FILED UNDER SEAL

NO. 14-3921
IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NATASHA FELIX Plaintiff-Appellant, v. ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES and BOBBIE GREGG, in her capacity as ACTING DIRECTOR OF THE ILLINOIS DEPARTMENT OF CHILDREN AN FAMILY SERVICES, Defendants-Appellee	)	Appeal from the Circuit Court of Cook County Case No. 14 CH 3999 Judge Thomas R. Allen

OPENING BRIEF OF PLAINTIFF-APPELLANT

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ORAL ARGUMENT REQUESTED

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POINTS AND AUTHORITIES

NATURE OF THE ACTION

The appeal raises a question of great importance to parents and children of this State: may a parent who allows her school-aged children to play in a nearby park for thirty to forty minutes, without remaining in her line of sight at all times, avoid being registered in a State-run database as a child neglector? The February 3, 2014 final administrative decision by the Illinois Department of Children and Family Services ("DCFS" or the "Department")[1] declared that Plaintiff-Appellant Natasha Felix ("Ms. Felix") engaged in "inadequate supervision" in violation of its child neglect rules and regulations; it sustained an indicated finding against her pursuant to Allegation 74, which sets forth factors defining "inadequate supervision."[2] Ms. Felix timely appealed that final administrative hearing decision against her by filing a Complaint in Administrative Review (the "Complaint") on March 7, 2014, A10-A21, RC00003-04[3], and after the Circuit Court ruled against her in administrative review, she filed this timely appeal to this Court. A23-A24, RC00110-111. This appeal raises statutory and factual arguments as to why DCFS' determination that Ms. Felix engaged in child neglect should be reversed.

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[1] The Appendix, which is attached to this Brief, includes the Director's Final Decision at Appendix A1 and the Administrative Law Judge's Opinion at Appendix A2-A9.

[2] 89 Ill. Adm. Code § 300, App. B (Allegation 74) (2014), *available at* http://www.ilga.gov/commission/jcar/admincode/089/08900300ZZ9996bR.html.

[3] The Appellate Record consists of 4 volumes—2 volumes of the proceedings in the Circuit Court of Cook County and 2 supplemental volumes of the proceedings before the Department. The pages in both sets of volumes are marked C00000. For the Court's reference, this brief adds an R before the citations to the proceedings in the Circuit Court of Cook County i.e. RC00000 and an S for supplemental before the citations to the proceedings before the Department. The Transcript of the Administrative Hearing before the Department starts at SC00027.

ISSUES PRESENTED FOR REVIEW

1. Does the Abused and Neglected Child Reporting Act, as amended on July 12, 2013 pursuant to P.A. 97-0803 to set forth clearer standards for finding child neglect, authorize Allegation 74 (defining "inadequate supervision"), which has not been amended to conform to the statutory language as revised?

2. Even if Allegation 74's broad, factored-based standard set forth in DCFS Rules and Procedures for labeling a parent neglectful due to "inadequate supervision" comports with the Abused and Neglected Child Reporting Act, did DCFS properly apply the relevant factors when it concluded that Ms. Felix neglected her children when exercising her own judgment about her children's developmental abilities and level of experience in being independent, she allowed them to play in a park next to her home for 30 to 40 minutes?

3. Can DCFS assume that 11-year-olds with attention deficit hyperactivity disorder ("ADHD") may not supervise their siblings at a nearby park in the absence of medical or psychological evidence in the record as to the effect of a specific child's ADHD diagnosis on the child's abilities?

4. Were the findings of fact that DCFS' Administrative Law Judge ("ALJ") rendered and the Director adopted, contrary to the manifest weight of the evidence because the ALJ credited statements of the child abuse reporter that had not been previously disclosed, that contradicted her own prior account, and that were contrary to and irreconcilable with the unanimous account of the children and the DCFS investigator?

JURISDICTIONAL STATEMENT

On November 24, 2014, the Circuit Court of Cook County, Illinois entered an order affirming DCFS' February 3, 2014 final administrative decision. A22; RC00109. The November 24, 2014 order rendered a final judgment resolving all claims asserted as to all parties. *Id.* Ms. Felix filed a timely notice of appeal on December 22, 2014. A23-A24; RC00110. This Court has jurisdiction under Illinois Supreme Court Rule 301. *See* Ill. Sup. Ct. R. 301.

STATUTES AND RULES INVOLVED

The appeal involves the interpretation of the Abused and Neglected Child Reporting Act ("ANCRA") and DCFS' regulations implementing ANCRA. ANCRA authorizes DCFS to maintain a State Central Register ("SCR") for all persons found, through indicated reports, to have abused or neglected a child in Illinois. 324 ILCS 5/7.7 (West 2013). DCFS receives reports of suspected child abuse and neglect through a 24-hour hotline number. 89 Ill. Adm. Code 300.30(a) (2013). DCFS then conducts an investigation and determines whether the report of abuse or neglect should be "indicated," "unfounded," or "undetermined" for abuse or neglect. 325 ILCS 5/7.12 (West 2013), 7.14 (West 2013).

In evaluating a report of abuse or neglect, DCFS is governed by ANCRA's statutory definitions of abuse and neglect. A "Neglected Child":

> means any child who is not receiving the proper or necessary nourishment or medically indicated treatment including food or care not provided solely on the basis of the present or anticipated mental or physical impairment as determined by a physician acting alone or in consultation with other physicians or otherwise is not receiving the proper or necessary support or medical or other remedial care recognized under State law as necessary for a child's well-being, or other care necessary for his or her well-being, including adequate food, clothing and

> shelter; *or who is subjected to an environment injurious insofar as (i) the child's environment created a likelihood of harm to the child's health, physical well-being, or welfare and (ii) the likely harm to the child is the result of a blatant disregard of parent or caretaker responsibilities; or who is abandoned by his or her parents or other person responsible for the child's welfare without a proper plan of care* […] A child shall not be considered neglected for the sole reason that the child's parent or other person responsible for his or her welfare has left the child in the care of an adult relative for any period of time.

325 ILCS 5/3 (West 2013).

DCFS has expounded on this definition of neglect, through rulemaking that it adopts, to include a series of "Allegations" or definitions as set forth in 89 Illinois Administrative Code § 300, Appendix B (Allegation 74) (2014)[4]. At issue in this case is DCFS' Allegation 74, Inadequate Supervision, which states:

> The child has been placed in a situation or circumstances that are likely to require judgment or actions greater than the child's level of maturity, physical condition, and/or mental abilities would reasonably dictate. A child shall not be considered neglected for the sole reason that the child's parent or other person responsible for this or her welfare has left the child in the care of an adult relative for any period of time [325 ILCS 5/3]. Examples include, but are not limited to:
>
> – Leaving children alone when they are too young to care for themselves.
>
> – Leaving children alone who have a condition that requires close supervision. Such conditions may include medical conditions, behavioral, mental or emotional problems, or developmental or physical disabilities.
>
> – Leaving children in the care of an inadequate or inappropriate caregiver.
>
> – Being present but unable to supervise because of the caregiver's condition. (This includes (1) the parent or

[4] 89 Ill. Adm. Code § 300, App. B (Allegation 74) (2014), *available at* http://www.ilga.gov/commission/jcar/admincode/089/08900300ZZ9996bR.html.

caregiver repeatedly uses drugs or alcohol to the extent that it has the effect of producing a substantial state of stupor, unconsciousness, intoxication or irrationality and (2) the parent or caregiver cannot adequately supervise the child because of his or her medical condition, behavioral, mental, or emotional problems, or a developmental or physical disability.)

– Leaving children unattended in a place that is unsafe for them when their maturity, physical condition, and mental abilities are considered.

Factors To Be Considered

The following factors should be considered when determining whether a child is inadequately supervised:

Child Factors

– The child's age and developmental stage, particularly related to the ability to make sound judgments in the event of an emergency.

– The child's physical condition, particularly related to the child's ability to care for or protect himself or herself. Is the child physically or mentally handicapped, or otherwise in need of ongoing prescribed medical treatment such as periodic doses of insulin or other medications?

– The child's mental abilities, particularly as they relate to the child's ability to comprehend the situation.

Caregiver Factors

– Presence or Accessibility of Caregiver

•How long does it take the caregiver to reach the child?

•Can the caregiver see and hear the child?

•Is the caregiver accessible by telephone?

•Has the child been given access to a phone and numbers to call in the event of an emergency?

– Caregiver's Capabilities

•Is the caregiver mature enough to assume responsibility for the situation?

•Does the caregiver depend on extraordinary assistance to care for self and the child, i.e., meal preparation, laundry, grocery shopping, transportation? Is the caregiver without consistent or reliable assistance?

•Is the child assuming primary care giving duties, i.e., meal preparation, laundry, grocery shopping, transportation?

– Caregiver's Physical Condition

•Is the caregiver physically able to care for the child? Do the caregiver's own health needs present serious obstacles to the care and well-being of the child?

– Caregiver's Cognitive and Emotional Condition

•Is the caregiver able to make appropriate judgments on the child's behalf?

•Do the caregiver's own health needs present serious obstacles to the care and well-being of the child?

Incident Factors

– What is the frequency of occurrence?

– What is the duration of the occurrence (as related to the "child factors" above)?

– What is the time of the day or night when the incident occurs?

– What is the condition and location of the place where the minor was left without supervision?

– 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?

– 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?

- Was there food and other provisions left for the child?
- Are there other factors that may endanger the health and safety of the child?

Individuals indicated as perpetrators of abuse or neglect, whose names have been placed on the SCR, can challenge the indicated findings by requesting an administrative hearings at which DCFS bears the burden of proving child abuse or neglect by a preponderance of the evidence. 325 ILCS 5/7.16 (West 2013); 89 Ill. Adm. Code 336.60(a) (2000). DCFS administrative hearings are then conducted by assigned administrative law judges ("ALJs"). 89 Ill. Adm. Code 336.120(a) (2000); 89 Ill. Adm. Code 336.120(b)(1) (2000).

At the administrative hearing, DCFS bears the burden of proof by a preponderance of the evidence that the appellant committed abuse or neglect as defined by Illinois law. 89 Ill. Adm. Code 336.100(e) (2000). DCFS rules define "preponderance of the evidence" to mean "the greater weight of the evidence which renders a fact more likely than not." 89 Ill. Adm. Code 336.20 (2005). After the evidentiary hearing, the ALJ presents a written opinion and recommendation to the Director of DCFS. The written opinion and recommendation sets forth findings of fact, conclusions of law, and a recommendation on whether there is a preponderance of evidence of abuse or neglect based on information in the administrative record. 89 Ill. Adm. Code 336.220(a) (2005), 336.120(b)(15) (2000).

INTRODUCTION

In this case, a mother of three boys ages 11, 9, and 5 has been indicated for child neglect under DCFS' Allegation 74 Inadequate Supervision for allowing her sons to play outside in a park immediately adjacent to the family's apartment for 30 to 40 minutes.

The neglect finding should be vacated because it is supported by neither DCFS's statutory authority nor by the facts in the case.

Although ANCRA establishes a child abuse hotline and authorizes DCFS to investigate and maintain records of allegations of child abuse and neglect, DCFS's authority is limited by ANCRA's definitions of "abused child" and "neglected child." 325 ILCS 5/3. Tellingly, neither the definition of "abused child" nor the definition of "neglected child" refer to "inadequate supervision." "Inadequate supervision" is simply not a category of either abuse or neglect. Despite the absence of governing statutory language, DCFS has enacted an open-ended standard that invites its investigators to assess the quality of parental supervision whenever it investigates allegations of neglect.

But even if ANCRA authorizes DCFS to determine a child was neglected due to "inadequate supervision," the decision to indicate Ms. Felix for neglect is clearly erroneous because it failed to consider numerous factors that DCFS itself has set forth in its administrative rule definition of "inadequate supervision." It is also clearly erroneous because the neglect finding rests in significant part on speculation, without any evidence, that children like Ms. Felix's sons who have been diagnosed with ADHD and who are not taking medication "have conditions that require close supervision." A8; RC00013. This speculative conclusion, applied below, was also contrary to the manifest weight of the evidence as it was contradicted by DCFS' Investigator who testified that based on her interview, Ms. Felix's oldest son was "a mature young boy" who "certainly could be allowed to go outside by himself to the park next door." SC00104-105; T. at 77-78.

The neglect finding below was also contrary to the manifest weight of the evidence when it credited testimony of the child abuse reporter that X.F., the youngest of

Ms. Felix's three sons, had been rolling on a "skateboard" under three parked cars. This was a newly-presented account, offered for the first time at the administrative hearing Ms. Felix had requested, and without prior notice to her or to the DCFS Investigator herself. SC00257; SC00100-101; T. at 73-74; SC00270. This version of events contradicted the reporter's own prior account and that of every other person, including the DCFS investigator and the children themselves, that it was a scooter that the children had been playing with, not a skateboard, and a scooter could not possibly have slid under cars as the Hotline caller had claimed during her testimony at the hearing.

STATEMENT OF FACTS

I. THE FELIX FAMILY, THE CHILDREN'S DEVELOPMENTAL ABILITIES AND THE FAMILY'S CUSTOMARY PRACTICES REGARDING PARENTAL AND SIBLING SUPERVISION

Ms. Felix is a mother of three boys, W.J., M.J., and X.F., who were respectively ages 11, 9, and 5 at the time of the incident. SC00035-36, 00189; T. at 8-9, 162. The family apartment is located on a one-way residential street next to a small community park. SC00140; T. at 113. The small park is the size of a house lot, is surrounded by an iron fence, contains a tall tree and playground equipment, and has bushes that run along its border next to the family's home and its front border which faces the street. SC00055, SC00140; T. at 28, 113.

Through three large front windows, Ms. Felix can see the front yard, the front of the neighboring park, and the street. SC00145; T. at 118. From the bathroom window, the entire park is visible from the street to the back alley. SC00148; T. at 121. When her boys play in the front yard or park next door, Ms. Felix looks out these windows to observe the boys. SC00143, SC00204; T. at 116, 177. She has also instructed her oldest son, 11-year-old W.J., that he is in charge of his younger brothers when they play outside

together. SC00188; T. at 161. Even with W.J. supervising, however, Ms. Felix still makes a practice of checking on her boys approximately every ten minutes. SC00139; T. at 112.

W.J. was entering the sixth grade at the time of DCFS's investigation, is a very helpful boy who attends Pritzker Magnet School, and is a B/C student. SC00034, 00129, 00134; T. at 7, 102, 107. Ms. Felix had discussed with W.J. his responsibilities in watching his younger brothers and keeping them safe when they play outside. SC00188-189; T. at 161. She had instructed her boys on rules for playing outside, including not to play in the street. SC00137; T. at 109-110. Ms. Felix had told W.J. that safety comes first, that he must keep an eye on his younger brothers, and that if there are any problems or if his brothers do not listen to him, he must tell his mother so she can attend to the boys herself. SC00188-189; T. at 161-62. W.J.'s experience, prior to the date of the incident that brought this family to DCFS's attention, had included both bringing his youngest brother inside when he fell and scraped his knee, and helping to take care of the scrape. SC00189; T. at 162. Ms. Felix and one of her friends both later testified that X.F. and M. J. listen to W.J. and follow his directions. SC00131; T. at 104, 170-71.

W.J. and M.J. have been diagnosed with ADHD. SC00130, 00133; T. at 102, 106. Although W.J. took medication for his ADHD in the past, his doctor recommended removing him from the medication because he was having adverse side effects, including migraines. SC00130, 00179; T. at 103, 152. Ms. Felix followed the doctor's advice and testified that she had taken W.J. off medication, that W.J. "has been doing fine without the ADHD medicines" and that he does not have any behavior problems at school.

SC00130, 00162; T. at 103, 135. As for M.J., under doctor's advice, Ms. Felix had taken him off his ADHD medicines during the summer months. SC00181-82; T. at 154-155.

II. THE JULY 29, 2013, INCIDENT

On July 29, 2013, Ms. Felix was spring cleaning and had friends over to visit. SC00149-150; T. at 122-23. She sent the boys outside to play in the front yard and neighboring park for approximately 30 to 40 minutes. SC00150; T. at 123, 161. Ms. Felix's friend also sent her daughter—the boy's cousin—outside to play with them. SC00150; T. at 149. Ms. Felix had instructed W.J. that he was to watch over his younger brothers and report to her if there were any problems. SC00188; T. at 161-62. For the entire time that the boys were playing outside, Ms. Felix remained inside the family home immediately adjacent to the park. SC00081; T. at 53-54, 115-16. Ms. Felix checked on the children approximately every ten minutes by looking for them through the windows facing the park and spoke with the children once during the 30-40 period to remind them to share their cousin's scooter and to get along with each other. SC00087, 00143; T. at 124-125.

Erica Crespo, a local preschool teacher, was also in the park that day. SC00039; T. at 12. She had brought her class of fifteen 3- to 5-year-olds into the park for approximately fifteen minutes. SC00052; T. at 25. Ms. Crespo claimed that while she was in the park, she watched the middle child climb a tree located in the park and shake its branches. SC00041; T. at 14. While watching him climb the tree, Ms. Crespo also reportedly watched the oldest "r[u]n inside and g[e]t a 'skateboard' 'scooter.'" SC00042; T. at 15 (referring to the object with both labels). Based on Ms. Crespo's reported observations of the children outside, DCFS received a report of alleged abuse or neglect and began an investigation as to whether the children's mother, Natasha Felix, had

neglected her children pursuant to DCFS Rule 300/Appendix B-74 (Inadequate Supervision).

Ms. Crespo acknowledged that she never asked the middle or younger child to move onto the sidewalk. SC00061; T. at 21. When asked if she had told the child who was climbing the tree to climb down, Ms. Crespo testified, "I didn't say get out of the tree because I don't know this child." SC00061; T. at 34-35. During the fifteen minutes that Ms. Crespo was in the park, neither she, the other teacher, nor the other three adults present asked the children to stop doing anything, and Ms. Crespo never called anyone for help. SC00063; T. at 36-37, 42, 44. After consulting with her supervisor to make sure she would not get fired for doing so, Ms. Crespo called DCFS' child abuse hotline on July 29, 2013 to report the boys' activities and allege that Ms. Felix engaged in abuse or neglect. SC00072-73; T. at 45-46.

III. THE DCFS INVESTIGATION

DCFS Investigator Nancy Rodriguez visited the family's apartment to investigate the call and found the children "were clothed appropriately, appeared clean, [and] well groomed," that the children were "well supervised" and "well taken care of" on her visits, and that Ms. Felix "appeared to be a good mother." SC00103, SC00110-11; T. at 76, 83-84.

When asked if her children had any special needs, Ms. Felix was forthcoming and told Investigator Rodriguez that M.J. and W.J. were diagnosed with ADHD and were not on their medication during the summer. SC00082; T. at 55-56. Investigator Rodriguez did not investigate this ADHD diagnosis further; she called no medical or psychological professionals to provide information about the impact of ADHD on an older child's ability to supervise younger siblings while playing outside, nor to ask about whether the

behavior of a 9-year-old with ADHD would be so difficult to manage that an 11 year old older brother could not reasonably do so. Investigator Rodriguez did not "have any specific knowledge about how the diagnosis of ADHD affects these two children," and she did not ask Ms. Felix "if the children were harder to manage when they weren't on meds or more active." SC00108-109; T. at 82-83, 87. Investigator Rodriguez agreed that, based on her interview, W.J. was "a mature young boy" who "certainly could be allowed to go outside by himself to the park next door." SC00104; T. at 77-78.

When discussing the children's activities on July 29, 2013, Ms. Felix told Investigator Rodriguez that she had been watching the children periodically from inside the apartment and had not seen them climb trees or go into the street. SC00085; T. at 59.

Investigator Rodriguez also spoke with all three boys. SC00086; T. at 59. X.F., the youngest, told her that he had taken his cousin's scooter away from her and said he had run into the street but not the alley. SC00087; T. at 60. W.J., the oldest, said that he had seen X.F. and the boys' cousin fighting over the cousin's scooter, but had not seen them either in the alley or on the street. SC00089-90; T. at 62. The middle child, M.J. said that he had climbed the tree in the park. SC00091; T. at 64. M.J. also said that he saw his younger brother X.F. and the cousin fighting over the scooter and running into the backyard and street but not into the alley. SC00089-90; T. at 63-64. M.J. said that the cousin was crying over the scooter. SC00090; T. at 65.

During the interviews, all three boys mentioned the scooter; none mentioned a "skateboard." SC00089; T. at 61-62, 65. Investigator Rodriguez herself observed the scooter during her interview and described it as follows:

> It's gray or silver color and it's got an L shape with the - - with the handlebars across. It's got the handlebars across and then it

> has got what holds the handlebars, the tube that goes down vertically and then you have the long flat piece where you put your foot and then you have - - so that's the type that you have to ride with the - - with one foot riding it on the ground and the other foot on the scooter.

SC00093; T. at 66-67

Investigator Rodriguez also interviewed Ms. Crespo. SC00100; T. at 73. At her initial DCFS investigative interview, Ms. Crespo reportedly told Investigator Rodriguez that "[a] [g]irl was running through the alley and into the street to help bring the scooter out of the street. 8 and 9 year old were running into the street with a scooter. Car riding down the street beeped at the two boys to get out the way." SC00270.

Following this investigation, Investigator Rodriguez and her supervisor recommended Ms. Felix be indicated for Allegation 74 "Inadequate Supervision." Investigator Rodriguez's recommendation was "based on the mother not knowing that the kids were running into the street with the scooter, based on the children having ADHD, which is [W.J.] and [M.J.], based on [X.F.] being only five years old." SC00117; T. at 90. At the time of the indicated finding, there was no allegation presented that X.F. had been pushed under three parked cars while lying on a skateboard, SC00101; T. at 74-75, and thus, these alleged facts were not the basis of DCFS's recommendation to indicate Ms. Felix for "inadequate supervision".

IV. THE ADMINISTRATIVE HEARING

At the DCFS Administrative Hearing convened on January 10, 2014 DCFS called Ms. Erica Crespo and DCFS Investigator Nancy Rodriguez to testify. Over the objection of Ms. Felix's counsel that the investigative file was not a proper business record hearsay exception and, as such, was inadmissible pursuant to the Administrative Procedures Act (and other grounds), 5 ILCS 100/10-40 ("Evidence not admissible under [the] rules of

evidence may be admitted . . . if it is of the type commonly relied upon by reasonable prudent men in the conduct of their affairs.").

At the administrative hearing in her testimony on behalf of DCFS, Ms. Crespo's account of what she observed changed from the account she had previously given to Investigator Rodriguez. In her testimony, she stated that during the 15-minute period while she was in the park area with her class of 3 to 5 year olds, she watched as the youngest of the three brothers ran to join the oldest brother in the street, and further watched as the middle brother lay the youngest brother face-up on a skateboard and pushed him under the bumper of a parked car. SC00045; T. at 18. Balanced on the skateboard, the youngest child reportedly rolled under a total of three cars, parked bumper to bumper. SC00045; T. at 18. Then, the youngest brother reportedly rolled out from under the last car, he picked up the skateboard, and he carried it back to the oldest brother. SC00045-46; T. at 18. According to Ms. Crespo's testimony, as the youngest brother brought the alleged skateboard back, a car driving along the one-way street honked, prompting the children to step back as the car drove past. SC00046; T. at 19. Ms. Crespo then claimed that shortly after the incident with the skateboard near the street, the middle brother climbed safely down from the tree, and Ms. Crespo left with her students. SC00048; T. at 21.

Investigator Rodriguez acknowledged that Ms. Crespo had never reported the skateboard account to DCFS previously and agreed with Ms. Felix's counsel on cross examination that in order for a scooter to go underneath a car, "You have to actually place it under a car. It doesn't - - you would have to lay it flat." SC00094; T. at 67. She

further testified that when laid flat, "the wheels would be up in the air. I would think it's the metal part that would touch the ground of the scooter." SC00094; T. at 67.

Ms. Felix presented three witnesses: Ms. Felix; Ms. Maritza Rodriguez, and Ms. Tatiana Saez. Martiza Rodriguez ("Rodriguez") is a friend of Ms. Felix and has been present while the boys are playing outside. SC00149; T. at 122. She confirmed that Ms. Felix regularly checks on her boys when they are playing outside, and that she has observed M.J. and X.F. following both Ms. Felix's rules and W.J.'s direction. SC00194, 00197-198; T. at 167, 170, 171. With respect to how W.J.'s and M.J.'s ADHD diagnosis affects their observable behavior, Ms. Rodriguez testified, "I think they are like every other normal kid. I mean, they are well behaved. . . . I find them perfectly fine. . . ." SC00196; T. at 169.

Tatiana Saez, another of Ms. Felix's friends, has known the boys for their entire lives, and sees the boys approximately four times per week. SC00203; T. at 175. She testified that Ms. Felix monitors the boys when they are outside by looking out her apartment windows, from which the whole park is visible, and by calling out to them. SC00204; T. at 177-78. Based on her observations, W.J.'s and M.J.'s ADHD diagnoses does not affect their ability to play outside. SC00206; T. at 178-79.

No testimony was presented at the hearing as to the effects of an ADHD diagnosis or the decision not to take medication on children's ability to supervise younger children at play, including if the younger child himself has an ADHD diagnosis. Nor was there any medical or psychological testimony presented as to the specific impact of W.J.'s diagnosis, or of the medication decisions Ms. Felix had made during the summertime, upon his ability to supervise his younger brothers while at the nearby park.

V. THE FINAL ADMINISTRATIVE OPINION AND RECOMMENDATION

Ms. Felix appeared before an ALJ, seeking to have DCFS's indication expunged. After listening to witness testimony—including Ms. Crespo's brand new claims that the children were sliding under parked cars on a skateboard—the ALJ held that DCFS had proven Allegation 74, "Inadequate Supervision," and that the indication would not be expunged. The ALJ's fact-findings included:

> [W.J.] got a skateboard and crossed into the street. [X.F.] then ran to [W.J.]. [W.J.] has [X.F.] lay on the skateboard face up and then pushed [X.F.] and the skateboard under three parked cars. When [X.F.] came out from under the three parked cars, he picked the skateboard up and then ran into the street back to [WJ.].

A5.

The ALJ findings did not mention that Ms. Crespo's testimony at the hearing varied significantly from what she previously had told DCFS's investigator, or mention that all the other witnesses, including the DCFS Investigator, called the object on which the children were playing a "scooter," not a "skateboard. Nor did the ALJ discuss the physical impossibility of pushing an L-shaped scooter with handlebars under parked cars. Despite these discrepancies in her statements, the ALJ credited Ms. Crespo's testimony in toto:

> Erica Crespo was a credible witness. She is a pre-school teacher with no connection to the Felix family. She has no motive or bias and testified credibly about what she saw that day in the park.

A9.

The ALJ further concluded that W.J.'s ADHD diagnosis made him unable to adequately supervise his younger brothers:

> [Ms. Felix] stated that [W.J.], the oldest, was in charge. If [W.J.] was a mature eleven year old boy who was not diagnosed with ADHD, this might have been a reasonable plan, but [W.J.] has ADHD, he was not medicated, and she knew this.

A8.

The Director of DCFS adopted the ALJ's findings of fact and conclusions of law and denied Ms. Felix's request to expunge the indicated finding of child neglect registered against her for "inadequate supervision." A1. The Circuit Court sitting in administrative review affirmed, with this timely appeal following.

ARGUMENT

I. STANDARD OF REVIEW

When reviewing a final administrative decision under the Administrative Review Act, 735 ILCS 5/3-101 *et. seq.*, Illinois appellate courts review the administrative agency's decision itself and not the subsequent legal proceedings. *See Julie Q. v. Department of Children & Family Servcs. et al.*,, 2011 IL App (2d) 100643, 963 N.E.2d 401, 409 (2d Dist. 2011) (hereinafter, *Julie Q. I*); *see also Burris v. Department of Children & Family Servc's.*, 951 N.E.2d 1202, 1208 (1st Dist. 2011); *Slater v. Department of Children & Family Servcs.*, 953 N.E.2d 44, 51 (1st Dist. 2011) ("In the case of an administrative review action, we review the findings of the ALJ during the administrative hearing and not the decision of the circuit court."). A reviewing court may encounter three types of questions on administrative review of an agency decision: questions of law, questions of fact, and mixed questions of law and fact. *See Cinkus v. Vill of Stickney Mun. Officers Electoral Bd.*, 228 Ill. 2d 200, 210 (2008) (citing *City of Belvidere v. Ill. State Labor Relations Bd.*, 181 Ill. 2d 191, 229 (1998)). The applicable standards of review follow the type of question presented to the reviewing court. *Id.*

(citing *American Fed'n of State, Cnty. & Mun. Emps., Council 31 v. Illinois State Labor Relations Boards*, 216 Ill. 2d 569, 577 (2005)).

In this case, the grounds for reversing the final administrative decision implicates three types of questions. The first two questions presented here are questions of law, including whether DCFS had legislative authority to review parental supervision decisions absent harm to children in the guise of a child neglect statute and to enact Allegation 74 in its present form, given that Allegation 74 does not match ANCRA's later enacted restrictive definition of neglict. An agency's decision on a question of law is not binding on an reviewing court and is reviewed *de novo*. *City of Belvidere*, 181 Ill. 2d at 205. Similarly, an interpretation of an agency's regulations is a question of law and is reviewed *de novo*. *Walk v. Dep't of Children & Family Servcs.*, 399 Ill. App. 3d 1174, 1182 (4th Dist. 2010); *see also Julie Q. v. Dep't of Children & Family Servcs. et al.*, 2013 IL 113783, ¶ 20, 995 N.E.2d 977, 981 (Ill. 2013) (hereinafter, *Julie Q. II*) ("The scope of powers conferred on an administrative agency by its enabling legislation is a question of statutory interpretation which we review *de novo*.").

The second group of questions presented here are mixed questions of law and fact. Mixed questions of law and fact, which arise when "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory [or regulatory] standard," are reviewed under a clearly erroneous standard. *Cinkus*, 228 Ill. 2d at 210 (citation omitted). Under this standard, "when 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.'" *AFM*

Messenger Serv., Inc. v. Department of Employment Sec., 198 Ill. 2d 380, 395 (2001) (citing *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

Finally, the findings of fact that W.J.'s ADHD condition made him unable to supervise his younger brothers, even if he could supervise himself, and the finding that the youngest child X.J. rolled under three parked cars on a skateboard are subject to review under the "manifest weight of the evidence" standard. Findings of fact are against the manifest weight of the evidence where the opposite conclusion is clearly evident or where there is not sufficient evidence in the record to support the agency's decision. *Abrahamson v. Ill. Dep't of Professional Reg.*, 606 N.E.2d 1111, 1117 (Ill. 1992); *Carrillo v. Park Ridge Firefighters' Pension Fund*, 2014 IL App (1st) 100656, ¶ 21.

II. ANCRA DOES NOT AUTHORIZE A FINDING OF NEGLECT FOR A PARENT WHO LETS HER SCHOOL AGE CHILDREN PLAY IN A NEARBY PARK

ANCRA, pursuant to which Ms. Felix was investigated and declared a child neglector, "is essentially a reporting act," and its "central feature is the requirement that all mandated reporters inform DCFS whenever they have 'reasonable cause to believe a child known to them in their professional or official capacity may be an abused or neglected child.'" *Julie Q. I*, 2011 IL App (2d) 10064, ¶ 40 (quoting 325 ILCS 5/4). As a result, Illinois courts have recognized that "it is necessary for [ANCRA's] definitions of abuse and neglect to be clear enough for mandated reports to apply." *Id.* (citing Richard T. Cozzola, *Towards an Upstream Model of Child Abuse Legislation in Illinois*, 11 Loy. U. Chi. L.J. 251, 258 n.52 (1980)).

ANCRA, however, does not contain any language identifies "inadequate supervision" as a specific neglect ground. *See generally* 325 ILCS 5/3 (West 2013). Rather, at all times relevant to the dispute underlying this appeal, ANCRA listed five

situations that constitute child neglect: (1) a "child not receiving adequate medical care or other care necessary for his or her well-being including adequate food, clothing, and shelter;" (2) a child "subjected to an environment which is injurious;" (3) a child "abandoned by his or her parents;" (4) a child "who has been provided with interim crisis intervention services under the Juvenile Court Act of 1987" (705 ILCS 405/1-1 *et seq.* (West 2008)), "and whose parents refuse to allow the child to return home;" and (5) "a newborn infant whose blood, urine, or meconium contains any amount of a controlled substance." 325 ILCS 5/3 (West 2013); *see also Julie Q. II*, 2013 IL 113783, ¶ 22. Not one of these situations spelled out in ANCRA applies to authorize DCFS to conduct an assessment, under the guise of a neglect investigation, of the quality of parental supervision of their children that does not result in any clearly defined harm to the children.

Despite the absence of "inadequate supervision" as a ground for finding neglect pursuant to ANCRA, DCFS treats "inadequate supervision" as a neglect allegation, and has enacted through rulemaking a broad, open-ended definition for that term in its codified administrative rules. Pursuant to Appendix B of 89 Ill. Adm. Code 300, "Inadequate Supervision," coded as Allegation 74, transpires when a "child has been placed in a situation or circumstances that are likely to require judgment or actions greater than the child's level of maturity, physical condition, and/or mental abilities." 89 Ill. Adm. Code 300, Appendix B (Allegation 74) (2011). DCFS also includes the following examples of inadequate supervision in its appendix:

- "Leaving children alone when they are too young to care for themselves."
- "Leaving children alone who have a condition that requires close supervision."

- "Leaving children in the care of an inadequate or inappropriate caregiver."
- "Being present but unable to supervise because of the caregiver's condition."
- "Leaving children unattended in a place that is unsafe for them when their maturity, physical condition, and mental abilities are considered."

Id.

Appendix B also includes a series of child, caregiver, and incident factors that "should be considered when determining whether a child is adequately supervised." *Id.* *See supra* at 4-7 for the text of Allegation 74 Inadequate Supervision in Appendix B. *Id.* Neither ANCRA nor DCFS rules ascribe priority or weight to any of the child, caregiver, or incident factors or provide direction on how they should be applied in reaching a determination concerning an allegation of inadequate supervision.

A. ANCRA Does Not Authorize Allegation 74

An administrative agency is without general or common law powers. *Julie Q. II.*, 2013 IL 113783, ¶ 24 (citing *Alvarado v. Industrial Comm'n*, 216 Ill.2d 547, 553 (2005)). As such, an "agency is limited to those powers granted to it by the legislature in its enabling statute." *Id.* ¶ 24. Its regulations, therefore, cannot extend or alter the scope of the enabling statute, but must conform to its confines. *See Dep't of Revenue v. Civil Service Comm'n*, 357 Ill. App. 3d 352, 363-64 (2005). "When an agency renders a decision that it is without statutory authority to make, it is without jurisdiction and the decision is void." *Id.* The scope of authority conferred on an administrative agency by its enabling legislation is a question of statutory interpretation that is reviewed *de novo*. *Genius v. County of Cook*, 2011 IL 110239, ¶ 25 (2011).

As discussed above, ANCRA does not define "Inadequate Supervision," nor does ANCRA include "inadequate supervision" as a ground for finding a child to be neglected.

See generally 325 ILCS 5/3 (West 2013). At the time the Department indicated Ms. Felix in this matter, ANCRA defined "neglected child," in two different ways potentially pertinent to this case as follows:

> "Neglected child" means any child [(1)] who is not receiving the proper or necessary nourishment or medically indicated treatment including food or care […] or otherwise is not receiving the proper or necessary support or medical or other remedial care recognized under State law as necessary for a child's well-being, or other care necessary for his or her well-being, including adequate food, clothing and shelter; or [(2)] 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 to the child is the result of a blatant disregard of parent or caretaker responsibilities . . . .

325 ILCS 5/3 (West 2013).

Under the "necessary care" prong of the neglect definition, Ms. Felix's children plainly were not neglected. Although "other care necessary for his or her well-being" is not specifically defined in ANCRA, necessary care is limited to items similar to the examples of food, clothing, and shelter listed in ANCRA. As the Illinois Supreme Court has explained: "when followed by a listing of items, [includes or including] mean[] that the preceding general term encompasses the listed items, but the list is not exhaustive. The preceding general term is to be construed as a general description of the listed items and other similar items." *People v. Perry*, 224 Ill. 2d 312, 328, 864 N.E.2d 196, 207 (2007). Any additional terms must be similar to and not different from the items listed in the statute. *LeCompte v. Zoning Bd. of Appeals for Vill. of Barrington Hills*, 958 N.E.2d 1065, 1071 (Ill. App. Ct. 1st Dist. 2011) ("[I]f there are any other terms to be included in the description of uses of the land for agricultural purposes they should be similar to, not different from, as in this case, the listed terms."). Food, clothing, and shelter are basic

subsistence requirements that are essential for life. In contrast, parental supervision is not a subsistence requirement or even a basic necessity of life, and therefore is qualitatively different than the items that are enumerated. Therefore, parental supervision is not properly included in the statutory definition of "necessary care." Here, moreover, there was absolutely no evidence that there was a lack of food, clothing, shelter, or subsistence requirements. Indeed, the evidence including the testimony of DCFS' Investigator Rodriguez was that the children were well-cared for including "well fed" and "clothed appropriately." Tr. at 76, 84; SC00103, 00111.

Even if, arguendo, parental supervision were a proper category of basic subsistence care that fits within the scope of "necessary care," momentary inattention to a child, even when such inattention results in a serious injury to the child, does not constitute child neglect under the "necessary care" prong of the ANCRA neglect definition. *Slater*, 953 N.E.2d at 54. Instead, it is incumbent upon DCFS to show by a preponderance of the evidence that the injury was the result of a caretaker's failure to provide "care necessary for [the child's] well-being" and not "an isolated incident that could happen to anyone." *Id.* (citing the definition of "neglected child" in 325 ILCS 5/3). Even if a child is injured during a period of parental inattention, "[i]t cannot be the case [under ANCRA] that the existence of [an] injury [to a child] itself automatically results in a finding of neglect." *Id.* DCFS is not authorized to make *per se* connections between an incident and a conclusion of neglect. Here, there is no dispute that Ms. Felix's children were not injured. SC00102, Tr. at 75. Accordingly, the first or necessary care prong of the definition of "neglected child" does not support indicating Ms. Felix as a perpetrator of child neglect.

Similarly, the second prong which defines neglect in terms of an "environment injurious" also does not provide a statutory basis for indicating Ms. Felix as a perpetrator of neglect. The second or environment injurious prong of this definition was enacted into law on July 13, 2012 after the Illinois Appellate Court, Second District, ruled that the Department exceeded its statutory authority when it promulgated Allegation of Harm 60. *Julie Q. I,* 2011 IL App (2d) 100643, ¶ 27. In response to the Second District ruling, the Illinois General Assembly amended ANCRA's definition of a neglected child to authorize inclusion of a 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 to the child is the result of a blatant disregard of parent or caretaker responsibilities." *See* Pub. Act. No. 97-803 (eff. July 13, 2012). The General Assembly also included in its amendment the definition for blatant disregard, which "means an incident where the real, significant, and imminent risk of harm would be so obvious to a reasonable parent or caretaker that it is unlikely that a reasonable parent or caretaker would have exposed the child to the danger without exercising precautionary measures to protect the child from harm." Pub. Act. No. 97-803.

DCFS has yet to conform Allegation 74 to ANCRA as amended post-*Julie Q*. Indeed, the factors to be assessed under Allegation 74, as currently written, do not require any showing of a likelihood of harm due to the parent's or caretaker's "blatant disregard of parent or caretaker responsibilities," as required by ANCRA's amended definition of "neglected child." 325 ILCS 5/3 (West 2013).

Allegation 74's child, caretaker, and incident factors could, through DCFS policy and practice directives, be applied so as to confine Allegation 74's application to those situations where a child has been (i) deprived of necessary care through inadequate supervision or (ii) exposed to a likelihood of harm because of a caretaker's blatant disregard of his or her responsibilities, 325 ILCS 5/3 (West 2013). However, DCFS has not limited the application of Allegation 74 to the confines spelled out in either the necessary care or the "likely harm/blatant disregard" prongs of ANCRA's definition of neglect. This is clear from both the language of Allegation 74 itself, which neither ascribes priority nor weight to any of those factors, nor provides direction in their application, *see generally* 89 Ill. Adm. Code 300. App'x B (2011), and from the implementing procedures DCFS has adopted that instruct its investigators how to apply Allegation 74 as its rules permit, without limitation. DCFS Procedures 300, Appendix B.

As a result, the current language of Allegation 74 does not require DCFS to measure neglect under its own inadequate supervision allegation category with reference to the threshold statutory requirement that requires a showing of either a deprivation of necessary care or the likelihood of harm to an unsupervised child's health, physical well-being, or welfare. Nor does it require DCFS to show that any existent likelihood of harm is the consequence of a caretaker's blatant disregard of his or her responsibilities. Allegation 74 therefore fails to conform to ANCRA. As a result, Allegation 74 like the previous version of "environment injurious" that has been invalidated by the Illinois Supreme Court and Appellate Court, in its current form is void. *Julie Q. I*, 2011 IL App (2d) 100643, ¶ 21; *Julie Q II.*, 2013 IL 113783, ¶ 44.

B. The Lack of Clear Standards in Allegation 74 Is Contrary to ANCRA's Purpose.

Because Allegation 74 contains none of the limitations that have been placed on the definition of neglect in ANCRA, the application of Allegation 74 to real world situations is unclear to the very people who are expected to report abuse or neglect to DCFS. Indeed, by fashioning Allegation 74 so broadly without roots in any actual deprivation of necessary care or the likelihood of harm/blatant disregard standards required by ANCRA, DCFS has placed mandated reporters in a precarious situation in which they have to balance the risk of criminal or other civil liability for failing to report suspected neglect, 325 ILCS 5/4, with the reality that each report to DCFS has the potential to have "debilitating consequences, including the loss of custody, harm to reputation and needless destruction of stable family units" on "fit parents and functional families." *Julie Q. I*, 963 N.E.2d at 412. Potential child neglect reporters like Ms. Crespo may also worry they are "damned if they do and damned if they don't" make a report.

Indeed, the lack of guidance offered by Allegation 74 to mandated reporters has the potential to wreak havoc on even the most innocent and harmless of familial interactions and parenting decisions like the ones Ms. Felix made here. Without conditioning a finding of inadequate supervision on a showing of lack of necessary care or the likelihood of harm as a result of blatant disregard of caretaker responsibilities, Allegation 74 places loving parents and professionals at risk of severe familial and professional impacts if there is a disclosure or use of an indicated finding against them when they are registered as a child abuser or neglector without having committed an act or omission that has been recognized as serious enough to warrant that consequence. *See Dupuy v. McDonald*, 141 F. Supp. 2d 1090 (2001) *aff'd in relevant part sub nom Dupuy*

v. Samuels, 397 F.3d 493 (7th Cir. 2005) (finding the State Central Register operates as a blacklist and, when used against persons who have not been shown to be guilty of abuse or neglect, thereby "harms the children of Illinois").

The definition of Inadequate Supervision contained in DCFS Rule 300/Appendix B 74 is not sufficiently limited. It applies to any "child [who] 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," regardless of whether the "situation or circumstance" deprives the child of care necessary to his well-being regardless of the likelihood of harm resulting from the circumstances and regardless of the parent's culpability in putting the child in this "situation or circumstance." This language imposes a near impossible standard for any parent trying to teach a child a new skill. Any time a parent tries to teach his child a new skill or allow the child to engage in an activity that has any degree of unforeseen risk, no matter how slight (like riding a bicycle), regardless if any actual harm to the child results, the parent could be subject to a neglect finding under the DCFS definition of Inadequate Supervision. Furthermore, the Allegation 74 standard is arguably unconstitutional, for it gives no deference to the parents' own judgments as to their child's ability, and instead permits the State to substitute, without any limitation, its judgments about the children's abilities. *See Troxel v. Granville*, 530 U.S. 57 (2000) (state statute permitting judges to substitute their judgment about children's best interests in visiting their grandparents for the judgment of the parent is an unconstitutional infringement on the liberty interests of the parent).

Under the plain language of Allegation 74, any parent who demands that their child cease watching television and go outside to play basketball--or chess—with older children could be subject to an investigation if the older children play a more challenging game of basketball—or chess—than the younger child is capable of competing in. A parent of a disabled child is particularly vulnerable to being labeled an inadequate supervisor if, as here, the Rule is read under its plain language as having no threshold requirement that the parent should be the person entitled to determine the level of their children's abilities, as opposed to a DCFS caseworker or supervisor. Moreover, under this allegation as written, the parent becomes strictly liable for whatever shenanigans their children engage in outside their presence, even if they had no reasonable basis to predict that their children would not follow the parents' directives. Because this definition has no requirement of likely harm, any action that challenges the child or could conceivably be dangerous could subject a parent to an inadequate supervision finding. Because walking across a busy street can present a risk for a child, as can riding a bicycle for the first time or climbing up a challenging hill, the language of the rule invites the limitless application of the discretion of a state official to family life, including the individualized decisions that reasonable parents must make on a daily basis in raising their children.

To be sure, DCFS could readily remedy the defects in Allegation 74 by incorporating ANCRA's statutory standards of "necessary care" and "likely harm/blatant disregard" into a lawful administrative rule. But the fact that DCFS *could* develop an adequate rule to cover clear instances of inadequate supervision, does not mean that it has done so here, or that the rule it did apply to Ms. Felix is lawful. It has not, and it is not.

Because Allegation 74 defines "neglect" without regard to the standards set forth in ANCRA, it offers no fixed and coherent metric for mandated reports to follow in identifying circumstances involving neglect through lack of necessary care or likelihood of harm. In light of the criminal penalties mandated reporters face for failing to report suspected cases of child neglect, it is incumbent upon DCFS to promulgate regulations that are clear enough for mandated reporters to accurately apply. 325 ILCS 5/4 (West 2013) ("Any person who knowingly and willfully violates any provision of this Section […] is guilty of a Class A misdemeanor for a first violation and a Class 4 felony for a second or subsequent violation"). *See, e.g., City of Chicago v. Morales*, 177 Ill. 2d 440, 449-50 (1997) ("Due process guarantees […] adequate notice of proscribed conduct so that ordinary persons are not required to guess at a law's meaning but, rather, can know what conduct is forbidden and act accordingly.") (citation omitted); *People v. Maness*, 191 Ill. 2d 478, 484 (2000) (explaining that a law is unconstitutionally vague if it fails to "provide explicit standards to regulate the direction of governmental authorities who apply the law") (citations omitted). The Department's failure to promulgate Allegation 74 in a manner consistent with ANCRA saddles mandated reporters, parents and investigators alike with a definition of neglect by inadequate supervision that is unclear and impossible to consistently and accurately apply.

III. THE FINAL ADMINISTRATIVE DECISION INDICATING MS. FELIX FOR INADEQUATE SUPERVISION IS CLEARLY ERRONEOUS

A. DCFS Clearly Erred In Finding That By Allowing Her Three Children To Play Outside For 30-40 Minutes, Ms. Felix Neglected Them And Placed Them In A Situation Or Circumstance That Were Beyond their "Level Of Maturity, Physical Conditions, And/Or Mental Abilities"

Even if Allegation 74's rule is deemed to not violate ANCRA, the application of that rule to Ms. Felix was clearly erroneous. By its own terms, Allegation 74 requires a detailed factor-based analysis in order to come to any conclusion that a parent has neglected her children by inadequately supervising them. Those factors include a detailed assessment of the parent, the child, and the incident involved. In the proceedings below, DCFS hardly assessed these factors, let alone weighed them appropriately as the Rule anticipates. Instead, DCFS leapt to the assessment of the incident, barely considering the relevant child factors, including their overall maturity, and reaching improper conclusions about the children, as discussed below. And instead of making any assessment of Ms. Felix's abilities as a parent, DCFS made no assessment of the parent as Allegation 74 requires. Because DCFS failed to properly apply Allegation 74's delineated factors to the facts here, the decision below should be reversed as clearly erroneous.

This Court would not be writing on a blank slate in finding that DCFS failed to properly apply the Allegation 74 factors to the facts of the case before it. Very recently, the Second District Appellate Court determined that DCFS had misapplied Allegation 74 to facts that were much more concerning than Ms. Felix's conduct here. In *L.F. v. DCFS*, plaintiff L.F. was indicated for inadequate supervision of her five-year-old son where she admitted to smoking and being "high" on K3 (a synthetic marijuana, legal at that time) on

at least some occasions while her son slept in their apartment. 2015 Ill. App. 2d 131037 at ¶51 (Ill. App. Ct. March 11, 2015). The appellate court, however, held that DCFS failed to meet its burden of proof as required by Allegation 74 because it "did not provide any evidence that plaintiff's use of K3 produced a substantial state of stupor, unconsciousness, or irrationality such that she placed [her son] in a situation that would likely require judgment or actions greater than his level of maturity." *Id.* ¶53. Even though plaintiff testified that K3 made her "high" and was "similar to marijuana," DCFS did not establish that she could not adequately supervise her son. *Id.* Nor did DCFS introduce any evidence on the chemical effects of K3 or refute plaintiff's testimony that she could still function after using K3. *Id.* Accordingly, the court held that the indicated finding was clearly erroneous and directed that it be expunged. *Id.* ¶¶54-55.

The *L.F. v. DCFS* decision focuses in particular on the importance of a careful assessment of the caregiver's abilities when assessing an allegation of inadequate supervision. While no such assessment was even made by DCFS in this case, it is apparent that Ms. Felix's conduct does not come close to raising to the same level of concern as *L.F.*'s conduct, who admitted to being "high" while her son was in her care. Here, a careful assessment of Ms. Felix's abilities as a caregiver demonstrates nothing but evidence in her favor, including that Ms. Felix regularly checks on her boys when they are outside, she can observe the entire park from her window, and has instructed her oldest son on how to help supervise and care for his younger brothers. SC00188; T. at 161; SC00137; T. at 109-110.

The decision below makes clear that DCFS conducted no meaningful assessment of the reasonableness Ms. Felix's decision to let her children play outside and her overall

abilities as a parent. The decision also does not consider the general safety of the neighborhood and the park itself, its proximity to the home, or the time of day. Instead of the detailed factual analysis that Allegation 74 requires, the Final Administrative Hearing decision relied on only two factors, and misapplied even those to the conclusion here. Those two factors were the incident itself and W.J.'s ADHD.

The heavy focus on the "incident" in the street involving a supposed skateboard sliding under parked cars, which incorporates findings that Ms. Felix asserts are contrary to the manifest weight of the evidence, is itself nothing more than a red herring. Even assuming that this incident did occur, which is disputed *see infra* Section IV, does that mean that Ms. Felix is therefore responsible for "allowing" that behavior? Such a conclusion would not follow unless the law provided that parents are strictly liable for all of their children's misconduct. But strict parental liability is not Illinois law, and it certainly doesn't constitute Illinois neglect law. The issue before this Court is not, therefore, whether X.J. slid under three parked cars, but whether Ms. Felix's decision to let him play in the park with his older brothers was manifestly unreasonable because it was likely to put him in a situation beyond his abilities. Where, as here, the record is bereft of evidence showing Ms. Felix knew or should have known that her five-year-old son would play under a parked car, or that she condoned that behavior, relying on the alleged car incident does not answer the legal question before this Court as to whether Ms. Felix neglected her children by letting them play outside.

B. The Department Clearly Erred When It Relied On W.J.'s and M.J.'s ADHD As a Basis for Finding Them to Be Neglected Due to Inadequate Supervision

The second clear error in this case occurred when DCFS relied on W.J. and M.J.'s ADHD to conclude that Ms. Felix inadequately supervised them and that W.J. was not

able to supervise himself and his brothers. In the proceedings below, DCFS had conceded, and the ALJ found, that an ordinary 11-year-old would be permitted by a reasonable parent to go to play in the park with his younger brothers for a 30- to 40-minute period. A8 ("If [W.J.] was a mature eleven year old boy who was not diagnosed with ADHD, this might have been a reasonable plan . . . ."). Courts have found parents not neglectful for leaving children younger than W.J. alone for longer than 30 to 40 minutes. *See Gosh v. Ill. Dep't of Children & Family Servs.*, 2014 IL App (1st) 131099-U (finding no inadequate supervision where a father left his 8- and 9-year old children alone for two hours). In *Vargas v. Calica*, 2014 IL App (2d) 131135-U, the court found no inadequate supervision where a 5-year-old left his day care center unsupervised for one hour and wandered almost one mile away. The caregiver's reasonable supervision, including checking on the child every five to six minutes, was sufficient: "Sometimes, even when caretakers are doing things in an acceptable manner, kids still find a way to get into trouble." *Id.* ¶ 30. Courts have even found no inadequate supervision in cases where a child was significantly injured. In *Slater*, a 7-month-old fell on a colored pencil her mother was using and punctured her left lung. The court found the mother was not neglectful and the injury was "the result of an isolated incident that could happen to anyone." *Slater v. Dep't of Children & Family Servs.*, 2011 IL App (1st) 102914, ¶ 39, 953 N.E.2d 44, 54 (1st Dist. 2011). Ms. Felix took reasonable steps to ensure her children's safety at the park: she instructed her 11-year-old son to watch the younger children and checked on the children every ten minutes.

The ALJ improperly made assumptions about W.J.'s ADHD diagnosis to conclude he could not adequately supervise his younger brothers. The ALJ relied on

W.J.'s diagnosis of ADHD, combined with the fact he was not taking prescribed medication during the summer, to conclude that he could not be trusted to watch his brothers in the park. A8. This conclusion is clearly erroneous, for it is based on nothing more than an assumption about ADHD, which is not permitted by the law. The Rehabilitation Act prohibits discrimination against a person with a disability based on assumptions and stereotypes about the disability. 29 U.S.C. § 794 (2014); *School Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 284 (1987) (holding "the basic purpose of [section 794] is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitude or the ignorance of others"). The ALJ was not permitted to assume W.J. was unable to supervise his siblings simply because he has ADHD. *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 405 (1979) (Section 794 "indicat[es] only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context"). This assumption was not even explored by DCFS during the investigation by means of inquiry to W.J.'s doctors, teachers, or any other expert on the impact of ADHD on his ability to care for younger siblings. As a result, the record below contains no evidence on any negative impact from ADHD on W.J.'s ability to supervise his brothers.

DCFS must cite evidence "admitted in the case" that shows by a preponderance of the evidence that the children were inadequately supervised and that W.J. was insufficiently mature to supervise his brothers for that brief period of time due to his ADHD. *Anderson v. Human Rights Comm'n*, 314 Ill. App. 3d 35, 41 (1st Dist. 2000). It "is fundamental that a decision pursuant to an administrative hearing must be based upon testimony and other evidence received at the hearing . . ." *Seul's, Inc. v. Liquor Control*

Comm'n, 240 Ill. App. 3d 828, 833 (1st Dist. 1992) (citations omitted). Because no evidence supporting an assumption that W.J.'s ADHD negatively impaired his ability to supervise his younger brothers for a 30- to 40-minute period was ever presented, DCFS clearly erred when it denied Ms. Felix's expungement request based on a conclusion about W.J.'s maturity that directly conflicted with the record. The Director's conclusion was founded on nothing more than a prejudicial assumption about the abilities of a child with ADHD as opposed to actual evidence about the abilities of this specific child.

Given that there was no evidence presented below, DCFS has effectively adopted a per se rule about the impact of a commonplace diagnosis on children's general abilities. DCFS has cited no legislative or policy to support such a per se rule. And, given that approximately eleven percent of children in the United States have been diagnosed with ADHD, *Key Findings*, Centers for Disease Control and Prevention, (Dec. 10, 2014) http://www.cdc.gov/ncbddd/adhd/features/key-findings-adhd72013.html, the impact of this per se rule is significant. Further, this per se rule is contrary to federal and state policy, which soundly reject the sort of stereotype applied here. In passing the Rehabilitation Act, Congress clearly indicated that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. *School Bd. Of Nassau Cty.*, 480 U.S. at 284.

IV. THE FINDINGS OF THE DEPARTMENT THAT X.F. SLID UNDER THREE PARKED CARS AND THAT W.J.'S ADHD DIAGNOSIS RENDERED HIM UNABLE TO WATCH HIS YOUNGER BROTHERS IN THE PARK ARE CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

Even if this Court were to find that DCFS applied a proper legal rule to the facts the ALJ found, those facts include ones that are contrary to the manifest weight of the evidence. Because the ALJ drew improper conclusions about the evidence and credited

testimony that should have been deemed not credible, and made other findings about the children's abilities that lacked any evidentiary foundation, the decision below should be reversed on manifest weight grounds.

All of the witnesses at the hearing below, save for Ms. Crespo, denied that there ever was a skateboard on which the children played. Each of the children had described the instrument as a scooter, not a skateboard. Even Ms. Crespo herself first described the instrument as both a scooter and a skateboard, suggesting that she didn't know which it was, to any degree of certainty. This is itself not surprising, for the entire incident involving the scooter/skateboard was not one that Ms. Crespo reported in her initial call to DCFS, SC00257, or in the investigative interview she gave with Investigator Rodriguez. SC00100-101; T. at 73-74; SC00270.

Not only was there no skateboard, but the adults as well as the children involved in this investigation showed Investigator Rodriguez the very scooter that had been involved in the children's play, including that they had quarreled about it. And not only did Investigator Rodriguez herself also consider it to be a scooter, *not* a skateboard, she allowed that a scooter could not have gone under parked cars without a great deal of difficulty, given the way a scooter, rather an a skateboard is constructed. SC00094; T. at 67.

Ms. Crespo did not know the children involved or their mother, and she had been attending to her own classroom of 3- to 5- year-old students when she noticed the children in the park. While the ALJ considers Ms. Crespo's profession and her lack of connection to the family as reasons to credit her testimony on this point over even the testimony of DCFS's investigator, the ALJ failed to conduct any analysis of the

testimony itself or the fact it had not been reported earlier, and failed to properly assess the weight of the evidence that came from multiple other sources besides Ms. Crespo when the ALJ found as a matter of fact that X.F. slid under parked cars while on a skateboard and was honked at by a passing car.

Similarly, the ALJ ignored the weight of the evidence of W.J.'s maturity and his prior experience responsibly supervising his siblings and instead found him insufficiently mature on the sole ground that he had an ADHD diagnosis and was not taking his medication. DCFS had not even investigated what the import of such diagnosis was. There was simply no evidence in the record that allowed the ALJ to conclude W.J. was insufficiently mature to watch his brothers.

CONCLUSION

For the reasons above, the decision of the Department that Ms. Felix neglected her children by inadequately supervising them should be reversed on legal, clear error and manifest weight grounds.

Dated: June 29, 2015

WINSTON & STRAWN LLP

By: _____

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under rule 342(a), is 38 pages.

By:_____
Kathleen B. Barry

CERTIFICATE OF SERVICE

I, Kathleen B. Barry, an attorney, certify that on June 29, 2015, I caused three copies of the foregoing OPENING BRIEF OF PLAINTIFF-APPELLANT to be served on the individuals listed below by electronic mail and by enclosing copies thereof in envelopes, addressed as shown, with First Class postage prepaid, and depositing them in the U.S. Mail.

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