

Charles D. Baker
Governor

Karyn Polito
Lieutenant Governor



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Secretary

Linda S. Spears
Commissioner

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

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*The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Department of Children and Families
600 Washington Street, 6th Floor
Boston, MA 02111*

CHARLES D. BAKER
Governor

*Tel.: 617-748-2000 Fax: 617-261-7435
www.mass.gov/dcf*

MARYLOU SUDDERS
Secretary

KARYN E. POLITO
Lieutenant Governor

LINDA S. SPEARS
Commissioner

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

This document fulfills the requirements of line item 4800-0015 of Chapter 165 of the Acts of 2014 that requires the Department of Children and Families to report on:

... (i) the fair hearing requests filed in fiscal year 2015, stating for each hearing request using non-identifying information: (a) the subject matter of the appeal; (b) the number of days between the hearing request and the first day of the hearing; (c) the number of days between the first day of the hearing and the hearing officer's decision; (d) the number of days between the hearing officer's decision and the agency's final decision; (e) the number of days of continuance granted at the appellant's request; (f) 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; and (g) whether the departmental decision that was the subject of the appeal was affirmed or reversed;

and (ii) the fair hearing requests filed prior to fiscal year 2015, which are pending for more than 180 days, stating the number of such cases, how many of such cases have been heard but not decided and how many have been decided by the hearing officer but not yet issued as a final agency decision; ...

Following an introduction to the Fair Hearing process is information responsive to the statutory request for information on particular statistics within the Fair Hearing Unit and information regarding new initiatives that are being implemented. Enclosed as an attachment following this report you will also find the FY2015 Docket as required by 4800-0015.

Part I. Introduction to Fair Hearings
Part II. Response to Legislative Request
Part III. Fair Hearing Unit Reforms
Attachment: FY2015 Fair Hearing Docket

Part I. Introduction to Fair Hearings

As with administrative hearings in other agencies, Fair Hearings at the Department of Children and Families provide an opportunity for consumers to appeal certain decisions made by the agency. The process is governed by M.G.L. c.30A, similar to administrative appeals within other state agencies, and also by 110 CMR 10.00 et. seq. of the Department's regulations.

Matters subject to Fair Hearing include:

- Appeal of a Supported Abuse and/or Neglect Finding
- Appeal of a Supported Abuse and/or Neglect Finding in an Institution
- Denial of Foster Parent Homestudy
- Case Closing
- Removal of Child from Foster Parent
- Appeal of a Supported Abuse and/or Neglect Finding by a Foster Parent
- Foster Care Review Goal Determination
- Adoption Subsidy Reduction or Termination
- Alleged Perpetrator Listing
- Removal of Child from Pre-Adoptive Home
- Denial of Adoptive Parent Homestudy
- Closing of Foster Home due to License Revocation
- Reduction of Services
- Daycare Denial
- Failure to Follow Regulations
- Any action or inaction involving the placement of children across state lines pursuant to the Interstate Compact on the Placement of Children (ICPC)
- Dispute as to the Sliding Fee for services calculated by the Department

Appellants are able to employ an attorney to assist them during this process if they would like, but it is not required as a function of a Fair Hearing and most individuals do not currently retain an attorney in the defense of their claim. These informal hearings do not follow the Massachusetts Rules of Evidence so the rules regarding what can/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 often while the fair hearing process is occurring, there is a parallel but separate process occurring in the Juvenile or Probate and Family Court which relates to the custody of the child or children. While those same children may be the subject of the fair hearing, 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 interests of the child. The scope of a Fair Hearing decision is limited; it does not supersede the Court's authority in determining what placement is in the best interest of a child, whether that placement is at home with parents, or in a particular foster or adoptive home.

Part II. Response to Legislative Request

The information that follows provides a detailed response to the statutory request.

(a) Subject matter of the appeal

Table 1 (below) and Graph 1 (on the following page) show that the vast majority of requests for Fair Hearings in Fiscal Year 2015 are appeals of supported abuse and/or neglect findings (1724 requests).

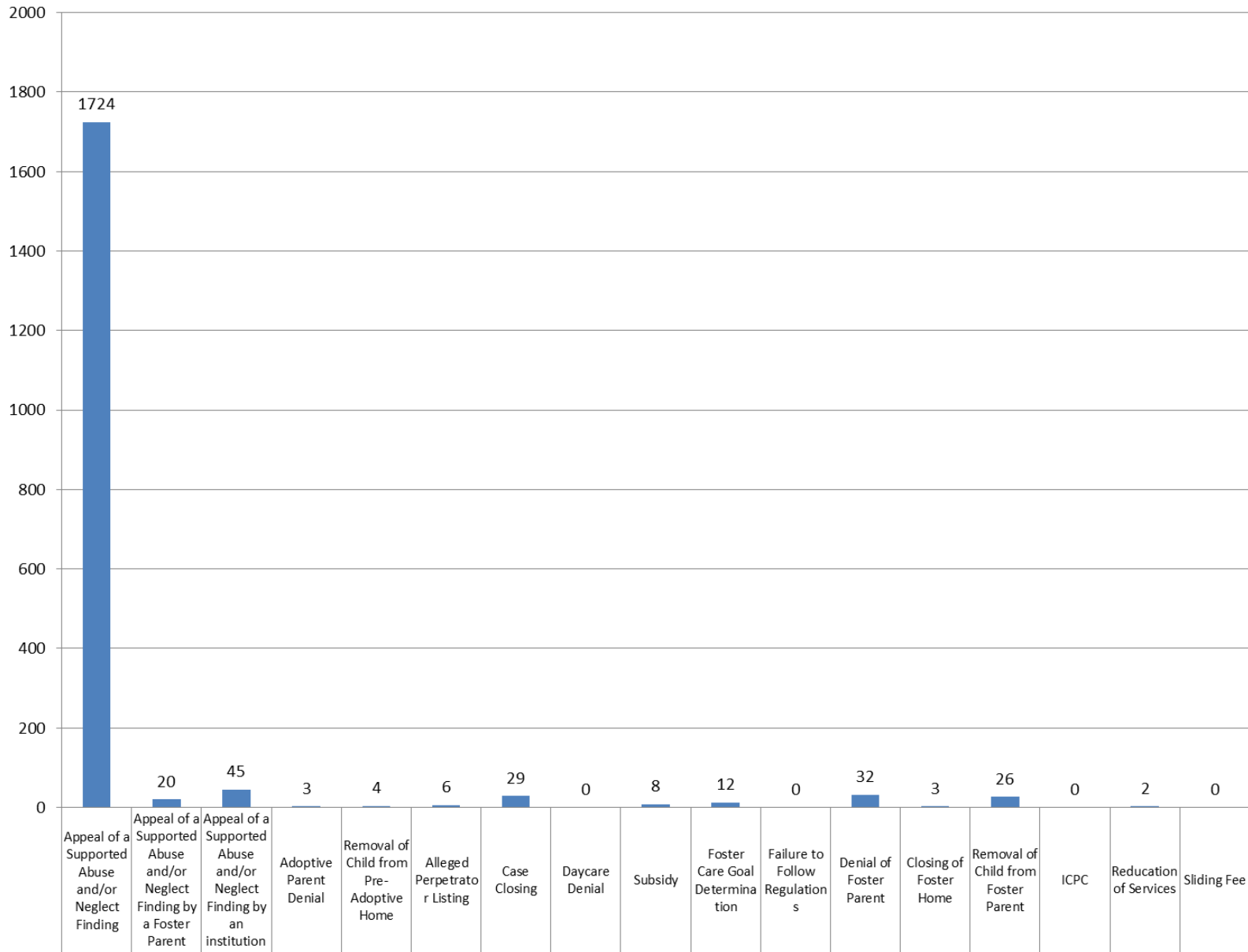
These 1724 Fair Hearing requests on supported abuse and neglect findings represent a fraction of the total number of reports of abuse and/or neglect received over the course of a year. During this same period, the Department average was 7,433 reports of abuse or neglect per month and 1,686 substantiated reports per month (4800-0015 quarterly caseload report to the legislature).

The next most common subject matter for appeal is removal of a child from a pre-adoptive home (45 requests) followed by denial of a license to be a foster parent (32 requests). A full listing of the allowable grounds for appeal can be found in 110 CMR 10.06.

Table 1. Subject of DCF Fair Hearings in FY2015

| Subject of Fair Hearing Requests in FY2015 | Count of Fair Hearing Requests in FY2015 |
|---|--|
| Appeal of a Supported Abuse and/or Neglect Finding | 1724 |
| Appeal of a Supported Abuse and/or Neglect Finding at an Institution | 45 |
| Denial of Foster Parent Homestudy/Foster Parent License Revocation | 32 |
| Case Closing | 29 |
| Removal of Child from Foster Parent | 26 |
| Appeal of a Supported Abuse and/or Neglect Finding by a Foster Parent | 20 |
| Foster Care Goal Determination | 12 |
| Guardianship or Adoption Subsidy Determination | 8 |
| Alleged Perpetrator Listing | 6 |
| Removal of Child from Pre-Adoptive Home | 4 |
| Denial of Adoptive Parent Homestudy | 3 |
| Closing of Foster Home | 3 |
| Reduction of Services | 2 |
| Daycare Denial | 0 |
| Failure to Follow Regulations | 0 |
| ICPC | 0 |
| Dispute re: Computation of Sliding Fee | 0 |

Graph 1: Subject of DCF Fair Hearings in FY2015



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

The OCA's report found that the Department in 2014 averaged 68 days working days for a hearing to take place once an appeal is filed (this number excludes the current backlog of cases). Department regulations stipulate that the target amount of time should be within 65 working days. Though still outside of our ideal range, in 2005 the unit was averaging 418 days between receiving the request and the actual date of a hearing; there has been an improvement of 350 days.

(c) the number of days between the first day of the hearing and the hearing officer's decision and (d) the number of days between the hearing officer's decision and the agency's final decision;

While it is not currently possible in our database to provide the number of days between the start of the hearing to when the hearing officer submits their recommended decision or the number of days between the hearing officer's decision and the agency's final decision, there is data that indicates the Fair Hearing Unit has made progress regarding the timely issuance of decisions.

The Fair Hearing Unit data entry was converted to a newer version of iFamilyNet in FY 2015, and as new reports are created based upon the iFamilyNet system, we anticipate that we should be able to identify this data during FY 2016.

The OCA's report found that for Fair Hearing requests in 2014, the Department was averaging 100 working days from the date that the record closes to notify appellants of a decision on fair hearing cases (excluding those cases that are backlogged). DCF regulations set the amount of time for decisions at 90 days from the close of evidence, so the Department understands our work is not yet complete. In 2005, the average was 393 days so major improvements have been made.

In addition, the OCA's report found that timeliness of the entire life of the hearing process has improved to an average of 168 working days currently (excluding those cases currently pending in the backlog) from 810 business days in 2005. Though still outside our ideal range, we are now averaging 13 days beyond our regulations.

- (e) the number of days of continuance granted at the appellant's request;
- (f) 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;

Table 2: Number of Continuances Granted in FY2015

| | <i>Number of Continuances Granted in FY2015</i> | <i>Range</i> |
|--|---|----------------|
| Days Granted at Appellant's Request | 147 | 5 to 208 days |
| Days Granted at Fair Hearing Officer's Request | 55 | 3 to 110 days |
| Days Granted at Area Office's Request | 16 | 26 to 118 days |
| Total | 218 | |

The chart above shows the continuances granted on Fair Hearings that were requested in FY2015 based on who requested the continuances. The spreadsheet attached shows the length of time of each continuance granted. In general, when a continuance is allowed the matter is then scheduled on the next available date. Currently, due to the higher volume of cases, combined with the logistics regarding available hearing space in each area office, the next available date is often 60 to 90 days later.

- (g) whether the departmental decision that was the subject of the appeal was affirmed or reversed;

Table 3: Outcomes as of 07/02/2015 for Fair Hearings Requested in FY2015

| <i>Outcomes as of 07/02/2015 for Fair Hearings Requested in FY2015</i> | |
|--|-------------|
| Settled* | 86 |
| Withdrawal | 56 |
| Closed for Other Reason | 444 |
| Not yet decided | 1274 |
| Total | 1860 |

The chart above shows, as of the close of the fiscal year on July 2, 2015, the outcomes of Fair Hearings Requested in FY2015.

*Settled cases are cases where the underlying decision on appeal is overturned prior to hearing, after an administrative review by an Area Office Manager.

Since the close of the fiscal year, many more cases from FY2015 have come to a conclusion. As of October 2, 2015, there are 1046 cases that remain open out of 1860 that were requested. This is shown in charts on the following pages.

(ii) the fair hearing requests filed prior to fiscal year 2015, which are pending for more than 180 days, stating the number of such cases, how many of such cases have been heard but not decided and how many have been decided by the hearing officer but not yet issued as a final agency decision.

Resolving cases open for more than 180 days is a high priority for the Department. As of September 2, 2015, there were 1,558 fair hearing requests filed prior to FY2015 which are pending for more than 180 days without a final agency decision. Of that number, 1,445 have been heard but not decided. It is not currently possible in our database to provide a number for how many have been decided by the hearing officer and not yet issued as a final agency decision. That data should be available in a subsequent version of iFamilyNet.

Several charts and graphs at the end of this section provide greater context as to progress made on this issue. The Department intends to provide an update of these charts quarterly as progress is made to reduce the number of cases open for more than 180 days.

As previously documented, the backlog of Fair Hearing cases, defined in as those cases with no final decision within 180 days grew as a result of budget cuts in the early 2000s, when staff turnover and hiring freezes meant the Department briefly employed only 3 hearing officers. At the same time, appeals filed with the Department grew. Three hearing officers were insufficient to keep up with the high volume of appeals. More recently, as described in the OCA's recent report on Fair Hearings, the Fair Hearing Unit experienced a 62% increase in the volume of requests received from 2012 to 2014, but the hearing officer capacity only grew by 33% in the same timeframe.

With 12 fair hearing officers on board as of September 2015, the Fair Hearing Office is dramatically increasing its staffing for both short term and long term needs towards the stated goal of eliminating the backlog by the end of calendar year 2016. To support the ongoing demands of a high volume of Fair Hearing requests, the Office has hired 2 additional hearing officer positions who will start within the month, bringing the unit to 14 hearing officers. In addition, the hiring process is moving forward for 5 paralegal positions to support the hearing office staff.

While working to keep up with the current requests for Fair Hearings, the Department continues to focus on resolving those cases that have been open beyond 180 days. There are two components to the backlog: 1) cases where hearings have occurred, but decisions have yet to be written and; 2) cases where decisions are written that are awaiting supervisory review. To address the cases which have yet to be written, the Unit continues to utilize law student interns each semester as well as a 120 day position to write decisions. In addition, four temporary paralegals were hired during the month of November to focus solely on writing decisions. As for the cases awaiting supervisory review, the Department has hired an additional supervisor who started August 10, 2015, to review written decisions which are pending. In addition, two additional temporary part-time supervisors are scheduled to start on November 30. Both temporary supervisors are recently retired clinical managers, and therefore they possess the

knowledge of both the agency and the subject matter necessary to conduct an efficient review of cases. Finally, an additional temporary clerical staff person has been hired to assist in data entry and processing the paperwork associated with the large volume of cases being written and reviewed.

All told this represents an increase of 14 positions to the Fair Hearing Unit.

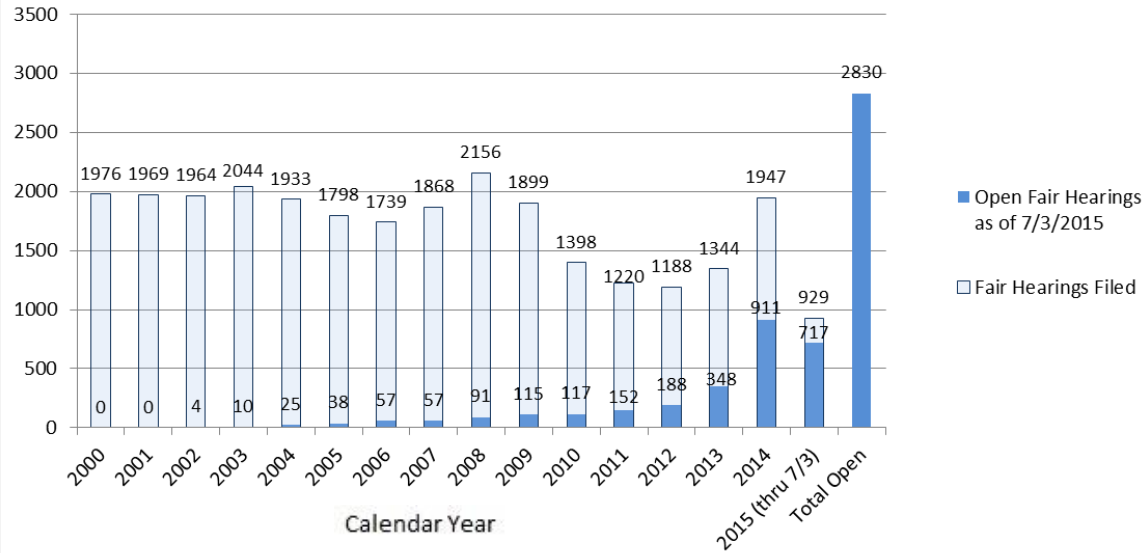
Also, there were 129 requests for hearing in the backlog that had yet to be scheduled from 2012 and 2013. Letters have been sent to all appellants with pending requests, and those who have expressed an interest in pursuing their hearing are receiving hearing dates.

Table 4: Number of Fair Hearings Open and Closed for Each Month

| | January 2015 | February 2015 | March 2015 | April 2015 | May 2015 | June 2015 | July 2015 | August 2015 | September 2015 | YTD Total |
|-------------------------------------|-------------------------|--------------------------|-----------------------|-----------------------|---------------------|----------------------|----------------------|------------------------|---------------------------|----------------------|
| Total at the beginning of the month | 2502 | 2554 | 2570 | 2614 | 2698 | 2761 | 2830 | 2877 | 2934 | |
| Filed during the month | 132 | 129 | 166 | 178 | 150 | 174 | 159 | 150 | 144 | 1382 |
| Total at the end of the month | 2554 | 2570 | 2614 | 2698 | 2761 | 2830 | 2877 | 2934 | 2922 | |
| Number closed out during the month | 80 | 113 | 122 | 94 | 87 | 105 | 112 | 93 | 156 | 962 |

The chart shows, as of each month, how many fair hearings are awaiting final agency decision, how many new fair hearing requests are received and then the total remaining at the end of the month. The bottom column shows how many Fair Hearing Decisions have been finalized by the department during the month with year to date columns at the far right.

Graph 2: Number of Open DCF Fair Hearings as of 7/3/2015 compared against total filed since 2000

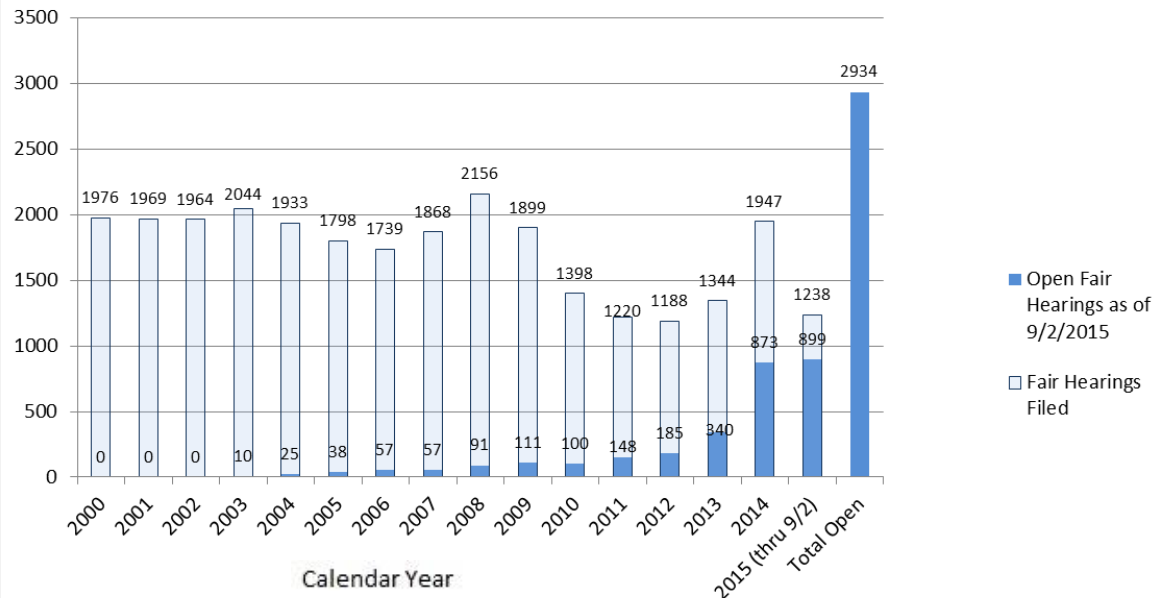


The graphs on this and the following page show, as of the beginning of the month, the total number of pending Fair Hearing Decisions sorted by the calendar year in which that request was received.

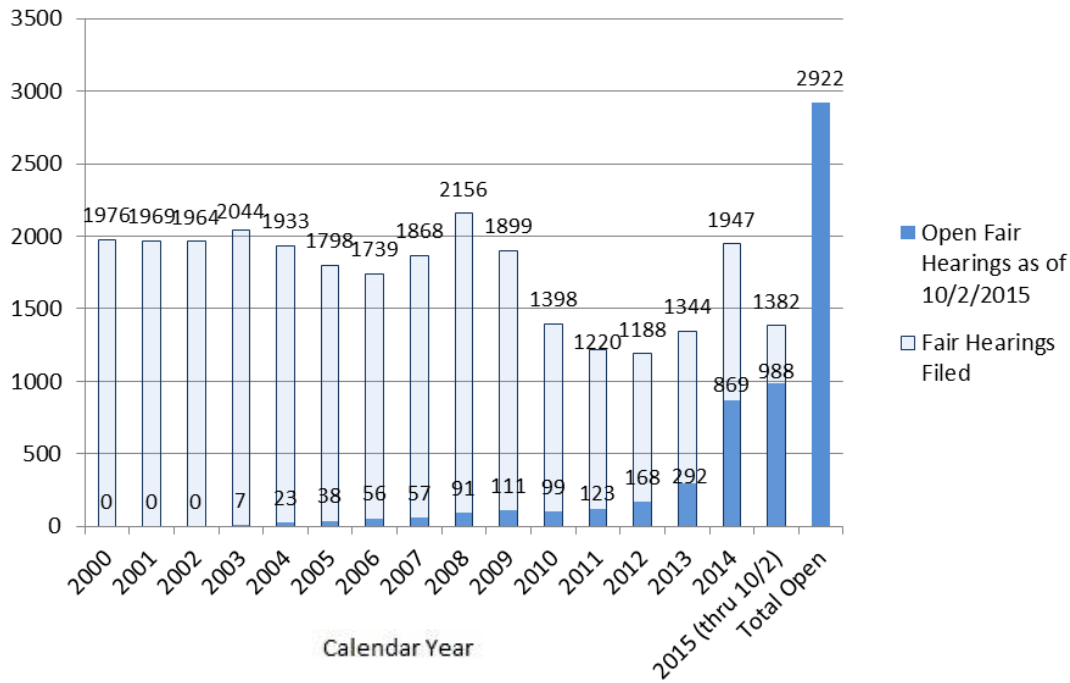
The July and September charts have been previously shared with the Chairs of the Children and Family Committee on September 30th 2015.

Progress over this 3 month time period includes: resolving more than 350 both timely and “backlogged” cases, resolving all outstanding Fair Hearings from calendar year 2002; resolving 127 hearings filed from 2009 to 2013; and resolving 42 hearings from 2014.

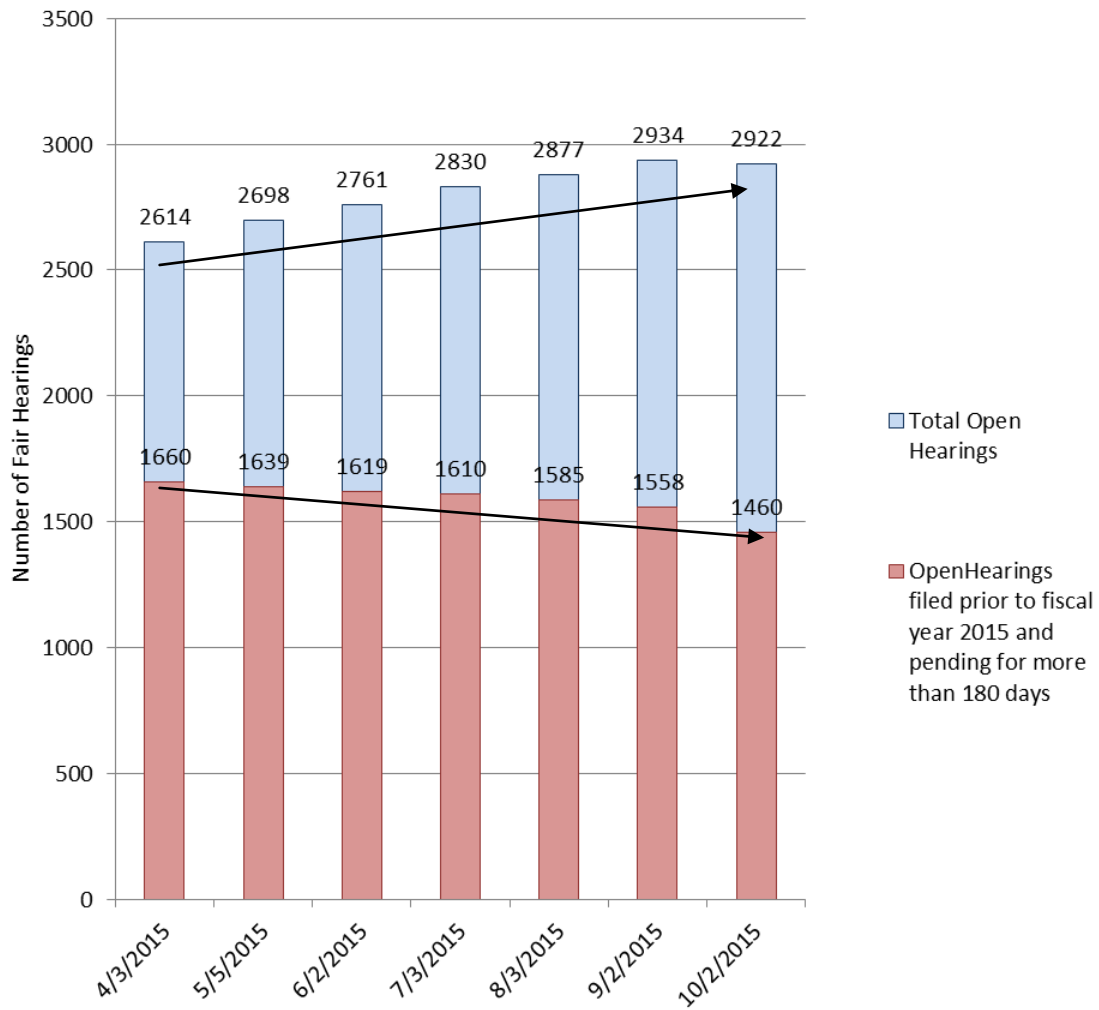
Graph 3: Number of Open DCF Fair Hearings as of 9/2/2015 compared against total filed since 2000



Graph 4: Number of Open DCF Fair Hearings as of 10/2/2015 compared against total filed since 2000



Graph 5: Monthly Count of Open DCF Fair Hearings with Those Requests Pending more than 180 Days Highlighted



The graph to the left shows as of the date listed along the x-axis, the total number of Fair Hearing requests that had not been decided and, of that number how many had been both open for more than 180 days and filed prior to fiscal year 2015.

This breakdown of cases that are both filed prior to FY2015 and open more than 180 days parallels language in 4800-0015 line of the FY15 budget.

Part III. Fair Hearing Unit Reforms

In addition to hiring new staff to grow the Fair Hearing Unit, the unit is also working to implement a series of new initiatives and reforms to improve the experience for appellants. These new initiatives build off of the new regulations for the Fair Hearing Unit which were promulgated in September 2013 and incorporate learnings from the OCA's review of the Fair Hearing Process conducted as required in Chapter 165 of the Acts of 2014.

Below is a summary of some of the new initiatives underway.

Review of Materials Provided to Appellants

DCF is reviewing and redrafting materials that appellants receive to ensure that they provide clear information about their rights and the Fair Hearing process in plain terminology. These materials include the currently provided letter mailed with the scheduled hearing date, which has been redrafted so that the average reading level of the document is decreased from a ninth grade reading level to a sixth grade reading level. The draft document has been completed and has been forwarded to the Department's Family Advisory Board as well as the Commissioner for feedback.

DCF is also working to create new materials to share with appellants including a Fair Hearing Guide, a list of free or low cost legal aid and lawyer referral services that are available in the community, and an information sheet with the actual anticipated dates a decision may be received based on the scheduled hearing date. A draft guide has been completed and has been forwarded to the Department's Family Advisory Board and Commissioner for feedback, and a draft legal aid/lawyer referral document has been completed as well. In addition to producing new printed material, DCF is also exploring what other new media tools may be helpful to appellants and their attorneys.

The OCA's Report recommended that the Department automatically send appellants all relevant documentation. Prior to September, 2013 the regulations required that only the relevant documents be sent to the Appellants. The Department, listening to advocacy groups for parents, determined that this was not the best practice nor did it promote a fair and independent defense for the Appellant. Our current regulations allow the Appellant to determine what information they would like to request to prepare for their Fair Hearing, provided their request conforms to the laws of the Commonwealth.

DCF is committed to working with area offices to ensure that records are provided in a timely manner and determining if there are additional staffing needs that are necessary to support this effort.

Timeline Changes

DCF agrees with the recommendation from the OCA's report to maintain the current standards of timeliness that were implemented as part of the regulations promulgated September 27, 2013.

The report recommended requiring all timeframes in the fair hearings process be described in calendar days where as currently certain areas that impact the Department are described in

“business days.” This is being explored by the Department however there is a concern that this could lead to shorter timeframes which is contrary to recommendations provided elsewhere in the report.

Shift Burden of Proof

The OCA’s report recommended that the Department shift the burden of proof to the Department. As described in the hearing held by Joint Committee on Children, Families and Persons with Disabilities on July 29, 2015, Massachusetts Administrative Law sets out a clear standard that the burden of proof should be on the appellant in any administrative hearing which would include DCF Fair Hearings. Implementing this recommendation would be a deviation from this standard practice in the Commonwealth.

Provide Fair Hearing Training to Area Offices

From May to July 2015 trainings were offered to staff in each of the four regions throughout the state and provided an overview of the fair hearing process. Topics that were discussed included what the area office obligations are regarding the provision of discovery to the Appellant, the structure of the hearing, and the function of the fair hearing officer as an impartial and independent decision maker. Additional trainings in specific area offices and with specific units within the Department as well as with contract agencies that provide foster care for the Department are ongoing, as gaps in knowledge are identified either by an individual area office or by the hearing unit.

Public Access

The Department has also complied with a requirement in line item 4800-0015 of Chapter 165 of the Acts of 2014 to allow public access to records in the Fair Hearing unit .

...provided further, that the department shall maintain and make available to the public, during regular business hours, a record of its fair hearings, with identifying information removed, including for each hearing request: the date of the request, the date of the hearing decision, the decision rendered by the hearing officer and the final decision rendered upon the commissioner's review; provided further, that the department shall make redacted copies of fair hearing decisions available within 30 days of a written request; provided further, that the department shall not make available any information in violation of federal privacy regulations;

The Department is committed to ensuring that appellants have a timely, fair and independent decision when they bring a case to DCF Fair Hearing Office and we look forward to continuing to partner with the legislature as we address this issue and work towards eliminating the backlog of fair hearing decisions.