2015 IL App (1st) 14-1337-U

THIRD DIVISION
March 31, 2015

No. 1-14-1337

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LILLIE H., a minor, by and through Robert F. Harris,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 14 CH 272
	)	No. 14 CH 670
THE DIRECTOR OF CHILDREN AND FAMILY SERVICES	)	
(THE DEPARTMENT OF CHILDREN AND FAMILY,	)	The Honorable
SERVICES),	)	Mary Mikva,
	)	Judge Presiding.
Defendants-Appellees.	)	

JUSTICE LAVIN delivered the judgment of the court
Justices Hyman and Mason concurred in the judgment

ORDER

¶ 1 *Held*: This court affirms the circuit court judgment affirming the administrative decision to remove Lillie H. from her foster family because the administrative decision was neither contrary to the law nor against the manifest weight of the evidence.

¶ 2 Lillie H., now age 10, challenges the administrative decision of the Director of the Department of Children and Family Services (the Department), determining that she should be removed from her current home with foster mother, Diane Cora H., after it was discovered that Diane's adult son and a caretaker to Lillie sexually abused his biological siblings over a decade ago. Following an evidentiary hearing under the Department's service appeal process, an

administrative law judge (ALJ) concluded that Lillie and Diane failed to show the Department's decision to remove Lillie was contrary to Lillie's safety, well-being, and her permanency goal of adoption (see 89 Ill. Adm. Code 337.30(e)(1) (2012)). The Department's Director affirmed the ALJ's decision, and the circuit court in turn affirmed the Director's decision. Lillie appealed[1] through her guardian *ad litem*, who represented her throughout. This court stayed her removal and visits with alternate foster homes pending our review. On appeal, Lillie contends the factual findings by the Director were against the manifest weight of the evidence. Lillie further argues the Director failed to consider the statutory best interests factors set forth in the Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/1-3 (West 2012)), when reaching its conclusion that she should be removed. She lastly argues the Director's finding of risk in the home was arbitrary and capricious. Having reviewed the record and considered the parties' arguments, and remaining ever mindful of the gravity our decisions hold, we affirm the circuit court judgment and the decision to remove Lillie from her foster home.

¶ 3 BACKGROUND

¶ 4 Lillie was born July 30, 2004, with cocaine in her system and soon was moved into the State child welfare system. Only weeks after her birth, Children's Place, the Department's contracted service agency, placed Lillie in foster care with Diane (now age 62) and her then husband, Peter. Diane and Peter had three biological sons (Mark, b. 1976; Michael, b. 1985; and Nicholas, b. 1990), an adopted son (Randy, b. 1997), and adopted daughters (Dhazane, b. 1999 and Megan, b. 2000). Lillie is special needs and has congenital cerebral palsy and attention deficit/behavioral disorders, requiring regular appointments with doctors and therapists. Randy and Megan also have special needs. In 2008, the juvenile court terminated the parental rights of Lillie's natural parents and later entered adoption as the permanency goal. The juvenile court

[1] Although Diane was party to the administrative hearing, she is not a party to this appeal.

appointed the Guardianship Administrator of the Department as Lillie's guardian, with the right to consent to adoption. To date, adoption remains Lillie's court-ordered permanency goal under the Juvenile Court Act (see 705 ILCS 405/2-28 (West 2012)).

¶ 5 In 2008, Diane's husband died, leaving Diane as the sole parent. She was a homemaker with no apparent outside income, only a tenth-grade education, and no driver's license. Consequently, she began relying even more on her sons Mark and Nicholas, then around age 32 and 19, to help care for the children. Mark became the primary driver, as Nicholas also did not have a driver's license. Mark transported Diane and Lillie to her doctor and therapy appointments and would later drive Nicholas to his part-time employment. Mark, who had lived independently since 1997, started visiting Diane's home daily and spent some nights there.

¶ 6 The action precipitating the present proceedings was Diane's May 2010 application for an adoption subsidy for Lillie, wherein she listed Mark as the backup-care provider in the event of Diane's death or disability. This application prompted a routine background check of Mark, which revealed the Department had made "indicated findings" against Mark in 1997 for sexual molestation and penetration of his two younger biological brothers.[2] Children's Place apparently had knowledge in 2004 of the indicated findings, but the current caseworkers claimed to have lost this knowledge in the midst of personnel changes, and Children's Place only discovered the indicated findings in 2010.[3] Mark admitted that, when age 19, he began "grooming" Michael, then around age 11. The abuse of tongue kissing and oral sex lasted some three years until

[2] Under the Abused and Neglected Child Reporting Act, an "indicated report" is made if an investigation determines that credible evidence of the alleged abuse or neglect exists. See 325 ILCS 5/3 (West 2012). The Department maintains a central register of these reports. 325 ILCS 5/7.7 (West 2012). According to hearing testimony, the indicated reports are retained for 50 years.

[3] According to a May 2010 clinical staffing summary, Children's Place was aware of the indicated findings when it placed Lillie in the foster home in 2004, but at that time Mark apparently was not living there, and Children's Place had concluded he posed no appreciable risk. Ivan Harrison, the Children's Place case manager supervising Lillie in 2010, stated that a previous member of the agency knew of Mark's history around 2004, but she left a year later, and apparently did not pass along this information. Harrison testified the issue of the indicated reports reared its head again after Peter died and Diane began relying on Mark more heavily.

Michael was about 13. Mark then targeted Nicholas, who was around age six, with the abuse lasting some months to a year. On learning of the abuse, Diane promptly called the police, leading to Mark's arrest and conviction of misdemeanor battery in 1999. He served two years of court supervision, and underwent four years of therapy.[4]

¶ 7 *The 2010 Safety Plan:* With this information, Children's Place found Mark posed a threat to Lillie's safety, and in May 2010, instituted a "safety plan" pending a determination of whether Diane's home was suitable for Lillie's adoption. Under the plan, which Diane and Mark signed, Mark could not spend nights at home. All contact between Mark and the other children had to be supervised by Diane or a "designee," namely Nicholas. Children's Place caseworkers were to visit the home unannounced twice a week and weekends to verify the plan.

¶ 8 *Report by Juvenile Protective Association, an Independent Social Service Agency:* The Juvenile Protective Association (JPA), an independent social service agency, was recruited to evaluate the level of risk for sexual abuse and the appropriateness of Lillie's current placement. The JPA's licensed clinical psychologist and expert in child abuse, Dr. Steve Spaccarelli, spearheaded the April 2011 report, which was based on documents, records, and clinical interviews with the family. The report noted that Mark had not committed a sex offense for 14 years, his offense was limited to family members, suggesting a "relatively low risk for re-offense," and his therapy also mitigated any risk. Nonetheless, the report concluded these low-risk factors did not justify Mark having unsupervised contact with Lillie or the other children. JPA stated it was possible that Mark was pedophilic or otherwise opportunistic in his abuse and

[4] Section 402, Appendix A, of the Illinois Administrative Code prohibits licensing a foster parent or any adult member of that foster parent's household who has been convicted of certain enumerated criminal offenses, including sexual exploitation of a child and criminal sexual abuse. 89 Ill. Adm. Code 402.APPENDIX A. Other listed offenses (such as aggravated battery) also serve as a bar unless certain criteria are met, like the offense occurred more than 10 years ago and the applicant has provided and can continue to provide a safe home. *Id.* The record in this case does not identify Mark's specific criminal offense, but it appears he was found guilty of misdemeanor battery and thus Appendix A does not apply. We note this rule to show that the Department does not favor placing children in homes with a criminal past.

chose his victims for emotional reasons to compensate for psychological inadequacies, which were still present. As a result, JPA concluded there was a "low, but still meaningful level of risk that [Mark] would pose to young children if allowed unsupervised contact with them," especially those who trusted him and were thus vulnerable to his exploitation. The JPA report added that Nicholas claimed not to remember the abuse.

¶ 9 The JPA report further concluded that Diane lacked "seriousness and commitment" in appreciating the risk that Mark posed, as she denied the gravity of Mark's sexual abuse. Diane purposefully chose not to learn any details of the abuse and a therapist told her Michael and Nicholas had "not been scarred." Diane also revealed her will named Mark as the guardian of her adopted and future children, that she wanted him to move home after adopting Lillie, and indicated she trusted Mark. When the evaluator said this might prove problematic for Lille's adoption, Diane expressed regret at "opening my mouth." Diane several times bemoaned not having her husband's assistance. Even after learning the details of the abuse, it took Diane about six months to change her will. She named Nicholas as backup provider when he turned 21 and later explained there was no available individual more appropriate.

¶ 10 The JPA report ultimately recommended that Lillie remain in Diane's home under the safety plan because she was bonded to Diane and the other children. The report supported the permanency goal of adoption, and noted, "we are certain that it would be a very severe and psychologically damaging stress to remove [Lillie] from her foster mother and siblings, who constitute the only family she has known." The report, however, added that Diane should not be permitted to adopt Lillie "unless and until" Diane removed Mark as Lillie's guardian and underwent family therapy in order to minimize the risk of further sexual abuse to a "negligible

level." Mark should take a secondary and supportive care role. Lillie and the other children were to be informed of the reasons for the safety plan since Diane had not already done so.

¶ 11 *Developments Following the JPA Report:* In November 2011, Diane and the children began therapy at Forward PC, per the JPA recommendation. Nonetheless, about a year later, the Department terminated the contract with Forward PC's therapist, citing concerns with the provider.[5] Diane expressed she was willing to engage in further therapy, but in December 2012, the guardianship administrator concluded she would not consent to Lillie's adoption. On March 6, 2013, the Department issued notice that Lillie would be removed from Diane's foster home in pursuit of other adoptive homes. Diane filed a request for "clinical placement review" under the Illinois Administrative Code (the Code), an administrative step where the Department considers the child's current placement, the reason for the removal, and the child's need for safety, well being, and permanency. 89 Ill. Adm. Code 337.30(c)(2) (2012); see also 89 Ill. Adm. Code 337.30(c)(1) (2012) (noting a clinical placement review decision precedes a fair hearing).

¶ 12 *Clinical Placement Review Decision, Removal of Lillie from her Foster Home:* In March 2013, the Department issued its "Placement Review Summary" (hereinafter, "clinical decision"), authored by Susan Mellema, a licensed clinical social worker and the clinical services coordinator for the Department. The clinical decision was issued following a meeting between the parties and noted the conflict as to Lillie's placement. Children's Place and Lillie's guardian *ad litem* believed the risk of sexual abuse in Diane's home was lower than the risk of emotional trauma if Lillie were removed. They favored long-term foster care under the 2010 safety plan. Conversely, the Department favored removal, citing safety concerns, including Mark's continued access to Lillie and the "closed family system and co-dependency." At the time of the clinical

[5] Forward PC recommended that Nicholas be evaluated for sexual offending because the therapist saw Lillie straddling Nicholas when he was sitting down, but the Department's sexual abuse services coordinator did not think the evaluation was needed.

decision, Diane had not yet told the children about Mark's prior sexual abuse. She claimed they would not be able to understand because of their developmental and emotional needs and noted Lillie believed the reason for her threatened removal was Diane's advanced age.[6] Diane also stated she trusted Mark, and wanted him to move back home, although Children's Place later disputed this characterization. In spite of the situation with Lillie, around January 2012, Diane asked for another foster child.[7] The clinical decision further noted Diane's initial listing of Mark as backup care provider, only to replace him with Nicholas, who was not appropriate for the role.

¶ 13 The clinical decision questioned whether Lillie and the other adopted children should have been placed with Diane in the first place due to the family's mental health concerns and assigned some fault to Children's Place (Mellama cited and relied on 89 Ill. Adm. Code 402.14 (2009), requiring the foster family to show they are free of mental health problems affecting care). Indeed, Mark had just completed his sex offender treatment when the adoptive child entered Diane's home. The clinical decision also noted the change in circumstances regarding Diane's foster care with the death of her husband and essentially questioned her capacity to care for four special needs children. The Department found it concerning that since Diane's husband died, she relied heavily on Mark and Nicholas to fulfill the parental role that Diane should maintain as foster parent.

¶ 14 The clinical decision finally noted that Lillie had been seeing therapist Tanya Katsaros in Streamwood once a week since 2008 to address Lillie's behavioral and emotional needs. Katsaros learned of the current situation from a lawyer involved in the case and was unaware of Diane's level of dependence on her sons. Although Katsaros recommended that it was in Lillie's best interests to remain with Diane, she suggested there be a no-contact order as a safeguard.

[6] At the hearing, Diane claimed she did not inform the children of the abuse because the therapist, did not raise the issue in the therapeutic setting.

[7] At the hearing, Diane retracted this request, stating she was "at capacity."

¶ 15 The clinical decision concluded that Lillie should be removed from Diane's foster care and that her adoption with another family should be pursued based on Lillie's safety and best interests. Lillie and Diane filed a "service appeal," which was consolidated, and a fair hearing before an administrative law judge took place over five months, concluding in November 2013. See 89 Ill. Adm. Code 337.30(c)(6), (e) (2012).

¶ 16 *Administrative Fair Hearing, Review of Clinical Placement Decision:* At the hearing, the burden of proof was on Diane and Lillie to show "by a preponderance of the evidence that the decision made by the clinical reviewer was not consistent with the child's needs regarding safety, well being, and permanency." See 89 Ill. Adm. Code 337.30(e)(1) (2012). Consistent with administrative rules, both parties presented evidence. *Id*. Testifying on behalf of Lillie and Diane were psychologists, Dr. Spaccarelli (of the JPA report) and Dr. Barry Leavitt; Children's Place caseworkers Ivan Harrison and Almeta Rollins; and also Lillie and Diane. Testifying on behalf of the Department were psychologist, Dr. Carlos Plazas; Mellama (of the clinical decision); and the guardianship administrator, Debra Dyer-Webster. While the hearing testimony focused on whether the family complied with the safety plan and whether Lillie was bonded to her foster family, those matters are not now in dispute. The family appears to have complied with the safety plan,[8] and the evidence showed Lillie was bonded to her family, testifying (at age 8) that she wished to remain there.

¶ 17 Despite Lillie's bonded relationship with her foster family, Lillie's witnesses maintained the safety plan should remain intact as Mark posed a risk of abuse to Lillie. Harrison, a psychologist and program manager at Children's Place, testified that Lillie was safe in Diane's home "as long as there continues to be compliance with the safety plan that's currently in place."

[8] In March 2013, following an investigation and victim sensitive interviews with the children, the Department determined there was no credible information to support a hotline call of possible sexual abuse in the family.

Likewise, Dr. Spaccarelli, a stipulated expert in child abuse and psychology of the 2011 JPA report, recommended that the safety plan remain intact given Mark's background even though there was no evidence Lillie had been abused. Dr. Spaccarelli testified that interviews with Mark indicated "there were still some outstanding *** risk factors" and given his background, "one cannot really ever assume that there is no risk." Diane's need to keep the family tightly-knit also might be "a pressure running against disclosure of abuse." He acknowledged that Lillie, with her special needs, was perhaps more vulnerable than other children her age and removal would be psychologically difficult if not traumatic; however, he stated, "[t]he risk *** of her being sexually abused *** is not negligible. It's real and it's of concern." Mellema, the author of the clinical decision, opined that the 2010 safety plan needed to remain in place due to Mark's frequent visits home and concerns of inadequate monitoring by Children's Place. Emphasizing the safety plan was an untenable long-term solution, Mellama added that an emergency would prove problematic since Mark was the only driver and since Diane was heavily reliant on her two sons.

¶ 18 Conflicting expert testimony by psychologists who tested Mark for risk of sexually reoffending was presented by the parties. The Department's sexual abuse expert, Dr. Plazas, a clinical psychologist at Forward PC, opined that Mark's depression and self-esteem problems were significant because those same factors were at play when Mark abused his brothers. Dr. Plazas opined that results from the Abel test and visual stimulation tests showed Mark was interested in prepubescent children, and "there is a high probability [81%] risk of sexual re-offense." Dr. Plazas opined that Mark should not be alone with the children due to his high risk, although he could serve as support and help his mother. Conversely, Lillie and Diane's expert Dr. Leavitt, a clinical and forensic psychologist with expertise in juvenile and adult risk

assessments, opined that Mark was in the "low/moderate" risk category, applying a 5- to 10-year period to the assessment, based on a Static 99R test. Dr. Leavitt explained that Mark was low risk because there were numerous additional protective factors, like his treatment and the absence of any sexual abuse accusations over 17 years. Dr. Leavitt further noted that Mark's "visual reaction times were most significant to adult female individuals." Even so, Dr. Leavitt did not have an opinion regarding whether, absent the safety plan, Mark would be able to self-regulate his behavior and not offend.

¶ 19 The parties raised concern about Nicholas supervising Mark with the children and serving as a caretaker to the children. Dr. Spaccarelli testified that while there was no evidence that Nicholas posed a risk of harm to Lillie, he could not rule out concerns that Nicholas might sexually abuse Lillie based on his own past sexual abuse victimization. Dr. Plazas and Mellama echoed this concern. Dr. Spaccarelli worried about Nicholas' claim that he could not remember the sexual abuse. Dr. Spaccarelli found that Nicholas' supervisory role was "not an ideal scenario," since Nicholas might not have fully processed his abuse. Dr. Spaccarelli also was concerned about Nicholas acting as a full-time caretaker given his young age (early 20s), and need to develop independent relationships. Mellama found that Nicholas was not an appropriate backup care provider.

¶ 20 In support of removal, Dyer-Webster, the Department's guardian administrator, and Mellama[9] cited the risk Mark posed, and also Diane's lack of awareness of that risk. Dyer-Webster noted Diane's self-imposed lack of knowledge about the abuse and the length of time it took her to delete Mark as a backup provider. They testified Lillie deserved permanency but could not achieve it in her current home. Dyer-Webster, for example, testified that if Lillie were adopted, there would be no one to enforce or supervise the safety plan. Dyer-Webster concluded

[9] Notably, as revealed on cross-examination, neither Mellama nor Dyer-Webster had met or talked to Lillie.

the case had been going on for too long and she would not consent to Diane adopting Lillie. Mellama believed the Deparment could find a more appropriate family for Lillie where these concerns did not exist and where Lillie could achieve permanency.

¶ 21 *The ALJ's Written Decision:* Following this evidence, the ALJ recommended denying the service appeal. In a written decision, the ALJ determined that Lillie and Diane failed to establish by a preponderance of the evidence that removal from her foster home was inconsistent with Lillie's need for safety, well being, and permanency. The ALJ noted that both Lillie and Diane, as well as the Department, presented evidence showing that Mark's history of sexual abuse against his brothers posed a risk to Lillie. The ALJ found that while this risk was mitigated by the safety plan, and Mark's low/moderate risk of reoffending, the burden of maintaining a safety plan continued, as it required supervision and vigilance. Lillie and Diane failed to present evidence that "the safety plan is no longer necessary," and in fact, the evidence showed the opposite. The ALJ found that removal "provides Lillie with placement in a home where there is no risk of suffering sex abuse and a life free of safety plans and outside monitoring." Thus, it was consistent with Lillie's need for safety. The ALJ further found that because Lillie's court-ordered permanency goal was adoption, and the only possibility in her current home was long-term foster care under a safety plan, removal was consistent with Lillie's goal of adoption and permanency. The ALJ noted Lillie's wish to remain in the home but found she did not understand the concept of permanency well enough to make that decision.

¶ 22 Moreover, the ALJ found removal was not contrary to Lillie's well-being. While she was bonded with her foster family, she had displayed resiliency in adjusting to her foster father's death and changes in her school. This showed she could withstand the change in foster family. The ALJ further noted that Lillie would not benefit from exposure to emotional trauma from the

continued therapeutic services needed to heal her foster family's sexual abuse history, which had no relation to her entry into the system. The ALJ found Lillie would benefit more from therapy for foster care and she could work towards achieving permanency in a healthy family dynamic. The Department's Director adopted the ALJ's findings of fact and conclusions of law in her decision. See 89 Ill. Adm. Code 337.30(e) (2012).

¶ 23 *Circuit Court Ruling on Complaint for Administrative Review*: Diane and Lillie filed complaints for administrative review of the removal decision in the circuit court, which were consolidated. The circuit court affirmed the December 9, 2013, decision of the Director to remove Lillie from her foster home. Only Lillie appealed. As stated, pending resolution of this appeal, on the parties' motion, this court ordered that Lillie remain in Diane's home.

¶ 24 ANALYSIS

¶ 25 On appeal, Lillie challenges the judgment of the circuit court affirming the removal from her current foster home. When a party appeals the decision of an administrative agency, we review the decision of the agency and not that of the circuit court. *Boom Town Saloon, Inc. v. City of Chicago*, 384 Ill. App. 3d 27, 32 (2008). Factual rulings will be reversed only if against the manifest weight of the evidence. *Heabler v. Illinois Dept. of Financial and Professional Regulation*, 2013 IL App (1st) 111968, ¶ 17. Questions of law, however, are reviewed *de novo*, while mixed questions of law and fact are reviewed under the clearly erroneous standard. *Kouzoukas v. Retirement Board of the Policeman's Annuity and Benefit Fund of the City of Chicago*, 234 Ill.2d 446, 463 (2009). An administrative decision is clearly erroneous where the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.* at 464.

¶ 26 Lillie first contends the Department rule requiring that she prove the clinical review decision was inconsistent with her safety, well being, and permanency (see 89 Ill. Adm. Code 337.30(e)(1) (2012)), fails to encompass the best interests factors under both the Children and Family Services Act (Services Act) (20 ILCS 505/1 *et seq*. (West 2012)) and the Juvenile Court Act. She argues that when applying section 337.30(e)(1), the Director did not consider her best interests in its determination. The Department does not dispute that the best interests must be considered, but argues they are subsumed by the relevant administrative factors in the Code's section 337.30(e)(1) and were therefore considered.

¶ 27 Lillie did not, however, challenge these regulatory factors as conflicting with the statutory scheme at the administrative hearing, resulting in waiver of the issue. See *Texaco-Cities Service Pipeline Co. v. McGaw*, 182 Ill. 2d 262, 278-79 (1998) (issues or defenses not placed before the administrative agency will not be considered for the first time on administrative review since review is confined to proof offered before the agency). Nonetheless, the Department does not argue waiver, and we note that waiver is not a limitation on this court where justice is concerned. *Id*. at 279. We will thus proceed in our review.

¶ 28 As this matter is a question of law, our review is *de novo*. By way of background, under the Services Act, when placing a child in a home, the Department must ensure her health, safety, and best interests are met. 20 ILCS 505/7(c) (West 2012); see also 89 Ill. Adm. Code 301.60 (2001). To evaluate the child's best interests, the Department must consider the factors stated in section 1-3 of the Juvenile Court Act (705 ILCS 405/1-3(4.05) (West 2012)), including the child's physical safety and welfare (food, shelter, health, clothing, etc.); the development of her identity; her family, religious, and cultural background and ties; her sense of attachments, including where she feels loved and attachment, her sense of security, familiarity, the continuity

of affection, and the least disruptive placement; the child's wishes and long-term goals; her need for permanence; her community ties; the child and family's unique situation; and the preferences of the person available to care for the child. *Id*. When placing a child, the Department also must consider the individual needs of the child and the "capacity of the prospective foster or adoptive parents to meet the needs of the child." *Id*. Of course, the Department's goal is to achieve permanency "at the earliest opportunity." 20 ILCS 505/7(c-1) (West 2012). Moreover, the Department bears the important decision of directing placement of children into suitable adoptive homes and, as guardian, of determining the minor's legal custody. 705 ILCS 405/1-3(8) (West 2012); 20 ILCS 505/7 (West 2012); see also 89 Ill. Adm. Code 337.20 (2012) ("child welfare services," are meant to accomplish "placing children in suitable adoptive homes, in cases where restoration to the biological family is not possible or appropriate").

¶ 29 Reading the statutes and administrative rules as a whole and considering them in their plain and ordinary meaning, as we must, we conclude that *with the power of placing the child in a suitable home*, comes the power *to remove the child* when the home is unsuitable in view of the child's best interests. See *Roselle Police Pension Bd. v. Village of Roselle*, 232 Ill. 2d 546, 552 (2009); see also *People ex rel. Madigan v. Illinois Commerce Comm'n*, 231 Ill. 2d 370, 380 (2008) (administrative rules and regulations have the force of law and are construed under the same standards as statutes); *McTigue v. Personnel Board of the City of Chicago*, 299 Ill. App. 3d 579, 588 (1998) (we give the agency interpretation of its rules deference). In this case, the Department made clear that it believed Lillie's foster placement with Diane was contrary to her best interests and the home was no longer suitable based on Mark's background and Diane's lack of awareness about the seriousness his risk posed. The burden at the fair hearing of proving such a decision was not in her best interests – or contrary to her safety, well-being, and permanency –

then fell on Lillie. See 89 Ill. Adm. Code 337.30 (2012). Indeed, the very definition of "fair hearing" under the administrative rules requires review of whether the Department's decision "is in compliance with applicable laws and rules and will be in the best interests of the child." 89 Ill. Adm. Code 337.20 (2012).

¶ 30 We conclude the only fair reading of the statutes and rules is that the best interests factors are reasonably subsumed in the three general elements of safety, well being, and permanency, to be analyzed at a fair hearing disputing the Department's removal decision. Section 337.30(e)(1) of the Code is thus consistent with the statutory scheme at hand and permits even broader considerations than the best interests factors. See *Aurora East Public School Dist. No. 131, Kane County v. Cronin*, 92 Ill. App. 3d 1010, 1015 (function of the court to determine, as a matter of law, whether the agency acted within and according to the provisions of the statute creating it). Other considerations, like the foster family's actual capacity to care for the child, for example, might affect the child's well being.

¶ 31 Having reached this conclusion, we reject Lillie's contention that the Director failed to consider her best interests in its decision to affirm Lillie's removal from Diane. The Director correctly identified the three administrative factors at play, and carefully considered each one. The ALJ stated at the outset of the hearing that Lillie had the burden of proving the removal was not in her best interests, thus implicitly acknowledging the three administrative factors summarize the best interests factors. The ALJ further heard testimony from the Children's Place employees, wherein they applied each best interest factor to the current case. Finally, the Code does not require the Director to delineate each of the best interests factors and sufficient evidence supported the agency's decision, as discussed below. See *Lehmann v. Department of Children*

and Family Services, 342 Ill. App. 3d 1069, 1080-81 (2003) (sufficient evidence of record supported agency decision).

¶ 32 Lillie argues in the alternative that the decision to remove her from Diane's home was against the manifest weight of the evidence. In other words, Lillie argues she proved by a preponderance of the evidence that the decision was inconsistent with her safety, well-being, and permanency. See 89 Ill. Adm. Code 337.30(e)(1) (2012). "Preponderance of the evidence" means "the greater weight of the evidence or evidence that renders a fact more likely than not." 89 Ill. Adm. Code 337.20 (2012); see also *In re N.B.*, 191 Ill. 2d 338, 343 (2000) (proof that makes the condition more probable than not). A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *In re Arthur H.*, 212 Ill. 2d 441, 464 (2004). The mere fact that an opposite conclusion is reasonable or even that the reviewing court might have ruled differently will not justify reversal of administrative findings. *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88 (1992). Because the weight of the evidence and the credibility of the witnesses are uniquely within the province of the agency, there need only be some competent evidence in the record to support its findings. *Iwanski v. Streamwood Police Pension Board*, 232 Ill. App. 3d 180, 184 (1992); 735 ILCS 5/3-110 (West 2012) (an administrative agency's fact findings and conclusions are *prima facie* true and correct). In short, "If the record contains evidence to support the agency's decision, it should be affirmed." *Abrahamson*, 153 Ill. 2d at 88. This is just such a case.

¶ 33 Here, the Director determined the only way for Lillie to remain in Diane's home was with the 2010 safety plan in place, given Mark's background. Although there was no evidence of any present abuse, Lillie's own witness Dr. Spaccarelli testified warning signs of significant risk still existed and the risk of Lillie being sexually abused was not negligible. Harrison, the case

manager supervisor, recommended the safety plan remain. The Department's expert Dr. Plazas testified that Mark was at a high risk of reoffending and also testified Mark should not be alone with the children, thus suggesting the safety plan had to be sustained. While Dr. Leavitt testified Mark was at a low-to-moderate risk of sexually abusing Lillie, and this risk could be mitigated with treatment, he had no opinion regarding the safety plan. Dr. Spaccarelli also added that he could not rule out concerns that Nicholas might sexually abuse Lillie based on his own victimization and apparent lack of awareness of how that abuse impacted him. To put it lightly, Nicholas was not an ideal "adult supervisor" of Mark and the children. Significantly, testimony from Dr. Spaccarelli, Mellama, and Dyer-Webster, showed Diane lacked appreciation for the risk in her home and the reason for the safety plan in the first place.

¶ 34 The Department's witnesses testified that a continuing safety plan was untenable as a long-term solution and it was also inconsistent with the goal of Lillie achieving adoption. Lillie did not offer adequate, if any, contrary evidence. The Director, crediting this testimony, held that the greater weight of the evidence in fact showed removing Lillie was consistent her safety and permanency. See 89 Ill. Adm. Code 337.30(e)(1) (2012). Weighing the evidence against the legal standard, the Director concluded that Lillie's safety and permanency affected her well-being more than the psychic pain of being displaced from her long-term foster home and of adjusting to a new family. The Director determined Lillie thus failed to meet her burden. We will not reweigh the evidence or make independent determinations on the facts, as that is not within the province of this court. See *Abrahamson,* 153 Ill. 2d at 88; see also *Parikh v. Division of Professional Regulation of Dept. of Financial and Professional Regulation,* 2014 IL App (1st) 123319, ¶ 28 (if the issues are merely ones of conflicting testimony or credibility of witnesses, the determinations of the agency should be upheld). In light of the testimony and evidence, we

cannot say the Director's finding that Lillie failed to show the removal decision was inconsistent with her safety, well being, and permanency was against the manifest weight of the evidence. To the extent Lillie's argument encompasses a mixed question of law and fact, we conclude the agency decision was also not clearly erroneous.

¶ 35 In reaching this conclusion, we cannot agree with Lillie's argument that the Director failed to reconcile the testimony of the opposing expert witnesses as to Mark's level of risk. We conclude that the Director did not have to reconcile their testimony as to the exact level of risk. It was enough that Lillie was at *any* risk in her foster home and that a safety plan had to be instituted for her to remain. As the Director aptly stated, the therapy services recommended for Diane and her family had no relation to Lillie's reason for entering into the child welfare system and should not be her problem to right. The Director found the burden of exposing Lillie to the foster family's own unresolved trauma and the continued safety plan would be greater than placing her with a new family to achieve permanency. Again, it is not within our province to weigh the evidence or make determinations as to witness credibility. See *Iwanski*, 232 Ill. App. 3d at 184. In that regard, we reject Lillie's contention that the agency action was arbitrary or capricious, even assuming that standard applies, since the matter of safety was fully considered. See *Hoffelt v. Illinois Dept. of Human Rights*, 367 Ill. App. 3d 628, 632 (2006) (agency action is arbitrary and capricious when the agency contravenes the legislature's intent, fails to consider a crucial aspect of the problem, or offers an implausible explanation contrary to agency expertise).

¶ 36 Regarding the permanency factor, Lillie further argues the court-ordered goal of adoption "was not immutable." She argues, "Under the circumstances, a goal other than adoption could provide Lillie a permanent home." At the hearing, however, Lillie challenged her removal. See 89 Ill. Adm. Code 337.70(a)(7) (2012). She did not challenge her permanency goal of adoption.

Indeed, under the regulations, she could not do so. According to rule 337.70(a)(3) of the Code, a party in a service appeal may only request a change of the permanency goal when the circuit court has *not* already entered any permanency order. 89 Ill. Adm. Code 337.70(a)(3); see also 89 Ill. Adm. Code 337.80(c), (f) (2012) (same). There is no dispute that the goal the juvenile court entered was adoption. The record shows the last permanency order was entered April 27, 2012. This goal cannot be changed without the approval of the juvenile court. 89 Ill. Adm. Code 315.200(c)(3) (2011). Should Lillie wish to challenge this goal, she will have to reappear before the Juvenile Court, not raise the issue for the first time on appeal from an administrative decision. See 705 ILCS 405/2-28 (West 2012) (permanency hearings are to be held every six months).

¶ 37 Lillie finally argues the Director's findings about Diane's named backup provider of Mark and Nicholas were contrary to the manifest weight of the evidence. Lillie points to Diane's 2009 will, noting it shows Mark (and then Nicholas) merely as the designated guardian of her *estate*, as opposed to guardian of her children. Lillie acknowledges the 2009 will was not entered into evidence at the hearing, which considerably weakens her argument. See 735 ILCS 5/3-110 (West 2012) (no new or additional evidence in support of or in opposition to any finding, of the administrative agency shall be heard by the court). Regardless, the entire reason this matter arose was because Diane named Mark as backup care provider to the children on the Department's paperwork in the event of Diane's incapacity or death. The JPA report stated Diane did the same in her will. At the hearing, Diane stated she changed her will in October 2011 to reflect Nicholas as the new guardian of Lillie and her other children. In short, the evidence was overwhelming that Diane wanted Mark, and then Nicholas, to care for her children if she were unable, and this was not in dispute. If there were any factual error, it was up to Lilly to correct it,

since she bore the burden of proof and since changing the will was required by the JPA. We decline to further entertain Lillie's argument on appeal.

¶ 38 In light of the parties' arguments and our review of the record, we cannot say the opposite conclusion regarding factual findings was clearly evident, nor do we have a definite and firm conviction that a mistake has been made.

¶ 39 CONCLUSION

¶ 40 Based on the foregoing, we affirm the circuit court judgment affirming the decision of the Director to remove Lillie from her foster home. We note that it has been some two years since the hearing. Given the dynamic factors at play, we would urge the parties to carefully assess Lillie's current circumstances. If Lillie still wishes to remain with Diane and the rest of her foster family, it would behoove the Department to find Lillie an alternate home where she can achieve the least disruption and maintain contact with Diane. Afterall, she was placed in Diane's home under the Department's watch for about eight years before any issue was raised, and in the meantime, Diane was allowed to adopt three other children. In short, the Department should be sensitive to Lillie's hardship, especially because the Department contributed to it. We find it unfortunate that the Department's contracted services agency, Children's Place, failed in its obligation to find Lillie a suitable foster home early on. Had Children's Place not overlooked information available to it at the time of Lillie's initial placement into foster care, it seems Diane's home would never have been deemed suitable (given the potential for the child's exposure to an immediate family member who was an admitted sex abuser), and Lillie would not now face the prospect of removal from the only home she has known.

¶ 41 Affirmed.