FOURTH DIVISION
May 15, 2014

1-13-2758

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BLANCA VELAZQUEZ,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 12 CH 20108
	)	
THE DEPARTMENT of CHILDREN and FAMILY SERVICES, and BOBBIE GREGG, in her official capacity as Acting Director of Children and Family Services,	)	
	)	Honorable
	)	Peter Flynn,
Defendants-Appellees.	)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

ORDER

¶ 1 *Held*: The Director's decision is set aside and defendants are ordered to expunge the indicated finding of neglect as to plaintiff for the June 1, 2011 incident from the State central register. Defendants had statutory authority to indicate a finding of neglect based on inadequate supervision of plaintiff's children; however the director failed to consider all the statutory factors required to be considered to determine whether a child had inadequate supervision, therefore, we find the final administrative decision is clearly erroneous.

¶ 2 Plaintiff, Blanca Velazquez, asks this court to reverse the decision of defendants, the Department of Children and Family Services (DCFS or the department) and the director of children and family services (the director), to deny plaintiff's request to expunge an indicated finding of neglect from the department's State central register. DCFS has the power to find a parent neglected his or her child under the rule plaintiff allegedly violated. Even though the rule is valid, the director failed to apply the proper standards to the facts. Applying the standards articulated in the rule to the facts in this case, the director's decision is clearly erroneous. Accordingly, we set aside the director's decision and order defendants to expunge the indicated finding of neglect as to plaintiff for the June 1, 2011 incident from the State central register.

¶ 3 BACKGROUND

¶ 4 On June 3, 2011, defendant DCFS received a report alleging child abuse or neglect of plaintiff's children: 8-year-old Ad.V., and 1-year-old E.V. Plaintiff has a third child, 4-year-old Al.V. The nature of the alleged neglect was inadequate supervision.

¶ 5 A. Indicated Finding

¶ 6 DCFS opened an investigation following a report that on June 1, 2011, plaintiff left Ad. V. and E.V. home alone as she took Al. V. to school. Al. V.'s school is two miles from plaintiff's home. On June 27, 2011 DCFS wrote plaintiff and informed her that after the investigation it had determined that she neglected a child and indicated plaintiff for inadequate supervision. The department's letter explained that an indicated finding means that DCFS's investigation found credible evidence of neglect and informed plaintiff that indicated reports are retained on file in the State central register for 5 years. DCFS stated in the letter that the facts it gathered in the investigation would lead a reasonable person to believe that a child was abused or neglected. Plaintiff appealed the indicated finding to the DCFS administrative hearings unit

(hearings unit). Following an administrative hearing, an administrative law judge (ALJ) issued a recommendation and opinion. The ALJ found that DCFS had not met its burden of proof to show that the allegation of inadequate supervision was supported by a preponderance of the evidence. The ALJ recommended that the director grant plaintiff's request for expungement of the indicated finding of allegation of harm # 74 (inadequate supervision) from the State central register.

¶ 7 1. The Investigation

¶ 8 On June 6, 2011 a DCFS child protection investigator, David B. Martin, interviewed plaintiff. Plaintiff told Martin that on June 1, 2011, she overslept and was "out of sorts" due to a lack of sleep. Plaintiff was lacking sleep that week because E. V. had been sick. Because plaintiff overslept she missed the bus that takes Al. V. to school, so she decided to drive him to school. When plaintiff left to drive Al. V. to school, she did not immediately realize she had left Ad. V. and E. V. at home. Plaintiff's neighbor, Norma Flores, helps plaintiff with the children if plaintiff feels overwhelmed or has an errand to run. Plaintiff told the investigator she had been seeing a therapist and was supposed to be taking an herbal remedy, but was not because it caused nausea.

¶ 9 Plaintiff's therapist, Jenny Ripley, told Martin she (Ripley) had been seeing plaintiff for depression but transferred plaintiff's case to a bilingual therapist. Ripley recommended plaintiff obtain a psychiatric evaluation but plaintiff had not done so. Martin informed plaintiff that the psychiatric evaluation "was necessary to ensure that [plaintiff was] getting the appropriate monitoring of her medication so that her mental health needs are appropriately treated." After Martin contacted plaintiff, she informed Martin she had made an appointment with the referral

the therapist Ripley provided. Ripley did not feel that plaintiff's mental health status interfered with plaintiff's ability to supervise her children.

¶ 10 At the same time Martin interviewed plaintiff, Martin interviewed Ad. V. Ad. V. told the investigator that on the day in question she stayed home with her brother, 18-month old E. V., while her mother took Al. V. to school. Ad. V. told the investigator her mother took Al. V. to school because Al. V. had missed his bus. Ad. V. told the investigator that sometimes, when her mother takes Al. V. to get on the bus, Ad. V. stays with E. V. for a few minutes. This time, her mother was gone for about 20 minutes. Ad. V. had never been left with E. V. for that long before. Ad. V. told the investigator that during those 20 minutes she was not scared, that she knows when to open the door, and that she knows when it is her mother or the neighbor at the door. The neighbor did not come to their apartment after her mother left. Al. V. told the investigator his mother and father never left him alone in the house.

¶ 11 Plaintiff provided Martin with the name of the children's doctor, Peter Novota. Martin interviewed their doctor. The doctor told Martin he never had concerns of abuse or neglect of the children and that their parents had been model parents. Dr. Novota did not suspect any mental health problems that would affect plaintiff's ability to parent.

¶ 12 Martin recommended to his supervisor, Carla Roberts that DCFS find the allegation of neglect is indicated. Roberts supported Martin's recommended finding. DCFS found the allegations indicated as to Ad. V. and E. V. Roberts listed a rationale for the finding as to each child in a DCFS investigation report. The rationale for the indicated finding for each child stated that evidence was presented that rises to the level of neglect under allegation # 74, examples of which include, but are not limited to, leaving children alone when they are too young to care for

themselves. The rationale stated that plaintiff took Al. V. to school and was gone for about 20 minutes, and during that time Ad. V. and E. V. were home alone.

¶ 13 2. The Administrative Hearing

¶ 14 Plaintiff testified at the hearing that she had not slept well the night before June 1, 2011. She woke at 7:30 a.m., woke her children, and dressed Al. V. as fast as she could. Plaintiff told Ad. V. "she knows what to do" then went to take Al. V. to his bus to school. Plaintiff explained that when she told Ad. V. she (Ad. V.) knows what to do, plaintiff was referring to Ad. V.'s normal morning routine to be ready to go to school. Plaintiff missed the bus and took Al. V. to school in her car, leaving Ad. V. and E. V. in the home. Plaintiff testified she realized she left Ad. V. and E. V. at home while she was in the car taking Al. V. to school. Plaintiff left Al. V. with a classroom assistant at the school, returned to her car, and drove home. When plaintiff returned home, E. V. was watching television in bed in plaintiff's room. Plaintiff testified E. V. always came to her bed early in the morning. He could not turn on the television in her room himself, so Ad. V. must have turned it on for him, and Ad. V. knows what morning program E. V. likes. When plaintiff returned home, she walked Ad. V. to her bus to school. E. V. comes with them to Ad. V.'s bus so Ad. V. can say goodbye. Plaintiff testified she later told her therapist she left the children at home.

¶ 15 Plaintiff testified that Ad. V. is charming, compassionate, and smart, and that she helps a lot. Ad. V. helps with housework and taking care of the other children. Plaintiff's husband also testified that Ad. V. is very smart and takes good care of her brothers. Plaintiff's neighbor, however, described Ad. V. as a "normal girl." The children know the neighbor, Norma Reyes, she (Reyes) has babysat the children, and the children play in Reyes's home with her child. Reyes has observed Ad. V.'s interactions with her brothers. Reyes testified Ad. V. "took care

of" her siblings. Norma Arriola knows Ad. V. from a children's program. Arriola described Ad. V. as responsible and obedient. Arriola also testified that she has observed Ad. V. interact with her siblings and that Ad. V. takes care of them.

¶ 16 Plaintiff testified she trusts Ad. V. to help her take care of the other children because Ad. V. is responsible and loves them a lot. Plaintiff testified that about 3 years prior, she had talked to her children about what to do in an emergency. She told Ad. V. to knock on their neighbor's door if there was an emergency when plaintiff was not home or if plaintiff became incapacitated. Plaintiff's husband also told the children that if something happened, they were to look for the neighbor or call 9-1-1.

¶ 17 Roberts, the supervisor on plaintiff's DCFS investigation, testified the department investigated plaintiff for inadequate supervision. Roberts testified that the department's internal procedures regarding allegation # 74 require an assessment of the minor or caregiver's ability to make sound judgments in the event of an emergency. Roberts confirmed the investigator made that assessment of Ad. V., but Martin's assessment is not contained in the investigative report and was not made in writing at any time. Roberts also confirmed with the investigator that the door to plaintiff's home was locked while plaintiff was taking Al. V. to school, and that Ad. V. was not afraid during the brief period plaintiff was away. Roberts testified she spoke with the investigator and he provided Roberts with a recommendation based on evidence gathered during his investigation, which he conducted according to her instructions, that plaintiff did leave Ad. V. and E. V. alone and unattended. Roberts testified she and the investigator discussed and she considered Ad. V.'s maturity and Ad. V.'s ability to make sound judgments in case of emergency. They also discussed the fact that Ad. V. was experienced in helping care for her

younger siblings. But Roberts did not document how she considered those things or her discussions with the investigator.

¶ 18 Roberts testified that Ad. V. could make a sound decision in the event of an emergency involving only her, but that being left in the care of a 16-month-old was beyond her ability to make a sound judgment in the event of an emergency. Roberts testified "the policy is clear in terms of her ability and maturity to make the type of judgment that would be necessary in the event of an emergency for that child." Roberts conceded that "[h]ad [Ad. V.] been home alone, it might have been a different situation." Roberts admitted that she did not base her findings on her consideration of Ad. V.'s ability to make sound judgments in the event of an emergency, but she testified she did factor in Ad. V.'s maturity. Roberts testified the evidence which supports her finding was plaintiff's statements, the children's statements, and plaintiff's statement to her therapist. Based on the evidence, Roberts recommended that plaintiff be indicated for neglect. Roberts articulated no additional evidence on which she based her recommendation other than the statements and the policy regarding inadequate supervision.

¶ 19 The ALJ issued a written recommendation and opinion after the hearing. The ALJ found that a preponderance of the evidence does not support the indicated finding. The ALJ's recommendation noted the uncontested facts and made findings of fact based on the testimony. The uncontested facts were that plaintiff woke up late on the morning of June 1, 2011, left Ad. V. and E. V. home alone while she drove Al. V. to school, Ad. V. was not afraid when she realized her mother had been gone longer than usual, and that neither child was harmed when plaintiff returned home. It was uncontested that when plaintiff returned home, Ad. V. was dressed and prepared for school and had turned on the television for her brother to watch his regular morning program. The ALJ's findings of fact were that plaintiff returned within 20

minutes, and Ad. V. knew what to do in case of emergency. As to Ad. V., the ALJ found that she is a mature 8-year-old who helps her parents with chores and with her siblings, and she was mature enough to care for herself and for E. V. for a limited amount of time. The ALJ also found that the investigator had made no indication in the investigative report of his assessment of Ad. V.'s level of maturity or whether being left alone with E. V. put her in a situation or circumstances likely to require judgment or actions greater than her level of maturity, physical condition, or mental abilities would reasonable dictate.

¶ 20 The ALJ applied the facts to the language of the "inadequate supervision" allegation of harm and the factors to be considered when determining whether a child has been inadequately supervised. Those factors are categorized into child, caregiver, and incident factors. After discussing the facts in the context of the relevant factors, the ALJ found that, taking the factors into consideration, Ad. V. was able to care for herself and was able to provide adequate and appropriate care for E. V. on the morning of June 1, 2011.

¶ 21 B. Final Administrative Decision

¶ 22 On May 1, 2012, the director wrote to plaintiff's attorney and issued the department's final administrative decision. The director disagreed with the ALJ's recommendation. The director determined the preponderance of the evidence showed that the allegation was supported and denied plaintiff's request to expunge the record. The director disagreed with the ALJ's reasoning that the 8-year-old was mature enough to be left home alone with her 16-month-old brother. The director found that the assessments of Ad. V.'s maturity "are based on her actions when there are adults present that are supervising her and assisting her with her decision making." The director dismissed the ALJ's finding that Ad. V. knew what to do in case of emergency by stating that "[t]he fact that no calamity occurred during the 20 minutes that

[plaintiff] left her children unsupervised does not mean that it was proper to leave an eight year old child to be the primary caregiver for a 16 month old. Clearly a 16 month old is a handful, and there are many adults who would find it challenging to supervise a 16 month old for less than 20 minutes." The director concluded that it was not reasonable to leave an 8-year-old child alone for 20 minutes to supervise a 16-month-old child. The director concluded that both children were unsupervised and that doing so for 20 minutes constitutes inadequate supervision.

¶ 23 Defendant appeals the director's final administrative decision denying plaintiff's request to expunge the indicated findings of neglect based on inadequate supervision. For the following reasons, we set aside the director's decision and order defendants to expunge the indicated finding of neglect as to plaintiff for the June 1, 2011 incident from the State central register.

¶ 24 ANALYSIS

¶ 25 This appeal challenges a final decision by an administrative agency under the Administrative Review Law (735 ILCS 5/3-101 *et seq*. (West 2010)). *West-Howard v. Department of Children and Family Services*, 2013 IL App (4th) 120782, ¶ 16 ("the provisions of the Administrative Review Law shall apply to and govern all proceedings for judicial review of DCFS's administrative decisions. [Citation.]") (Internal quotation marks omitted.). The director adopted some of the ALJ's findings of fact and made findings of fact other than the facts in the ALJ's recommendation. "[I]t is the agency's findings of fact that are entitled to deference, not the findings of a hearing officer or an ALJ. [Citations.] This is true even when the agency's findings differ from those of the ALJ and the agency has not had the opportunity to observe the witnesses." *Wilson v. Illinois Department of Professional Regulation*, 317 Ill. App. 3d 57, 64-65 (2000).

¶ 26 The director disagreed with the ALJ's reasoning and entered a decision contrary to the ALJ's recommendation. "It is the final decision of the agency that is reviewed in an administrative review proceeding ***." *Wilson*, 317 Ill. App. 3d at 64. Ultimately, to reach the final decision, the director had to apply findings of fact to the regulation at issue. "[W]e review the [department's] decision *** applying the law to its findings *** under the clearly-erroneous standard." *Chamberlain v. Civil Service Comm'n of Village of Gurnee*, 2014 IL App (2d) 121251, ¶ 25. Accordingly, we will review the director's findings of fact to determine if they are against the manifest weight of the evidence and the final decision to determine whether it is clearly erroneous.

¶ 27 1. Validity of Allegation # 74

¶ 28 Plaintiff's first contention on appeal is that the director's decision is void because DCFS lacks statutory authority to indicate her for inadequate supervision. Plaintiff argues the inadequate supervision allegation is void because it does not require the department to find that the child was "neglected" as that term is defined in the department's enabling statute. We initially address the State's argument plaintiff forfeited this issue for review by failing to raise it before the administrative agency. *Jackson v. City of Chicago*, 2012 IL App (1st) 111044, ¶ 21 ("Generally, issues or defenses not raised before the administrative agency will not be considered for the first time on administrative review."). We agree plaintiff forfeited her claim that allegation # 74 permits DCFS to exceed its statutory authority. "The rule of waiver is an admonition of the parties and not a limitation on the jurisdiction of the court. [Citation.]" *U.S. Bank National Ass'n v. Rose*, 2012 IL App (3d) 130356, ¶ 24. "[W]e may overlook general forfeiture principles in a civil case and consider an issue not raised below if the issue is one of law, is fully briefed and argued by the parties and the public interest favors considering the issue

now." *Forest Preserve District of Du Page County v. First National Bank of Franklin Park*, 2011 IL 110759, ¶ 28. Plaintiff's claim raises a pure question of law. The public interest favors not leaving open the question of the validity of allegation # 74. Therefore, we will review plaintiff's claim. *Id.*

¶ 29 An agency's authority must either arise from the express language of the statute or devolve by fair implication and intendment from the express provisions of the [statute] as an incident to achieving the objectives for which the [agency] was created. [Citations.]" (Internal quotation marks omitted.) *Crittenden v. Cook County Comm'n on Human Rights*, 2012 IL App (1st) 112437, ¶ 78. The department derives its authority to investigate reports of alleged child neglect, to determine whether the allegation is indicated or unfounded, and to enter initial, preliminary, and final reports of alleged child neglect into a State central register from the Abused and Neglected Child Reporting Act (Reporting Act) (325 ILCS 5/1 *et seq*. (West 2010)). *Burris v. Department of Children and Family Services*, 2011 IL App (1st) 101364, ¶¶ 32-33. "An act that is unauthorized is beyond the scope of the agency's jurisdiction. [Citation.] When the agency renders a decision that it is without statutory authority to make, it is without jurisdiction and the decision is void. [Citation.]" *Julie Q. v. Department of Children & Family Services*, 2013 IL 113783, ¶ 24.

¶ 30 In pertinent part, the Reporting Act defines a neglected child as one who is not receiving care necessary for his or her well-being. 325 ILCS 5/3 (West 2010). DCFS adopted regulations identifying specific instances of child neglect. 89 Ill. Admin. Code 300.Appendix B (2011). The regulations describe specific incidents of harm that must be alleged for the department to accept a report of child neglect. *Burris*, 2011 IL App (1st) 101364, ¶ 36. The allegation of harm at

issue in this case is allegation # 74 (inadequate supervision), and reads, in pertinent part, as follows:

> "The child has been placed in a situation or circumstances that are likely to require judgment or actions greater than the child's level of maturity, physical condition, and/or mental abilities would reasonably dictate. *** Examples include, but are not limited to:
>
> -- Leaving children alone when they are too young to care for themselves.
>
> * * *
>
> -- Leaving children in the care of an inadequate or inappropriate caregiver." 89 Ill. Admin. Code 300.Appendix B (Allegation # 74) (2011).

¶ 31 Allegation # 74 lists factors which should be considered when determining whether a child is inadequately supervised, categorized into (1) child factors, (2) caregiver factors, and (3) incident factors. *Id.*

¶ 32 Plaintiff argues that nothing in the text of allegation # 74 or in the department's procedures for allegation # 74 requires the department to find that as a result of inadequate supervision the child was neglected because the child was "not receiving care necessary for his or her well-being." 325 ILCS 5/3 (West 2010). Plaintiff admits the factors that are to be considered to determine whether a child has been inadequately supervised could be applied in such a way to confine allegation # 74 to situations where a child has in fact been deprived of necessary care. However, plaintiff argues, DCFS has failed to expressly limit the application of allegation # 74 to those situations. Rather, its broad language opens the door for the department

to indicate a report of child neglect based on inadequate supervision, regardless of whether the child was receiving the care necessary for his or her well-being, where to do so would be "decidedly absurd." Defendants respond allegation # 74 comports with the Reporting Act because it identifies "circumstances when a child is not receiving care necessary for her well-being because she is not being properly supervised." Defendants cite our supreme court's decision in *Julie Q.*, 2013 IL 113783, ¶ 44 for the proposition that "[n]ot every Allegation promulgated by DCFS needs to follow the exact language provided by the legislature's definition of neglect under section 3 of the [Reporting] Act." *Id.*

¶ 33 We reject plaintiff's argument that allegation # 74 is overbroad in that it could be applied to a situation or circumstances where the child was receiving care necessary for its well-being but, nonetheless, was "inadequately supervised" as that term is defined in allegation # 74. Plaintiff's argument ignores the purpose of the DCFS regulations. An agency charged with enforcing a statute is given inherent authority and wide latitude to adopt regulations or policies reasonably necessary to perform the agency's statutory duty. *Chemed Corp., Inc. v. State*, 186 Ill. App. 3d 402, 410 (1989). "DCFS promulgated Appendix B to describe the specific incidents of harm that constitute *** neglect. [Citation.]" (Internal quotation marks omitted.) *Julie Q.*, 2013 IL 113873, ¶ 23. In other words, allegation # 74 defines neglect under the Reporting Act in the context of inadequate supervision. A specific incident of neglect occurs when a child has been placed in a situation or circumstances that are likely to require judgment or actions greater than the child's level of maturity. Allegation # 74 lists factors to be considered in determining if the child has been placed in such a situation or circumstances. *Julie Q.*, 2013 IL 113783, ¶ 5; 89 Ill. Admin. Code 300.Appendix B (Allegation # 74) (2011). If, after consideration of those factors based on the evidence in the record, DCFS finds that a child was inadequately supervised

within the meaning of allegation # 74 then, by law, that child was "not receiving the care necessary for his or her well-being." *Walk v. Department of Children and Family Services*, 399 Ill. App. 3d 1174, 1181 (2010) ("DCFS promulgated regulations detailing various child-abuse and neglect allegations, essentially defining problematic conduct."); *Id.* at 1187 ("If there is evidence in the record supporting the administrative agency's decision, it should be affirmed. [Citation.]") (Internal quotation marks omitted.).

¶ 34 "An administrative regulation carries the same presumption of validity as a statute, and so long as the regulation furthers the purpose of the statute and is not arbitrary, unreasonable or capricious, it will be sustained." *Board of Trustees of University of Illinois v. Illinois Educational Labor Relations Board*, 274 Ill. App. 3d 145, 148 (1995). "The two purposes of the [Reporting] Act are to protect (1) any abused child and (2) any person erroneously accused of abuse. [Citations.] Many provisions in the [Reporting] Act are designed to protect alleged abusers from the damaging effects of erroneous or false reports. [Citation.]" *Kemp-Golden v. Department of Children and Family Services*, 281 Ill. App. 3d 869, 874 (1996). The department's rules further the purposes of the Reporting Act and are not arbitrary because they provide a means to identify neglect, protect neglected children, and protect against false accusations. The department's rules set forth a procedure for investigating reports of neglect. 89 Ill. Admin. Code 300.100 (1990) (Initial Investigation); 89 Ill. Admin. Code 300.110 (1998) (The Formal Investigative Process). Allegation # 74 provides clearly defined factors that should be considered before a report of neglect is found to be indicated. 89 Ill. Admin. Code 300.Appendix B (Allegation # 74) (2011). If, after an investigation, a report is indicated, the rules permit the department to offer services if the parent or caregiver is willing to cooperate, and to seek court intervention if the parent or caregiver is not willing to cooperate. 89 Ill. Admin.

Code 300.150(a) (1995). The rules also require the department to offer services when a report is unfounded "but the family *** may need services." 89 Ill. Admin. Code 300.150(b) (1995). Accordingly, we hold that allegation # 74 is a valid exercise of the department's authority under the Reporting Act and defendants had authority to indicate plaintiff for neglect based on inadequate supervision. In light of the enumerated factors used to determine whether a child had been inadequately supervised as well as the specific examples listed in the department's rules, we also reject plaintiff's argument that allegation # 74 "is unclear and impossible to consistently and accurately apply."

¶ 35 2. The Director's Application of Allegation # 74

¶ 36 Having determined that the department had the statutory authority to find the report of neglect against plaintiff for inadequate supervision on June 1, 2011 was indicated, we next turn to the issues of whether the director's findings of fact are against the manifest weight of the evidence and whether the decision is clearly erroneous. The director's factual findings are held to be *prima facie* true and correct and will not be disturbed on review unless against the manifest weight of the evidence. *Wilson*, 317 Ill. App. 3d at 64. Findings of fact are against the manifest weight of the evidence where the opposite conclusion is clearly evident or because there is not sufficient evidence in the record to support the agency's decision. *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88-89 (1992); *Carrillo v. Park Ridge Firefighters' Pension Fund*, 2014 IL App (1st) 100656, ¶ 21. "Although the manifest evidence standard is a high hurdle, it still does not relieve the appellate court of its duty to examine the evidence in an impartial manner and to set aside an order unsupported in fact. [Citation.]" (Internal quotation marks omitted.) *Boom Town Saloon, Inc. v. City of Chicago*, 384 Ill. App. 3d 27, 32 (2008). We will find the decision clearly erroneous only where we are left with the

definite and firm conviction that a mistake has been committed. *Carrillo*, 2014 IL App (1st) 100656, ¶ 21.

¶ 37 Defendants argue that the director disagreed with the ALJ's determination that Ad. V. was mature enough to be left home alone with E. V. and that it was proper and reasonable to leave Ad. V. to be the primary caregiver for E. V., and that the record does not contradict these findings of fact. Defendants thereby imply that the director found that Ad. V. was not mature enough to be left home alone with E. V. or to be his caregiver as determinations of fact. However, we note that whether a child is too young to care for herself and whether a caregiver is inadequate or inappropriate are not pure questions of fact because those determinations require an application of the facts to the factors in allegation # 74. *Slater v. Department of Children and Family Services*, 2011 IL App (1st) 102914, ¶ 33 (neglect determination presented mixed question of law and fact). See also *Maplewood Care, Inc. v. Arnold*, 2013 IL App (1st) 120602, ¶ 56 (despite classification of finding of neglect under Nursing Home Care Act (210 ILCS 45/1-101 *et seq*. (West 2012)) as a factual determination, court held finding was a legal conclusion based on application of the facts to the statute and regulation and thus presented a mixed question of law and fact).

¶ 38 We find that the director's findings of fact were that the incident occurred approximately 4 months after Ad. V.'s 8th birthday and that the assessments of Ad. V.'s maturity were "based on her actions when there are adults present that are supervising her and assisting her with her decision making." The director also found that "many adults *** would find it challenging to supervise a 16 month old for less than 20 minutes." The factual findings with regard to the witnesses' assessments of Ad. V.'s maturity are not against the manifest weight of the evidence. It is reasonable to infer that when plaintiff was present, she was supervising Ad. V. Reyes

testified she observed Ad. V. while she was babysitting the children. Arriola observed Ad. V. while she was participating in an organized children's program and described Ad. V. as obedient. Although none of the witnesses directly testified to "supervising her and assisting her with her decision making" that fact is a reasonable inference from the testimony. "[T]his court will not substitute its judgment for that of the agency merely because other reasonable inferences could have been drawn from the evidence. [Citations.]" (Internal quotation marks omitted.) *520 South Michigan Ave. Associates v. Department of Employment Security,* 404 Ill. App. 3d 304, 322 (2010).

¶ 39 The director found that plaintiff left her 8-year-old and 16-month-old children home unsupervised for approximately 20 minutes on June 1, 2011. The director found that "it was not reasonable to leave an eight year old child alone for 20 minutes to supervise a 16 month old child" and Ad. V. was "placed in a situation or circumstances that [were] likely to require judgment or actions greater than [her] level of maturity, physical condition, and/or mental abilities would reasonably dictate." We will consider whether the findings and decision are clearly erroneous. It is apparent from the director's written decision that his finding that plaintiff left E. V. unsupervised is based on his determination that Ad. V. was an inadequate or inappropriate caregiver. Whether E. V. was left unsupervised will depend on our determination of whether the director's finding that Ad. V. was an inadequate or inappropriate caregiver is clearly erroneous.

¶ 40 The director's decision that Ad. V. had inadequate supervision is clearly erroneous because the director should have but failed to consider all the factors listed in allegation # 74. With regard to Ad. V., the director arguably considered only one child factor: Ad. V.'s ability to make sound judgments in the event of an emergency. The director did not refute the ALJ's

finding that Ad. V. knew what to do in the case of an emergency. The director simply dismissed that finding on the basis that "[t]he fact that no calamity occurred *** does not mean that it was proper to leave an eight year old child to be the primary caregiver for a 16 month old." The director's decision does not make clear whether the director was considering this factor in the determination of whether Ad. V. had inadequate supervision or whether Ad. V. was an appropriate and adequate caregiver for E. V. Defendants assert on appeal that "the fact that no harm befell the children has no bearing on whether they were inadequately supervised." Whether the fact no harm befell the children has any bearing on whether they *were* adequately supervised is not so apparent. Regardless, the director's written decision does not consider two remaining factors which are provided by statute: 1.) Ad. V.'s ability to care for herself and to comprehend the situation, and 2.) an assessment of any of the incident factors related to whether Ad. V. had inadequate supervision. "The first duty of a reviewing court in a case involving the findings of an administrative agency is to determine if the [agency] applied the proper tests to the evidence presented. [Citation.] When the agency with primary jurisdiction applies the wrong standard to the evidence before it, any resulting finding is invalid ***. [Citation.]" *Violette v. Department of Healthcare and Family Services*, 388 Ill. App. 3d 1108, 1113 (2009).

¶ 41 In addition to the director's failure to consider the relevant factors in making the decision as to Ad. V., applying those factors to the record facts, we are left with the definite and firm conviction that a mistake has been committed. We again note the director did not make a clear determination that Ad. V. did *not* have the ability to make a sound judgment in the event of an emergency. The evidence in the record and the only evidentiary finding of record is that she did know what to do in the case of an emergency. Defendants argue the witnesses' description of Ad. V. do not suggest that she was capable of caring for herself and E. V. without supervision.

The record contains other evidence of Ad. V.'s ability to care for and to protect herself. The record contains evidence that when plaintiff returned from taking Al. V. to school, Ad. V. had completed her morning routine as plaintiff instructed. Plaintiff testified that she took Ad. V. to the bus stop for school when she returned. Ad. V. was unharmed when plaintiff returned. The witnesses testified that Ad. V. knew when and when not to open the door to their home. The record also contains evidence that Ad. V. comprehended the situation. Ad. V. knew that her mother was away longer than usual when she took Al. V. to the bus stop but Ad. V. was not afraid. We find that these facts are relevant to the question before the director because they related to factors specified in allegation # 74. Defendants concede these factors should be considered but argue that the director has discretion to assess how much weight, if any, to give each. As noted above, the director's written decision fails to demonstrate the director gave any consideration to these facts or applied the factors in allegation # 74, much less made a determination that any factor was due little or no weight in this case.

¶ 42 An application of the incident factors also leads this court to the firm conviction that the director made a mistake. Defendants argue plaintiff "did not make a conscious decision to leave the children home alone because she determined that Ad. V. would be able to care for E.V.," therefore "the Director would not have erred in rejecting any claims about Ad. V.'s supposed maturity." We find this argument unconvincing in light of the factors the director should have considered to determine whether Ad. V. was left with inadequate supervision as that term is defined in the department's rules. The inquiry framed by the example in allegation # 74 is whether Ad. V. was too young to care for herself based on her "age and developmental stage" and "physical condition, particularly related to [her] ability to care for or protect *** herself." There is no factor related to the parent or caregiver's conscious assessment of those factors and

any such decision by the parent would not affect the director's independent assessment of the child. Allegation # 74 has no exception for a parent or caregiver's subjective belief their child is capable of caring for himself or herself.

¶ 43 The occurrence happened only once, for a brief duration. The incident occurred in the morning hours. Ad. V. was at home, a place where she could feel and was safe, and the condition of the home was, according to DCFS, not unsanitary. Plaintiff testified there was food in the home that Ad. V. could access. There is evidence in the record to suggest that plaintiff provided Ad. V. with a number to call in the event of an emergency (9-1-1) as well as a person to contact (Reyes). The record contains no evidence of any other factors that may have endangered Ad. V. for the 20 minutes plaintiff left her alone. The situation and the circumstances of being alone in her home for 20 minutes on a school morning with her 16-month-old brother were not likely to require Ad. V. to exercise judgment or take actions greater than her abilities would dictate, and the contrary finding by the director is clearly erroneous.

¶ 44 The director similarly failed to apply the appropriate factors to the evidence to determine whether E. V. had inadequate supervision on June 1, 2011 for 20 minutes because Ad. V. was an inadequate or inappropriate caregiver for that period of time in their home. The director simply concluded, without saying why, that "it was not reasonable to leave an eight year old child alone for 20 minutes to supervise a 16 month old child." That generalized statement is not the appropriate test for the adequacy of a caregiver. The director found that an 8-year-old was not mature enough to assume responsibility for the situation without citing any evidence. The factors the director should have applied look to the caregiver's presence, capabilities, physical condition, and cognitive and emotional condition. Ad. V. was present and had access to a number to call in the event of an emergency. There was evidence which established that Ad. V.

was mature enough to assume responsibility for the situation she was in and the director failed to dispute it. Plaintiff testified that when she returned, Ad. V. had turned on the television for E. V., which was part of his usual morning routine. Ad. V.'s maturity to assume responsibility for the situation is also established by the fact that she was not frightened by the situation and also continued with her own morning routine. Ad. V. did not require assistance to care for E. V. in the situation they were in--that is, briefly without their mother as Ad. V. prepared for school. During that time, Ad. V. did not have to assume primary care giving duties such as meal preparation, laundry, grocery shopping, or transportation. Plaintiff testified that E. V. came to her bed on his own in the mornings. From the record, we can conclude that the only duty Ad. V. assumed--the duty plaintiff would have assumed if present--was to turn on a television. Ad. V. performed that task, thus the evidence proves that she was physically able to care for E. V. and to make appropriate judgments for the situation they were in for the 20 minute time period at issue in this case. Ad. V.'s responsibility for being the caregiver for E.V. cannot be viewed in the abstract. The director should have considered the actual incident rather than abstract propositions about 8-year-olds and 16-month-olds. This incident happened one time, was of limited duration, and happened in the children's home. For this situation and under these circumstances, finding that Ad. V. was an inadequate or inappropriate caregiver for E. V. was clearly erroneous.

¶ 45 In light of the foregoing, we have no need to reach plaintiff's arguments that the director impermissibly shifted the burden to her to prove that Ad. V. was an adequate caregiver for E. V. or that the director applied an erroneous *per se* age-based rule to determine whether Ad. V. was in a situation or circumstances likely to require judgment or actions greater than her level of maturity. The director's decision is set aside and defendants are ordered to expunge the

indicated finding of neglect as to plaintiff for the June 1, 2011 incident from the State central register.

¶ 46 CONCLUSION

¶ 47 For the foregoing reasons, the director's decision is set aside and defendants are ordered to expunge the indicated finding of neglect as to plaintiff for the June 1, 2011 incident from the State central register.

¶ 48 Set aside, with directions.