant; or
- whether DCF failed to act with a reasonable basis or in a reasonable manner resulting in substantial prejudice.³

As part of this determination, the fair hearing will address whether there is reasonable cause to support the abuse or neglect, giving the weight due to the clinical judgments of DCF social workers."⁴ DCF defines *reasonable cause to believe* as

a collection of facts, knowledge or observations which tend to support or are consistent with the allegations, and when viewed in light of the surrounding circumstances and credibility of persons providing information, would lead one to conclude that a child has been abused or neglected.⁵

If the decision is to list someone on the Alleged Perpetrator Registry, there must be substantial evidence that that person is "responsible for the abuse or neglect."⁶

An appellant must prove "by a preponderance of the evidence" that DCF's decision to support the allegations was not made in conformity with its own policies or regulation and "resulted in substantial prejudice to the appellant," or was made without a reasonable basis or in an unreasonable manner resulting in substantial prejudice to the appellant.⁷

To win, an appellant must prove that DCF either

- broke its own rules, or
- had no reasonable basis for its decision.⁸

It is probably easier to prove that DCF broke its own regulations than to prove that DCF had no reasonable basis for its decision. An experienced lawyer might establish such a violation after a careful evaluation of the DCF documents and the appellant's own reporting of the investigation procedure.

In either case, an appellant must show actual harm as a result of DCF actions. In other words, the Hearing Officer must find whether the DCF action resulted in *substantial prejudice* to the parties.⁹

Present testimony supported by specific facts establishing the harm that the DCF finding caused either to an individual in your family, or to the family as a whole. Without this, the DCF decision may be written off as harmless error.

What evidence should one present at the fair hearing?

Organize and prioritize

The Hearing Officer will want the parties to present their argument and supporting evidence in an efficient manner.

Prepare for the fair hearing by organizing and prioritizing the evidence. Focus on putting forward the strongest evidence, but also enter any other evidence which would be important to have in the record if the appeal fails and further appeal is needed.

Seek out documentation

Parties may enter documentation into the record. Appellants have a right to receive a copy of the DCF reports pertaining to the supported 51A and 51B (subject to confidentiality requirements).¹⁰ Appellant needs to request such files at least 30 calendar days prior to the hearing date and the record needs be available within 30 days of the receipt of the request or 10 calendar days before the hearing, depending upon which is earlier. Appellants or their authorized representatives may examine and request copies of the files to which they are legally entitled (subject to confidentiality requirements) provided they submit a written request to the Area Office or other provider at least 30 calendar days in advance of seeing them.¹¹

Make a written request for these files to DCF as soon as possible and review the files in preparation for hearing. At hearing, highlight helpful material from the file.

Present all documentation that the Hearing Officer should review, including testimonials, any facts that might help make your case, and any proof of improper actions by DCF.

Witnesses

Parties have the right to subpoena witnesses to the hearing; parties must request subpoenas in writing to the hearing officer at least 15 calendar days before hearing.¹² However, parties cannot require any child victims to testify without a compelling reason establishing that such testimony is essential.¹³ If testifying will harm the child, the child will not be forced to testify.¹⁴

If any party so subpoenaed does not comply, the party who requested the subpoena may petition a superior court justice to order the person to comply with that subpoena.

Consider finding other supportive witnesses, including those who might contradict the DCF findings from the above sources.

Every witness who does testify at the fair hearing must be available for cross examination and is subject to penalties and pains of perjury.¹⁵

Carefully balance the value of each witness, and how much they may help and hurt your case depending on how they may be questioned.

Affidavits

An alternative to live testimony is supportive affidavits that may be submitted at hearing.¹⁶

When appealing a finding of neglect, consider individuals who will testify that you are a diligent parent, and/or those who have had good contacts with you working with your child in a supportive way. For example, you might bring school representatives, teachers, neighbors, etc.

If you are appealing a finding of abuse, bring in witnesses that may have been present for the incident, and any physical evidence which would contradict DCF findings.

How will evidence be evaluated at the fair hearing?

Evidence must be relevant and material

The formal Rules of Evidence do not strictly apply in fair hearings, but evidence must still be *relevant and material* to be admitted.¹⁷ The decision may be based on evidence that is both relevant and material, but information that is repetitive or irrelevant can still be excluded.¹⁸

Standard of proof is preponderance of the evidence

The standard of proof for the hearing is proof “by a preponderance of the evidence.” In other words, one has to prove that the “greater weight of the evidence” is on one’s side. This is the lowest evidentiary standard, which means it may be easier to prove.

However, the standard applies to DCF’s case as well as to the appellant’s. DCF only has to prove that its information is more believable than the appellant’s and DCF has already done an investigation finding neglect or abuse. An appellant needs evidence that is a bit more convincing than DCF’s evidence.

Issues of reliability (including hearsay) and credibility

Reliability

The Fair hearing officer determines what evidence is reliable enough to be admitted.¹⁹

If something seems particularly unreliable to you, raise that during the hearing for the Fair hearing Officer to consider.

The hearing officer may allow “hearsay” evidence. Hearsay includes statements made by people who are not present at the hearing, and/or statements made by individuals who do not have first-hand knowledge of what they are testifying to. Such evidence would normally not be admitted at a trial, however at a fair hearing, hearsay may be allowed.²⁰ Therefore, witnesses may testify about a person’s reputation as a good parent, even if the witness cannot cite specific incidents. At the same time, admitting hearsay may allow potentially baseless assertions to be admitted which would otherwise be considered too unreliable for consideration.

Credibility

Parties also may raise issues of credibility at the hearing.

Any witness must be available for cross examination, which can provide an additional opportunity to challenge the credibility of witnesses for the other side.²¹ However, this rule also makes appellant’s witnesses available for questioning by the other side.

How long will it take for the Hearing Officer to make a decision?

The Hearing Officer should issue a decision within 60 business days.²² However, the Hearing Officer can take an additional 30 business days if the aggrieved party is notified that additional time is necessary to make a decision.²³

If the hearing is expedited, the Hearing officer may not extend for the additional 30 business days.²⁴ Instead, after the closing of the record, the Hearing Officer must issue a decision within 60 business days.²⁵

If the Hearing Officer recommends reversal, he or she submits the decision of reversal to the Commissioner or other designated person within 60 business days.²⁶ The Hearing Officer must send notice to the Appellant that he or she has submitted a decision to the Commissioner or other designated person recommending a reversal of the Area Office decision.²⁷ The notice should state that if the Commissioner or other designated person does not issue that decision within 21 business days, the decision of the Hearing Officer is deemed final.

Once submitted to the Commissioner, the Commissioner must decide whether the Hearing Officer's decision will be overturned or upheld and issue that finding within 21 business days. If the Commissioner fails to issue such an order within 21 days, the Hearing Officer's decision will be issued without the review and be final.²⁸

How does one appeal an unfavorable Fair hearing decision?

It is difficult to win a fair hearing. The initial decision may well be upheld. The Hearing Officer must decide if DCF's decision violated DCF's requirements resulting in substantial prejudice to Appellant or if DCF did not act in a reasonable manner with a reasonable basis again resulting in substantial prejudice.²⁹ If the decision regards a report of abuse or neglect, the Hearing Officer must determine "whether based on the records as a whole, and giving due weight to the clinical judgments of the Department social workers, there is reasonable cause to believe" there was abuse.³⁰ If the decision concerns a listing on the registry of perpetrators, the decision must show that there is substantial evidence based on the "record as a whole" that the person listed is responsible.³¹

DCF's purpose in supporting these allegations is to stabilize and provide support for your home. This result may be a positive outcome for your family.

To challenge the Hearing Officer's decision, one may seek a remedy in court.³² However, one may only appeal what is in the record of the fair hearing itself. (That is why it is essential to enter all evidence and make all arguments at the hearing.)

The aggrieved party may obtain a transcript and tapes of the hearing at the party's own expense.³³ Failure to do so may prevent you from challenging the sufficiency of the evidence in court on appeal.³⁴

If you appeal, NEVER waive your right to submit a transcript of the hearing and always obtain copies of the entire record as soon as possible.

Appealing the hearing in court is more challenging than an informal fair hearing. The courts are highly deferential to an agency's findings of fact and law because of their expertise in dealing with their field.³⁵

Seek legal advice in deciding how to proceed.

ENDNOTES

¹ M.G.L. c. 30A, § 14(7)(e).

² Lindsay v. Dept. of Soc. Servs., 439 Mass. 789, 797-98 (2010); 110 CMR 4.32(2) (2010); 110 CMR 10.05(c).

³ 110 CMR 10.05.

⁴ 110 CMR 10.05.

⁵ Lindsay v. Dept. of Soc. Servs., 439 Mass. 789, 798 (2003).

⁶ 110 CMR 10.05(d).

⁷ 110 CMR 10.23.

⁸ See M.G.L. c. 30A, § 14(7); see also 110 CMR 10.05.

⁹ 110 CMR 10.05.

¹⁰ 110 CMR 10.14(1), 220 CMR 10.14(2).

¹¹ 110 CMR 10.14.

¹² 110 CMR 10.13; 110 CMR 10.20(8).

¹³ 110 CMR 10.13(2)(a).

¹⁴ 110 CMR 10.13 (2)(a).

¹⁵ See 110 CMR 10.21(2).

¹⁶ See 110 CMR 10.21(4); see also 110 CMR 10.20(5).

¹⁷ See 110 CMR 10.21(1).

¹⁸ 110 CMR 10.21(1).

¹⁹ See also Edward E. vs. Department of Social Services, 42 Mass. App. Ct. 478, 480 (1997); 110 CMR 10.20(4), 110 CMR 10.21.

²⁰ M.G.L. 30A, §11(2) (stating that the rules of evidence need not apply). Although not governed by the same rules of evidence as in a state court proceeding, the rules of privilege still apply. Id.

²¹ See 110 CMR 10.21(2).

²² 110 CMR 10.29(1).

²³ 110 CMR 10.29(1).

²⁴ 110 CMR 10.29(1)(a).

²⁵ 110 CMR 10.29(1)(a).

²⁶ 110 CMR 10.29(3).

²⁷ 110 CMR 10.29(3).

²⁸ 110 CMR 10.29(3).

²⁹ 110 CMR 10.05(a); 110 CMR 10.05(b).

³⁰ 110 CMR 10.05(c).

³¹ 110 CMR 10.05(d).

³² M.G.L. c. 30A, § 14.

³³ 110 CMR 10.27.

³⁴ Covell vs. Department of Social Services, 439 Mass. 766, 782 (2003).

³⁵ M.G.L. c. 30A, § 14(7).