2015 IL App (4th) 140056-U

NO. 4-14-0056

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
February 26, 2015
Carla Bender
4th District Appellate
Court, IL

LINDA MARKHAM,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Sangamon County
THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES and BOBBIE GREGG, Acting Director,	)	No. 13MR575
	)	Honorable
Defendants-Appellees.	)	Rudolph M. Braud,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court reversed, concluding defendants' decision to deny plaintiff's request for expungement was clearly erroneous.

¶ 2 In January 2013, defendant, the Illinois Department of Children and Family Services (DCFS), entered an indicated finding of neglect against plaintiff, Linda Markham, into the State Central Register. Plaintiff thereafter sought expungement of the founded report. In June 2013, following an evidentiary hearing, an administrative law judge (ALJ) recommended the founded report be expunged. Later that month, defendant, Richard H. Calica, the Director of DCFS, filed a written decision denying plaintiff's request for expungement. (Defendant Calica passed away during the pendency of this appeal. Acting Director Bobbie Gregg has therefore been substituted in his place. Ill. S. Ct. R. 366(a)(2) (eff. Feb. 1, 1994).) In July 2013, plaintiff

filed an action in the circuit court seeking reversal of the Director's decision. In December 2013, following a hearing, the circuit court confirmed the Director's decision.

¶ 3 Plaintiff appealed, arguing (1) defendants' decision to disregard the ALJ's recommendation and deny plaintiff's request for expungement was clear error; and (2) defendants misinterpreted the statutory and administrative definitions of "neglected child" and "inadequate supervision." We reverse.

¶ 4 I. BACKGROUND

¶ 5 A. The After-School Program

¶ 6 Plaintiff is employed as the program director of an after-school child-care program, the Macon After-School Program (program). On the date and time at issue, plaintiff's staff consisted of six members: (1) plaintiff's son, Stephen "Jake" Markham, who had been employed periodically by the program for eight years; (2) Ethan Snivley, who was 22 years old and had worked at the program since he was in high school; (3) Megan Craft, who was 20 years old and had worked at the program for four years; (4) Carey Craft, who was 49 years old and worked at the program for an unspecified period of time; (5) Josie Boyd, who was 17 years old and had worked at the program for one year; and (6) Jordan, who was college-age and had worked at the program for four years. (Neither Jordan's last name nor her precise age appears in the record.)

¶ 7 The program served children between kindergarten and fifth grade. The program ran on weekdays from 3 p.m. until 6 p.m. Plaintiff reported approximately 40 children were enrolled in the program. The program was housed at Meridian Primary School in Macon, Illinois. Behind the school was a large outside play area, where staff members took the children to play. The play area contained a blacktop, a swing set, and a playground. The play area was

surrounded by a chain-link fence, but had a sliding gate, as well as two gates through which a bike could be ridden. Along one boundary of the outside play area was a group of pine trees. No fence ran along this boundary, and the group of pine trees abutted the school.

¶ 8 The children enrolled in the program were placed in groups based on their grade level, and each program employee was assigned to one group. When everyone in a group finished their homework, the staff member assigned to the group could take the children to the outside play area. Once outside, each staff member was responsible for all the children present, not just those in their group.

¶ 9 Plaintiff put into place and reiterated daily several rules governing staff conduct. Her staff were not allowed to use their cell phones while working. She required her staff to escort the children to the bathroom, gym, and outside. Plaintiff also required parents to sign their children out of the program and did not allow the children to leave on their own.

¶ 10 With regard to supervision of the outside play area, plaintiff tried to maintain a ratio of 1 staff member for every 10 children. Plaintiff emphasized to her staff that when working the playground, they were there to focus on the children's safety and not have conversations with each other. Plaintiff believed in a "bubble system" for supervising the playground, in which the staff would act as a "bubble" around the children; however, plaintiff never communicated this to her staff.

¶ 11 Plaintiff directed the program for 14 years without incident until January 2013.

¶ 12 B. The Incident Leading to the Indicated Finding of Neglect

¶ 13 On January 11, 2013, two boys enrolled in the program, K.M. (born September 22, 2006) and C.D. (born January 19, 2007), wandered out of the outside play area. According

to the DCFS investigator, plaintiff estimated the children were gone no longer than eight minutes. No one refuted plaintiff's estimate.

¶ 14 Earlier that day, plaintiff observed K.M. and C.D. play fighting with sticks and told them it was not allowed at the program. Later that afternoon, Josie observed the boys walking toward the sliding gate and confronted them, asking them what they were doing. The boys told Josie they were going to see their mothers, who had just arrived in front of the school. Not believing them, Josie instructed K.M. and C.D. to return to the playground. After confronting the boys, Josie went inside to complete her cleanup duties. At this point, Ethan, Megan, and Linda were outside with the children. Josie did not tell Ethan, Megan, or Linda that K.M. and C.D. had attempted to leave the school.

¶ 15 At around 5 p.m., K.M.'s mother, Kimberly, arrived to pick up her son. When Kimberly did not see K.M., she asked Josie if she had seen him. Josie indicated she had not seen K.M. and directed Kimberly to check in the cafeteria. Kimberly did not see K.M. in the cafeteria and returned outside to inform Josie that K.M. was missing.

¶ 16 After learning K.M. was not inside the school, the staff began searching for him outside. When the staff did not see K.M. around the school, they searched the surrounding neighborhood. Josie eventually located K.M. and C.D. approximately three blocks away from the school. Josie did not know C.D. was also missing until she found him with K.M. In fact, none of the staff realized C.D. was missing until he was found by Josie. Kimberly's mother arrived in her car shortly thereafter and drove Josie and the two boys back to the school. C.B., a nine-year-old student in the program, later informed Josie the boys left the outside play area through a gap in the fence by the pine trees. At the time Josie located K.M. and C.D., it was

getting dark, but there was still daylight. Additionally, the weather was unseasonably warm to the point a jacket was unnecessary.

¶ 17 After an investigation, DCFS determined credible evidence existed to support an indicated finding of neglect against plaintiff under "allegation of harm" No. 74 (definition No. 74), which is entitled "Inadequate Supervision" and located in part 300, appendix B, of title 89 of the Illinois Administrative Code (89 Ill. Adm. Code § 300. Appendix B (2011)). Plaintiff thereafter requested DCFS expunge the indicated finding from the State Central Register pursuant to section 7.16 of the Abused and Neglected Child Reporting Act (Child Reporting Act) (325 ILCS 5/7.16 (West 2012)). Plaintiff also requested an evidentiary hearing before an ALJ.

¶ 18 C. The Administrative Hearing

¶ 19 In May 2013, the matter proceeded to an evidentiary hearing before the ALJ, at which the following evidence was presented.

¶ 20 K.M.'s mother, Kimberly, testified K.M. began attending the program in August 2012. Kimberly reported she had no concerns with any of the program's employees watching K.M. outside and this incident did not change her mind. Kimberly also stated she thought the program had an adequate number of employees. At the time of the hearing, K.M. was still enrolled in the program. Kimberly continued to send K.M. to the program despite this incident because she trusted the program and believed they did a great job. Kimberly also stated she thought the employees' reaction was appropriate given their immediate response to the situation.

¶ 21 C.D.'s mother, Beth, testified C.D. began attending the program in August 2012. On January 11, 2013, at approximately 5:25 p.m., Beth arrived at the school to pick up C.D. When she arrived, she went into the cafeteria and saw a sheriff's deputy speaking with her son

and K.M. At this time, plaintiff pulled Beth aside and informed her C.D. and K.M. had run away from the program and were gone for about five minutes.

¶ 22 C.D. told Beth he and K.M. wanted to go "play ninjas." Because they were not allowed to do so on the playground, they left the outside play area. Beth testified C.D. was still enrolled at the program despite this incident.

¶ 23 Josie Boyd testified she was a high-school senior and was employed by the program at the time of the incident. Josie was assigned to the second-grade group at the program. Her duties included helping the children with their studies and watching them on the playground. Josie stated she worked at the program for approximately one year before stopping in February 2013.

¶ 24 Josie testified as to the day-to-day operations of the program and her interaction with K.M. and C.D. before they snuck away from the play area. Additionally, Josie provided more detail concerning her actions that day.

¶ 25 On January 11, 2013, the group for which Josie was responsible went outside at about 4:15 p.m. K.M. and C.D. were not part of Josie's assigned group, but they were in the outside play area at that time. Two other staff members, Megan and Ethan, were outside supervising 20 or 25 children. In addition, three or four children from the neighborhood who were not enrolled in the program were also playing in the outside play area.

¶ 26 At some point, Josie was called inside to clean up the cafeteria. When she finished with her cleanup duties, Josie returned outside and told Ethan and Megan to bring the children inside because it was getting dark. Josie held the door open as the children filed inside. About that time, Kimberly arrived and went inside to get K.M. After a short time, Kimberly returned and asked Josie where K.M. was.

¶ 27 DCFS investigator Angelique Maxwell testified, on January 11, 2013, she received a hotline report that K.M. and C.D. went missing from the program. Maxwell spoke with K.M. and C.D. following the incident and learned the boys left the program to "do karate" because they had been told earlier it was not allowed at the program. Maxwell walked the route the boys took with C.D. and noticed they were found only one block from Macon County Highway 32, which was "a pretty busy highway." The boys had crossed two streets in their escape.

¶ 28 Maxwell also spoke with plaintiff. Plaintiff gave Maxwell an account of what happened on January 11, 2013, and estimated the boys were gone for approximately eight minutes. Maxwell determined the incident fit the criteria for definition No. 74 (inadequate supervision), and that is why DCFS entered an indicated finding. DCFS also took the position no measures were put in place to ensure K.M. and C.D. did not escape. On cross-examination, however, Maxwell could not point to any measure that should have been, but was not, in place to prevent K.M. and C.D. from walking out of the outside play area.

¶ 29 Plaintiff's attorney questioned Maxwell about how this incident fit within definition No. 74. When asked how plaintiff placed the children in a situation likely to require judgment greater than their level of maturity, Maxwell provided the following answer:

> "Well, I would say that the children were outside with others that were supervising, and from the parents I had talked to, they had never seen any other adults outside besides these high school or college kids that were watching them. So that might be, you know, without her assessing or reassessing the situation or checking on her staff, that possibly could be putting the kids at a—in a

circumstance that, you know, would require, you know, more supervision."

¶ 30 When asked how plaintiff left the children alone, Maxwell indicated plaintiff did not leave the children alone. Maxwell testified plaintiff was not unable to care for the children because of a mental or physical condition or intoxication. Further, Maxwell testified plaintiff did not leave the children unattended in an unsafe place.

¶ 31 When asked whether plaintiff left the children in the care of an inadequate or inappropriate caregiver, Maxwell responded in the affirmative, explaining the caregivers were inadequate or inappropriate "because they [K.M. and C.D.] left—they got away from the staff that was supposed to be watching them." When pressed further, Maxwell could not point to any evidence showing plaintiff was aware the staff on the playground were inadequate or inappropriate. Maxwell concluded plaintiff placed the children in the care of an inadequate or inappropriate caregiver because "she's the director, she should have been checking." Maxwell concluded plaintiff was not checking on her staff because Josie told her plaintiff stays inside a majority of the time. Additionally, Maxwell stated K.M.'s and C.D.'s mothers told her they rarely saw "an adult or [plaintiff] outside." However, Maxwell did not ask plaintiff or any of the other staff members whether she typically supervised the children on the playground or whether she had that day.

¶ 32 Maxwell acknowledged plaintiff did not place the children on the playground unsupervised. However, Maxwell noted the supervisors "were high school or college kids," but acknowledged the only supervisor who was not an adult was Josie, a 17-year-old high-school senior. Maxwell acknowledged, under DCFS policy, people of this age are allowed to supervise children provided they do not have a mental disability. None of plaintiff's staff had a mental

disability of which Maxwell was aware. Additionally, Maxwell did not know (1) how plaintiff hired her staff; (2) how long Josie, Ethan, or Megan had been working for the program; or (3) whether Josie, Ethan, or Megan had any previous issues in terms of their supervision of the children. Maxwell did not investigate the backgrounds of the program's employees. Additionally, Maxwell was unable to state DCFS's policy with regard to a required adult-child ratio.

¶ 33 Finally, when questioned by the ALJ, Maxwell testified she never interviewed Ethan or Megan, the two staff members who were on the playground when K.M. and C.D. left the premises. Maxwell explained she thought Josie's information was the most important, despite the fact she was not outside when K.M. and C.D. wandered away, because (1) the boys told her Josie was in charge of them that day, and (2) Josie was the employee who eventually located the boys.

¶ 34 Detective Kristopher Thompson testified he became aware of the incident when he, on January 12, 2013, received a call from Maxwell. Thompson had never been called to respond to any problems at the program and was not aware of any other instance in which children had wandered away from the program. After he received a report from the responding deputy, Thompson found no criminal wrongdoing and considered the case to be closed.

¶ 35 Though Thompson's children were not enrolled in the program, he had taken his children to the playground at the school while the program was in session. Thompson did not observe any problems with how the program was run and, in fact, thought the program "seemed to be very well ran [*sic*] and organized." Thompson reported plaintiff had a very good reputation with regard to her care for the children in the program. Thompson stated he would trust plaintiff with his own children.

¶ 36 Alicia Ralston testified two of her three children are enrolled in the program. Ralston testified she is satisfied with the program because it is structured, teaches respect, and is convenient. Ralston reported no concerns with any of the staff members' ability to supervise the children on the playground. Ralston testified she has seen plaintiff both inside helping children with homework and outside supervising the children on the playground. Additionally, Ralston cited no concerns with plaintiff's ability to run the program or hire appropriate staff.

¶ 37 Kevin West testified his daughter is enrolled in the program. West believed the program was appropriately structured and "run very well." West had observed the supervision on the playground and found it to be appropriate because "there [was] somebody that [could] see from almost all vantage points." West stated he almost always sees plaintiff on the playground supervising the children when he arrives to pick up his child. West reported he never had any safety or security concerns with the program or its staff. Additionally, West believed plaintiff and her program had a strong, positive reputation in the community.

¶ 38 Francine Moyer testified she has two sons, both of whom have special needs and attended the program. (Her oldest son had aged out of the program.) Moyer liked the program because the staff instilled discipline and were very caring, especially with children with special needs. Moyer cited no concerns with the staff's ability to supervise her children. While the incident involving K.M. and C.D. caused her some concern, Moyer viewed it as an isolated incident that could have happened to anybody and did not think it was the result of negligence on plaintiff's part.

¶ 39 Plaintiff's son, Jake, testified he currently supervised the program's staff. Jake described the day-to-day operations at the program. Additionally, Jake explained new written

policies regarding playground supervision were implemented following the incident. Prior to the incident, the written policies were orally communicated to the staff by plaintiff.

¶ 40 Plaintiff testified she had never been involved with DCFS, either through her work with the program or in her personal life. During her time with the program, plaintiff never had to call police to respond to a situation and had never been accused of neglecting a child.

¶ 41 With regard to plaintiff's hiring and training of her staff, she testified she calls the counselor at the high school and asks if any students are interested in teaching and helping children. The counselor sent students who were interested. Plaintiff would then meet with the student, explain what she expected of the student, and set forth the rules she expected her staff to follow. Her staff were expected to be attentive and have good grades.

¶ 42 Plaintiff noted the area through which K.M. and C.D. left was of "special concern" to her. Students were not allowed to approach the pine trees without being accompanied by a staff member.

¶ 43 Prior to the incident, plaintiff had no reason to believe her staff were not adequately supervising the children. On a typical day, plaintiff works both inside helping children and outside supervising them on the playground. On January 11, 2013, plaintiff was "in and out," but she never saw K.M. and C.D. near the trees. Although Josie saw and stopped K.M. and C.D.'s attempt to sneak away, she never related this information to plaintiff. Plaintiff explained if Josie would have told her, she would have pulled the two boys inside to wait for their parents.

¶ 44 Plaintiff testified she was outside when it was discovered K.M. was missing. At that time, two employees, Ethan and Megan, were outside supervising the children. Plaintiff had no concerns with their abilities because they always paid attention. When she learned the boys

were missing, plaintiff searched the school building with Kimberly. When the search was unsuccessful, plaintiff called the police.

¶ 45 Plaintiff testified she did not leave the children without adult supervision. According to plaintiff, she did not place either K.M. or C.D. "in a situation likely to require them to use judgment or actions greater than their level of maturity." Plaintiff felt it was appropriate for the children to be outside that day and made sure staff were outside watching the children. She did not know K.M. and C.D. had been left unattended.

¶ 46 D. The ALJ's Recommendation

¶ 47 Following the evidentiary hearing, the ALJ recommended plaintiff's request for expungement be granted, concluding DCFS had not proved definition No. 74 by a preponderance of the evidence. The ALJ found (1) three staff members were outside with 20 to 25 children on the date in question; (2) during regular school hours, 80 to 100 children are on the playground with only two supervisors; (3) plaintiff was inside and outside throughout the afternoon, but was inside when Kimberly arrived at 5 p.m.; (4) sometime between 4:30 and 5 p.m., K.M. and C.D. left the playground without anyone's knowledge; (5) the boys were found three blocks away from the school; (6) no evidence rebutted plaintiff's assertion that the boys were gone for eight minutes; (7) K.M. and C.D. remained enrolled in the program and in the care of plaintiff; and (8) no evidence showed the two supervisors outside were inadequate in ability, the number of children in their care violated any applicable standard for the care of children, or the number of children to supervise was unreasonable.

¶ 48 The ALJ noted Maxwell stated that plaintiff was indicated because she had the ultimate responsibility, as director of the program, for the children, her staff, and program guidelines. The ALJ noted, however, Maxwell could not identify any area of deficiency in the

program or negligence on plaintiff's part. The ALJ found the sole rationale supporting the indicated finding was, "since the children left unobserved, ipso facto, there must have been inadequate supervision and [plaintiff], somehow, the ultimate inadequate supervisor." The ALJ found no evidence showing plaintiff's negligence and no reasonable basis was offered to impute the negligence of her staff onto plaintiff. Instead, the ALJ viewed this incident as an accident—"much the same as if they had sustained an injury unobserved during the course of play."

¶ 49 E. The Director's Decision

¶ 50 In June 2013, the Director sent plaintiff a letter informing her that he disagreed with the ALJ's recommendation and denied her request for expungement. The Director found the ALJ "did not adequately consider and weigh the factors that are required under Allegation #74, Inadequate Supervision." The Director noted definition No. 74 is defined "as occurring when, the child has been placed in a situation or circumstances which are likely to require judgment or actions greater than the child's level of maturity, physical condition, and/or mental abilities would reasonably dictate."

¶ 51 The Director also set forth the following:

> "Some of the factors to be considered in [definition No. 74] include:
>
> child's age and developmental stage, particularly as it relates to the ability to make sound judgments in the event of an emergency (*this incident involved two children that are 5 years of age*);
>
> is the caregiver mature enough to assume responsibility for the situation (*your client left 20-25*

children under supervision of 3 young adults, ages 17 to 22 years of age [*sic*]*, one of whom is a high school student*);

can the caregiver see and hear the child (*no one was aware the children were missing until one of their mother's arrived to pick them up*);

duration of the occurrence (*approximately 8 minutes*);

time of the day or night when the incident occurs (*January at about 5:00 p.m. and it was getting dark*);

child's location (*3 1/2 blocks away*);

frequency of occurrence (*earlier on the same day both children were observed, by staff, trying to walk through the playground gate and were stopped*)."

(Emphases in original.)

¶ 52 F. Review Pursuant to the Administrative Review Law

¶ 53 In July 2013, plaintiff filed a complaint in the circuit court seeking judicial review of the Director's decision. The parties thereafter submitted written arguments to the court. In December 2013, the court held a hearing on plaintiff's complaint for the purpose of hearing oral argument from the parties. Following this hearing, the court denied plaintiff's request for administrative review and confirmed defendants' decision to deny plaintiff's request for expungement. The court found the Director's findings were not against the manifest weight of the evidence, and defendants' decision to deny plaintiff's request for expungement was not clearly erroneous. Additionally, the court's order stated, "to briefly state, this court specifically

finds that two five year olds wandering down the street while under the care and supervision of [p]laintiff is ample evidence describing an environment injurious and likely harmful to these children."

¶ 54 This appeal followed.

¶ 55 II. ANALYSIS

¶ 56 On appeal, plaintiff contends (1) defendants' decision to deny plaintiff's request for expungement despite the recommendation of the ALJ was clearly erroneous because the facts established by the administrative record do not meet the statutory definition of "neglected child" or satisfy the administrative standard of "inadequate supervision"; and (2) defendants misinterpreted the statutory and administrative definitions of "neglected child" and "inadequate supervision" as a matter of law. We will begin by discussing the standard of review.

¶ 57 A. Standard of Review

¶ 58 In administrative cases, this court reviews the decision of the administrative agency and not the determination of the circuit court. *Walk v. Illinois Department of Children & Family Services*, 399 Ill. App. 3d 1174, 1181, 926 N.E.2d 773, 779 (2010). The appropriate standard of review depends on whether the question presented is one of law, one of fact, or a mixed question of law and fact. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210, 886 N.E.2d 1011, 1018 (2008).

¶ 59 The agency's interpretation of its own regulations or a statute is a question of law. *Id.* We review *de novo* an agency's decision on a question of law. *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 532, 870 N.E.2d 273, 293 (2006). In such cases, the agency's decision is not binding upon the reviewing court; rather, our review is independent and not deferential. *Cinkus*, 228 Ill. 2d at 210, 886 N.E.2d at 1118. However, the agency's

interpretation of its own rules and regulations enjoys a presumption of validity. *Walk*, 399 Ill. App. 3d at 1181, 926 N.E.2d at 779.

¶ 60 "Review of purely factual findings made by an administrative agency is conducted under a manifest-weight-of-the-evidence standard." *Id.* at 1186, 926 N.E.2d at 784. Under this standard, we may not substitute our judgment for that of the agency and do not reweigh the evidence or make an independent determination of the facts; rather, the proper inquiry is whether the opposite conclusion was clearly evident. *Id.* We will not reverse the agency's decision merely because we would have come to a different conclusion. *Id.* at 1186-87, 926 N.E.2d at 784. Instead, " 'If there is evidence in the record supporting the administrative agency's decision, it should be affirmed.' " *Id.* at 1187, 926 N.E.2d at 784 (quoting *MJ Ontario, Inc. v. Daley*, 371 Ill. App. 3d 140, 145, 861 N.E.2d 1161, 1166 (2007)).

¶ 61 When the agency decision presents a mixed question of law and fact, our inquiry is whether the administrative decision was clearly erroneous. *Id.* A mixed question of law and fact is presented when the dispute concerns the legal effect of a given set of facts. *Cinkus*, 228 Ill. 2d at 211, 886 N.E.2d at 1018. A decision is clearly erroneous when the reviewing court is left with the definite and firm conviction a mistake has been made. *Id.*

¶ 62 B. The Child Reporting Act

¶ 63 The Child Reporting Act (325 ILCS 5/1 to 11.8 (West 2012)) requires DCFS to maintain a central register of suspected child abuse or neglect cases that are reported as required by the statute. 325 ILCS 5/7.7 (West 2012). When DCFS receives a report of possible abuse or neglect, it conducts an investigation to determine whether the report is "indicated," "unfounded," or "undetermined." 325 ILCS 5/7.12 (West 2012). A report is deemed "indicated" where the investigation establishes "credible evidence of the alleged abuse or neglect exists." 325 ILCS 5/3

(West 2012). "Credible evidence" of child neglect is present when "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 (2011).

¶ 64 Once an indicated finding is entered into the central register, the subject of the report "may request [DCFS] to amend the record or remove the record of the report from the register." 325 ILCS 5/7.16 (West 2012). The subject of the report is entitled "to a hearing within [DCFS] to determine whether the record of the report should be amended or removed on the grounds that it is inaccurate." *Id.* At this hearing, DCFS must show a preponderance of the evidence supports the indicated finding. 89 Ill. Adm. Code § 336.100(e)(2) (2011). Following this hearing, the Director receives the ALJ's recommendation and decides whether to accept, reject, amend, or remand the ALJ's recommendation. 89 Ill. Adm. Code § 336.220(a) (2011). The Director's decision then becomes the final administrative decision for purposes of review. *Id.*

¶ 65 C. Definitions

¶ 66 Section 3 of the Child Reporting Act defines "neglected child," in relevant part, as any child "who is subjected to an environment which is injurious insofar as (i) the child's environment creates a likelihood of harm to the child's health, physical well-being, or welfare and (ii) the likely harm is the result of a blatant disregard of *** caretaker responsibilities." 325 ILCS 5/3 (West 2012). DCFS has promulgated a series of definitions to guide the agency in its determination of whether a child has been neglected, which is contained in part 300, appendix B, of title 89 of the Illinois Administrative Code. 89 Ill. Adm. Code § 300. Appendix B (2011).

¶ 67 In this case, the Director denied plaintiff's request for expungement, finding plaintiff placed the children in the care of an inadequate or inappropriate caregiver, which

satisfied definition No. 74. Under definition No. 74, "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." *Id.* Definition No. 74 sets forth multiple examples of inadequate supervision, one of which is "[l]eaving children in the care of an inadequate or inappropriate caregiver." *Id.*

¶ 68 Definition No. 74 also directs DCFS to consider certain factors when determining whether a child has been inadequately supervised. Definition No. 74 groups the factors into three categories: "child factors," "caregiver factors," and "incident factors." *Id.*

¶ 69 The "child factors" include the child's (1) age and developmental stage as they relate to the child's ability to make sound judgments in case of emergency; (2) physical condition as it relates to the child's ability to care for himself or herself; and (3) mental abilities as they relate to his or her ability to comprehend the situation. *Id.*

¶ 70 The "caregiver factors" include (1) the presence or accessibility of the caregiver, and particularly (a) how long it takes the caregiver to reach the child, (b) whether the caregiver can see and hear the child, (c) whether the caregiver is accessible by telephone, and (d) whether the child has access to a phone and numbers to call in case of emergency; (2) the caregiver's capabilities, and particularly whether the (a) caregiver was mature enough to assume responsibility for the situation, (b) caregiver relies on assistance to care for himself or herself and the child, and (c) child has assumed primary caregiving duties; (3) the caregiver's physical condition and, in particular, whether the caregiver is physically able to care for the child; and (4) the caregiver's cognitive and emotional condition, particularly whether the (a) caregiver is able to

make appropriate judgments on the child's behalf, and (b) caregiver's own health needs present serious obstacles to the care and well-being of the child. *Id.*

¶ 71 The "incident factors" include (1) the frequency of the occurrence; (2) the time of day or night when the incident occurs; (3) the condition and location of the place where the minor was left without supervision; (4) the weather conditions and whether the minor was left in a location without adequate protection from the natural elements; (5) whether other supporting persons were overseeing the child; (6) whether food and other provisions were left for the child; and (7) whether any other factor was present that endangered the health and safety of the child. *Id.*

¶ 72 D. The Director's Decision To Deny Plaintiff's Request for Expungement Was Clearly Erroneous

¶ 73 In this case, the material facts are largely undisputed. In making his decision, the Director determined the legal effect, under definition No. 74, of these facts. Therefore, our inquiry is whether the agency's decision was clearly erroneous. *Walk*, 399 Ill. App. 3d at 1187, 926 N.E.2d at 784.

¶ 74 Our review of the record, when viewed in light of the relevant factors under definition No. 74, leaves us with a definite and firm conviction a mistake has been committed in the Director's denial of plaintiff's request for expungement. In this case, the Director noted how several of the factors under definition No. 74 weighed in favor of DCFS's decision. For example, the Director considered the "child's age and developmental stage, particularly as it relate[d] to the ability to make sound judgments in the event of emergency." The Director's analysis under this factor states, "this incident involved two children that [were] [five] years of age." In this case, however, no evidence showed plaintiff ever placed K.M. and C.D. in a situation in which they would be required to make sound judgments in the case of emergency.

Rather, the record shows plaintiff placed the boys under the supervision of her staff, and DCFS failed to present any evidence showing plaintiff's staff were not able to make sound judgments in case of emergency. Accordingly, we fail to see how this factor supports defendants' decision.

¶ 75 The Director also considered whether the caregivers, in whose care plaintiff placed K.M. and C.D., were mature enough to assume responsibility for the situation. The Director's analysis states, "[plaintiff] left 20-25 children under supervision of [three] young adults, ages 17 to 22 years of age, one of whom [was] a high school student." However, no evidence established the caregivers were not mature enough to assume responsibility for the situation. Further, Maxwell testified that young adults are permitted to care for children so long as they have no mental disability. DCFS failed to present any evidence showing anyone on plaintiff's staff had a mental disability. Additionally, the evidence showed no one had any concern in relation to the staff's ability to supervise the children on the playground. We fail to see how this factor weighs in favor of defendants' decision.

¶ 76 DCFS points to Josie's age and her failure to report the boys' earlier attempted escape in support of its position plaintiff's staff were not mature enough to assume responsibility for the situation. Josie's age notwithstanding, DCFS failed to present any evidence Josie was not mature enough to assume responsibility for the situation. Although Josie told no one of the boys' earlier attempted escape, this does not establish Josie was too immature to assume responsibility for the situation. Josie demonstrated her maturity by stopping K.M. and C.D.'s earlier attempted escape when she determined the boys were not being truthful about why they were leaving.

¶ 77 The Director also considered whether the caregiver could see and hear the child. The Director's analysis states, "no one was aware the children were missing until one of their mother's [*sic*] arrived to pick them up." While this fact is uncontroverted and it is true K.M. and

C.D. *ended up* in a place where no one could see or hear them, the Director missed the real thrust of this factor, *i.e.*, whether the caregiver *left* the child unattended in a place where the caregiver could neither see nor hear the child. Here, the record shows plaintiff placed the children in the care of the playground supervisors. The record shows the supervisors could see the children from "almost all vantage points." We fail to see how this factor weighs in favor of defendants' decision.

¶ 78 The Director next considered the duration of the occurrence. The Director's analysis states, "approximately 8 minutes." The Director's analysis fails to shed any light onto how the duration of the occurrence weighs against plaintiff's request for expungement. In other words, the Director's analysis on this factor, without more, weighs neither in favor of nor against plaintiff's request for expungement.

¶ 79 The Director also considered the time of day when the incident occurred, finding it supported the denial of plaintiff's request for expungement. The Director's analysis states, "January at about 5:00 p.m. and it was getting dark." The record shows although the incident occurred in January, it was unseasonably warm that day to the extent a jacket was not necessary. The record also shows it was "getting dark" outside; however, it was not completely dark when the boys were found. Further, DCFS presented no evidence as to how the time of day made this incident any more dangerous or severe. Based on the evidence contained in the record, we fail to see how this factor weighs against plaintiff.

¶ 80 Additionally, the Director considered the children's location. The Director's analysis states, "3 [1/2] blocks away." Similar to his analysis on the duration of the occurrence, the Director's analysis fails to shed any light onto how the children's location weighed against plaintiff's request for expungement. Although the record shows Josie found K.M. and C.D.

about a block away from the "pretty busy" Macon County Highway 32, no evidence showed the boys ever made it that far. The Director's analysis on this factor, without more, weighs neither in favor of nor against plaintiff's request for expungement.

¶ 81 Finally, the Director considered the "frequency of occurrence" and stated, "earlier in the same day, both children were observed, by staff, trying to walk through the playground gate and were stopped." While it is true Josie observed K.M. and C.D. attempting to leave the school earlier that afternoon, the record shows Josie never communicated that incident to the other playground staff or plaintiff. DCFS asserts plaintiff should have had a written policy in place requiring employees to report such instances when they occur, and by failing to do so, she is responsible for her employees' inadequate supervision. While it is true a written policy would have been the best way to ensure plaintiff was made aware of the earlier attempted escape, we cannot say plaintiff was neglectful as a result of her failure to foresee that Josie would not report the earlier attempted escape. Additionally, we note plaintiff orally conveyed policies with regard to playground supervision, one of which was to be especially attentive to the children's safety, and reiterated them frequently.

¶ 82 Further, this incident was not a recurrence of the "incident" cited by the Director. In relation to this factor, the Director cited the boys' previous *attempted* escape. However, the record shows this was the first time in plaintiff's 14 years as director of the program that a child wandered off while the program was in session. In fact, DCFS had never been involved with the program for any alleged problem. Given the evidence contained in the record, we fail to see how this factor weighs in favor of denying plaintiff's request for expungement.

¶ 83 Additionally, the Director's decision makes no reference to several relevant "caregiver factors," which is curious given the allegation of harm in this case—plaintiff placed

K.M. and C.D. in the care of inadequate supervisors. In this case, the evidence established none of plaintiff's employees were physically unable to supervise the children. The evidence established none of plaintiff's employees were unable make appropriate judgments on the children's behalf. Finally, Maxwell could not explain what plaintiff did wrong or should have done differently in this case.

¶ 84 Moreover, we find Maxwell's statements during the evidentiary hearing and the Director's decision show DCFS applied a *per se* rule in this instance to hold plaintiff strictly liable for the K.M. and C.D.'s escape. According to DCFS, because K.M. and C.D. were able to sneak away from the program, plaintiff, as the program's director, must have placed the boys in the care of an inadequate caregiver. During her testimony, Maxwell was asked how plaintiff's employees were inadequate or inappropriate caregivers, and she responded, "because they [K.M. and C.D.] left—they got away from the staff that was supposed to be watching them." The ALJ adequately summarized DCFS's position in her recommendation, stating DCFS's "sole rationale supporting the indicated finding was that since the children left unobserved, ipso facto, there must have been inadequate supervision and appellant, somehow, the ultimate inadequate supervisor."

¶ 85 It is well settled each case of abuse or neglect should be evaluated on a case-by-case basis. See *Walk*, 399 Ill. App. 3d at 1182, 926 N.E.2d at 781 ("Courts have traditionally decided matters involving abuse and neglect of children on a case-by-case basis."); *Slater v. Department of Children & Family Services*, 2011 IL App (1st) 102914, ¶ 36, 953 N.E.2d 44 ("Issues concerning abuse and neglect are decided on a case-by-case basis ***."). We, as did the ALJ, reject DCFS's invitation to apply a *per se* rule and conclude defendants' failure to present

evidence as to why the children escaped—*i.e.*, what plaintiff could have done differently to prevent this incident—is fatal to their case.

¶ 86 Plaintiff also argues defendants misinterpreted the statutory and administrative definitions of "neglected child" and "inadequate supervision." Because we have determined the Director committed clear error in denying plaintiff's request for expungement, we decline to address this issue.

¶ 87 III. CONCLUSION

¶ 88 For the reasons stated, we reverse the circuit court's judgment and the agency's decision.

¶ 89 Reversed.