

EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN & FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
600 WASHINGTON STREET, 6TH FLOOR
BOSTON, MASSACHUSETTS 02111

LINDA S. SPEARS,
COMMISSIONER

Voice: (617) 748-2000
Fax: (617) 261-7428

(
(IN THE MATTER OF)
(K.C.)
(FH # 2017-0119)
(

HEARING DECISION

Procedural Information

The Appellant, Ms. K.C., appeals the Department of Children and Families' ["the Department" or "DCF"] FCR ["FCR"] decision of December 13, 2016, to approve a change in a goal determination for one year-old J, from permanency through reunification to permanency through adoption, which had been made at a Permanency Planning Conference ["PPC"] convened by the DCF Arlington Area Office and held in August 2016. The Appellant is J's mother. The FCR panel found that the Appellant had made insufficient progress toward the goal of permanency through reunification of the family. The Appellant filed a request for a Fair Hearing ["Hearing"] on January 30, 2017, pursuant to 110 CMR 10.06 (2) and 110 CMR 6.10 (12). The Appellant's request to appeal the goal change was granted and her Hearing held on April 13, 2017 at the Department's Central Office located at [REDACTED] in Boston, MA. Present at the Hearing was the DCF FCR Supervisor of the Boston Region, I.W.; the DCF On-Going Supervisor for the Family, K.B.; the DCF Adoption Supervisor, G.H.; the DCF Adoption Social worker, E.R.; the Appellant's Attorney, J.S.; and, the Appellant. All parties were sworn in and testified with the exception of counsel. The proceeding was recorded, pursuant to 110 CMR 10.26, and downloaded to a CD. Admitted into evidence for the Department was the FCR Report Approved on December 13, 2016 [Exhibit A]. Admitted into evidence for the Appellant was the Appellant's Massachusetts Department of Public Health Medical Marijuana Card – Two Sided [Exhibit 1]. The Hearing record was closed at adjournment on this date.

In accordance with 110 CMR 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.

Pursuant to 110 CMR 10.21 (1), the Hearing Officer need not strictly adhere to the rules of evidence, The Massachusetts Rules of Evidence do not apply, but the Hearing Officer shall observe any privilege conferred by statute such as social worker-client, doctor-patient, and attorney-client privileges. Only evidence, which is relevant and material, may be admitted and may form the basis of the decision. Unduly repetitious or irrelevant evidence may be excluded.

Statement of the Issue

The issue presented in this Hearing is whether, based upon the evidence and the Hearing record as a whole, the Department's decision or procedural action, in approving the change in the permanency planning goal, violated applicable statutory or regulatory requirements, or the Department's policies or procedures, and resulted in substantial prejudice to the Appellant. If there is no applicable statute, policy, regulation or procedure, the issue is whether the Department failed to act with a reasonable basis or in a reasonable manner resulting in substantial prejudice to the Appellant. [110 CMR 10.00]

Findings of Fact

1. The Appellant and her partner, D.M., are the mother and father, respectively, of J, who was born a substance exposed newborn in [REDACTED] because he tested positive for prescription substances taken by the Appellant for her opiate dependence. The Department completed a 51B Response and opened the family's case for assessment. J was removed from his parents care on an emergency basis in [REDACTED] when two months-old. The removal stemmed from the Appellant posting on social media that J's father had taken J without her knowledge and permission, and without a proper coat or J's prescribed medication. J was removed that day, placed in foster care for a couple of weeks, and then placed in a foster home that became his pre-adoptive home where he remains to date. J has not been back in the Appellant's care, since his removal. After the 72 Hearing¹, the Appellant was viciously attacked by her partner, the father of the child. A neighbor called for help, because the Appellant was unconscious. [Exhibit A; Testimony of the On-Going Supervisor]
2. In August 2016, a PPC² was held by the Department's Arlington Area Office where J's permanency goal was reviewed and then changed from reunification with his family to adoption. [Testimony of the On-Going Supervisor]
3. J was assigned to as an adoption unit on September 1, 2016. [Testimony of the Adoption Supervisor; Testimony of the Adoption Social Worker]
4. Pursuant to 110 CMR 6.10, the Department is required to conduct a FCR within six months after a child is placed and every six months thereafter provided the child remains in placement. Of relevance herein is a FCR that was convened on September 12, 2016, wherein the goal change of the area office was reviewed; a decision made that the Appellant had made insufficient progress toward

¹ This is a temporary court custody hearing, referred to as a 72 hour hearing, because it is scheduled to take place within 72 hours of the removal of a child.

² The PPC is the Department's primary internal planning vehicle for reviewing the clinical and legal issues related to permanency decision-making. The Director of Areas/designee provides for the attendance of all participants needed to make decisions regarding a child's permanency plan. Neither the child nor her/his parents participate; however, the Director of Areas/designee encourages participants to be prepared to reflect their understanding of family members' perspectives on how the child's need for permanency can best be addressed. Participants discuss the family's situation in its entirety and determine whether family reunification can occur within legislated timeframes or an alternative permanency plan is most appropriate for a child's needs. The PPC establishes the Department's permanency plan and identifies and assigns related tasks with timelines to achieve this plan. Additionally, at all PPC's, consideration is given to the appropriateness of initiating Termination of Parental Rights [TPR] and using permanency mediation services. The option of Adoption Surrender, Post-Termination and Post-Adoption Agreements are also considered when it is in the child's best interests. [Permanency Planning Policy - Permanency Planning Conferences, Effective July 1, 2013]

the goal of reunification and her ability to parent; and, a recommendation made that the goal change to adoption and the projected date of adoption, to September 12, 2017, was appropriate. In making this recommendation, the three person FCR panel solicited input from various participants. Present at the September 12, 2016 review were ten participants - the Appellant and father and their attorneys; J's attorney; the DCF adoption supervisor and social worker for the child, who testified at the Appellant's Hearing of April 13, 2017; the DCF case manager for the [Appellant and father]; the family resource social worker, and another individual whose function is unspecified. The FCR panel recommendation was approved by the FCR Supervisor on December 13, 2016, who testified and explained the FRC process at the Appellant's Hearing of April 13, 2017. A copy of the FCR report encompassing this review in its totality was submitted by the Department to the Hearing Officer for review. [Exhibit A; Testimony of the FCR Supervisor]

5. The Department had concerns about father's mental health and how it was impacting his functioning; the Appellant's mental health and how that was affecting her care of J and her interaction with others; the violence in the couple's relationship while the Appellant was living in her abuser's home and J's exposure to this; her judgment about J's access to his father; and, some questions around the Appellant's substance abuse history. [Testimony of the On-Going Supervisor; Testimony of the Adoption Supervisor]
6. J has supervised visits with the Appellant [and his father]. [Exhibit A] The Appellant has been engaged with the Department and visiting J religiously. She loves J and enjoys her time with him, and desperately wants to care for him, nevertheless, although the Appellant was a victim of the domestic violence, the Department continues to have concerns about the relationship between the Appellant and J's father. Specifically, whether the father has really done work to address the violence concerns and concerns around how father would be able to manage himself and provide a safe environment for the child. In addition, the Appellant's mental health hinders her ability to make safe choices for J as in father's access to the child. [Testimony of the On-Going Supervisor]
7. There have been times when the Appellant sought support around the domestic violence and other times when she has shied away from it, because she lives in the abuser's home and he has been controlling of her. [Testimony of the On-Going Supervisor]
8. The Appellant does not dispute the domestic violence. She spoke at Hearing of having handprints around her neck. She said she tried to leave the house three times. She recalls lying on the ground and throwing a rock on the house, which she believes made the police come to her aide. The child's father was charged. [Testimony of the Appellant]
9. The Appellant does not dispute posting on social media that the father took J, but denies that J was without a jacket. Rather, she explained at Hearing that the child's father had not packed a change of clothes or enough diapers. This was needed, if father was taking J to a music lesson. The Appellant said she had just given birth, and they had not been out yet, and this trip with father would take three hours, and father had only packed lightly. The Appellant said it was very juvenile for her to post this, but she wanted everyone's opinion on this, everyone. She reported having full custody of J at this time and said she called the police. [Testimony of the Appellant]
10. The Appellant has not complied with the visitation expectation of the Department. [Exhibit A]

11. The DCF on-going supervisor, K.B., received the Appellant's case in April 2016. She testified at Hearing that the Appellant's visits with J were quite challenging for J. His sleep, eating, and mood were impacted. He had a very difficult time. The Appellant, who stopped caring for J when he was an infant, was having a difficult time understanding what J's developmental needs were. J did not want to be held like a baby. He did not want to engage in certain activities. He ended up melting down. [Testimony of the On-Going Supervisor]
12. J was underweight at birth. [Exhibit A] J was almost failure to thrive because he was not gaining weight. Part of J's inability to gain weight had to do with the almost frantic way in which his caregiver fed him prior to the child coming into DCF care. J's feeding at that time had been disruptive as opposed to being done in a soothing, calm environment where he could latch on. J is currently working with a feeding specialist. So, the Department was instructed to only have the foster parents feed J and it had to be in a dark room with sensory items removed. Later on, everything J now eats has to be thickened due to an underdeveloped trachea, which has to do with his exposure to substances at birth. This has been hard for the Appellant to accept; not feeding J; and, not giving him anything to eat at the visits. [Testimony of the On-Going Supervisor]
13. The Appellant reports having been able to feed J at home. She was watched by the " [REDACTED] and [REDACTED] group. There was a special box of formula they ended up changing for a more sensitive stomach. Contrary to Finding #12, the Appellant testified that J gained weight. She said she got an A+, in Amy's words. [Testimony of the Appellant]
14. The Appellant has a significant trauma history. She has been diagnosed with PTSD [Post Traumatic Stress Disorder] and Borderline Personality Disorder R/O. The Appellant's mental health directly impacts her relationship with J as well as her interactions with others and is a primary concern for the Department. For example, the Appellant actively disassociated with J during visits. The on-going supervisor, K.B., found the Appellant in a corner holding J during a visit and talking about rape and murder. The Appellant was not [mentally] present. She did not know the on-going supervisor or her on-going social worker were in the visitation room. J was taken from the Appellant and the Appellant given time to collect herself. The Appellant's mental health directly impacted her relationship with J. [Testimony of the On-Going Supervisor³]
15. The Department had many conversations with the Appellant and with her former attorney about the above described behavior in order to help the Appellant understand. The Appellant has been horrified that she did this, when told about it. The Department opins that the Appellant's behavior is beyond her control, because of her mental health, and that she did not know she had acted this way during that visitation. [Testimony of the On-Going Supervisor]
16. The adoption social worker, E.R., was assigned primarily to J's case in September 12, 2016. Per the adoption social worker, the bi-weekly visits at the Arlington Area Office between the Appellant and J were very difficult. J was very anxious throughout the visits and would often get upset. The Appellant would not let him get down, walk around, or play. The Department came to believe that J needed somewhere else to play so he could walk around and so the Appellant could better demonstrate her progress with J and her mental health. So, the Department changed the visits to an

³ The on-going supervisor has been, in part or at total, seven visits, since the case was transferred to her unit in April 2016. [Testimony of the On-Going Supervisor]

indoor play area, which is where the last two visits occurred. Things improved with this change and J is much happier because he can do things there. At the last visit, at the indoor play area, J was trying to climb a blow up slide and the Appellant looked at the adoption social worker for direction, who told her it would be inappropriate. They discussed this afterward wherein the Appellant said she was thinking that it was not in his best interest but upon seeing the adoption social worker's reaction, she knew she would have to get J down from the slide. [Testimony of the Adoption Social Worker⁴]

17. The Appellant does not dispute the incident with the slide occurred. She said there were two other children using a slide. She reported making eye contact with the adoption social worker and moving the child off the slide. [Testimony of the Appellant]
18. It was reported during the FCR that the Appellant was challenging, presented with a negative attitude, and argued with Department staff and father at the visits. She frequently had to be redirected. [Exhibit A]
19. During the FCR of September 12, 2016, it was reported that the Appellant was engaged in treatment to address her mental health; however, it was also reported that the Department had not received proof of this. [Exhibit A]
20. The Appellant did not dispute having a diagnosis of PTSD. She testified at her Hearing that she is in treatment for her mental health. On Monday, she goes to a woman's group. On Wednesday, she addresses her PTSD and domestic violence with [REDACTED]. On Thursday, she does parenting. The Appellant also spoke of seeing a psychiatrist and [REDACTED] monthly, and that this fluxuates between the two. [Testimony of the Appellant] Despite the Appellant's testimony, no proof of this treatment was submitted to the Hearing Officer at the Appellant's Hearing of April 13, 2017. [Administrative Record]
21. The Appellant has been prescribed Suboxone for her opiate addiction, per her clinician/ prescriber. [Testimony of the On-Going Supervisor] However, the Appellant continued to maintain at Hearing, as she did previously, that she is prescribed this medication for pain management because she has ovarian issues. [Testimony of the On-Going Supervisor; Testimony of the Appellant] The Appellant's denial makes it hard for the Department to understand the Appellant's triggers for using and how she is managing and coping with her opiate addiction. [Testimony of the On-Going Supervisor]
22. Although the Appellant disputed this, the On-Going Supervisor, K.B., reported that the Appellant often arrived for visits with J smelling of marijuana. [Testimony of the Appellant v. Testimony of the On-Going Supervisor] In lieu of stopping visits on those occasions, the ongoing social worker was always close by to make sure the Appellant's parenting was not impaired and adversely affecting J. Although the Appellant reported she had a medical marijuana card, the Department had not seen it and needed to understand how her use of marijuana impacted her ability to care for J. At this point in time, the ongoing supervisor has not seen any difference in the visits, whether smoking or not. [Testimony of the On-Going Supervisor]

⁴ The adoption social worker, assigned on September 1, 2016, has supervised about ten bi-weekly visits between the Appellant and J. [Testimony of the Adoption Social Worker]

23. The Appellant supplied the Hearing Officer with a copy of her Massachusetts Department of Public Health Medical Marijuana Card, in effect until August 1, 2019 [Exhibit 1] She testified at Hearing that she no longer smokes marijuana; she ingests edible chocolates instead. [Testimony of the Appellant]
24. The Appellant, at the time of the FCR of September 2016, had not completed her substance abuse evaluation and did not provide up to date results from her urine screens. [Exhibit A]
25. At her Hearing of April 13, 2017, the Appellant said she signed two releases for [REDACTED] to release documents. She reports having gone there every month, being compliant, and that they have never found anything in her system. Nevertheless, the Appellant did not provide evidence of these releases at her Hearing of April 13, 2017. [Testimony of the Appellant v. See the Administrative Hearing]
26. J has been in the care of the Department for more than a year now and the Department is still closely monitoring the Appellant's interactions with the child during visits. The Department has not been able to move to partially supervised visits or unsupervised visits, which is unusual for a case that has been opened for so long. J does need a social worker present at visits to help advocate for him and help the Appellant understand what the child's needs are. [Testimony of the On-Going Supervisor]
27. There have been no physical injuries to J during visits with the Appellant. [Testimony of the Adoption Social Worker]
28. The Appellant has been following the rules and not feeding J during visits. [Testimony of the Adoption Social Worker; Testimony of the Appellant]
29. The Appellant testified that the goal of adoption is "traumatic to her soul". She thought of everything for J. She really feels she would have been the best training wheels for this child. He would receive the best care, if he were with her. [Testimony of the Appellant]

Applicable Standards

Biological parents may appeal when a goal determination made at a FCR changes pursuant to 110 CMR 6.10 (12): Appeal of FCR Determination. The Appellant, the biological parent of J., requested such an appeal, which was granted and held on April 13, 2017 at the Department's Central Office in Boston, MA.

Regulations and policies applicable to this appeal include, but are not limited to the following.

Permanency planning involves a mix of child-centered, family-empowering casework and legal strategies that ensure children have caring, stable, lifetime families and that safety remains the paramount concern throughout the family's involvement with the Department. Permanency planning begins with the goal of safely maintaining a child at home. If placement becomes necessary to ensure safety, the child's first goal is reunification with her/his family. If the risk posed to the child's safety by her/his family remains high and the prognosis for reunification is poor, an alternative plan for permanency is developed concurrently with the family. As soon as the Department determines that

reunification is not in the child's best interests, an alternative plan is established. This permanency plan will be adoption, guardianship or permanent care with kid, or an alternative planned permanent living arrangement ... Permanency Planning Policy – Introduction, Effective: 7/1/2013

The Department shall conduct a FCR within six months after a child is placed out of the home and every six months thereafter for a child who remains out of the home. 110 C.M.R. 6.10 (1)

A FCR shall include consideration of the following issues:

- (a) the necessity and appropriateness of the services to the family; and
- (b) a review of the purpose of the service plan; and
- (c) a review of the past six months' activities, including:
 - (1) the Department's fulfillment of the tasks identified in the service plan;
 - (2) the parent's fulfillment of the tasks identified in the service plan, including the visitation schedule;
 - (3) the provider's fulfillment of the tasks identified in the service plan;
 - (4) where appropriate; the child's fulfillment of the tasks identified in the service plan; and
 - (5) progress made toward resolving the problems identified in the assessment or previous case review; and
- (d) a review of the safety of the child and the necessity and appropriateness of the child's continued placement; and
- (e) a review of the extent of progress made toward alleviating or mitigating the causes necessitating the child's placement; and
- (f) a review of the goal and the projected date by which the child will achieve permanency either through
 - 1. stabilization with his or her parents or guardian;
 - 2. reunification and safely maintaining with his or her parents or guardian;
 - 3. adoption;
 - 4. guardianship by a person other than the Department or its agent;
 - 5. permanently living with Kin; or
 - 6. another permanent planned living arrangement; and
- (g) a review of the proposed direction of service planning for the next six months, including:
 - 1. the steps necessary to achieve permanency for the child; and
 - 2. the visitation schedule for the parents and the means by which the schedule will be implemented; and
- (h) a review of the child's medical and dental checkups, consistent with the well-child schedule.

110 CMR. 6.10 (2)

The panel members shall discuss and determine:

- (a) the necessity and appropriateness of the child's continued placement in substitute care; and
- (b) the extent of the parties' compliance with the written service plan and the actions which must be undertaken within specified time limits by all parties to achieve identified service goals; and
- (c) the extent of progress which has been made toward alleviating or mitigating the causes necessitating the child's placement in substitute care; and
- (d) the goal and the projected date by which the child may achieve permanency...

110 CMR. 6.10 (10)

Parents, foster parents, the child's attorney, and children over the age of 14 may appeal the FCR determination to change the service plan goal by requesting a Fair Hearing within 30 days after receiving the FCR Report. 110 CMR. 6.12 (a)

To prevail, an Appellant must show based upon all of the evidence presented at the hearing, by a preponderance of the evidence that: (a) the Department's or Provider's decision was not in conformity with the Department's policies and/or regulations and/or statutes and/or case law and resulted in substantial prejudice to the Appellant, (b) the Department's or Provider's procedural actions were not in conformity with the Department's policies and/or regulations, and resulted in substantial prejudice to the aggrieved party, (c) if there is no applicable policy, regulation or procedure, that the Department or Provider acted without a reasonable basis or in an unreasonable manner which resulted in substantial prejudice to the aggrieved party; or (d) if the challenged decision is a supported report of abuse or neglect, that the Department has not demonstrated there is reasonable cause to believe that a child was abused or neglected. 110 CMR 10.23.

Analysis

Notwithstanding the Appellant's love for her one year-old son, J; her consistent visits with her son; and, her desperate need to care for him again, the Department's concerns in this matter are found to have substantial merit. The Hearing Officer did not find any information offered by the Appellant to be substantial or compelling to such an extent that the Department failed to comply with its regulations or policies or acted unreasonably or abused its discretion in making its decision in this matter. Based upon a review of the evidence presented at the Hearing, including the testimony and documents provided, the Department's decision to change from the child's permanency goal of reunification to adoption is in the best interests of the child as reunification poses a risk to the child's safety.

The Appellant's mental health has adversely affected her interactions with J during supervised visits as noted in Findings #11 through #19. In addition, the Appellant's mental health hindered her ability to make safe choices for J, in connection with father's access to the child. See Findings #1 & #6 through #9. Despite father's assault of the Appellant, which resulted in hand marks around her throat and her unconsciousness, the Appellant vacillates about receiving services for her victimization, sometimes seeking support and sometimes shying away because she lives in the abuser's home and he controls her. Despite testimony from the Appellant that she is in treatment to address her mental health, no such corroborating documents were supplied at the Hearing.

The Department's concern and questions about the Appellant's use of substances remains. Although the Appellant acknowledges having a medical marijuana card and supplied the card at her Hearing, the ongoing supervisor had noticed that the Appellant often had visitations with J when smelling of marijuana. This necessitated closer DCF supervision of the Appellant during visitations to make sure that she was able to parent J. The Appellant denied having visitation with J after having smoked marijuana; a fact contrary to the aroma of marijuana surrounding her at these visitations.


Further, there is also the Appellant's prescription for Suboxone, which her prescriber gave her to address her opiate addiction, which she incorrectly claims was prescribed to help her manage her pain. The Appellant's denial in this regard is concerning. In addition, she has failed to provide the Department

proof of her clean urine screens. Although she testified she had signed releases on two separate occasions with [REDACTED] to show that nothing has been found in her system, these releases were not submitted at her Hearing. This is a case that was opened with the Department in [REDACTED] because J was a substance exposed newborn due to the Appellant's use of prescription medications taken for her opiate dependence.

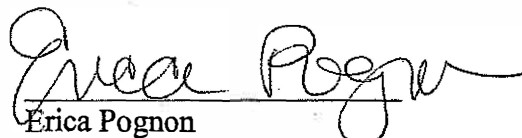
The burden is on the Appellant to show, by a preponderance of the evidence, that the FRC panel decision, to approve the change in J's permanency goal from reunification to adoption, was not in conformity with the Department's regulations and policies, and resulted in substantial prejudice to the Appellant. [110 CMR 10.23] The Hearing Officer finds that the Appellant failed to meet this burden of proof. J has been in the care of the Department for over a year and the Department is still closely monitoring the Appellant's interaction with the child during supervised visits; which is unusual in a case that has been opened that long.

Order

The decision of the Department's FCR Panel, to approve the change of goal for J from permanency through reunification with family to permanency through adoption, was made in conformity with Department regulations and policies and with a reasonable basis. Therefore, the Department's decision is **AFFIRMED**.


Frances I. Wheat
Administrative Hearing Officer

Date: 11/28/17


Erica Pognon
Fair Hearing Supervisor