

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Superior Court Department
Civil Action No.

CHILD 1, by his next friend, Colleen Manwell, MOTHERS 1-3, and FATHERS 1-3,
Plaintiffs,

v.

CHARLES BAKER, Governor of the Commonwealth of Massachusetts, MARYLOU
SUDDERS, Secretary of the Executive Office of Health and Human Services, and
LINDA SPEARS, Commissioner of the Massachusetts Department of Children and
Families,
Defendants.

COMPLAINT

INTRODUCTION

1. This complaint is brought by families in the foster care system who are losing time together – time that they will never get back – due to a recently imposed Department of Children and Families (department) policy terminating visitation.
2. In March 2020, in response to risks presented by the COVID-19 pandemic, the department ended visitation for most children in its custody and their parents. This near-total prohibition on visitation causes severe harm to children because it is unnecessarily delaying families’ reunification, is unwarranted under prevailing public health guidelines, and violates the law.
3. Plaintiffs’ visitation rights are constitutionally protected and also guaranteed by G. L. c. 119, § 35, which requires visitation if the welfare of the child or the public interest will not be injured. Visitation may only be terminated by court order, and only after a court

finds by clear and convincing evidence that parental visits will harm the child or the public welfare.

4. No such findings have been made with respect to Plaintiffs. Instead, Defendants unilaterally terminated visitation for Plaintiffs. On April 2, 2020, Defendants announced that the department would provide “video conference visitation” whenever possible and would approve “in-person visitation” only as needed. See April 2 Interim Guidance for DCF Supervised Visitation Providers¹; April 3 Guidelines for Parent-Child Visitation During the COVID-19 Outbreak.²
5. Visitation means in-person contact. Providing only “video conference visitation” constitutes a termination of visitation. Through this policy, the department is unilaterally deciding whether to provide visitation or terminate visitation, without the requisite court order.
6. In so doing, the department is depriving Plaintiffs of visitation that they are entitled to by statute, G. L. c. 119, § 35, and by Article 10 of the Declaration of Rights. The department is also depriving Plaintiffs of these rights without providing them an adequate and meaningful opportunity to be heard.
7. Plaintiffs seek an order declaring that the department’s policy is unlawful; a preliminary injunction ordering the department to immediately provide Plaintiffs with constitutionally and statutorily-required visitation, in the amount Plaintiffs were receiving prior to the start of the COVID-19 pandemic; a permanent injunction requiring the department to maintain visitation until properly terminated by a court; and an order for Plaintiffs to

¹ Available online at <https://www.mass.gov/doc/guidance-for-supervised-visitation/download>.

² Available online at <https://www.mass.gov/doc/guidelines-for-parent-child-visitation-during-covid-19-outbreak/download>.

receive additional visitation time equal to the amount they were unlawfully denied since the policy took effect.

PARTIES

8. Plaintiff Mother 1 resides in Dorchester, Massachusetts. Her state-intervention child custody case is in Boston Juvenile Court, 19CP0293BO. The department has been denying her visitation with her two children, ages 9 and 11 years old, since March 13, 2020.
9. Plaintiff Father 1 resides in Taunton, Massachusetts. His 3-year-old daughter is in the custody of the department through a state-intervention child custody case in Taunton Juvenile Court, 18CP0295TN. Plaintiff Father 1 has not been permitted to visit with his daughter since March 5, 2020.
10. Plaintiff Child 1 is a 7-year-old boy. He is placed at a foster home by the department, which has custody pursuant to a state-intervention child custody case in Lynn Juvenile Court, 17CP0130SA. He has not been permitted to have visitation with his mother since the week of March 9, 2020.
11. Plaintiff Mother 2 is the mother of a 3-month-old baby. She lives in Monterey, Massachusetts. Her state-intervention child custody case is in the Pittsfield Division of the Berkshire Juvenile Court, 20CP0020PT. The department has denied her visitation with her baby since March 9, 2020.
12. Plaintiff Father 2 resides in Westport, Massachusetts. His state-intervention child custody case is in Fall River Juvenile Court, 18CP0396FV. He and his 1½-year-old daughter have not been permitted to visit one another since March 13, 2020.

13. Plaintiff Mother 3 resides in Salem. She is the mother of a 5½ -year-old child. Her state-intervention child custody case is in Salem Juvenile Court, 20CP0003SA. She has not been permitted visitation since the week of March 8, 2020.
14. Plaintiff Father 3 resides in Pittsfield, Massachusetts. He has a 12-year-old daughter and a 10-year-old son. The family has a state-intervention child custody case in Pittsfield Juvenile Court, 20CP0018PT. The department has denied Plaintiff Father 3 visitation since mid-March, 2020.
15. Defendant Charles Baker is the Governor of the Commonwealth of Massachusetts and is sued solely in his official capacity. Pursuant to Part II, Chapter II, Section 1, Article 1 of the Massachusetts Declaration of Rights, the executive power of the Commonwealth is vested in the governor. The governor has the ultimate authority to direct and control the operation of the Executive Office of Health and Human Services and the Department of Children and Families. See G. L. c. 6A, §§ 2, 4. Governor Baker maintains his principal office at the Massachusetts State House, Office of the Governor, Room 280, Boston, Massachusetts, 02133.
16. Defendant Marylou Sudders is Secretary of the Executive Office of Health and Human Services. As such, she oversees the administration and operation of the departments within the Executive Office, including the Department of Children and Families. See G. L. c. 6A, § 16. She maintains an office at 1 Ashburton Place, Boston, Massachusetts, 02108. She is sued in her official capacity.
17. Defendant Linda Spears is the Commissioner of the Massachusetts Department of Children and Families. By statute, Defendant Spears is the executive and administrative head of the department. The department operates under her direction,

supervision, and control. See G. L. c. 18B, § 6. Defendant Spears maintains an office at 600 Washington Street, Boston, Massachusetts, 02111. She is sued in her official capacity.

NEXT FRIEND

18. Plaintiff Child 1 appears by his next friend, Attorney Colleen Manwell. Attorney Manwell serves as Plaintiff Child 1's court-appointed counsel in his state-intervention child custody proceedings in Salem Juvenile Court. In that role, Attorney Manwell maintains regular and frequent contact with Plaintiff Child 1. She is familiar with this litigation. She is pursuing these claims on Plaintiff Child 1's behalf because the litigation advances his expressed interest in resuming visitation with his mother. Therefore, Attorney Manwell has a concrete and good-faith interest in the litigation and is qualified to serve as next friend for Plaintiff Child 1.

FACTS

19. In response to risks presented by the COVID-19 pandemic, Governor Baker directed that all non-emergency state employees working in Executive Branch agencies should not report to their workplace on Monday, March 16, and Tuesday, March 17. See Baker-Polito Administration Announces Emergency Actions to Address COVID-19 Press Release.³ The operation of both public and private elementary and secondary schools in the Commonwealth was also suspended effective March 16, 2020. See Order Temporarily Closing All Public and Private Elementary and Secondary Schools.⁴

³ Available online at <https://www.mass.gov/news/baker-polito-administration-announces-emergency-actions-to-address-covid-19>.

⁴ Available online at <https://www.mass.gov/doc/march-16-2020-k-12-school-closing-order/download>.

20. At the same time, the department ended visitation for all Plaintiffs and the majority of children in its custody and their parents, with few exceptions.

21. On April 2, 2020, the Commissioner advised supervised visitation providers that the department is “encouraging video conference visitation for parents and children whenever possible” and recommended precautions to be followed when there are “circumstances in which in-person visitation is needed.” See April 2 Interim Guidance for DCF Supervised Visitation Providers.⁵ Those precautions included screening questions about a person’s history of exposure to the virus, social distancing, and personal protective equipment when appropriate.

22. On April 3, 2020, the Commissioner announced that the department would be “limiting in-person interactions as much as possible” and instructed workers that:

In talking with children and parents, you may identify situations where an in-person visit is requested or needed to support the emotional well-being of children. Talk to your supervisor, manager and the attorney assigned to the case and together you can develop a plan. If you identify that an in-person visit needs to occur, talk with the child’s caregiver and anyone who will be participating in the visit. Ask the following screening questions regarding the caregiver’s household and the parent’s household.... If someone in either household answers yes to one of these questions, talk with your supervisor and manager. We also recommend reaching out to the DCF Medical Team to discuss the situation further. You may need to reschedule visitation, offer an extended make-up visitation at a later date, or do a video conference visit instead. When this occurs, let the DCF attorney assigned to the case know.

April 3 Guidelines for Parent-Child Visitation During the COVID-19 Outbreak.⁶

23. On April 8, 2020, a communication to parents was published on the department’s website. See April 8 Parent Communication.⁷ In that communication, Defendant

⁵ Available online at <https://www.mass.gov/doc/guidance-for-supervised-visitation/download>.

⁶ Available online at <https://www.mass.gov/doc/guidelines-for-parent-child-visitation-during-covid-19-outbreak/download>.

⁷ Available online at <https://www.mass.gov/info-details/parent-communication>.

Commissioner Spears stated that “parent-child visits are currently occurring by video conference whenever possible. Your social worker will work with you and your child’s caregiver to facilitate video conference visits. We recognize there will be circumstances that necessitate an in-person visit. We encourage you to talk with your attorney and your social worker about this.”

24. Effectively, the policy of the department as articulated in this guidance is to provide video contact in lieu of visitation, except where the department deems visitation necessary. See Email from Defendant Commissioner Spears dated April 3, 2020 (“[f]or the time being, the majority of parent-child visitation will be done by video conference or phone”).
25. As a result of the department’s unilateral termination of visitation, Plaintiffs, who were previously receiving visitation regularly, are not receiving visitation.
26. Specifically, Plaintiff Mother 1’s 9- and 11-year-old children are placed in two different non-relative foster homes. The plan is for them to be reunified with her and they were having extended two-hour visits. Yet, due to the department’s policy, she has not visited with them since March 13. Plaintiff Mother 1 is engaged in the services contained in their family action plan and had a meeting scheduled to discuss a reunification plan just before visitation was terminated due to the pandemic. On April 10, at a foster care review, the social worker observed that the children missed having visitation with one another as well as with their mother. The foster parent of the 11-year-old child observed that termination of family visitation had been traumatic for him. The negative impact of termination of visits on reunification was discussed at the meeting. Plaintiff Mother 1’s counsel has requested that the

reunification plan be expedited. Her request for expedited action was denied. She also requested that parenting time be reinstated. This request was also denied.

27. Plaintiff Father 1 has a 7-year-old boy and a 3-year-old girl. Both children are in the custody of the department, but the 7-year-old has been placed by the department in Plaintiff Father 1's physical custody for approximately six months now. Plaintiff Father 1's daughter is placed in a non-relative foster home. Prior to the COVID-19 pandemic, the department intended to return her to Plaintiff Father 1's home this spring. Since the pandemic, his attorney has requested that reunification be expedited. The department has not responded to his request. Also prior to the pandemic, Plaintiff Father 1 had two hours per week of unsupervised visitation with his daughter. He was doing everything he was asked to do by the department: he has completed programs and assessments, and has been actively engaged in therapeutic services. Since their last visit on March 5, though, despite requests made by his attorney to the department, he and his daughter have not had any visitation. They have had one hour of virtual contact per week. Because Plaintiff Father 1's son lives with him, the lack of visitation impairs the child's opportunity for sibling bonding as well as parental bonding.

28. Plaintiff Child 1, a 7-year-old boy, lives in a non-relative foster home. The current goal is for him to be adopted, but his mother is actively engaged in her action plan. Prior to the outbreak of COVID-19, he and his mother had two-hour weekly supervised visits with one another in the community. Since then, he has only been able to contact her by video calls.

29. Plaintiff Mother 2 has not been physically present with her 3-month-old baby, who is currently placed in a non-relative foster home, since March 9, when the baby was only about one month old. It has been very difficult for bonding to occur over video, both between the baby and Plaintiff Mother 2, and between the baby and her older sister, who is placed in a guardianship with her maternal grandfather. Plaintiff Mother 2 is actively engaged in her family action plan, and the goal is for the baby to be reunified with her. Her counsel has advocated for her to receive visitation and has even identified family members who are willing to supervise visits. She has also filed a motion in the juvenile court to resume parenting time. The court has given the department until June 4, 2020, to file a response, and a decision will be made sometime thereafter.

30. Until March 13, 2020, Plaintiff Father 2 had extended unsupervised visitation with his 1½-year-old daughter, each week, visiting with his daughter for four hours on Fridays, in the community, and one hour on Mondays, in his apartment in Westport. Plaintiff Father 2's daughter is in a non-relative foster home. Although the goal is for her to be reunited with her father, their contact has been limited to just two video chats per week. Given the child's age and attention span, those calls rarely last more than ten minutes. Plaintiff Father 2's counsel filed a motion for expedited reunification. On April 30, 2020, the motion for reunification was denied. However, the Juvenile Court ordered the department to expand the visitation schedule to ensure that visitation was provided in a "reasonable form" so as to be meaningful, consistent, and provide an opportunity for children and parents to continue progressing toward

their respective goals. Visitation has not been expanded since the Juvenile Court made that order; Plaintiff Father 2 still has only virtual contact with his daughter.

31. Plaintiff Mother 3's 5½ -year-old son is in a kinship foster home with her parents.

The plan is for her to be reunited with her son. Prior to COVID-19, Plaintiff Mother 3 visited with her son weekly. Since then, they have only had virtual contact. Plaintiff Mother 3 is actively engaged in her action plan. Her attorney has requested visitation from the department. On May 20, 2020, the department denied her request.

32. Plaintiff Father 3's two children are in two different placements. His 10-year-old son is placed in a non-relative foster home. His 12-year-old daughter is placed in a group home. The goal is for them to be reunified, and Plaintiff Father 3 is actively engaged in the tasks on his action plan. Since the department terminated visitation, Plaintiff Father 3 has had just one weekly video call with his children. When his counsel requested to resume visitation, the attorney representing the department responded by e-mail that "the Department is not providing in-person visitation at this time. I do not know when in-person visits will resume, but when we get that directive I will certainly let you know when they are scheduled."

JURISDICTION AND VENUE

33. This Court has jurisdiction to decide this matter under the declaratory judgment act, G. L. c. 231A, § 1. See Doe v. Sex Offender Registry Bd., 480 Mass. 212, 220–21 (2018) (declaratory relief is “the proper mechanism” for challenging the constitutionality of a regulation of general application). Pursuant to G. L. c. 214, § 1, this Court has “original and concurrent jurisdiction of all cases and matters of equity cognizable under the general principles of equity jurisprudence.” It also has original jurisdiction over this civil action pursuant to G. L. c. 212, § 4.
34. Venue is proper because the Defendants’ principal place of business is in Suffolk County.

CLAIMS FOR RELIEF

Count I – The Department’s Policy Violates G. L. c. 119, § 35.

35. Plaintiffs incorporate the preceding paragraphs of this Complaint as if fully set forth herein.
36. Pursuant to G. L. c. 119, § 35, Plaintiffs are entitled to visitation.
37. Visitation may not be terminated unless ordered by the court after a finding by clear and convincing evidence that “parental visits will harm the child or the public welfare.” Custody of a Minor (No. 2), 392 Mass. 719, 726 (1984). See 110 C.M.R. § 7.128 (“if DCF seeks to terminate visitation between the child and the parents, it will not do so unless the matter is brought before a judge, and the judge makes specific findings demonstrating that parental visits will harm the child or the public welfare”). See also G. L. c. 119, § 35.

38. By unilaterally terminating visitation without an evidentiary hearing before the court at which the department met this standard, the department unlawfully circumvented the statutory framework.

Count II – The Department’s Unilateral Denial of Visitation Violates Plaintiffs’ Constitutional Rights to Visitation and to Due Process.

39. Plaintiffs incorporate the preceding paragraphs of this Complaint as if fully set forth herein.

40. “The interest of parents in their relationship with their children has been deemed fundamental, and is constitutionally protected.” Dep’t of Pub. Welfare v. J. K. B., 379 Mass. 1, 3 (1979).

41. This right to family integrity, guaranteed by Article 10 of the Declaration of Rights, entitles children and parents to regular, frequent, and appropriately arranged in-person visitation with each other.

42. Parents and children have the right to visitation unless parental rights have been terminated. Adoption of Helen, 429 Mass. 856, 862-63 (1999).

43. Visitation means “being *physically present* in a child’s life.” Care and Protection of Walt, 478 Mass. 212, 229 (2017) (emphasis added), quoting L.B. v. Chief Justice of Prob. & Family Court Dep’t, 474 Mass. 231, 242 (2016). It is a critical component of family integrity; without it, the parent-child bond is likely to be weakened, which, in turn, endangers a family’s prospects for reunification. Care and Protection of Walt, 478 Mass. at 229-30; L.B. v. Chief Justice of Prob. & Family Court Dep’t, *supra*.

44. Plaintiffs have a vested liberty interest in meaningful contact and visitation. L.B., 474 Mass. at 242; Blixt v. Blixt, 437 Mass. 649, 652 (2002); Care and Protection of Robert, 408 Mass. 52, 60–61 (1990).

45. The department cannot deprive them of that interest without procedural due process, which is analyzed according to the balancing of factors set out in Matthews v. Eldridge, 424 U.S. 319, 335 (1976). See Roe v. Attorney Gen., 434 Mass. 418, 427 (2001), citing Aime v. Commonwealth, 414 Mass. 667, 674-74 (1993).
46. The Supreme Judicial Court has determined that termination of visitation is a “ruling of such significance” that it must be held to the same standard that is required for termination of parental rights. Custody of a Minor (No. 2), 392 Mass. at 725-726. In the context of terminating parental rights, clear and convincing evidence is the minimum standard that satisfies due process and which a state must meet before interfering with parents’ fundamental liberty interest in the care, custody, and management of their children. Santosky v. Kramer, 455 U.S. 745, 770 (1982). Accordingly, due process requires visitation between parents and children, absent a finding by a court by clear and convincing evidence that visitation would be harmful to the child or the public welfare. See Adoption of Rhona, 57 Mass. App. Ct. 479, 489 (2003); Care and Protection of Ian, 46 Mass. App. Ct. 615, 620 (1999).
47. Because such findings have not been made and could not be made with respect to Plaintiffs, the Department’s policy unlawfully infringes upon their constitutional rights.
48. Termination of visitation without an evidentiary hearing before the court, at which the department is held to a standard of clear and convincing proof of harm to the child or the public interest, violates the Massachusetts Constitution’s guarantee of due process of law. See Article 10 of the Massachusetts Declaration of Rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

49. Declare that the department's policy unlawfully terminated visitation in violation of Plaintiffs' statutory and constitutional rights;
50. Grant a preliminary injunction ordering the department to immediately recommence visitation;
51. Grant a permanent injunction requiring the department to maintain visitation unless properly terminated by a court;
52. Order the department to provide make-up visitation to Plaintiffs for the time they were unlawfully denied visitation; and
53. Award such other and further relief as the Court deems proper, just, and equitable.

Respectfully Submitted on Behalf of the Plaintiffs,

/s/ Lauren Russell

Lauren Russell, BBO 683102
Rebecca Jacobstein, BBO 651048
Committee for Public Counsel Services
44 Bromfield Street
Boston, MA 02108
(617) 910-5803
lrussell@publiccounsel.net