2014 IL App (1st) 131099-U

No. 1-13-1099

Fifth Division
June 13, 2014

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

SUBHASIS GHOSH, Plaintiff-Appellant, v. THE ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES; BOBBIE GREGG, in her Official Capacity[1]; MARKO I. DJURISIC, in his Official Capacity; MCKELVIE JACKSON, in his Official Capacity; THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES ADMINISTRATIVE HEARINGS UNIT; and JOHN DOES and JANE DOES A-Z, Defendants-Appellees.	Appeal from the Circuit Court of Cook County. No. 12 CH 27604 The Honorable Mary Anne Mason, Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Palmer concurred in the judgment.

ORDER

¶ 1 *Held:* The Director's decision to deny plaintiff's request to expunge an indicated finding of neglect due to inadequate supervision is reversed, where the eight- and nine-year-old

[1] While plaintiff's notice of appeal lists Richard H. Calica as the Director of the Department of Children and Family Services, Bobbie Gregg currently holds the position of Acting Director. Accordingly, pursuant to section 2-1008(d) of the Code of Civil Procedure (735 ILCS 5/2-1008(d) (West 2012)), we have amended the caption to correctly reflect the current Director. On this court's own motion, we hereby substitute her as a party as shown above.

children of plaintiff were left alone for less than two hours and responded to a smoking microwave by calling plaintiff.

¶ 2 Defendant, the Illinois Department of Children and Family Services (DCFS), entered an indicated finding of neglect against plaintiff Subhasis Ghosh in the State Central Register, based on an incident in which plaintiff's two children, ages eight and nine, were left home alone for several hours while plaintiff was at work. Plaintiff contested the finding of neglect, seeking to have the finding expunged. After a hearing before an administrative law judge (ALJ), the ALJ determined that the preponderance of the evidence did not support a finding of neglect, and recommended granting plaintiff's expungement request. However, the Director of DCFS (Director) rejected the ALJ's recommendation and instead denied plaintiff's expungement request, determining that the preponderance of evidence supported a finding of neglect. Plaintiff sought administrative review in the circuit court, and the circuit court affirmed the Director's decision. Plaintiff appeals, arguing that the Director's finding was clearly erroneous. For the reasons that follow, we reverse.

¶ 3 BACKGROUND

¶ 4 The underlying facts in this case are not in dispute. On October 10, 2011, plaintiff's daughter, age nine, and son[2], age eight, did not have school on the Columbus Day holiday. Plaintiff had failed to arrange childcare for the children, so they were left alone while plaintiff and his wife went to work. Plaintiff worked approximately 3.5 miles, or five to seven minutes, away from home, and was planning on being at work for only a few hours. Shortly before 11 a.m., plaintiff's daughter called plaintiff and told him that it smelled like something was burning in the home. Plaintiff ordered his daughter to go outside with her

[2] The first names of plaintiff's children begin with the same letter. Accordingly, we refer to them simply as plaintiff's son and daughter and not by their initials.

brother, and called the fire department on his way home. The fire department determined that there was no fire or visible smoke, and that the smell originated from something burnt inside the microwave.

¶ 5 After an investigation, DCFS notified plaintiff on December 8, 2011, that it was indicating a report of "Inadequate Supervision" against him. On January 16, 2012, plaintiff filed an appeal of the indicated finding. On May 16, 2012, DCFS's administrative hearing unit conducted a hearing on plaintiff's appeal.

¶ 6 At the hearing, Palatine police officer Wayne Sunderlin testified that on October 10, 2011, at approximately 10:54 a.m., he was dispatched to an address on Illinois Avenue to assist the fire department. When he arrived at the home "within a minute" of the dispatch, the fire department was already present, and Sunderlin observed two children standing outside with an adult neighbor. The fire department informed Sunderlin that there had been a microwave fire in the home's kitchen.

¶ 7 Sunderlin testified that the two children—a boy and a girl, eight and nine years old---appeared to be "very scared." He spoke with them and they indicated that the microwave had started smoking after they attempted to microwave food. He asked where their parents were, and one of the children indicated that their father was at work and their mother was not at home.

¶ 8 Sunderlin then went into the kitchen to again speak with the firefighters, who indicated that the fire had already been extinguished. When Sunderlin entered the home, there was no visible smoke, but there was a smell of burnt food.

¶ 9 Sunderlin returned to speak with the children again. He asked when their father had left, and they indicated that he had left "a couple hours" prior to the fire. Sunderlin testified that

the children were still "scared" and "very nervous" waiting for their parents and were pacing back and forth.

¶ 10 Sunderlin testified that approximately 15 minutes later, plaintiff arrived home. Plaintiff initially informed Sunderlin that "he had just stepped out for a minute," but when Sunderlin later informed plaintiff that there was information contradicting that, plaintiff indicated that he had in fact been at work and had left the home at 9 a.m. Plaintiff informed Sunderlin that he had returned home due to a phone call. Sunderlin informed plaintiff that it was a requirement of his department that Sunderlin contact DCFS about the incident.

¶ 11 On cross-examination, Sunderlin testified that he was not aware of the source of the call reporting the fire. He further testified that he did not ask either of the children whether they knew how to contact their parents or where their father worked, and did not ask either the children or plaintiff how far away plaintiff worked. Sunderlin testified that this information would not have been a factor in determining whether he needed to contact DCFS, since "[t]he age of the children, the circumstances of the situation and no parental guidance at the scene requires us at the Palatine Police Department to contact DCFS."

¶ 12 Next, Mckelvie Jackson, a child protection investigator with DCFS, testified that he was assigned plaintiff's case after a hotline call placed on October 10, 2011. Jackson interviewed plaintiff at plaintiff's home on October 18, 2011. Plaintiff informed Jackson that the children normally went to daycare but that, due to the holiday, they were unable to attend the school daycare program since plaintiff had not arranged it in advance. Plaintiff was planning on going to work for approximately an hour, then come home; plaintiff informed Jackson that he left at approximately 9 a.m. and returned at 11 a.m. Plaintiff informed Jackson that his

daughter had called and reported that the microwave was smoking; plaintiff immediately told his children to leave the home and called the fire department.

¶ 13 Jackson also spoke to the children on October 18. Plaintiff's son informed Jackson that he and his sister had been downstairs watching television and smelled smoke. They determined that the smoke originated from the microwave and plaintiff's daughter called plaintiff, who ordered them to leave the home. Jackson testified that the children were "[v]ery intelligent" and that they and their home were clean and appropriate.

¶ 14 After conducting the interviews, Jackson discussed the case with his supervisor and recommended indicating the report for inadequate supervision. Jackson's reasoning was "[b]ecause even though the father was gone and *** the children are very mature and responsible, alert kids, they still – he was gone for a short period of time and the children when an emergency did happen didn't really know to call 911 at that particular instance rather than call him, [as] their response was." Jackson further reasoned that "it took [the] father to ask them to leave the house."

¶ 15 On cross-examination, Jackson testified that it was determined that there was no fire or visible smoke in the home, other than the smoking of the microwave and the smell of burnt food. Jackson further testified that he did not ask the children if they knew how to call 911 or whether there were rules regarding opening the door to strangers. Jackson did verify that they were aware of how to use the phone and had contact numbers for parents and friends. Jackson testified that it was inappropriate to call plaintiff instead of 911 even though there was no visible fire, because "[i]f they smelled smoke and didn't know where the smoke was coming from, they should have called 911." Further, even though they determined the smell was coming from the microwave, "they should have still called 911. They are kids. They

don't know. It could have been anywhere." Jackson testified that he did not ask plaintiff how far his work was from his home.

¶ 16 On cross-examination, Jackson again testified that it was his position that the children should not have been left alone "[b]ecause they are kids. They were in an incident that – an emergency incident that they didn't know what to do or how to respond appropriately" and that calling their father was not an appropriate response because "they should have called 911 first." Jackson testified that it was appropriate that plaintiff ordered the children to leave the house and that they did so, and further testified that there was a good dynamic between the parents and the children. Jackson testified that other than calling plaintiff instead of 911, there was nothing else that indicated that the children lacked the capacity to protect themselves.

¶ 17 Jackson testified that "DCFS recommends that [children] not be left home alone until they are 13," but was "not sure" whether that was law. However, when asked whether he would have recommended indicating a report for every circumstance in which a child under 13 was left alone, Jackson testified that "[e]very case is different. This case, because this was the emergency that you hope doesn't happen, it could have been a lot worse. Fortunately, it was not. But the kids showed that they didn't know what to do, that they panicked. I wouldn't say they panicked. But they were in a situation where they were smelling smoke, they didn't know what their response should be. And they smelled it for a while before they actually did call it in."

¶ 18 The report Jackson prepared was admitted into evidence. The document, described as a "Investigation Transition/Handoff Document," was dated October 10, 2011. For each child, the document stated:

> "Ther[e] is sufficient evidence to support the allegation 74-Inadequate supervision. The children's ages are 9 and 8. The child does not have a medical condition, behavioral, or mental or emotional problem, or disability that impacts on their ability to protect themselves or significantly increases a caretaker's stress level. There does not appear to be a pattern of the parent leaving the children home alone and he states that they are normally in a preschool and after school program but that they were on school holiday and he had not been aware of it and was unable to make some other arrangements. There is no previous history of abuse or neglect. The dynamics between the children and the parent are good. The children are not afraid of the father and he appears to be concerned about their welfare and protection. There is an appropriate parent-child relationship. The level of stress in the home is normal and the atmosphere is positive. There does appear to be an appropriate support system in place for the child and the parent."

¶ 19 The document also contained case notes from Jackson's interviews with plaintiff and the children. The case note concerning plaintiff's daughter stated that "[s]he stated that she and her brother were both down stairs[;] he was watching tv and she was doing something else. She stated she kept smelling smoke for a long time and then she decided to call her dad at work. He told her that she and her brother should go and stand outside. When they got outside the fire dept. and police came and then their dad. After the fire men [*sic*] talked to her dad they told them that they could go back inside. It was the microwave oven that was smoking."

¶ 20 Finally, plaintiff testified that he was a senior software developer and worked in Rolling Meadows, approximately 3.5 miles or five to seven minutes from his home in Palatine. His wife was employed as a senior business analyst. He had two children, both of whom were "A plus students" who had no disciplinary issues and were involved in extracurricular activities. Neither child had any special needs or any emotional or physical disabilities. Both children knew how to use the phone and knew plaintiff's and his wife's work and cell phone numbers, as well as the numbers of friends and relatives in the area. The children also knew how to contact emergency services if necessary, which they learned from school, television, and their parents. Plaintiff testified that he considered both of his children to be mature for their ages, and that he had left the children alone previously for short periods of time. Plaintiff testified that the children knew that, in case of an emergency, they were to leave the home and call one of their parents, and plaintiff believed that his daughter possessed the emotional and mental ability to protect herself and her brother during an emergency.

¶ 21 Plaintiff testified that October 10, 2011, was Columbus Day. His wife went to work and left the children in his care. Normally, the children participated in a before- and after-school daycare program, but, because of the school holiday, plaintiff needed to sign up in advance to enroll his children in the program that day and failed to do so. Plaintiff needed to work for approximately an hour and a half, and he left the home at 9:30 a.m. At approximately 10:55 a.m., he received a phone call from his daughter. She said that she smelled something burning, so plaintiff told her to leave the house with her brother. Plaintiff called the fire department and immediately left work to return home; plaintiff reached home in approximately seven minutes. Plaintiff testified that he called the fire department because

"[t]hey are close-by. And, you know, I just wanted them to check out the burning smell." Plaintiff testified that the home had smoke and heat alarms, and neither engaged.

¶ 22 Plaintiff testified that when he returned home, the children were standing in the driveway and fire department personnel were present; plaintiff had not informed the children that he would be calling the fire department, but they did not appear to be nervous or crying when he arrived. Plaintiff met with a "fire officer" who informed him that "everything was fine."

¶ 23 Plaintiff testified that he told the police officer and the DCFS investigator that he knew that he should not have left the children alone. However, in retrospect, he believed that it was appropriate to leave them alone for that short a period of time.

¶ 24 On June 20, 2012, the ALJ made written findings of fact and conclusions of law, and recommended that plaintiff's request for expungement be granted. The ALJ set forth the factors that were to be considered in determining whether a child was inadequately supervised, then stated:

> "It is clear from the Investigator's testimony in this matter that the Department has an uncodified policy that any child under the [*sic*] thirteen years of age left alone at home is deemed to be neglected. While Investigator Jackson stated that every case is unique, it is obvious that for the investigation in this matter (which, according to the Department's Exhibit #1, consisted, in its entirety, of a single interview of the Appellant and the alleged minor victims on October 18, 2011) the only factor that was ever considered was [the] minors' age."

¶ 25 The ALJ stated that, if DCFS had considered other factors, "the Department's Investigator would have found, as the Administrative Law Judge did," that the children had no physical

limitations, were bright and mature for their ages, and had the mental capacity to understand the situation on October 10, 2011, and to make sound judgments in the case of emergency. Further, plaintiff was only five to seven minutes away, was available by telephone, and had provided a means for his children to contact him if an emergency would occur. Finally, the incident "appeared to be an isolated one borne out of an unforeseen lack of child care" and the children were alone for less than two hours during the day and located in the relative safety of their own home. The ALJ continued:

> "If the Department's rule making body had determined that there was a certain threshold age under which a minor, regardless of other factors, would be considered neglected, (as was the apparent rationale behind the indication in this matter) then such an age would have been clearly delineated in the Department's allegation #74. As it has not, the Administrative Law Judge must then weigh the other factors against the *relative* ages of [the children] on October 10, 2011, not merely their biological ages of nine and eight years respectfully. The Administrative Law Judge finds, that in weighing the facts and the analysis of the factors as outlined above, [the children] were never placed in a situation of circumstance which was likely to require judgment or actions greater than *their* level of maturity and mental abilities would reasonably dictate." (Emphases in original.)

¶ 26 The ALJ found that there was insufficient evidence to support DCFS's argument that the children were inadequately supervised because they did not respond appropriately to the circumstances by calling their father instead of 911. The ALJ stated:

> "[C]onsidering the only factor the Department's Investigator apparently considered was the minors' ages, it seems immaterial to the Department's reasoning who called the fire department. Nonetheless, the unrebutted testimony and evidence at hearing indicates there was no fire in the Appellant's residence on October 10, 2011, for the children to react to, one way or the other. The Department's Investigator testified the home had adequate smoke detectors which no one had testified activated at any point during the Columbus Day incident, and the Investigator saw no evidence of a fire or smoke damage in the home a mere eight days after the incident. Even more telling, Patrolman Sunderlin testified he saw no smoke and no fire when he arrived on the scene, mere moments after [the] fire department arrived. If there were a fire in the Appellant's residence on October 10, 2011, according [to] the Appellant, [the children] would have surely known what to do, and since neither Patrolman Sunderlin nor Investigator Jackson bothered to ask the two children if they did know how to respond during a fire emergency, the Administrative Law Judge must take the Appellant at his word."

The ALJ concluded that, "despite their calendar years, both [of the children] were more than sufficiently capable of responding appropriately to the emergency situation they found themselves in and were provided the means to do so by the Appellant." Accordingly, the ALJ found that they were not inadequately supervised on October 10, 2011, and recommended that the Director grant plaintiff's request for expungement.

¶ 27 On June 29, 2012, the Director issued a final administrative hearing decision, rejecting the ALJ's recommendation to grant the request for expungement. In rejecting the ALJ's recommendation, the Director noted:

> "While I appreciate the fact that Appellant's children are both smart, I find that leaving a nine year old child home alone for two hours, with the expectation that she also supervise her younger sibling for that period constitutes inadequate supervision. The Administrative Law Judge suggested that the Department made its decision to indicate solely on age. Although the age of the children is one of the factors that we used to indicate, I disagree with the suggestion it was the only factor. Although it may be reasonable to leave the children together for a short period of time (5 to 10 minutes) on occasion, placing a nine year old in a position where she has to take care of herself and supervise her younger sibling for several hours places her in a position that is greater than the child's level of maturity. It appears that the children's attempt to cook a meal caused the microwave to start smoking. [Plaintiff's daughter] actually told Investigator Jackson that she smelled smoke for a long period of time. Her comment suggests that it may have been her younger brother who was the catalyst for the smoking microwave. Nonetheless, it appears that there was a period in which she hesitated prior to making the phone call to [plaintiff]. Had there been a real fire emergency, she may not have had time to call [plaintiff] and maintain the presence of mind to get both herself and her brother out of the home. During a fire emergency, flames

> can become deadly within minutes. The Administrative Law Judge believed that [plaintiff's daughter] acted appropriately when she contacted her father instead of calling the Fire Department directly. However, I disagree with this reasoning. Again, if a true fire emergency existed, any hesitation on [her] part could have seriously endangered both children's lives."

¶ 28 Accordingly, the Director found that the circumstances were sufficient to support the allegation of inadequate supervision by a preponderance of the evidence, and therefore denied plaintiff's request for expungement.

¶ 29 On July 19, 2012, plaintiff filed a complaint for administrative review in the circuit court of Cook County. On February 26, 2013, the circuit court issued a written order affirming the Director's decision to deny expungement. This appeal follows.

¶ 30 ANALYSIS

¶ 31 On appeal, plaintiff argues that the Director's decision was clearly erroneous. Additionally, plaintiff claims that DCFS exceeded its authority as a matter of law by applying its "uncodified policy" that children under 13 could not be left alone to the instant case.

¶ 32 I. Abused and Neglected Children Reporting Act

¶ 33 The Abused and Neglected Child Reporting Act (the Act) (325 ILCS 5/1 *et seq.* (West 2010)) requires DCFS to maintain a central register of all cases of suspected child abuse or neglect reported and maintained under the Act. 325 ILCS 5/7.7 (West 2010). DCFS investigates all reports and classifies them as " 'indicated,' " " 'unfounded,' " or " 'undetermined.' " 325 ILCS 5/7.12 (West 2010); *Lyon v. Department of Children & Family*

Services, 209 Ill. 2d 264, 267 (2004). A report is " 'indicated' " "if an investigation determines that credible evidence of the alleged abuse or neglect exists." 325 ILCS 5/3 (West 2010). " 'Credible evidence of child abuse or neglect' means that the available facts, when viewed in light of surrounding circumstances, would cause a reasonable person to believe that a child was abused or neglected." 89 Ill. Adm. Code 300.20, amended at 35 Ill. Reg. 1599 (eff. Jan. 15, 2011).

¶ 34 A subject of an indicated report may request that DCFS amend the record of the report or remove the record of the report from the State Central Register. 325 ILCS 5/7.16 (West 2010). If DCFS does not do so, the subject of the report has the right to an administrative hearing within DCFS to determine whether the record of the report should be amended or removed. 325 ILCS 5/7.16 (West 2010). During the hearing, DCFS has the burden of proof in justifying the refusal to amend, expunge, or remove the record, and DCFS must prove that a preponderance of the evidence supports the indicated finding. 89 Ill. Adm. Code 336.100(e) (2000). After the hearing, the Director receives the ALJ's recommendation and may accept, reject, amend, or return the recommendation. 89 Ill. Adm. Code 336.220(a)(2) (2005). The Director's decision is the final administrative decision by DCFS. 89 Ill. Adm. Code 336.220(a)(2). If the subject of the report prevails, the report is released and expunged. 325 ILCS 5/7.16 (West 2010).

¶ 35 In the case at bar, DCFS entered an indicated finding of neglect against plaintiff. The Act provides definitions of when a child is considered to be abused or neglected. A " '[n]eglected child' " includes "any child who *** is abandoned by his or her parents or other person responsible for the child's welfare without a proper plan of care." 325 ILCS 5/3 (West 2010). Based on the Act's definitions of abuse and neglect, DCFS promulgated regulations detailing

a number of child abuse and neglect allegations, "essentially defining problematic conduct." *Walk v. Department of Children & Family Services*, 399 Ill. App. 3d 1174, 1181 (2010).

¶ 36 Under the regulations, in order for DCFS to accept a report of child abuse or neglect, the person making the report must allege that the act or omission of the perpetrator caused one of a number of "allegations of harm." 89 Ill. Adm. Code 300.Appendix B (2011). In the case at bar, plaintiff's conduct was categorized as allegation No. 74[3], "Inadequate Supervision." Inadequate supervision occurs when "[t]he 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," and includes, by example, "[l]eaving children alone when they are too young to care for themselves." 89 Ill. Adm. Code 300.Appendix B. Accordingly, in the administrative hearing, DCFS was required to prove by a preponderance of the evidence that plaintiff's children had been placed in a situation that was likely to require judgment or actions greater than their level of maturity, physical condition, and/or mental abilities would reasonably dictate.

¶ 37 II. Director's Decision

¶ 38 In the case at bar, the Director determined that the preponderance of the evidence supported the allegation of inadequate supervision. The decision of the Director is an administrative decision and judicial review is governed by the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2010)). 325 ILCS 5/7.16 (West 2010). In the case of an administrative review action, we review the decision of the administrative agency and not the decision of the circuit court. *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 531 (2006) (*per curiam*). Under the Administrative Review Law, actions to review a

[3] "Many of the allegations of harm can be categorized as resulting from either abuse or neglect. All abuse allegations of harm are coded with a one or two digit number under 50. All neglect allegations of harm are coded with a two digit number greater than 50." 89 Ill. Adm. Code 300.Appendix B.

final administrative decision "shall extend to all questions of law and fact presented by the entire record before the court." 735 ILCS 5/3-110 (West 2010). Additionally, "[t]he findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct." 735 ILCS 5/3-110 (West 2010). The reviewing court is not to reweigh the evidence or make an independent determination of the facts. *Kouzoukas v. Retirement Board of the Policemen's Annuity & Benefit Fund*, 234 Ill. 2d 446, 463 (2009).

¶ 39 In the case at bar, plaintiff does not challenge the ALJ's findings of fact but only challenges the Director's conclusion that the facts support the allegation of inadequate supervision. An administrative agency's decision on a mixed question of law and fact is reviewed for clear error. *Elementary School District 159 v. Schiller*, 221 Ill. 2d 130, 143 (2006). This standard of review is deferential to the agency's expertise in interpreting and applying the statutes that it administers. *Schiller*, 221 Ill. 2d at 143. " '[W]hen the decision of an administrative agency presents a mixed question of law and fact, the agency decision will be deemed clearly erroneous only where the reviewing court, on the entire record, is left with the definite and firm conviction that a mistake has been committed.' " (Internal quotation marks omitted.) *Schiller*, 221 Ill. 2d at 143 (quoting *Comprehensive Community Solutions, Inc. v. Rockford School District No. 205*, 216 Ill. 2d 455, 472 (2005)).

¶ 40 In the case at bar, as noted, plaintiff was indicated for neglect on the basis of allegation 74, inadequate supervision, which occurs when "[t]he 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," and includes, by example, "[l]eaving children alone when they are too young to care for themselves." 89 Ill. Adm. Code 300.Appendix B. The DCFS regulations also provide a number of additional

factors that "should be considered when determining whether a child is inadequately supervised." 89 Ill. Adm. Code 300.Appendix B. These additional factors are characterized as "Child Factors," "Caregiver Factors," and "Incident Factors." 89 Ill. Adm. Code 300.Appendix B.

¶ 41 The "Child Factors" to be considered are: (1) "[t]he child's age and developmental stage, particularly related to the ability to make sound judgments in the event of an emergency"; (2) "[t]he child's physical condition, particularly related to the child's ability to care for or protect himself or herself"; and (3) "[t]he child's mental abilities, particularly as they relate to the child's ability to comprehend the situation." 89 Ill. Adm. Code 300.Appendix B.

¶ 42 The "Caregiver Factors" to be considered are: (1) the "Presence or Accessibility of Caregiver"; (2) the "Caregiver's Capabilities"; (3) the "Caregiver's Physical Condition"; and (4) the "Caregiver's Cognitive and Emotional Condition." 89 Ill. Adm. Code 300.Appendix B. These factors are largely irrelevant to the situation in the case at bar, other than the first factor, which is further described as considering such issues as: (1) "How long does it take the caregiver to reach the child?" (2) "Can the caregiver see and hear the child"? (3) "Is the caregiver accessible by telephone?" and (4) "Has the child been given access to a phone and numbers to call in the event of an emergency?" 89 Ill. Adm. Code 300.Appendix B.

¶ 43 Finally, the "Incident Factors" to be considered ask: (1) "What is the frequency of occurrence?" (2) "What is the duration of the occurrence (as related to the 'child factors' above)?" (3) "What is the time of the day or night when the incident occurs?" (4) "What is the condition and location of the place where the minor was left without supervision?" (5) "What were the weather conditions, including whether the minor was left in a location with adequate protection from the natural elements such as adequate heat or light?" (6) "Were

there other supporting persons who are overseeing the child? Was the child given a phone number of a person or location to call in the event of an emergency, and whether the child was capable of making an emergency call?" (7) "Was there food and other provisions left for the child?" and (8) "Are there other factors that may endanger the health and safety of the child?" 89 Ill. Adm. Code 300.Appendix B.

¶ 44 In the case at bar, after examining these factors, we find that the Director's determination that the preponderance of the evidence supported the allegation of inadequate supervision was clearly erroneous. Almost all of the factors weigh against a finding of neglect. For instance, there is no dispute that the children are bright and have no physical or mental challenges that would impact their ability to be home alone. Additionally, plaintiff testified that he was at work 3.5 miles away, which was approximately a five to seven minute drive, and further testified that he was accessible by telephone and the children had his and his wife's work and cell phone numbers, as well as the contact information for family and friends. Further, the children were instructed to call their father if any emergencies occurred. Finally, the incident appears to have been an isolated incident based on the inability to arrange childcare, and occurred during the day while the children were in their own home. There was no evidence that the children had ever been left alone for a significant period of time on any previous occasion.

¶ 45 The only factors that even arguably weigh in favor of a finding of neglect are the children's ages – eight and nine, nearly 10, at the time of the incident – and their response in calling their father instead of 911 in response to the smoking microwave. However, neither of these factors is sufficient to support a finding of neglect by the preponderance of the evidence.

¶ 46 We note that we are not persuaded by plaintiff's argument that DCFS has an "uncodified policy" of finding that any child under 13 is inadequately supervised if left home alone, which has its basis in the ALJ's recommendation, in which the ALJ stated that "[i]t is clear from the Investigator's testimony in this matter that the Department has an uncodified policy that any child under the [*sic*] thirteen years of age left alone at home is deemed to be neglected." The Director noted the ALJ's statements that age was the only factor considered and disagreed, specifically stating that age was not the only factor considered. As noted, the Director's analysis gave the greatest weight to the children's failure to call 911, so plaintiff is incorrect in his claim that "the director clearly relied only upon the age of the children and ignored all of the other factors." Moreover, while Jackson's report appears to focus on the children's ages, his testimony at the hearing was that "[e]very case is different," and also focused on the children's reaction in calling their father instead of calling 911. Thus, there is no basis for finding the Director's decision to be void as outside the scope of DCFS's authority.

¶ 47 However, while it is proper to consider the children's ages, here, that factor is not dispositive. This is not a situation where an infant or small child was left alone for a prolonged period of time, where the age factor could be weighted quite heavily; instead, an eight-year-old boy and a nearly-10-year-old girl were left alone in their home for less than two hours. Additionally, we cannot find the children's conduct in responding to the smoking microwave to be as egregious as depicted by the Director. The Director was concerned that:

> "it appears that there was a period in which [plaintiff's daughter] hesitated prior to making the phone call to [plaintiff]. Had there been a real fire emergency, she may not have had time to call [plaintiff] and maintain the

> presence of mind to get both herself and her brother out of the home. During a fire emergency, flames can become deadly within minutes. The Administrative Law Judge believed that [plaintiff's daughter] acted appropriately when she contacted her father instead of calling the Fire Department directly. However, I disagree with this reasoning. Again, if a true fire emergency existed, any hesitation on [her] part could have seriously endangered both children's lives."

However, as plaintiff points out, there was no fire, merely a smoking microwave. While it is certainly correct that fires can spread quickly, there is no indication that the microwave posed such a danger. The home was equipped with active smoke and heat detectors, none of which sounded an alarm. Additionally, Sunderlin, the police officer who responded immediately to the dispatch, did not encounter any fire or visible smoke immediately after the incident. Thus, there is no indication that calling plaintiff was an inappropriate response that endangered the children's lives, especially when plaintiff instructed the children to call him. We agree with plaintiff that speculating as to the children's reaction in the event of an actual fire does not serve as a basis for finding the children inadequately supervised.

¶ 48 CONCLUSION

¶ 49 The Director's decision to deny plaintiff's request for expungement is reversed where the Director's determination that a preponderance of the evidence supported the allegation of inadequate supervision was clearly erroneous because this court is left with the definite and firm conviction that a mistake has been committed.

¶ 50 Circuit court and Director reversed.