ASCEND JUSTICE

REPRESENTING CLIENTS AT DCFS ADMINISTRATIVE EXPUNGEMENT APPEAL HEARINGS

A TRAINING AND PRESENTATION FOR PRO BONO ATTORNEYS BY ASCEND JUSTICE

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Links to the Most Relevant DCFS Rules and Procedures:

General Link to all DCFS Policies, Rules, Procedures, and Forms:
https://www2.illinois.gov/dcfs/aboutus/notices/Pages/default.aspx

DCFS Rule 300 (Reports of Child Abuse and Neglect), *codified at 89 Ill. Admin. Code § 300*:
http://www.ilga.gov/commission/jcar/admincode/089/08900300sections.html

DCFS Rule 300, Appendix B (Child Abuse and Neglect Allegations), *codified at 89 Ill. Admin. Code § 300*, App'x B:
http://www.ilga.gov/commission/jcar/admincode/089/08900300ZZ9996bR.html

DCFS Procedures:
https://www2.illinois.gov/dcfs/aboutus/notices/Pages/pr_policy_procedure.aspx

DCFS Rule 336 (Expungement Appeals), *codified at 89 Ill. Admin. Code § 336*:
http://www.ilga.gov/commission/jcar/admincode/089/08900336sections.html

About the Family Defense Center

First formed in 2005 and opened as a legal services office in 2007, the Family Defense Center is a unique organization in the United States, based in Chicago but with national impact. Its mission is to advocate justice for families in the child welfare system. The Center focuses primarily on child protection investigations, which is the "front-end" of the child welfare system. Its award-winning programs include direct services, impact litigation, policy advocacy, parent empowerment, community/public education, and self-representation education for individuals involved in child protection investigations.

The Center advocates for families who need our help the most: families threatened with losing their children to foster care. Nothing is more painful for a child than to be taken from the only parents he or she knows. Yet, child protection systems throughout America frequently remove children from parents as a first, not a last, resort. Too often parents lose custody of their children to state foster care systems primarily because they are poor or because they are victims of abuse themselves. Far too many children in foster care bounce from home to home and are separated from siblings. Any family can be the victim of a false, harassing, or misguided Hotline call.

Throughout America, families at risk of separation lack legal resources to mount adequate defenses against abuse or neglect charges even when they are innocent.

The Family Defense Center is the first of its kind: a legal advocacy organization that provides high-level systemic advocacy and grass-roots activities for families treated unfairly by State child protection agencies. The Family Defense Center defends children who can be safely raised in their own families and it helps families preserve their right to raise their own children.

Overview of DCFS:

The DCFS Hotline, Investigations, "Indicated" Findings, and Administrative Appeals

DCFS investigations most often begin when someone makes a report of suspected child abuse or neglect to the DCFS State Central Register's phone number (800-25-ABUSE), commonly called the "Hotline." Some cases are cross-referred to the police for investigation, but many have no police involvement. If DCFS accepts a Hotline call for investigation, that investigation will conclude with a final determination by an investigator of either "unfounded" or "indicated." "Unfounded" means DCFS determined that there was not credible evidence to support a finding of abuse or neglect; "indicated" means DCFS determined that there *was* credible evidence to support a finding of abuse or neglect. This Manual focuses on appeals from "indicated" findings.

After a Hotline call is accepted, the investigation is assigned to an investigator in a local field office. In cases of serious allegations (such as allegations of sexual abuse or severe physical abuse), police may be involved as well, but they conduct their own investigations and operate under different legal mandates. The DCFS investigator is expected to see any children mentioned in the Hotline call within 24 hours, and to do a safety/risk assessment within 48 hours of the call. The investigator is expected to talk at the outset of the investigation to the Hotline reporter and to the child's parents. The reporter may be any person, including an anonymous caller or a "mandated" reporter. A person is a "mandated" reporter if she holds a position that requires her to make Hotline calls whenever she has a reasonable basis to believe that a child known to her in her professional capacity has been abused or neglected. Alleged perpetrators have no right to secure the name of the Hotline reporter and efforts to secure this information should not be attempted because they are futile.

DCFS rules require investigators to make contact with alleged perpetrators within 7 days of the start of an investigation and to provide written notice of the allegations being investigated. In practice, however, investigators will often delay talking to or notifying alleged perpetrators until late in the investigation. The written notice of investigation provided to the alleged perpetrator triggers his or her ability to request special treatment (in the form of additional procedural protections) if that person works with children and an "indicated finding" would have a detrimental effect on his or her career and/or livelihood. The written notice also advises the alleged perpetrator of the consequences of an "indicated finding" and that there is an eventual right to challenge an "indicated finding" through an administrative appeal process.

By statute and rule, the investigator has a duty to complete the investigation within 60 days, but can get extensions for good cause. In order to support a finding that there is credible evidence of abuse or neglect, DCFS is constitutionally required, pursuant to the Family Defense Center's federal court class action lawsuit *Dupuy v. Samuels*, to gather and consider exculpatory evidence. The federal court made the consideration of exculpatory evidence an explicit requirement after it determined that DCFS had been making indicated findings based on "practically nominal" (and unconstitutionally little) evidence. In practice, however, many DCFS investigators continue to struggle to properly identify and weigh applicable exculpatory evidence.

Parents and care providers who find themselves subject to a DCFS investigation should provide any exculpatory information during the investigation to the extent they can. Unlike a criminal case, however, the evidentiary threshold DCFS applies is very low (arguably substantially less than a "preponderance" of the evidence is sufficient to issue an indicated finding). Also unlike a criminal case, DCFS characterizes an alleged perpetrator's failure to respond to questions as a failure to cooperate that can be penalized. For these reasons, lawyers should not treat DCFS investigations as equivalent to criminal proceedings in which the routine advice is "do not talk to the police." Many potential clients are indicated because they did not know the basic rules governing DCFS and have not provided exculpatory information that might have made the difference between an indicated finding and an unfounded one.

Indicated findings are registered in the State Central Register (the "SCR"), which is not accessible to the public but can be accessed through specific child abuse/neglect background checks commonly conducted by employers, law enforcement, and licensing authorities. An indicated finding can have disastrous consequences for individuals, both personally and professionally. Personally, an indicated finding may mean the loss of custody of children; restricted visitation with children; strained or ended relationships with a spouse, significant other, or family members; an inability to adopt children; and accumulation of debt through lost time at work and the assumption of legal bills to overturn the finding. If the indicated person is a day care provider, teacher, nurse, or in any other way cares or provides services to children or vulnerable adults, there is a real and significant risk the person may lose their job or career, further compounding the personal consequences.

Expungement appeals are termed "expungements" and "appeals" even though they are the **first** evidentiary hearing on the question of whether an indicated report is supported by the law and the facts (*i.e.*, they are the first neutral assessment regarding the guilt or innocence of the person who has been "indicated" for abuse or neglect). The term "expungement" refers to the fact that indicated reports are registered by DCFS investigators prior to this hearing; they are maintained in the State Central Register for a legally defined period (5, 20, or 50 years) unless removed through the administrative appeal process. Expungement appeals are conducted as full hearings, albeit with sharp time limits and somewhat relaxed rules of evidence.

Expungement hearings result in final administrative hearing decisions made by the DCFS Director. Indicated findings that are affirmed by the Director can be appealed to the Circuit Court within 35 days of the decision, pursuant to the Illinois Administrative Review Law.

In representing any client in an expungement appeal, attorneys should review investigation policies and procedures and raise concerns as to violations of these policies and procedures. Expungement appeals present an opportunity to monitor whether DCFS followed its own investigation policies and procedures and to bring to light any significant deviation from these policies.

About this Manual

This manual contains basic information an attorney needs to conduct an appeal from a DCFS indicated finding and includes helpful templates and issues to consider during the course of a case. It is not, however, completely exhaustive of all the possible avenues a case could take. FDC attorneys are happy to answer additional questions and provide additional resources to a pro bono attorney at any point during a case.

The manual is organized in a Q&A format, in the general order that issues might arise in an appeal proceeding. The number in parentheses following a question refers to the DCFS Rule or Procedure governing the issue.

How Will My Pro Bono Case Start?

1. At what stage in an expungement appeal will I get a case?

a. You will receive a case in which DCFS conducted and concluded an investigation, and the client has already been indicated for either abuse or neglect.

b. The client will more than likely already have filed her request for an appeal.

c. If the client *has not* filed the request for an appeal of the indicated finding, you will do so for them at the same time that you file your appearance.

d. If the client *has* filed the appeal, you will merely need to appear for the client. (*See* Question 4, infra, for instructions on filing the appeal and Appendix A-1 for a sample template.)

2. What paperwork will I get?

a. The FDC will provide you with copies of whatever paperwork we have received from the client, which may or may not include DCFS correspondence and the DCFS investigative file. (What paperwork you receive depends on whether the client has already appealed; usually the Center will have the investigative file by the time we refer the case to a pro bono attorney.)

b. We will also provide you with a copy of our internal intake notes and a pro bono case referral form, which will include: the contact information for the client and other case contacts, a brief synopsis of the case, and the allegations for which they have been indicated.

3. What are we appealing if the "appellant" has never had a hearing before?

a. In the world of the Illinois Department of Children and Family Services, a person essentially is found guilty and registered as guilty (*i.e.*, "indicated" as a child abuse or neglect "perpetrator") first. Only *after* this happens is the individual given an opportunity to have a neutral person (in the form of an administrative law judge) review the evidence and apply the law. However, pursuant to developed constitutional law, the resulting hearing and decision must be very prompt (within 35 days of the appeal request for child care workers entitled to "expedited processes," and within 90 days for everyone else, unless these time limits are waived or tolled for certain time periods (*see* pp. 8-9 for discussion of hearing timing/waiver issues)) otherwise DCFS is under an obligation to expunge the finding it registered first without due process. *See* Appendix C: *Lyon v. Ill. Dep't of Children & Family Servs*., 209 Ill. 2d 264 (2004).

b. Upon receiving a report of abuse or neglect, DCFS conducts an investigation, during which, due to federal court rulings in the Center's class action lawsuit *Dupuy v. McDonald*, 141 F. Supp. 2d 1090 (N. D. Ill. 2001), *aff'd in relevant part sub nom Dupuy v. Samuels*, 397 F. 3d 493 (7th Cir. 2005)), they thoroughly investigate an allegation by interviewing all the parties involved and pursuing any evidence related to the allegation. If, at the conclusion of the investigation, DCFS determines the report is supported by credible evidence, the alleged perpetrator is "indicated" for child abuse or neglect, and his name is placed in a database called the State Central Register (SCR). The SCR is not accessible by the general public, but may be accessed by certain employers, law enforcement, medical professionals, foster care agencies, licensing authorities, and other DCFS staff.

c. Following that finding, the now-indicated person may "appeal" the registering of the report in the SCR, by requesting an administrative expungement appeal hearing. The expungement hearing is the alleged perpetrator's first real chance at due process.

4. **What are my first steps** (assuming you have cleared all conflicts and are ready to get started)?

a. Raise any questions you have about the referral information with FDC staff.

b. Make sure there is a properly-filed appeal—either expedited (35-day timeframe) or regular (90-day timeframe). *See* Appendices A-1 and A-2 for samples. In the vast majority of cases, FDC will have already ensured that the client has filed the appeal request.

c. Schedule a time to meet with your client. Make sure you ask the client if he has a job in which he works with children, or is in the process of pursuing a job in which he would work with children, as this affects the timing and arguments to be made. (In some cases, the FDC will not have fully discussed licensure and job positions with the client but usually will have done some screening to identify if the client works with children and is eligible for extra procedural protections.)

d. File a Notice of Attorney Appearance and Authorization (DCFS Rule 336.70)

The appearance must have the notarized signature of the client, giving you authorization to act as the client's legal representative. *See* Appendix A-1 for a sample. **The appearance is "filed" by sending a copy via both fax <u>and</u> U.S. Mail to:**

i. the assigned administrative law judge,

ii. the assigned DCFS attorney, and

iii. the Administrative Hearings Unit in Springfield.

Only the initial documents (the attorney's appearance and the client's request for an appeal) need to be sent to the AHU office in Springfield. All subsequent filings just need to be sent to the ALJ and the DCFS attorney (via fax <u>and</u> U.S. Mail). If the appearance is filed with the original appeal request, it is only sent to the AHU in Springfield. **In most cases, however, a pro bono attorney will be filing the appearance separately, after an ALJ and DCFS attorney have been assigned, and the appearance needs to be sent to both of them as well as the AHU in Springfield.**

5. How does the appellant appeal? (DCFS Rule 336.80)

a. Within 60 calendar days of the date on the DCFS letter stating that the report was indicated, the person indicated (the appellant) must fax or mail a written request to DCFS requesting an appeal of that decision. The appeal is considered filed as of the date that it is received at DCFS offices either by mail or facsimile.

b. The appeal must be sent to: DCFS Administrative Hearings Unit
Expungement Appeals
406 E. Monroe St., Station #15
Springfield, Illinois 62701-1498
FAX: 217-557-4652

c. The appeal must state the name, address, and phone number of the appellant and the attorney/representative (if any), the full name(s) and birthdate(s) of the child(ren) in the indicated finding (if known), and the SCR number (which you can find on the "Notice of Indicated Finding" letter that had been sent to the client).

6. What can be appealed? (DCFS Rule 336.60)

A person can appeal an indicated finding of abuse or neglect, the failure to remove an unfounded report, or the length of the retention period assigned to an indicated finding.

Currently, however, indicated findings as to which no perpetrator is assigned ("unknown perpetrator") are not appealable.

7. **What is an expedited appeal and who is entitled to one?** (DCFS Rule 336.85)

a. People who work with children ("child care workers" broadly defined as including many types of professionals, including day care providers, nannies, teachers, school bus drivers, school custodians, medical professionals, nurses, etc.) are entitled to a fast-track appeal process. In these cases, during the investigation DCFS should have first notified the child care worker that they intend to indicate him or her. The child care worker is then entitled to a pre-deprivation Administrator's Conference, which takes place *before* an indicated finding is entered onto the SCR. (DCFS Rule 300.160(c)). Usually, the FDC or the client will have handled the Administrator's Conference and will refer the case to you after a decision against the client has been rendered by DCFS. In some referred cases, however, the client will have the right to a special review through DCFS legal counsel if the Administrator's Conference was not afforded. (DCFS Rule 336.105(b)(1)). Please consult with the FDC if your client is a child care worker who did not have an Administrator's Conference during the investigation.

b. If, after the Administrator's Conference, DCFS decided to indicate the report, the client should receive a formal notice of the indicated report, which provides notice of the specific finding and explains the right to an expedited appeal. If the worker requests an expedited appeal, a pre-hearing conference will be set within 14 days of the receipt of the appeal request, and the hearing must be held within 7 days of the pre-hearing conference. The final administrative hearing decision must be issued within 35 total days of the receipt of the appeal request. The typical referred pro bono case is not an expedited appeal.

8. **Who is considered a child care worker?** (DCFS Rules 300.20, 336.20)

a. A child care worker means any person that works directly with children, or who owns or operates a child care facility, regardless of whether the facility is licensed by DCFS.

b. Persons enrolled in a degree-seeking educational program that will result in a career working with children are also considered child care workers ("career entrants").

c. License holders for child contact work are child care workers whether or not they presently have a job in which they work directly with children.

d. Babysitters, nannies, and others who work 15 hours a week or more in child care employment are child care workers.

e. Most teachers and school employees are child care workers (the exception being tenured public school teachers who, because they have legal protections against the termination of their employment, are not entitled to Administrators' Conferences or expedited hearings).

f. Foster parents are *not* considered child care workers.

g. You should consult with the FDC as to any question that arises as to whether your client should be entitled to "child care worker" status.

9. What steps should I take to prepare for my first meeting with my client?

a. Prior to meeting with the client, review the DCFS Rules and Procedures defining the specific numbered Allegation(s) of Harm for which the client has been indicated.

b. DCFS Rule 300, Appendix B, sets forth a separate definition for each "Allegation of Harm." This definition delineates the elements of the allegation. Additionally, most Allegations of Harm have a corresponding section within DCFS Procedures 300, Appendix B, which elaborates upon the definition from the Rule and includes all of the steps DCFS was required to take during the investigation and the evidence required to "indicate" a finding for that allegation.

c. All DCFS Rules and Procedures can be accessed, downloaded, and printed from: https://www2.illinois.gov/dcfs/aboutus/notices/Pages/default.aspx

d. Prior to meeting with the client, you should also review the DCFS investigative file, which will document what information was provided during the Hotline call, a summary of each of the interviews the investigator conducted during the investigation, and the rationale for indicating the allegation(s).

10. What information should I get from my client in the first meeting?

a. First and foremost, you want to gather all information from the client that both supports and refutes the allegations against them.

b. Obtain from the client a detailed account of the underlying alleged incident and any other relevant events.

c. The elements of the allegations and the protocol DCFS should follow during an investigation will help guide your interview of the client because they inform you what information you must gather prior to the hearing.
d. Begin talking with the client about potential witnesses you may want to call on behalf of the client, and any potential documents, photographs, etc. that could be used as exhibits.

What Happens Before the Hearing?

1. Who hears the case?

a. An administrative law judge ("ALJ") employed by DCFS.

b. When your client (the appellant) receives notice of the pre-hearing date after filing an appeal, the notice provides the name of the ALJ who will be hearing the case. The notice also lists a temporary DCFS attorney who may be contacted until a DCFS attorney is assigned the case and enters an appearance.

2. Who is the "other side"?

The other side is the Department of Children and Family Services, represented by an attorney, either in-house or an outside contract attorney. This individual presents the Department's case in support of maintaining the indicated finding.

3. What is a pre-hearing conference? (*See* DCFS Rule 336.105)

a. A pre-hearing conference is a telephonic meeting with the Appellant (or the Appellant's attorney if there is one), the ALJ, and the DCFS attorney. A record of the pre-hearing conference is preserved via tape recording. The ALJ initiates the call to the appellant. If an attorney has entered an appearance for the appellant, the ALJ will call the attorney instead of the appellant. The attorney has the option to conference their client (the appellant) in to the call, but normally clients do not participate on the pre-hearing calls unless they have a strong preference to do so. It is optional.

b. TIP: If the attorney entered the appearance just hours or 1 day prior to the pre-hearing, it is a good idea to call the ALJ's office ahead of the pre-hearing, confirm the appearance was received, and confirm that the ALJ knows to call the attorney's number for the pre-hearing. Or, if you are expecting a call for a pre-hearing and still haven't received it 10-15 minutes past the scheduled time, you may want to call the ALJ's office at that time to confirm that they have your correct contact information and to confirm that you are available and waiting for the pre-hearing.

c. DCFS Rule 336.105 lays out in detail what to expect at the pre-hearing conference. Parties should be prepared to discuss: (i) the witnesses they may call or exhibits they may offer into evidence (if not yet known or final at the time of the pre-hearing, the parties should at least be able to provide a general idea or approximation); (ii) whether either side will seek to have a child testify (if so, a special rule on child witnesses must be satisfied); (iii) scheduling of the hearing; (iv) documents to be exchanged before the hearing; (v) any stipulations; and (vi) pre-hearing motions that are known at that time (*e.g.,* a request to have a witness testify by telephone).

d. Any evidentiary issues brought to light by the time of the pre-hearing conference may also be addressed at that time. Evidentiary issues, *e.g.,* a desire to exclude certain DCFS evidence, may be filed up to and including the day of the hearing via a motion in limine. Major substantive motions should be filed 14 days before the hearing or as soon as possible if discovered after that date.

e. **Timing considerations:** ALJs will issue standard admonitions about the choice of hearing dates pursuant to agreements reached with the FDC in post-decree negotiations in *Dupuy v. Samuels. See* Appendix B of this manual for the text of Standard Admonitions. At the first pre-hearing, the ALJ is obligated to offer a hearing date within the time frames that apply to the case (35 days for an expedited appeal and 90 days for a standard appeal), while affording at least 14 days for the issuance of subpoenas in standard 90-day appeals. For expedited appeals, if at any time the appellant requests a continuance of more than 7 days, the expedited appeal is waived and it converts to a regular appeal. For regular appeals, if at any time the appellant requests or agrees to a continuance of a pre-hearing or hearing date, the time period between the request for continuance and the continued hearing date does not count against the 90-day time limit for a final decision. Instead, that time is "tolled." *See* DCFS Rule 336.150 (Continuances). Often, by the time the case is referred by the FDC to a pro bono attorney, the client may have previously requested one or more continuances of the pre-hearing conference in order to allow time to find an attorney. In that case, DCFS is no longer under the original strict 90-day deadline, and it is most often acceptable for the pro bono attorney to accept the first offered hearing date that fits with his schedule and the client's schedule.

Under *Lyon v. Ill. Dep't of Children and Family Servs.,* 209 Ill. 2d 264 (2004) and *Dupuy v. Samuels,* 141 F. Supp. 2d 1090 (N.D. Ill. 2001) (*see* www.familydefensecenter.org for additional information about *Dupuy*), persons appealing indicated findings have a due process right to a timely hearing decision. Therefore, DCFS is under very strict timing limitations as to when a case must be heard and decided, depending on whether the appellant is a child care worker (35 days) or not

(90 days). See Appendix C for *Lyon* decision. The consequences of DCFS's failure to meet the 35-day or 90-day time limit is that the client should win expungement regardless of the merits of the case. The point at which this actually gets enforced is almost always on further review (i.e. an administrative review action in circuit court following an adverse administrative hearing decision.) Therefore, this is an issue that must be preserved as carefully as possible for appeal. If either the DCFS attorney or ALJ attempts to set a hearing date that is beyond the time limitations (excluding any continuances requested or agreed to by the appellant), you should state if the date is acceptable to you but at the same time explicitly state that you do not waive your client's right to a timely decision under *Lyon*. In such an instance, if you do not object or state that you do not waive your client's due process rights, the ALJ may consider the hearing date to be "by agreement," and you may find DCFS will argue you have waived your client's speedy hearing rights under *Lyon*.

<u>The ALJ's standard admonitions are meant to alert you and your client to the 90-day rule and the consequences of not accepting the first hearing date the ALJ offers at the first pre-hearing</u>. You have the right to refuse the first-offered date but you should only do so after consulting with your client and, if necessary, with the FDC staff about the need for additional time to prepare your case. If at the time of the referral the FDC is aware that the timing is critical for a particular pro bono client, the FDC will raise this issue with the pro bono attorney. In many cases, the pro bono attorney can accept the first date that works for his schedule and the client's schedule. In cases where it is essential for the client to have a hearing date as soon as possible, FDC will raise this with the pro bono attorney at the outset.

4. Does DCFS ever drop cases before the hearing?

Yes. If after reviewing DCFS's investigative file, you think there are strong arguments to be made that there is little to no evidence supporting the allegations, or that the facts do not meet the standard required by the allegation's definition, we highly recommend contacting the DCFS attorney to discuss the merits of the case and ask that they consider "voluntarily unfounding" the allegation, which means agreeing to expunge it without going to hearing. We recommend doing this as soon as possible because the DCFS attorney has to go through a bureaucratic process to get permission to drop a case; if you address this possibility too close to the hearing, there may not be sufficient time for the DCFS attorney to get a decision.

5. Is there discovery? (DCFS Rule 336.140)

a. There is an "exchange of information" where each party may request from the other party, without leave of the ALJ, a list of witnesses who may be called at the hearing and a list of documents that may be introduced into evidence, along with copies of these documents to the extent the opposing party does not have them in the case file.

b. We recommend having a fair idea of who and what will be on your Witness and Exhibit List prior to the pre-hearing. Some ALJs require the written list to be filed and exchanged before they will set a hearing date and will treat any need the Appellant has for additional pre-hearings in order to provide the list as the Appellant's request for a continuance (and, thus, *not* counted within the 90-day timeframe). At the pre-hearing, the ALJ will often set deadlines for when final Witness and Exhibit Lists need to be exchanged (usually no later than 14 days prior to the in-person hearing), for when copies of exhibits need to be exchanged (usually no later than 14 days prior to the in-person hearing), and for when any motions in limine need to be filed. If the pro bono attorney is unclear as to any of these deadlines, we recommend asking the ALJ to specify these deadlines on the pre-hearing call. The default deadline is generally 14 days prior to the in-person hearing for any lists, exhibit copies, or substantive motions. Normally, the DCFS attorney will file a Witness and Exhibit List as a matter of course. If for any reason the DCFS attorney does not appear to be doing so, we recommend filing a simple Motion to Produce, requesting that DCFS produce a list of witnesses that they intend to call and copies of any exhibits they intend to use at the hearing. *See* sample at Appendix A-6.

c. You should produce to the opposing party any exhibits you may seek to introduce no later than <u>14 days prior to the hearing</u> (unless the ALJ specifically sets a different deadline.)

d. Discovery as described in Supreme Court Rule 201, *et seq.*, is not permitted without leave of the ALJ. Due to the tight time frames for hearings, there ordinarily is very little discovery. Efforts to expand on discovery have generally not met much success. The decision to seek more discovery must be balanced against the right a timely adjudication for each specific case. Requests for continuances or additional time in order to complete one's own discovery from other parties (such as issuing subpoenas for medical records or asking for my time to find an engage an expert), as opposed to requesting discovery from DCFS, is often accommodated when the records are relevant/critical to the case.

6. **Can I subpoena witnesses?** (DCFS Rule 336.160)

   a. Yes. DCFS will issue subpoenas on behalf of the Appellant. The request for any subpoenas must be submitted no later than 14 days before the hearing, and DCFS's enforcement power is somewhat complex.

   b. The subpoena request is somewhat informal (it may be in a memo form) and is faxed to the Administrative Hearings Unit in Chicago (312-814-5602). *See* Appendix A-4 for a sample subpoena request.

7. **What if my witness lives far away or cannot be physically present to testify due to their work schedule?** (DCFS Rule 336.170)

   You may make a motion to have testimony heard by telephone. For most witnesses, the ALJ will allow telephone testimony for good cause, such as if the witness lives far away. Under a recent rule change, telephone testimony is presumed to be appropriate for physicians and other professionals testifying in their professional capacity, and the ALJ will allow telephone testimony for these witness unless good cause is shown that in-person testimony is necessary. *See* Appendix A-5 for a sample motion.

How Do I Prepare a Case?

1. What statutes and rules apply?

a. The Abused and Neglected Child Reporting Act (ANCRA), 325 ILCS 5/1 *et seq*., is the enabling legislation granting DCFS the authority to investigate and indicate allegations of child abuse or neglect.

b. DCFS Rule 336 (codified at 89 Ill. Admin. Code § 336) governs the administrative hearing process DCFS uses for expungement hearings.

c. DCFS Rule 300 and Procedures 300 provide the guidelines for reports of child abuse/neglect and the procedures to be followed by DCFS investigators during an investigation.

d. All DCFS rules and procedures (including Appendix B to DCFS Rule 300, which sets forth the detailed definitions for each specific Allegation of Harm) can be located at: https://www2.illinois.gov/dcfs/aboutus/notices/Pages/default.aspx

2. How are "abuse" and "neglect" defined? (325 ILCS 5/3; DCFS Rules 300.20, 336.20)

a. Both ANCRA (at 325 ILCS 5/3) and DCFS Rules 300.20 and 336.20 define the terms "abused child" and "neglected child." Many substantive arguments can be made that certain DCFS definitions of specific Allegations of Harm (contained in Rule 300, Appendix B) are legally debatable and inapplicable to the specific conduct alleged against your client. Note also that DCFS definitions of specific Allegations of Harm alleging neglect may arguably impermissibly expand on the actual statutory definition of "neglected child." *See Slater v. DCFS* opinion at Appendix C.

Definition of an "abused child":

> "Abused child" means a child whose parent or immediate family member, or any person responsible for the child's welfare, or any individual residing in the same home as the child, or a paramour of the child's parent:
>
> > inflicts, causes to be inflicted, or allows to be inflicted upon such child physical or mental injury, by other than accidental means, which causes death, disfigurement, impairment of physical or emotional health, or loss or impairment of any bodily function;
> >
> > creates a substantial risk of physical or mental injury to such child by other than accidental means which would be likely to cause death, disfigurement, impairment of physical or emotional health, or loss of or impairment of any bodily function;

commits or allows to be committed any sex offense against such child, as such sex offenses are defined in the Criminal Code of 2012 [720 ILCS 5] or in the Wrongs to Children Act [720 ILCS 150], and extending those definitions of sex offenses to include children under 18 years of age;

commits or allows to be committed an act or acts of torture upon such child;

inflicts excessive corporal punishment;

commits or allows to be committed the offense of female genital mutilation, as defined in Section 12-34 of the Criminal Code of 2012, against the child;

causes to be sold, transferred, distributed, or given to such child under 18 years of age, a controlled substance as defined in Section 102 of the Illinois Controlled Substances Act [720 ILCS 570] in violation of Article IV of the Illinois Controlled Substances Act or in violation of the Methamphetamine Control and Community Protection Act [720 ILCS 646], except for controlled substances that are prescribed in accordance with Article III of the Illinois Controlled Substances Act and are dispensed to such child in a manner that substantially complies with the prescription; or

commits or allows to be committed the offense of involuntary servitude, involuntary sexual servitude of a minor, or trafficking in persons for forced labor or services as defined in Section 10-9 of the Criminal Code of 2012 against the child.

A child shall not be considered abused for the sole reason that the child has been relinquished in accordance with the Abandoned Newborn Infant Protection Act [325 ILCS 2]. [325 ILCS 5/3]

<u>Definition of a "neglected child"</u>:

"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 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 (including when there is harm or substantial risk of harm to the child's health or welfare), or other care necessary for a child's well-being, including adequate food, clothing and shelter; or

who is subjected to an environment that is injurious insofar as:

the child's environment creates a likelihood of harm to the child's health, physical well-being, or welfare; and

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; or

who has been provided with interim crisis intervention services under Section 3-5 of the Juvenile Court Act of 1987 [705 ILCS 405/3-5] and whose parent, guardian, or custodian refuses to permit the child to return home and no other living arrangement agreeable to the parent, guardian, or custodian can be made, and the parent, guardian, or custodian has not made any other appropriate living arrangement for the child; or

who is a newborn infant whose blood, urine or meconium contains any amount of controlled substance as defined in Section 102(f) of the Illinois Controlled Substances Act [720 ILCS 570/102(f)] or a metabolite thereof, with the exception of a controlled substance or metabolite thereof whose presence in the newborn infant is the result of medical treatment administered to the mother or newborn infant.

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.

A child shall not be considered neglected for the sole reason that the child has been relinquished in accordance with the Abandoned Newborn Infant Protection Act [325 ILCS 5].

A child shall not be considered neglected or abused for the sole reason that such child's parent or other person responsible for his or her welfare depends upon spiritual means through prayer alone for the treatment or cure of disease or remedial care under Section 4 of the Abused and Neglected Child Reporting Act. When the circumstances indicate harm or substantial risk of harm to the child's health or welfare and necessary medical care is not being provided to treat or prevent that harm or risk of harm because the parent or other person responsible for the child's welfare depends upon spiritual means alone for treatment or cure, the child is subject to the requirements of the Act for the reporting of, investigation of, and provision of protective services with

> respect to the child and his or her health needs, and in such cases spiritual means through prayer alone for the treatment or cure of disease or for remedial care will not be recognized as a substitute for necessary medical care, if the Department or, as necessary, a juvenile court determines that medical care is necessary.
>
> A child shall not be considered neglected or abused solely because the child is not attending school in accordance with the requirements of Article 26 of the School Code [105 ILCS 5]. [325 ILCS 5/3]

b. To prevail in a case, DCFS must also show that the person being indicated is a "person responsible" for the care of the child. This is also referred to as being an "eligible perpetrator." Note that the definition of abuse would not permit a cousin or neighbor to be indicated for abuse unless they have specific caretaking responsibility for the child, and the definition of neglect excludes even immediate family members who are not parents or caretakers. In most cases, we would recommend addressing this issue through a written motion and/or a request for a voluntary unfound prior to the hearing.

3. Review the DCFS Rules and Procedures defining the specific allegations at issue. Throughout your preparation of the case, you should be continually referencing DCFS's own Rules and Procedures defining the specific Allegation(s) of Harm that have been indicated (found in Appendix B to Rule 300 and Appendix B to Procedures 300).

4. Carefully review the investigative file.

a. The DCFS investigative file should be very carefully reviewed prior to a hearing because it presents DCFS's case against the client, including all of the evidence DCFS gathered and considered during its investigation. We strongly suggest taking detailed notes—FDC attorneys have a standard table we use to create an "abstract" of the file, a sample of which we are happy to provide.

b. The file is comprised of computer-generated forms completed by the DCFS investigator. The first few pages contain the names and contact information of the appellant and the subjects of the investigation. The "Narrative" section, also located toward the beginning, is the information that was called in and provided to the DCFS Hotline operator.

c. The file also contains a list of the allegations against the appellant, whether they were indicated or unfounded, information that supports and mitigates the allegation, and the ultimate rationale for either indicating or unfounding the allegation. There may also be information toward the front regarding a risk assessment and details of the safety plans a family was under, if applicable, but these forms are not usually particularly important to the investigation decision.

d. The remainder of the file primarily constitutes "Contact Notes" documenting each interview the DCFS investigator conducted during the course of the investigation and "Case Notes" documenting other activity on the case (e.g., instructions from the supervisor to the investigator). The file should also include any documents DCFS received during the course of the investigation, *e.g.*, medical records, therapy reports, etc. Please note that the DCFS investigator's notes are often riddled with errors and misrepresentations.

5. How do I prepare direct examinations?

a. Talk to each of the witnesses you plan to present.

b. Plan to prepare your own client to testify. In most DCFS appeals, the client is your best and most important witness. The ALJ will want to hear from your client. Several ALJs will likely only rule for your side if they like your client and believe that DCFS mistreated him or her.

c. Your client may also be called as a witness by DCFS in its side of the case, sometimes as the very first witness. Prepare your client for this possibility but explain that you can recall them as a witness on your own behalf. Prepare your client to answer cross examination questions without getting "cross" (*i.e.,* defensive).

d. Do not call every witness under the sun. The ALJ will want to hear from two to three character witnesses, maximum. The ALJ is primarily interested in those witnesses who can directly address the incident, policy, subject matter, or facts in question.

e. Consider bringing in an expert witness as to critical issues in dispute, including

(a) the manner in which young children should be interviewed

(b) medical cause of injuries

(c) psychological issues

(d) dynamics of domestic violence

Note: if you are planning to call an expert witness, be sure to disclose the witness to DCFS counsel and provide a resume/CV.

6. What areas should I focus on in cross-examination of DCFS witnesses?

a. Focus your cross-examination on the investigator. Look for any inconsistencies in the investigative file—among witness statements, and particularly the statements being attributed to the alleged victim. If applicable, cross-examine on the incompleteness of the investigation—who the investigator didn't talk to; who they didn't meet with in person. The DCFS procedure regarding the specific allegation details the people an investigator must speak with, documents they must gather, etc. Cross-examine the investigator on this procedure (if they failed to follow it). You will not have an opportunity to speak with the investigator prior to the hearing.

b. Prior to the hearing, make an attempt to speak with the other witnesses DCFS has listed on their Witness and Exhibit List. DCFS will almost certainly call the Hotline reporter to testify (though DCFS is obligated to keep the identity of the reporter confidential, oftentimes it is obvious from the file who the reporter was and sometimes the reporter personally disclosed to your client that they called the Hotline). You will want to see if any of the people the investigator spoke with have perspectives to share that either elaborate upon what the investigator wrote in the file, or are different from what was written in the file.

What Happens at the Hearing?

1. **Where are the cases heard? In a regular courtroom?**

   a. In the Chicago area, the cases are heard at the DCFS Administrative Hearings Unit office, located at 17 N. State Street on the 7th Floor.

   b. The location of the hearing depends on the location of the investigation and, if not in Chicago, may be held at a local DCFS field office.

   c. The hearings are held in regular office conference rooms, with all parties seated around a conference table, with the ALJ seated at the head. The parties remain seated throughout the proceedings.

2. **Who are the parties presenting evidence?**

   The Appellant (your client), who is the person who was indicated for abuse or neglect. The other side is DCFS, represented by one of their attorneys. During the course of the hearing, a witness will be permitted in the hearing room *only* during the time that he is providing testimony (with the exception of the Appellant, who should be in the hearing room during the entire proceeding).

3. **When do I present a "motion in limine"?**

   Prior to starting a hearing and prior to any opening statement, the ALJ will generally ask if there are any issues the parties wish to address. Inform the court at that time of your motion in limine. Note that any specific motions in limine that go to the heart of the case are best filed in writing at least 10-14 days in advance of the hearing and set for argument at the commencement of the hearing.

4. **Do I make an opening statement?**

   Yes. Generally a short opening statement (approximately five minutes, give or take depending on the complexity of the case) outlining what you believe to be the pertinent facts and evidence and/or your main arguments is a good idea to frame your case for the ALJ. Do not waive your opening statement even if the DCFS attorney waives his.

5. **Who has the burden of proof and what is the burden?** (DCFS Rule 336.115(c)(2))

   DCFS has the burden of proving that a preponderance of the evidence supports the indicated finding. For this reason, DCFS presents its evidence first (but agreements to take witnesses out of order are generally welcome if it helps conclude the hearing promptly, and are especially common if done to accommodate a professional's or expert's work schedule).

6. Does the alleged victim testify?

a. Generally the alleged victim does not testify because the hearsay of a child's report regarding abuse is admissible (336.120(b)(10)). This generally negates, from DCFS's perspective, the need to have the child testify because DCFS can admit such evidence via witnesses to whom the child reported and the witnesses' reports.

b. DCFS Rule 336.105(b)(3) sets out the requirement if a party wants a child to testify at the hearing:

> 3) Whether children may testify or be involved in the hearing.
>
> A) Either party requesting that a child be subpoenaed to testify or be involved in the hearing process must demonstrate at the pre-hearing conference that:
>
> i) the child's testimony or involvement is essential to a determination of an issue on appeal;
>
> ii) the likelihood of inflicting emotional harm to the particular child involved can be minimized with conditions and restrictions and the child's testimony is necessary for the interests of justice; and
>
> iii) no alternatives, such as stipulations or transcripts from prior court hearings, exist that may be used as a substitute for the child's testimony.
>
> B) In determining whether a child will testify, the ALJ must consider, when available, the opinion of the child's treating clinician regarding the impact on the child if the child is permitted to testify or not permitted to testify, and how any negative impact could best be minimized for the particular child.
>
> i) The ALJ must balance the hardship on the child, taking into account possible restrictions or modifications described in subsection (c)(3)(B)(ii), against the interests of justice and the harm to the child if an appeal is improperly denied or an indicated finding is improperly expunged.

ii) If an ALJ allows a child to testify, the ALJ may set any conditions or restrictions, and may use any techniques allowed in any juvenile, civil or criminal court (including but not limited to in camera interviews, video conferences, questions submitted in writing, exclusion of parties to the proceeding (including but not limited to the parents), or change of hearing room or location) that will help minimize any emotional impact on the child.

c. In the past, children over age 14 could presumptively testify, but DCFS revised Rule 336 in December 2017.

d. While ALJs usually frown on a party proposing minor testimony because they do not want to traumatize children or take them out of school, it may be beneficial to make a motion to allow for a minor's testimony in certain circumstances, such as: you have knowledge that the alleged child victim has recanted the original abuse allegations; the alleged child victim wants to testify in support of their parent; a significant amount of time has passed since the original incident and the alleged child victim is at least close to age 18 and should be compelled to testify in person rather than have DCFS rely on hearsay evidence; or the appellant/client is a minor himself and should be allowed to testify in his own defense (a motion may or may not be required in this last instance).

e. It is possible one could gain permission for a child as young as 10 to testify, but based on past experience, normally children that testify are at least 12. It is also possible to admit affidavits or stipulations in lieu of testimony. Pro bono attorneys should discuss the various options with FDC staff.

f. TIP: See if you can get the DCFS attorney to stipulate to the testimony.

g. TIP: If a minor witness has exculpatory or useful information to your case, consider having them make a written statement that you then submit as an exhibit.

h. TIP: If you really need to present a child witness, *i.e*. it is a case involving allegations of sexual abuse and DCFS's only evidence is an uncorroborated outcry from the alleged child victim who is not credible due to, for example, a history of false reports, make a motion to have the child present, even if you think it will be denied. This motion will enable you to preserve the issue for a possible appeal.

7. What does it mean that the rules of evidence do not strictly apply? Do I still make objections? (DCFS Rule 336.120(b)).

a. What this rule means depends on the ALJ hearing the case. Some judges will apply the rules of evidence more strictly than others, *e.g.,* hold inadmissible evidence of prior arrests and sustain objections of "double hearsay" (where the Department is often eliciting testimony from the investigator regarding what the reporter said the alleged victim said).

b. The ALJ will generally be focusing on the probative value of the evidence, and will likely use this as a reason to admit evidence, even if the evidence is not fully competent under standard evidentiary rules, is not entirely relevant, or is potentially prejudicial.

c. Make relevance objections, competence objections (*e.g.,* hearsay and foundation), and prejudice objections to keep out harmful evidence that would not be admissible in a usual trial, to keep the case focused, and to preserve the objections for possible further review (in the form of an administrative review action in circuit court) if the expungement appeal is denied.

d. TIP: Object if the DCFS attorney seeks to admit any audio or videotaped interview of an alleged victim (that is not testifying) on the basis that such evidence denies your client the rights of due process by prohibiting the confrontation and cross-examination of witnesses against them. This argument is outlined in an unpublished Cook County Circuit Court case, *Manley v. DCFS* (*see* Appendix C). The argument of due process denial, in the event that further review is necessary (via an Administrative Review Action), is stronger if you have made a prior motion or attempt to have the alleged victim testify. Your objection will likely be overruled but it is important to make a record.

e. Regardless of the loose application of the rules of evidence, make your objections because, as with any trial proceeding, you are creating a record for a potential administrative review action.

8. Is the DCFS investigative file admissible as evidence? Should I object?

a. In the vast majority of cases, you'll want to make an oral objection to the introduction of the DCFS file into evidence. The FDC has a template written motion to exclude the file based on arguments that the file is full of hearsay, is not a business record, and is not generally reliable within the meaning of the Administrative Procedures Act. In appropriate cases, where there is extensive double and triple hearsay in the file that you think could seriously prejudice your client, file the written motion in limine objecting to the admission of the DCFS file in evidence. Otherwise, object orally for the record when DCFS moves to admit the file into evidence, briefly summarizing the basis as described in the written motion.

b. Despite the fact that the investigative file contains mountains of hearsay and may include information that is both irrelevant and prejudicial, it invariably comes in. DCFS Rule 336.120(b)(9) now deals explicitly with admission of the investigative file, directing the ALJ to: "allow into evidence all inculpatory and exculpatory evidence helpful in determining whether an indicated perpetrator abused or neglected a child, including oral and written reports and the investigative file, that the ALJ and the Director may rely upon to the extent of its probative value." But it is still worthwhile to object so as to preserve the argument that the ALJ relied on evidence that should not have been admitted. Additionally, even when the ALJ permits the file to be entered into evidence, you can make a specific objection that the hearsay statements of non-testifying adults *not* be considered for the truth of the matters asserted. Some ALJ's will grant the objection to that extent.

9. Should my client testify?

If there are no pending criminal charges, your client should generally testify. This is so particularly if the alleged victim has made contrary statements to your client regarding the alleged abuse; your client may testify as to those inconsistencies. NOTE: THE USUAL CRIMINAL CASE ADVICE AGAINST TESTIFYING IS NOT NECESSARILY GOOD ADVICE FOR DCFS ADMINISTRATIVE HEARINGS.

10. Can I call witnesses out of order?

Yes. Usually you should plan your order of witnesses to begin after allowing adequate time for DCFS, but special scheduling needs can be accommodated by asking the ALJ and/or working out the schedule with the DCFS attorney ahead of time.

11. Do I make a motion at the close of DCFS's case for a directed verdict?

No, because the ALJ does not have the authority to make the final decision in the case. The ALJ will have to defer ruling because the Director is the final decision-maker. A directed verdict thus will not save time or prevent you from having to present your case.

12. Do I make a closing statement?

Absolutely! The ALJ may state that she does not need to hear closing statements, but do not trust the ALJ to connect the dots in your evidence—do not waive your closing statement, even if DCFS waives theirs.

What Happens After the Hearing?

1. **Does the ALJ decide the case?** (DCFS Rule 336.220)

   No. The ALJ makes a written recommendation (with findings of fact, conclusions of law, and discussion) to the DCFS Director, who then makes a final decision. Almost always, the Director adopts the recommendation of the ALJ.

2. **When does the ALJ issue a recommendation?** (DCFS Rule 336.220)

   For expedited appeals (in the case of child care workers): within 35 days after receipt of a request for an appeal. For all others: within 90 days after receipt of a request for an appeal. Note: these time limits only apply where the client has not "agreed" to a later hearing date or waived their right to an expedited hearing. Any continuances requested or agreed to by the appellant do not count against the time limits.

3. **When does the DCFS Director issue a final administrative decision?**

   Within the same time periods as above (35 days for child care workers; 90 days for all others). Note: these time limits only apply where the client has not "agreed" to a later hearing date or waived their right to an expedited hearing. Any continuances requested or agreed to by the appellant do not count against the time limits. By statute, the final decision must also issue within 60 days of the hearing. (325 ILCS 5/7.16).

4. **How am I notified of a decision?**

   You will receive a certified letter from the Director stating the Director's decision and enclosing the ALJ's written recommendation/opinion.

5. **What if the Director disagrees with the ALJ?**

   The Director's final administrative decision is the controlling one, and it stands unless and until successfully appealed through an Administrative Review Action. If the Director has gone against the ALJ's recommendation, that is likely a good case for appeal.

6. **And if I lose?**

   You may choose to appeal it to the circuit court under the Administrative Review Law (735 ILCS 5/3 *et seq.*). To be timely, the "action to review a final administrative decision shall be commenced by the filing of a complaint and the issuance of summons within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected by the decision." (735 ILCS 5/3-103). Per statute, a decision is determined to be "served" on the *date it was post-marked* and <u>not</u> the date it was received. IN ALL REFERRED CASES FROM THE FDC, A DISCUSSION WITH FDC STAFF ABOUT WHETHER TO APPEAL AN ADVERSE ADMINISTRATIVE HEARING DECISION AGAINST OUR CLIENT SHOULD OCCUR WITHIN 14 DAYS OF THE FINAL ADMINISTRATIVE HEARING DECISION.

APPENDIX A

DOCUMENT TEMPLATES

STATE OF ILLINOIS
DEPARTMENT OF CHILDREN AND FAMILY SERVICES
ADMINISTRATIVE HEARINGS UNIT

IN RE: EXPUNGEMENT APPEAL OF	**)**	
	)	**SCR #**
Jane SMITH	**)**	
	)	
Appellant.	**)**	

TO: Department of Children & Family Services
Administrative Hearings Unit, Expungement Appeals
406 East Monroe Street, Station 15
Springfield, Illinois 62701-1498
Fax: 217-557-4652

NOTICE OF FILING

You are hereby notified that on ___________________, 20__, I caused to be filed with the Department of Children and Family Services Administrative Hearings Unit the attached: **(1) <u>Administrative Expungement Appeal</u> and (2) <u>Attorney Appearance and Authorization.</u>**

[Attorney Name]
[Firm]
[Address]
[Address]
[Phone]
[Fax]

____
[Attorney Name]

CERTIFICATE OF SERVICE

I, ______________________, hereby certify that I am an attorney for the Appellant ______________ and that on ______________, 20__, I served a copy of the attached Notice upon the persons to whom the Notice is addressed via facsimile and First Class Mail.

____
[Attorney Name]

STATE OF ILLINOIS
DEPARTMENT OF CHILDREN AND FAMILY SERVICES
ADMINISTRATIVE HEARINGS UNIT

IN RE: EXPUNGEMENT APPEAL OF	)	
	)	
Jane SMITH	)	**SCR#**
	)	
Appellant.	)	
	)	

ADMINISTRATIVE EXPUNGEMENT APPEAL

JANE SMITH, by and through her attorney[s], ____________________, hereby appeals the indicated finding(s) against her in the cause involving the following minor(s): __________________ [if known, insert minor names and dates of birth]. The Appellant requests a timely hearing and further requests that a copy of the investigative file be sent to her attorney at the following address:

Respectfully submitted,

____
[Attorney Name]

[Attorney Name]
[Firm]
[Address]
[Address]
[Phone]
[Fax]

STATE OF ILLINOIS
DEPARTMENT OF CHILDREN AND FAMILY SERVICES
ADMINISTRATIVE HEARINGS UNIT

IN RE: EXPUNGEMENT APPEAL OF	**)**	
	)	
Jane SMITH	**)**	**SCR#**
	)	**DKT#**
Appellant.	**)**	**AHU#**
	)	

APPEARANCE AND AUTHORIZATION

I, [Appellant's Name], hereby authorize [Firm Name] to represent my interests during the appeal of the above-captioned matter.

[Appellant Name]
[Address]
[Address]
T:

Respectfully submitted,

____
[Appellant Name]

Signed and sworn to before me on ___________________________, 20__

___________________________ **Notary Public**

I, [NAME], on behalf of [FIRM NAME], hereby enter my appearance in the Administrative Hearings Unit as an attorney for the appellant in the above-captioned matter.

[Attorney Name]
[Firm]
[Address]
Chicago, Illinois
T:
F:

Respectfully submitted,

____
[Attorney Name]

STATE OF ILLINOIS
DEPARTMENT OF CHILDREN AND FAMILY SERVICES
ADMINISTRATIVE HEARINGS UNIT

IN RE: <u>EXPEDITED</u> EXPUNGEMENT APPEAL OF	**)**	
	)	
Jane SMITH	**)**	**SCR#**
	)	
Appellant.	**)**	
	)	

TO: Department of Children & Family Services
Administrative Hearings Unit, Expungement Appeals
406 East Monroe Street, Station 15
Springfield, Illinois 62701-1498
Fax: 217-557-4652

NOTICE OF FILING

You are hereby notified that on ____________________, 20__, I caused to be filed with the Department of Children and Family Services Administrative Hearings Unit the attached **NOTICE OF <u>EXPEDITED</u> ADMINISTRATIVE EXPUNGEMENT APPEAL**.

[Attorney Name]
[Firm]
[Address]
[Address]
[Phone]
[Fax]

____
[Attorney Name]

CERTIFICATE OF SERVICE

I, ______________________, hereby certify that I am an attorney for the Appellant _______________ and that on _______________, 20__, I served a copy of the attached Notice upon the persons to whom the Notice is addressed via facsimile and First Class Mail.

____
[Attorney Name]

STATE OF ILLINOIS
DEPARTMENT OF CHILDREN AND FAMILY SERVICES
ADMINISTRATIVE HEARINGS UNIT

IN RE: <u>EXPEDITED</u> EXPUNGEMENT APPEAL OF	**)**	
	)	
Jane SMITH	**)**	**SCR#**
	)	
Appellant.	**)**	
	)	

NOTICE OF <u>EXPEDITED</u> ADMINISTRATIVE EXPUNGEMENT APPEAL

JANE SMITH, by and through her attorney, ________________________, hereby appeals the indicated finding(s) against her in the cause involving the following minor(s): _________________ [if known, insert minor names and dates of birth]. Because Appellant is a ***Dupuy*** **class member**, we request an **<u>expedited</u>** hearing decision <u>within 35 days of this expungement appeal request.</u> The Appellant requests a timely expedited hearing based on her [activities/employment] as: [LIST ALL RELEVANT INFORMATION establishing eligibility of Dupuy hearing], which required over X hours of time per week, which are potentially put at extreme risk of harm if an expedited appeal is not granted.

WHEREFORE, the Appellant requests an **<u>EXPEDITED</u>** hearing and further requests that a copy of the investigative file be sent to her attorney at the following address:

[Attorney Name]
[Firm]
[Address]
[Address]
[Phone]
[Fax]

Respectfully submitted,

____
[Attorney Name]

CERTIFICATION

Under the penalties provided by law, pursuant to Section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct, except as to matters stated above on information and belief. As to these matters, I certify that I believe those statements to be true.

____
Jane Smith

____
Date

Signed and sworn to before me on ___________________________, 20__

___________________________ **Notary Public**

STATE OF ILLINOIS
DEPARTMENT OF CHILDREN AND FAMILY SERVICES
ADMINISTRATIVE HEARINGS UNIT

IN RE: EXPUNGEMENT APPEAL OF	**)**	
	)	
Jane SMITH	**)**	**SCR#**
	)	**DKT#**
Appellant.	**)**	**AHU#**
	)	

TO: Administrative Law Judge _______________
Dep't of Children & Family Servs.
Administrative Hearings Unit
[ADDRESS]
[ADDRESS]
Fax: _______________

____
Attorney for Department
Illinois DCFS
[ADDRESS]
[ADDRESS]
Fax: _________________

NOTICE OF FILING

You are hereby notified that on __________________, 20__, I caused to be filed with the Department of Children and Family Services Administrative Hearings Unit the attached **Appellant's Witness and Exhibit List**.

[Attorney Name]
[Firm]
[Address]
Chicago, Illinois
T:
F:

____
[Attorney Name]

CERTIFICATE OF SERVICE

I, [NAME], hereby certify that I am an attorney for the Appellant [NAME] and that on _________________, 20__, I served a copy of the attached Notice upon the persons to whom the Notice is addressed via facsimile and First Class Mail.

____
[Attorney Name]

STATE OF ILLINOIS
DEPARTMENT OF CHILDREN AND FAMILY SERVICES
ADMINISTRATIVE HEARINGS UNIT

IN RE: EXPUNGEMENT APPEAL OF	**)**	
	)	
Jane SMITH	**)**	**SCR#**
	)	**DKT#**
Appellant.	**)**	**AHU#**
	)	

APPELLANTS' LIST OF WITNESSES AND EXHIBITS

NOW COMES the Appellant JANE SMITH, by and through her counsel, [NAME(S)] of [FIRM], and states that she may call the following individuals to testify as witnesses and may present the following exhibits at the hearing on this matter:

A. WITNESSES

1. Jane Smith

2. Brennan O'Leary
   Partner of Appellant, Father of Involved Minor

3. Dr. Catherine Lake
   Pediatrician

4. Jennifer Moore
   Chase Park Pre-School

5. Marie Dawner
   Friend of Appellant

6. Without waiving any objection as to relevance, any and all witnesses listed by the Department of Children & Family Services, if not otherwise listed above.

B. EXHIBITS

1. Chicago Police Department Incident Report, [DATE]

2. Emergency Medical Services Report, [DATE]

3. National Weather Service Report, [DATE]

4. Without waiving any objection as to relevance or authenticity, any and all documents listed by the Department of Children & Family Services, if not otherwise listed above.

[Attorney Name]
[Firm]
[Address]
Chicago, Illinois
T:
F:

____
[Attorney Name]

<u>SENT VIA FACSIMILE to: 312-814-5602</u>

To: Debra Martin or Other Administrator at DCFS Administrative Hearings Unit

From: [Attorney NAME, Firm]

Re: **<u>Request for Subpoenas</u>**

Date: November __, 20__

In the matter of JANE SMITH (SCR# __________-A; DKT# 2018-E-_______; AHU# ______), for which an administrative hearing is set to take place in the Chicago DCFS office on: **<u>Monday, November __, 20__ at __ a.m.</u>**, please issue subpoenas to the following persons for the following times on the day of hearing:

<u>1:00 p.m.</u>:

Dr. Amanda Smith
Testimony may be given via telephone
Advocate Christ Medical Center
4440 West 95th Street
Oak Lawn, Illinois 60453

Barbara Garcia
Counselor, Behavioral Health Center
3701 Woodfield
Chicago, Illinois 60089

<u>2:00 p.m.</u>:

Detective Timothy Brown
Waukegan Police Department
420 Waukegan Road
Waukegan, IL 60085

Thank you, and please contact me with any questions.

[Attorney Name]
[Firm]
[Address]
[Address]
[Phone]
[Fax]
Attorney for the Appellant

Cc: [DCFS Attorney Name]
Attorney for Department
Illinois DCFS
[Address]
[Address]
[Fax]

STATE OF ILLINOIS
DEPARTMENT OF CHILDREN AND FAMILY SERVICES
ADMINISTRATIVE HEARINGS UNIT

IN RE: EXPUNGEMENT APPEAL OF	**)**	
	)	
Jane SMITH	**)**	**SCR#**
	)	**DKT#**
Appellant.	**)**	**AHU#**
	)	

TO: Administrative Law Judge ________________
Dep't of Children & Family Servs.
Administrative Hearings Unit
17 North State Street, 7th Floor
Chicago, Illinois 60602
Fax: 312-814-5602

____
Attorney for Department
Illinois DCFS
[Address]
[Address]
Fax:

NOTICE OF MOTION

You are hereby notified that on ___________________, 20__, I caused to be filed with the Department of Children and Family Services Administrative Hearings Unit the attached **MOTION FOR TESTIMONY BY TELEPHONE**.

[Attorney Name]
[Firm]
[Address]
Chicago, Illinois
T:
F:

____
[Attorney Name]

CERTIFICATE OF SERVICE

I, [NAME], hereby certify that I am an attorney for the Appellant [NAME] and that on [DATE], 20___, I served a copy of the attached Notice upon the persons to whom the Notice is addressed via facsimile and First Class Mail.

____
[Attorney Name]

STATE OF ILLINOIS
DEPARTMENT OF CHILDREN AND FAMILY SERVICES
ADMINSITRATIVE HEARINGS UNIT

IN THE MATTER OF:	**)**	
	)	**SCR #**
JANE SMITH,	**)**	**DKT #**
	)	**AHU #**
Appellant.	**)**	

MOTION FOR TESTIMONY BY TELEPHONE

NOW COMES the Appellant, Jane Smith, by and through counsel, and respectfully requests that this Court, pursuant to Rule 336.170, grant her Motion for Testimony by Telephone, and in support thereof states the following:

1. Appellant has an administrative hearing scheduled for __________________, 20__ at _______ [A.M./P.M].

2. As part of her case, Appellant will call several material witnesses for whom testifying in person would be a significant burden.

3. Appellant's witness Jenny Smith resides in Cincinnati, Ohio, approximately five hours away. Traveling to and from Chicago for this hearing would be a hardship for her.

4. Appellant's witness Barbara Garcia is a counselor at Behavioral Health Center. Her work schedule and responsibilities do not permit her the time to travel to the administrative hearing.

WHEREFORE, having demonstrated good cause, Appellant respectfully requests that the above witnesses be permitted to provide their testimony by phone.

Respectfully submitted,

____
Attorney for Appellant

[name]
[firm]

STATE OF ILLINOIS
DEPARTMENT OF CHILDREN AND FAMILY SERVICES
ADMINSITRATIVE HEARINGS UNIT

IN THE MATTER OF:	)	
	)	**SCR #**
Jane SMITH,	)	**DKT #**
	)	**AHU #**
Appellant.	)	

MOTION FOR PRODUCTION OF DOCUMENTS AND LIST OF WITNESSES

NOW COMES the Appellant, Jane Smith, by and through counsel, and respectfully requests that the Illinois Department of Children & Family Services (hereinafter "DCFS" or "the Department"), pursuant to DCFS Rule 336.140, produce: (1) a list of witnesses that the Department intends to call at the hearing scheduled in this matter; and (2) copies of all documents that the Department intends to present at this hearing. In support of this request, the Appellant states as follows:

1. The Appellant has filed an appeal of the Department's indicated finding in this matter.
2. DCFS Rule 336.140 provides that a party may request from any other party a list of witnesses to be called at the hearing and copies of all documents that a party intends to present to the hearing.
3. DCFS Rule 336.140 further provides that all requests for this information shall be answered within 10 days after receipt unless, upon good cause shown, leave is sought for additional time to answer.

WHEREFORE, the Appellant respectfully requests that within 10 days the Department produce a list of witnesses that the Department intends to call and copies of all documents that the Department intends to present at this hearing.

Respectfully submitted,

Attorney for Appellant

[name]
[firm]

APPENDIX B

STANDARD ADMONITIONS FOR SCHEDULING THE HEARING DATE

ADMONITIONS FOR ALL CASES:

UNDER DCFS RULES, THE DEPARTMENT MUST ISSUE ITS DECISION WITHIN 90 DAYS AFTER THE APPEAL WAS RECEIVED. HOWEVER, IF AT ANY TIME DURING THE COURSE OF YOUR APPEAL, YOU NEED TO RESCHEDULE A HEARING DATE, PLEASE BE ADVISED THAT ANY TIME BETWEEN THE SCHEDULED HEARING DATE AND THE NEW HEARING DATE WILL NOT BE COUNTED IN THE DEADLINE. I AM GOING TO SELECT A HEARING DATE THAT WILL MEET 90 DAY DEADLINE. IN ORDER FOR YOU AND THE DEPARTMENT TO HAVE SUFFICIENT TIME TO ISSUE SUBPOENAS, GATHER DOCUMENTS AND NOTIFY WITNESSES, THE HEARING DATE WILL BE SCHEDULED NO SOONER THAN 14 DAYS FROM TODAY. MY FIRST AVAILABLE DATE AND TIME ARE AND SAY DATE AND TIME. IS THAT ACCEPTABLE?

IF YES:
WE ARE SCHEDULED FOR THE HEARING TO BEGIN ON DATE AND TIME. I NEED TO ADVISE YOU THAT SHOULD YOU NEED TO RESCHEDULE THIS HEARING DATE, OR IF YOUR WITNESSES REQUIRE A NEW HEARING DATE, THE TIME BETWEEN THE SCHEDULED HEARING DATE AND THE NEW HEARING DATE WILL BE NOT INCLUDED IN THE 90 DAY DEADLINE. DO YOU UNDERSTAND? APPELLANT MUST PROVIDE AUDIBLE ANSWER YES OR NO
DO YOU HAVE ANY QUESTIONS?

IF NO:
SINCE THE HEARING DATE I HAVE OFFERED IS NOT ACCEPTABLE, I MUST ADVISE YOU THAT I CAN OFFER YOU A HEARING DATE THAT IS CONVENIENT FOR EVERYONE, BUT THE TIME BETWEEN THE HEARING DATE I PREVIOUSLY OFFERED AND THE HEARING DATE WE AGREE ON WILL NOT BE INCLUDED IN THE 90 DAY DEADLINE.

DO YOU UNDERSTAND?

DO YOU HAVE ANY QUESTIONS?

WHAT WOULD BE GOOD DATES FOR YOU?

SET DATE.

WE ARE SCHEDULED FOR HEARING TO BEGIN ON DATE AND TIME.I NEED TO ADVISE YOU THAT SHOULD YOU NEED TO RESCHEDULE THIS HEARING DATE OR IF YOUR WITNESSES REQUIRE AN ADDITIONAL DATE, THE TIME BETWEEN THE SCHEDULED HEARING DATE AND THE NEW HEARING DATE WILL NOT BE INCLUDED IN THE 90 DAY DEADLINE.

DO YOU UNDERSTAND?
DO YOU HAVE ANY QUESTIONS?

ADMONITIONS FOR EXPEDITED APPEALS

YOU/THE APPELLANT HAVE REQUESTED AN EXPEDITED APPEAL. UNDER DEPARTMENT RULES, THE DEPARTMENT MUST ISSUE ITS DECISION WITHIN 35 DAYS OF THE DATE THE APPEAL IS RECEIVED. HOWEVER, IF AT ANY TIME DURING THE COURSE OF THIS EXPEDITED APPEAL, YOU NEED TO RESCHEDULE, PLEASE BE ADVISED THAT ANY RESCHEDULING THAT IS MORE THAN SEVEN DAYS FROM THE SCHEDULED HEARING DATE, YOU GIVE UP YOUR RIGHT TO RECEIVE AN EXPEDITED DECISION WITH 35 DAYS AND INSTEAD YOUR APPEAL WILL BE TREATED AS A REGULAR APPEAL AND WILL BE DECIDED WITHIN 90 DAYS. ADDITIONALLY, ANY TIME BETWEEN THE SCHEDULED HEARING DATE AND THE NEW HEARING DATE WILL NOT BE COUNTED IN THE DEADLINE.

UNDER DCFS RULES, THE DEPARTMENT MUST ISSUE ITS DECISION WITHIN 35 DAYS AFTER THE APPEAL WAS RECEIVED. WE HAVE ASSIGNED THE FOLLOWING HEARING DATE AND TIME ALJ MUST STATE THE EXACT DATE AND TIME WHICH MEETS THE 35 DAYS DEADLINE. ARE THE ASSIGNED HEARING DATE AND TIME ACCETABLE?

IF YES:

WE ARE SCHEDULED FOR THE HEARING TO BEGIN ON DATE AND TIME.

I NEED TO ADVISE YOU THAT SHOULD YOU NEED TO RESCHEDULE THIS HEARING DATE OR IF YOUR WITNESSES REQUIRE AN ADDITIONAL HEARING DATE, THE TIME BETWEEN THE SCHEDULED HEARING DATE AND THE NEW HEARING DATE WILL NOT BE INCLUDED IN THE 35 DAY DEADLINE. IN ADDITION, IF THE NEW HEARING DATE IS MORE THAN SEVEN DAYS BEYOND THE SCHEDULED HEARING DATE, YOU WILL GIVE UP YOUR RIGHT TO AN EXPEDITED DECISION TO BE ISSUED WITHIN 35 DAYS. IN THAT SITUATION, A DECISION WILL BE ISSUED WITHIN 90 DAYS AFTER THE DATE THE APPEAL WAS RECEIVED.

IF NO:

SINCE THE DATE AND TIME WE HAVE ASSIGNED ARE NOT ACCEPTABLE, I MUST ADVISE YOU THAT I CAN OFFER YOU A HEARING DATE WITHIN 7 DAYS THAT IS CONVENIENT FOR EVERYONE BUT THE TIME BETWEEN THE ASSIGNED HEARING DATE AND THE DATE WE AGREE ON WILL NOT BE INCLUDED IN THE 35 DAY DEADLINE. DO YOU UNDERSTAND? DO YOU HAVE ANY QUESTIONS?
DISCUSSION REGARDING DATE AND TIME

SINCE THERE IS NO DATE WITHIN 7 DAYS THAT IS ACCEPTABLE, YOU GIVE UP YOUR RIGHT TO AN EXPEDITED DECISION WITHIN 35 DAYS AND INSTEAD YOUR APPEAL WILL BE TREATED AS A REGULAR APPEAL AND WILL BE DECIDED

WITHIN 90 DAYS OF THE DATE THE APPEAL IS RECEIVED. WHAT WOULD BE GOOD DATES FOR YOU?

WE ARE SCHEDULED FOR DATE AND TIME:

I NEED TO ADVISE YOU THAT SHOULD YOU NEED TO RESCHEDULE THIS HEARING DATE OR IF YOUR WITNESSES REQUIRE AN ADDITIONAL HEARING DATE, THE TIME BETWEEN THE SCHEDULED HEARING DATE AND THE NEW HEARING DATE WILL NOT BE INCLUDED IN THE 90 DAY DEADLINE.

APPENDIX C

RELEVANT CASES

LEXSEE 209 ILL. 2D 264

MARK LYON, Appellee, v. THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES et al., Appellants.

Docket No. 95643

SUPREME COURT OF ILLINOIS

209 Ill. 2d 264*; *807 N.E.2d 423*; *2004 Ill. LEXIS 361*; *282 Ill. Dec. 799

March 18, 2004, Opinion Filed

PRIOR HISTORY: [***1] *Lyon v. Dep't of Children & Family Servs., 335 Ill. App. 3d 376, 780 N.E.2d 748, 2002 Ill. App. LEXIS 1071, 269 Ill. Dec. 276 (Ill. App. Ct., 2002)*

DISPOSITION: Appellate Court judgment affirmed.

COUNSEL: For Illinois Department of Children and Family Service, APPELLANT: Brian F. Barov, Assistant Attorney General, Chicago, IL.

For Mark Lyon, APPELLEE: Ralph H. Loewenstein, Loewenstein, Hagen, Oehlert & Smith, P.C., Springfield, IL.

For Chicago Teachers Union, Local 1, AMICUS CURIAE: Frederick S. Rhine, Gessler Hughes Socol Piers Resnick & Dym, Chicago, IL.

JUDGES: JUSTICE GARMAN delivered the opinion of the court. JUSTICE KILBRIDE, concurring in part and dissenting in part.

OPINION BY: GARMAN

OPINION

[*266] [**427] JUSTICE GARMAN delivered the opinion of the court:

Defendant Department of Children and Family Services (the Department) indicated a report of abuse against plaintiff, Mark Lyon, which was entered into the Department's State Central Register pursuant to the Abused and Neglected Child Reporting Act (the Act) (*325 ILCS 5/1 et seq.* (West 1998)). Lyon sought reversal of the indicated report and expungement of the report from the central register through the administrative appellate process established by the Act, arguing that procedural violations by the Department violated his due process rights and that the indicated finding was against the manifest weight of the evidence.

When his administrative appeal was denied in part, Lyon sought judicial review pursuant to the Administrative Review Law (*735 ILCS 5/3-101* (West 2002)) as permitted by the Act. *325 ILCS 5/7.16* [***2] (West 1998). The circuit court set aside the remaining indicated findings because Lyon's due process rights were violated by discovery deficiencies. The appellate court affirmed the circuit court judgment, but the appellate court instead [**428] found a due process violation in the combination of the standard of proof used during early stages of the administrative [*267] process and the delays in processing the appeal. *335 Ill. App. 3d 376, 390, 780 N.E.2d 748, 269 Ill. Dec. 276*. We granted the Department's petition for leave to appeal (177 Ill. 2d *R. 315*) and allowed the filing of an *amicus* brief by the Chicago Teachers Union, Local 1, American Federation of Teachers, AFL-CIO, in support of Lyon (155 Ill. 2d R. 345(a)). For the following reasons, we affirm the appellate court.

BACKGROUND

The State Central Register records all cases of suspected child abuse or neglect processed by the Department under the Act. *325 ILCS 5/7.7* (West 1998). The Department investigates all reports and finds them to be "indicated," "unfounded," or "undetermined." *325 ILCS 5/7.12* (West 1998). An "indicated report" is a report of abuse or neglect that investigation reveals is [***3] supported by credible evidence. *325 ILCS 5/3* (West 1998); *89 Ill. Adm. Code § 300.20* (2002). "Credible evidence" means that "the available facts, when viewed in light of the surrounding circumstances, would cause a reasonable person to believe that a child was abused or neglected." *89 Ill. Adm. Code § 300.20* (2002).

The Department appeals the appellate court's holding that when the Department uses the credible-evidence standard to support an indicated finding, then it must strictly comply with applicable statutory and regulatory deadlines in adjudicating the subject's administrative appeal to provide the subject due process. Lyon answers by alleging that several actions by the Department violated his due process rights, including: (1) the use of the credible-evidence standard of proof to support the indicated finding and the denial of his first-stage appeal; (2) the failure to provide timely disclosure of the investigative file and the failure to turn over the complete file; and (3) the violation of statutory and regulatory deadlines concerning the investigation, the indicated finding, the hearing, [***4] and the issuance of the Director's [*268] decision. Lyon also argues that the indicated findings were against the manifest weight of the evidence. We affirm the appellate court's judgment affirming the expungement of the indicated findings because Lyon's due process rights were violated by the standard of proof used and the delays in the administrative appeal, so we do not reach the additional constitutional issues raised by Lyon. See *People ex rel. Waller v. 1990 Ford Bronco, 158 Ill. 2d 460, 464, 634 N.E.2d 747, 199 Ill. Dec. 694 (1994)*. We summarize the facts that are relevant to our analysis.

Lyon was employed as a choral director at Gibson City-Melvin High School. On February 9, 2000, the Department received a report that Lyon had abused two students, H.B. and J.N. On April 11, the Department completed its investigation and determined that the report of abuse was indicated. On April 17, the indicated report was recorded on the official investigation form; following supervisor approval and transmission to Springfield, it was entered into the central register shortly thereafter. Specifically, the Department found three claims to be indicated: sexual exploitation of H.B., sexual molestation of H.B., and [***5] substantial risk of physical injury (sexual) of J.N.

On July 19, 2000, the Department sent to Lyon official notice that it had entered the indicated report in the central register and explained his appellate rights. Lyon appealed the indicated report and requested expungement of the report from the central register on August 29. On September 13, the Department denied Lyon's [**429] expungement request, concluding that the indicated finding was supported by credible evidence. Two days later, Lyon requested the second stage of administrative appeal, a hearing before an administrative law judge.

The hearing began on November 1, 2000. The hearing was not completed on that day, so the hearing was [*269] scheduled to proceed on November 13. However, the parties agreed to a continuance until December 19, because of a scheduling conflict. The hearing again was continued because the administrative law judge was in an automobile accident on the way to the hearing. The hearing concluded as scheduled by the second continuance, on January 24, 2001.

The administrative law judge issued her recommendation and opinion on February 9, 2001. After making several findings of fact, she found that the Department had [***6] not met its burden of showing that the indicated finding of substantial risk of physical injury (sexual) of J.N. was supported by a preponderance of the evidence, so she ordered that indicated finding be expunged from the central register. However, the judge affirmed the indicated finding of sexual exploitation and sexual molestation of H.B. under the preponderance standard. On March 23, the Director of the Department issued his decision adopting the conclusions of the administrative law judge, which constituted the final administrative decision.

Lyon filed a complaint for administrative review in the Champaign County circuit court on April 9, 2001. Lyon alleged that several actions by the Department violated his due process rights and that the findings of the administrative law judge were against the manifest weight of the evidence. Following briefing and argument, the circuit court set aside the decision of the Department because "the Department's refusal to provide full and complete discovery to the Plaintiff in a timely manner violated his due process rights."

A divided appellate court affirmed the circuit court judgment, but on different grounds. The appellate court noted that [***7] Lyon did not allege that the Department failed to produce any documents. The court concluded that there was no due process violation in the lateness of the [*270] Department's transmission of the investigative file because Lyon did not show that it prejudiced him. Similarly, Lyon did not show he suffered any prejudice because the Department delayed the sending of the indicated report to the central register. In addition, the investigation was completed within statutory and regulatory deadlines. However, the Department did violate deadlines regarding the issuance of the final decision. *335 Ill. App. 3d at 385-87*.

The appellate court next evaluated the credible-evidence standard of proof that the Department used in finding the report indicated. The court discussed cases from different jurisdictions. After noting that being entered into the State Central Register implicates a liberty interest, the court applied the test from *Mathews v. Eldridge, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 33, 96 S. Ct. 893, 903 (1976)*, to determine whether this low standard of proof was adequate. *335 Ill. App. 3d at 389*, citing *Cavarretta v. Department of Children & Family Services, 277 Ill. App. 3d 16, 28, 660 N.E.2d 250, 214 Ill. Dec. 59 (1996).* [***8] In light of the *Mathews* factors, the court explained, "The credible-evidence standard is fair only if the alleged perpetrator soon receives a hearing under the preponderance-of-the-evidence standard and, soon after the hearing, the Department issues a final decision." *335 Ill. App. 3d at 390*. Thus, the court held [**430] that Lyon's due process rights were violated by the combination of the Department's use of the credible-evidence standard of proof with its failure to strictly comply with its statutory and regulatory deadlines in processing the administrative appeal. The court signaled that strict statutory and regulatory compliance is not required when the Department uses the more stringent preponderance-of-the-evidence standard of proof. *335 Ill. App. 3d at 390*.

The dissenting opinion noted that the discovery was timely provided, and the entire appeals process was [*271] completed in approximately eight months. The delays that occurred were reasonable because they were much shorter than those found unconstitutional in *Stull v. Department of Children & Family Services, 239 Ill. App. 3d 325, 334-35, 606 N.E.2d 786, 179 Ill. Dec. 954 (1992)*, and *Cavarretta, 277 Ill. App. 3d at 26-27*, [***9] and were also shorter than those found acceptable in *S.W. v. Department of Children & Family Services, 276 Ill. App. 3d 672, 680-81, 658 N.E.2d 1301, 213 Ill. Dec. 280 (1995)*. *335 Ill. App. 3d at 390-91* (Myerscough, J., dissenting).

ANALYSIS

The Administrative Review Law provides for judicial review of all questions of fact and law presented by the entire record. *DiFoggio v. Retirement Board of the County Employees Annuity & Benefit Fund of Cook County, 156 Ill. 2d 377, 380, 620 N.E.2d 1070, 189 Ill. Dec. 753 (1993)*, citing Ill. Rev. Stat. 1983, ch. 110, par. 3-101, now codified at *735 ILCS 5/3-101* (West 2002). Courts cannot consider evidence outside of the record of the administrative appeal. *735 ILCS 5/3-110* (West 2002). An administrative agency's findings of fact are not reversed unless they are against the manifest weight of the evidence, and questions of law are reviewed *de novo*. *DiFoggio, 156 Ill. 2d at 380-81*. We review the issue of whether Lyon's procedural due process rights were violated under the *de novo* standard because it is a legal question. *People v. Hall, 198 Ill. 2d 173, 177, 760 N.E.2d 971, 260 Ill. Dec. 198 (2001).* [***10]

We will not reach constitutional questions if a case can be resolved on other grounds (*Waller, 158 Ill. 2d at 464*), so we first address Lyon's assertion that the indicated findings are against the manifest weight of the evidence. A finding is against the manifest weight of the evidence if "the opposite conclusion is clearly evident" or where it is "unreasonable, arbitrary, and not based upon any of the evidence." *Snelson v. Kamm, 204 Ill. 2d 1, 35, 787 N.E.2d 796, 272 Ill. Dec. 610 (2003)*. We have reviewed the record in this case, and we conclude that the indicated finding is not reversible under this standard.

[*272] The *due process clause* protects fundamental justice and fairness. *People v. Lindsey, 199 Ill. 2d 460, 472, 771 N.E.2d 399, 264 Ill. Dec. 695 (2002)*. However, what due process entails is a flexible concept in that "not all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey v. Brewer, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 494, 92 S. Ct. 2593, 2600 (1972)*; see also *Lindsey, 199 Ill. 2d at 472*. Consequently, what procedures are required by *due process* in a particular situation depend [***11] upon " 'the precise nature of the government function involved as well as the private interest that has been affected by governmental action.' " *Morrissey, 408 U.S. at 481, 33 L. Ed. 2d at 494, 92 S. Ct. at 2600*, quoting *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895, 6 L. Ed. 2d 1230,*

1236, [**431] *81 S. Ct. 1743, 1748-49 (1961)*; see also *Lindsey, 199 Ill. 2d at 472*. Due process principles apply to administrative proceedings. *Abrahamson v. Illinois Department of Professional Regulation, 153 Ill. 2d 76, 92, 606 N.E.2d 1111, 180 Ill. Dec. 34 (1992)*.

Procedural due process claims question the constitutionality of the procedures used to deny a person's life, liberty, or property. *Segers v. Industrial Comm'n, 191 Ill. 2d 421, 732 N.E.2d 488, 247 Ill. Dec. 433 (2000)*. We have explained: "It is a well-established constitutional principle that every citizen has the right to pursue a trade, occupation, business or profession. This inalienable right constitutes both a property and liberty interest entitled to the protection of the law as guaranteed by the *due process clauses of the Illinois* and *Federal constitutions*. [***12] " *Coldwell Banker Residential Real Estate Services of Illinois, Inc. v. Clayton, 105 Ill. 2d 389, 397, 475 N.E.2d 536, 86 Ill. Dec. 322 (1985)*; see also *Meyer v. Nebraska, 262 U.S. 390, 399, 67 L. Ed. 1042, 1045, 43 S. Ct. 625, 626 (1923)*. Generally, the State must act reasonably before depriving a person of an interest protected by the *due process clause*. *Rosewell v. Chicago Title & Trust Co., 99 Ill. 2d 407, 412, 459 N.E.2d 966, 76 Ill. Dec. 831 (1984)*.

[*273] We must first determine whether listing an indicated report about Lyon on the Department's central register affected an interest protected by due process. Damage to one's reputation alone is insufficient to claim deprivation of a due process liberty interest, but stigma plus the loss of present or future employment is sufficient. *Cavarretta, 277 Ill. App. 3d at 21*, citing *Paul v. Davis, 424 U.S. 693, 702-10, 47 L. Ed. 2d 405, 414-19, 96 S. Ct. 1155, 1161-65 (1976)*. To teach in Illinois public schools, a person must have a teaching certificate. *105 ILCS 5/21-1* (West 2002). A teacher's certificate can be suspended or revoked when, after a separate hearing [***13] subject to appellate review, an indicated report is found supported by clear and convincing evidence. *105 ILCS 5/21-23(b)* (West 2002). The Department must find credible evidence to indicate a report of abuse or neglect on the central register, which is a lower standard of proof than the clear and convincing evidence needed to justify suspension or revocation of a teaching certificate. See *Bazydlo v. Volant, 164 Ill. 2d 207, 213, 647 N.E.2d 273, 207 Ill. Dec. 311 (1995)* (clear and convincing evidence is more than a preponderance). However, there is still a substantial risk that a person indicated on the central register will lose the ability to teach in the public schools in Illinois.

In addition, a school employee with an indicated finding may be terminated and may have difficulty finding other employment in the teaching profession solely because of the indicated finding. The Act authorizes school superintendents to access the central register to do background investigations. *325 ILCS 5/11.1(11)* (West 2002). In the present case, the record does not reveal whether Lyon's teaching certificate was affected by this situation, [***14] but Lyon did in fact lose two teaching jobs, including his job at Gibson City-Melvin High School, following the entry of the indicated report into the central register. Thus, because of the substantial risk that a [*274] teacher will be barred from pursuing his or her chosen occupation, as occurred in the present case, we find that an indicated report in the central register implicates a protected due process interest. *Cavarretta, 277 Ill. App. 3d at 22*; *Stull, 239 Ill. App. 3d at 335*; *Doyle v. Camelot Care Cen* [**432] *ters, 305 F.3d 603, 617 (7th Cir. 2002)* (discussing Illinois law); *Dupuy v. McDonald, 141 F. Supp. 2d 1090, 1134 (N.D. Ill. 2001)* (discussing Illinois law); see also *In re Lee TT, 87 N.Y.2d 699, 709, 664 N.E.2d 1243, 1250, 642 N.Y.S.2d 181, 188 (1996)*.

Next, we must determine whether the procedures provided to Lyon met the requirements of due process. The United States Supreme Court has made clear that due process is a matter of federal constitutional law, so compliance or noncompliance with state procedural requirements is not determinative of whether minimum procedural due process standards have [***15] been met. *Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541, 84 L. Ed. 2d 494, 503, 105 S. Ct. 1487, 1492 (1985)*. Violation of state requirements may not indicate a due process violation, and vice versa, but these requirements are a useful reference because they represent standards that the General Assembly and the Department concluded were sufficient.

Lyon asserts that the Department missed several of its own statutory and regulatory deadlines concerning the hearing and the issuance of the Director's decision on appeal. A subject can request an appeal of the Department's indicated finding, and if the Department fails to act or denies the request within 10 days then the subject can request an administrative hearing. *325 ILCS 5/7.16* (West 1998); *89 Ill. Adm. Code § 336.40(c)* (2002). Lyon appealed the indicated report on August 29, 2000, which the Department denied on September 13. Two days later, Lyon requested a hearing before an administrative law judge. The hearing shall be held "within a reasonable time" [*275] of the subject's request. *325 ILCS 5/7.16* (West 1998). The [***16] hearing began on November 1, which is 47 days after it was requested.

Although provisions do not otherwise specify when the hearing should be scheduled, we can infer that the events of this case correspond to regulatory expectations. As discussed in greater detail below, relevant provisions specify that the final decision must be released within 45 days of the end of the hearing (*325 ILCS 5/7.16* (West 1998)) and within 90 days of the request for the hearing (*89 Ill. Adm. Code § 336.220(a)* (2002)). Read together, these provisions envision two considerations: that the hearing should be conducted within approximately 45 days of the request for the hearing; and that some flexibility is appropriate so that some delays in the hearing can be cured by the prompt release of the final decision and a prompt hearing can compensate for some delays in the release of the final decision. Thus, considered in isolation, scheduling the hearing to begin 47 days after it was requested complies with the statutory requirement that the hearing be held "within a reasonable time." *325 ILCS 5/7.16* (West 1998). However, [***17] we note that the timing of the scheduling of the hearing may implicate due process rights when combined with delay in the release of the decision. See *Federal Deposit Insurance Corp. v. Mallen, 486 U.S. 230, 241-42, 100 L. Ed. 2d 265, 279, 108 S. Ct. 1780, 1788 (1988).*

The administrative law judge shall issue her recommendation to the Director within 90 days of the request for the hearing, and the Director must issue his final decision accepting or rejecting the administrative law judge's recommendation within the same 90-day period. *89 Ill. Adm. Code § 336.220(a)* (2002). Lyon requested a hearing on September 15, 2000. The administrative law judge issued her decision on February 9, 2001, or 147 days later. The Director issued his final decision on March [*276] 23, 2001, which is 189 days [**433] after the hearing request. However, some delays are excusable or attributable to Lyon, and these days shall not be counted. *89 Ill. Adm. Code §§ 336.150(c), 336.220(a)* (2002). When the hearing was not completed during its first day on November 1, the hearing was continued until November 13. The parties agreed to delay the second [***18] day of the hearing until December 19 because of a scheduling conflict, so the period from November 13 to December 19, 36 days, should not be counted. In addition, the second day again was continued until January 24, 2001, because the administrative law judge was in an automobile accident on the way to the hearing. Because a full day of the hearing already had been held, the option of avoiding further delay through reassignment to a different judge was less tenable given the relative promptness with which the second day could be rescheduled. In addition, Lyon did not object to this continuance. Thus, we decline to penalize the Department for this 36-day delay; the car accident constituted good cause for a continuance. *89 Ill. Adm. Code §§ 336.150(a), (c)* (2002). Thus, the time periods of the release of decisions from the request for the hearing should each be reduced by 72 days. With this adjustment, the administrative law judge released her decision 75 days after the hearing began, and Director of the Department issued his decision 117 days after the hearing request. According to regulatory deadlines, only the Director missed the 90-day deadline, by 27 [***19] days.

The Director also must issue his final decision within 45 days of the end of the hearing. *325 ILCS 5/7.16* (West 1998). The hearing ended January 24, 2001, and the Director released the decision on March 23, which was 58 days after the hearing concluded and 13 days past the statutory deadline. Due process concerns may be raised by the length of time the subject waits for the issuance of the final agency decision concerning his appeal. See [*277] *Mallen, 486 U.S. at 241-42, 100 L. Ed. 2d at 279, 108 S. Ct. at 1788*.

The *due process clause* requires that the opportunity to be heard occur " 'at a meaningful time and in a meaningful manner.' " *Mathews, 424 U.S. at 333, 47 L. Ed. 2d at 32, 96 S. Ct. at 902*, quoting *Armstrong v. Manzo, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 66, 85 S. Ct. 1187, 1191 (1965)*. The United States Supreme Court has explained the factors courts should consider when evaluating procedural due process claims:

"First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, [***20] if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews, 424 U.S. at 335, 47 L. Ed. 2d at 33, 96 S. Ct. at 903*. The Supreme Court has adapted the general *Mathews* factors for the more specific determination of whether a delay in the provision of procedure offended due process: the importance of the private interest and the harm to the interest because of the delay; the government's justification for the delay and its connection to the underlying government interest; and the likelihood that the interim decision may have been mistaken. *Mallen, 486 U.S. at 242, 100 L. Ed. 2d at 279, 108 S. Ct. at 1788* (examining the constitutionality of the delay in the provision of a postsuspension hearing for a federal official suspended from his job at a federally insured bank following his indictment).

[**434] We recognize that Lyon has a significant interest in not having an indicated report about him entered into the central register because, as discussed above, an indicated [***21] report essentially bars employment in his chosen profession of teaching. *Cavarretta, 277 Ill. App. 3d at 28*; *Doyle, 305 F.3d at 618* (applying Illinois law); [*278] *Dupuy, 141 F. Supp. 2d at 1135* (applying Illinois law). As permitted by the Act, an indicated report was entered into the central register before Lyon appealed the indicated finding. See *325 ILCS 5/7.16* (West 1998). Lyon and other subjects have a significant interest in obtaining a hearing and a final decision in a prompt and efficient manner so that indicated reports, if mistaken, are expunged as quickly as possible to minimize their damaging impact.

The state has a similarly significant interest in protecting the welfare of children, and the central register is one mechanism the state uses to protect children from abuse and neglect. *Cavarretta, 277 Ill. App. 3d at 28*; *Dupuy, 141 F. Supp. 2d at 1135* (applying Illinois law); *Lee TT, 87 N.Y.2d at 710, 664 N.E.2d at 1251, 642 N.Y.S.2d at 189*. The Department justifies delays in the appellate process in this case by asserting that the time periods were [***22] reasonable and that this court should not require the Department to strictly comply with its own regulations.

The Department is correct that providing due process is not automatically synonymous with compliance with state regulations. *Loudermill, 470 U.S. at 541, 84 L. Ed. 2d at 503, 105 S. Ct. at 1492*. Instead, the state must act reasonably when depriving a person of a protected interest to avoid infringing on the person's due process rights. *Rosewell, 99 Ill. 2d at 412*. Several Illinois cases have evaluated the reasonableness of delays in the administrative appeals process provided under the Act. See, *e.g.*, *Lehmann v. Department of Children & Family Services, 342 Ill. App. 3d 1069, 1080, 796 N.E.2d 1165, 277 Ill. Dec. 799 (2003)*; *S.W., 276 Ill. App. 3d at 680-81*; *Stull, 239 Ill. App. 3d at 330-31*. However, we agree with the appellate court that this issue cannot be resolved merely by comparing the lengths of delays because the courts in these cases failed to consider the related issue of the standard of proof when resolving the due process claims. *335 Ill. App. 3d at 387*.

[*279] The standard of proof [***23] applied has a direct influence on the risk of erroneous judgments. When a higher standard of proof is applied, there is a reduced risk of finding an innocent person guilty and an increased risk of acquitting a guilty person. *In re Winship, 397 U.S. 358, 370-71, 25 L. Ed. 2d 368, 379, 90 S. Ct. 1068, 1076 (1970)* (Harlan, J., concurring). The applicable standard of proof in a particular proceeding, therefore, should be chosen based on a consideration of what balance of the risk of these two types of errors is appropriate under the circumstances. *Winship, 397 U.S. at 371, 25 L. Ed. 2d at 379, 90 S. Ct. at 1076* (Harlan, J., concurring). We conclude that the interests of indicated subjects and the state, on behalf of children, are both significant. However, we find it is appropriate to place more of the risk of error on adults, who may suffer mistaken employment hardship, than on children, who may suffer additional abuse. Thus, we must evaluate whether the use of the credible evidence standard to support the indicated finding and the decision in the first stage of appeal distributes the risk of error properly given the delays in the provision of Lyon's [***24] administrative appeal.

[**435] "Credible evidence" means that "the available facts, when viewed in light of the surrounding circumstances, would cause a reasonable person to believe that a child was abused or neglected." *89 Ill. Adm. Code § 300.20* (2002). At the hearing on appeal, the Department has the burden of proving that the indicated finding is supported by a preponderance of the evidence. *89 Ill. Adm. Code § 336.100(e)* (2002); see *325 ILCS 5/7.16* (West 1998). "Preponderance of the evidence" is defined as "the greater weight of the evidence or evidence which renders a fact more likely than not." *89 Ill. Adm. Code § 336.20* (2002).

In Lyon's case, the indicated finding was determined to be supported by credible evidence at the completion of [*280] the investigation and upon denial of Lyon's first-stage appeal, which is the standard required by regulation. *89 Ill. Adm. Code § 300.110(i)(2)* (2002). The decision from the second-stage appeal, the administrative hearing, was evaluated under the preponderance-of-the-evidence standard, also in compliance [***25] with the rules. *89 Ill. Adm. Code § 336.100(e)* (2002). Despite regulatory compliance, however, we recognize that the use of the credible-evidence standard of proof in early stages of the administrative appeals process may raise due process concerns. See *Cavarretta, 277 Ill. App. 3d at 28-29, Doyle, 305 F.3d at 617-19* (discussing Illinois law); *Dupuy, 141 F. Supp. 2d at 1135-36* (discussing Illinois law); *Lee TT, 87 N.Y.2d at 711-12, 664 N.E.2d at 1252, 642 N.Y.S.2d at 190*.

The New York Court of Appeals, the state's highest court, explained the dangers of using the minimal credible-evidence standard in a case analogous to the present case:

"Abuse frequently involves private conduct and is based upon the reports of minors or actions of a minor observed and interpreted by others. There may be no supporting eyewitness testimony or objective evidence to support the report and therefore the evaluation of it may involve, to a large degree, subjective determinations of credibility. Under the present standard a fact finder in such cases may be tempted to rely on an intuitive determination, ignoring [***26] any contrary evidence. The risk of error is placed entirely on the subject of the report for there is no requirement that the fact finder must consider, let alone evaluate, evidence favorable to the subject.

Not surprisingly this process results in a disturbingly high number of false positive findings of abuse." *Lee TT, 87 N.Y.2d at 711-12, 664 N.E.2d at 1251-52, 642 N.Y.S.2d at 189-90*. As in New York, the credible-evidence standard in Illinois does not require the fact finder to consider contrary evidence. *Cavarretta, 277 Ill. App. 3d at 28*. As a result, we agree with the New York Court of Appeals that the [*281] credible-evidence standard places the risk of error entirely on the subject. This risk of error is not insignificant; New York and Illinois both have a strikingly high rate of reversal of challenged indicated findings based on credible evidence. *Dupuy, 141 F. Supp. 2d 1090, 1135* (applying Illinois law) (noting a 74.6% reversal rate of appealed indicated findings in *Illinois); Valmonte v. Bane, 18 F.3d 992, 1004 (2d Cir. 1994)* (applying New York law) (noting that nearly 75% of indicated findings are expunged [***27] on appeal in New York).

In contrast, the risk of error under the preponderance-of-the-evidence standard is distributed much more evenly. "Because proof by a preponderance of the evidence requires that 'the litigants ... share the risk of error in a roughly equal fashion,' [**436] [citation], it rationally should be applied only when the interests at stake are of roughly equal societal importance." *Santosky v. Kramer, 455 U.S. 745, 787, 71 L. Ed. 2d 599, 628, 102 S. Ct. 1388, 1412 (1982)* (Rehnquist, J., dissenting, joined by Burger, C.J., White and O'Connor, JJ.). The final administrative decision, the Director's decision following a hearing, is conducted under this higher standard with the Department bearing the burden of proof. *89 Ill. Adm. Code § 336.100(3)* (2002).

We again apply the *Mathews* test to evaluate the standard of proof. We recognize that Lyon has a significant interest in not having an indicated report against him in the central register because of its negative impact on his chosen career. *Cavarretta, 277 Ill. App. 3d at 28*; *Doyle, 305 F.3d at 618* (applying Illinois law); *Dupuy, 141 F. Supp. 2d at 1135* [***28] (applying Illinois law). Clearly, this interest is advanced by application of a higher standard of proof that leads to fewer errors in indicated findings. The state also has a significant interest in protecting the welfare of children in part through the administration of the central register. *Cavarretta, 277 Ill. App. 3d at 28*; [*282] *Dupuy, 141 F. Supp. 2d at 1135* (applying Illinois law); *Lee TT, 87 N.Y.2d at 710, 664 N.E.2d at 1251, 642 N.Y.S.2d at 189*. The state's interest is promoted by application of a lower standard of proof that allows the state to intervene quickly, possibly preventing additional abuse, although the state also has a contrary interest in avoiding mistakes. *Lee TT, 87 N.Y.2d at 710, 664 N.E.2d at 1251, 642 N.Y.S.2d at 189*. In weighing these opposing interests, we again recognize that they are similarly important but that we will place more of the risk of error on the subjects rather than the children.

In light of these considerations, we conclude that the use of the credible-evidence standard to indicate a report and to consider a first-stage appeal does not automatically deprive a subject of due [***29] process because the second-stage appeal is conducted under the more stringent preponderance standard. See, *e.g., In re Selivonik, 164 Vt. 383, 389, 670 A.2d 831, 835 (1995)*. By using a weaker standard of proof, the state is equipped to respond more quickly to allegations of abuse and neglect. We find that it is constitutionally acceptable to place the entire risk of error, through use of the credible-evidence standard, on the subject for the finite period of the administrative appeal because the appeal is finally determined under the preponderance standard, which balances the risk of error equally.

Nevertheless, this distribution of the risk of error becomes problematic when the subject is not accorded a prompt appeal. We conclude that it is constitutionally inappropriate to allow indicated reports based on credible evidence, with their damaging effects on subjects, to persist past the deadlines the General Assembly and the Department itself decided to impose upon the administrative appeals process given the high risk of error inherent in the use of the credible-evidence standard. Thus, we agree with the appellate court and hold that a subject's [*283] due process rights [***30] are violated by the use of the credible-evidence standard to indicate a report and to resolve a first-stage appeal when combined with delays in the final resolution of the administrative appeal. *335 Ill. App. 3d at 390*; *Doyle, 305 F.3d 603, 619* (applying Illinois law).

The Department criticizes this holding of the appellate court, citing the flexibility of the reasonableness standard for due process claims. However, we note that [**437] applicable provisions themselves contain some flexibility. For example, a scheduled hearing may be continued for good cause, and a continuance is not counted toward the deadline tally if the appellant requests or agrees to it. *89 Ill. Adm. Code §§ 336.150(a), (c)* (2002). Thus, indicated findings will not be expunged due to unforeseen excusable delays. Hearings must be scheduled within a "reasonable time" of the subject's request (*325 ILCS 5/7.16* (West 2002)), the very standard for which the Department argues. In addition, we require strict statutory and regulatory compliance only if the Department uses the credible-evidence standard to indicate a report and to consider [***31] a first-stage appeal. The department has argued that strict compliance is too burdensome. If strict compliance is too burdensome, the Department is free to amend its regulations to, for example, require the preponderance of the evidence standard throughout to provide subjects with due process. *20 ILCS 505/4* (West 2002) (allowing the Department to make rules). The Department has a choice: (1) apply the credible-evidence standard to indicate a report and to decide a first-stage appeal and comply with applicable statutory and regulatory provisions; or (2) apply the preponderance-of-the-evidence standard during all stages of inquiry and provide reasonable process, which is not dependent on compliance with all requirements during the administrative appeal. Either option strikes an appropriate balance between the competing interests of subjects and children, [*284] by placing the risk of error to a slightly greater degree on subjects, to reflect our characterization of the societal importance of these interests. We conclude that this holding incorporates a sufficient measure of the flexibility inherent in due process analysis.

CONCLUSION

The Department violated [***32] Lyon's due process rights through the combination of the Department's use of the low credible-evidence standard to indicate the report against Lyon and to deny his first-stage appeal and of delays in the provision of the hearing and of the final administrative decision. Thus, the appellate court properly affirmed the expungement of the indicated reports against Lyon from the State Central Register.

Appellate court judgment affirmed.

CONCUR BY: KILBRIDE (In Part)

DISSENT BY: KILBRIDE (In Part)

DISSENT

JUSTICE KILBRIDE, concurring in part and dissenting in part:

I write separately because I take issue with the portion of the opinion offering the Department the "choice" of applying the credible-evidence standard while strictly adhering to the applicable statutes and regulations or applying a more stringent preponderance-of-the-evidence standard and gaining some flexibility in compliance requirements. See slip op. at 14-15. While I agree that the credible-evidence standard, as currently interpreted by the Department, is problematic and requires close judicial scrutiny, I believe that it is unwise for this court to override the legislature's decision.

Section 3 of the Act establishes that credible [***33] evidence is the appropriate standard for making an indicated finding. *325 ILCS 5/3* (West 1998) (defining an "indicated report" as "a report made under this Act if an investigation determines that *credible evidence* of the alleged abuse or neglect exists" (emphasis added)). In turn, "credible evidence" is defined in the Department's [*285] regulations as "available facts when viewed in light of the surrounding circumstances [that] would cause *a reasonable person* to believe that a child was abused or neglected." (Emphasis [**438] added.) *89 Ill. Adm. Code § 300.20* (2000). In my view, consideration of *all* the available evidence, not just that evidence tending to supporting an indicated finding, is necessarily included in any valid application of this "reasonable person" standard. This standard has, however, been interpreted to permit an indicated report to be filed *without* consideration of *any* exculpatory evidence. Slip op. at 13. Due process concerns arise, in part, when "credible evidence" is interpreted as not requiring consideration of *both* exculpatory and inculpatory evidence. Slip op. at 13. To overcome these concerns, [***34] this court need only alter the Department's working definition of "credible evidence." Specifically, the Department could cure the deficiencies by requiring review of the exculpatory evidence that was reasonably available at the time as part of the credible-evidence standard. This requirement is already implicit in the reasonable-person standard currently specified in the Department's regulations. *89 Ill. Adm. Code § 300.20* (2000). We need not create out of whole cloth an entirely new standard requiring a preponderance of the evidence without strict compliance with the applicable time limitations. Moreover, in its effort to override the legislature's mandated "credible evidence" standard, the majority has addressed an issue that need not be reached by this court, rendering its opinion purely advisory.

In *Dupuy v. McDonald, 2003 U.S. Dist. LEXIS 12019, No. 97-C-4199 (N.D. Ill. July 10, 2003)* (*Dupuy II*), *appeal pending*, the federal district court addressed the issue of the appropriate standard by approving modifications to the Department's internal procedures. I believe these modifications effectively reduce the risk that an erroneous indicated report will negatively impact [***35] an individual's employment [*286] and, thus, run astray of due process. The *Dupuy II* court entered a preliminary injunction imposing a more rigorous interpretation of the "credible evidence" standard. Under this interpretation, the Department is required to apply specific investigatory procedures and to consider both inculpatory and exculpatory evidence prior to making an indicated report. *Dupuy II, 2003 U.S. Dist. LEXIS 12019 at *14*. Those practices comport with due process, reduce the risk of unwarranted negative consequences due to an indicated finding based on one-sided information, and maintain a single "credible evidence" standard in all cases, thus avoiding any potential equal protection problem. Additional safeguards ordered by the court include mandatory telephonic administrative review hearings before making and registering indicated reports in the State Central Registry. These hearings were designed to afford the subject an appropriate, albeit limited, opportunity to be heard prior to a deprivation of protected liberty interests by disclosure of indicated reports to third parties. *Dupuy II, 2003 U.S. Dist. LEXIS 12019 at *21-22*.

In addition, the federal district court concluded that administrative hearings [***36] requested after an indicated finding "should be completed within 35 days from the date" an appeal is requested. *Dupuy II, 2003 U.S. Dist. LEXIS 12019 at *28*. This is far earlier than the 90 days currently permitted in the Department's rules (*89 Ill. Adm. Code § 336.220(a)* (2002)). In retaining the 90-day ceiling, however, the court cautioned that "should history demonstrate a pattern of non-compliance, *** the court will entertain a renewed motion for imposition of some form of self-executing sanction." *Dupuy II, 2003 U.S. Dist. LEXIS 12019 at *29*.

I share the *Dupuy II* court's concern that judicial mandates may be ineffectual in light of delays historically experienced in the Department's appeal process. I [**439] also believe the same concern may apply to this court's opinion due to its reliance on the 90-day time period [*287] imposed by the Department's own rules (*89 Ill. Adm. Code § 336.220(a)* (2002)). Slip op. at 8. Since this limit was created by the Department and not the legislature, the Department may elect to unilaterally extend the permissible time between a request for a hearing and the release of a final decision (see *89 Ill. Adm. Code § 336.220(a)* [***37] (2002)) rather than revamp its procedures to apply a preponderance-of-the-evidence standard. Any additional delay in the administrative appeal process would again raise the specter of the *due process clause*. For this reason, I echo the *Dupuy II* court's hope that the

Department will zealously attempt to resolve "the overwhelming majority of cases" within the current 90-day time limit. *Dupuy II, 2003 U.S. Dist. LEXIS 12019 at *29.*

ASIA SLATER, Plaintiff-Appellant, v. THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES and ERWIN McEWEN, as Director of the Department of Children and Family Services, Defendants-Appellees.

No. 1-10-2914

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, SIXTH DIVISION

953 N.E.2d 44; 2011 Ill. App. LEXIS 642

June 17, 2011, Decided

SUBSEQUENT HISTORY: Released for Publication July 25, 2011.

PRIOR HISTORY: [**1]
Appeal from the Circuit Court of Cook County. No. 09 CH 29198. Honorable Martin S. Agran, Judge Presiding.

DISPOSITION: Reversed with directions.

COUNSEL: For APPELLANT: Aron J. Frakes, Michael W. Weaver, McDermott Will & Emery LLP, Chicago, IL; Diane Redleaf, Melissa L. Staas, Family Defense Center, Chicago, IL.

For APPELLEES: Lisa Madigan, Attorney General of the State of Illinois, Michael A. Scodro, Solicitor General, Chicago, IL; Laura Wunder.

JUDGES: JUSTICE ROBERT E. GORDON delivered the judgment of the court, with opinion. Presiding Justice Garcia and Justice McBride concurred in the judgment and opinion.

OPINION BY: ROBERT E. GORDON

OPINION

[*46] Defendant, the Illinois Department of Children and Family Services (DCFS), entered an indicated finding of neglect against 17-year-old plaintiff Asia Slater in the State Central Register, based on an incident in which Asia's 7-month-old daughter fell on a colored pencil that Asia was using for a school art project, piercing her neck and puncturing her lung. Asia contested the indicated finding of neglect, seeking to have the finding expunged. After a hearing before an administrative law judge (ALJ), the ALJ determined that the preponderance of the evidence supported a finding of neglect. The ALJ recommended denial of Asia's expungement request. Defendant Erwin McEwen, Director of DCFS (Director), adopted the ALJ's recommendations and entered a final administrative decision denying Asia's request for expungement and ordering the indicated finding of neglect to remain in the State Central [**2] Register for five years. Asia sought administrative review in the circuit court, and the circuit court confirmed the Director's decision. Asia appeals, arguing: (1) the ALJ erred both in its factual findings and its decision that Asia was neglectful and (2) DCFS failed to sufficiently preserve the record of the administrative proceeding. We reverse.

BACKGROUND

The underlying facts in this case are not in dispute. On November 30, 2008, Asia was a 17-year-old high school student. She was the mother of a seven-month-old girl, N.S., and was N.S.'s primary caregiver. The two lived with Asia's mother, Lisa Slater. Asia was at her home working on an art project for school, which included the use of colored pencils. While Asia was working on her project, N.S. was in the same room, several feet away. At some point, N.S. took one of Asia's colored pencils from the coffee table where Asia was working. N.S. fell and the colored pencil pierced her neck. Asia took N.S. to the emergency room, where doctors discovered that the pencil had penetrated approximately three inches and had punctured the lining of N.S.'s lung.

[*47] After an investigation, DCFS notified Asia on or about February 20, 2009, that it [**3] was indicating a report of "Wounds by Neglect" against her. Before the pencil incident, there had been no prior indicated reports in the Child Abuse and Neglect Tracking System and there were no convictions in the Law Enforcement Agency Data System against Asia. On April 7, 2009, Asia filed an appeal of the indicated finding. On June 8, 2009, DCFS's administrative hearing unit conducted a hearing on Asia's appeal.

At the hearing, Asia testified that she was born on July 18, 1991, and that she gave birth to N.S. when she was 16 years old. On November 30, 2008, Asia was 17 and N.S. was 7 months old. Asia lived with her mother, Lisa, and attended high school. Asia was N.S.'s primary caregiver, but Lisa assisted in N.S.'s care. Asia attended parenting classes daily, including some on Saturdays, and had been doing so prior to N.S.'s birth. In her classes, she learned about how children develop and, in preparation for N.S.'s birth, Asia placed items "high" so that they would be inaccessible to a child.

As of November 30, 2008, N.S. was able to crawl and "cruise." Asia described cruising as learning to walk by standing and pulling herself along furniture, such as a coffee table. N.S. had been [**4] cruising for "a little while" but was unable to walk without supporting herself. N.S. was also able to pick up objects, such as toys, but was unable to feed herself. N.S. was verbal, saying words such as "ma-ma" but mostly "babbling." N.S. was unable to call for help in an emergency.

On November 30, 2008, Asia was working on an art project for school on the coffee table in her living room, sitting on the floor; she "had colored pencils out, [and] coloring books." Asia kept the colored pencils on the floor or on the table near her. N.S. was sitting at the opposite end of the table on the floor. N.S. was always in Asia's sight, no more than a few feet away. While Asia was working on her homework, N.S. was pulling herself up on the table "a lot."

N.S. obtained one of Asia's colored pencils. When asked how N.S. obtained the pencil, Asia testified, "Well, I didn't know that. I was cleaning up, so I don't know exactly what happened." Asia testified that "I was putting -- and I looked over and I noticed that [N.S.] had done that, and I went over to her." N.S. was "[n]ot too far" from Asia and wanted to come to Asia. N.S. fell and coughed, but did not cry. When Asia picked N.S. up, she noticed [**5] a colored pencil sticking out of N.S.'s neck; the flat end was sticking out, and the pointed end was inside N.S.'s neck. The pencil was a "regular" baby blue lead pencil, approximately the length of a pen. Asia had used the pencil earlier during her project and the tip of the pencil was "dull." N.S. was not having trouble breathing, but was coughing, and the wound was not bleeding. Asia "called out" to Lisa, who was in the bedroom taking a nap. Asia testified that after N.S. was hurt, "I didn't realize that that had happened. So I called 911, but I was pretty upset." The 911 operator was unable to understand her, so Asia had Lisa complete the phone call. N.S. was taken to Stroger Hospital with the pencil still in her neck. The pencil was removed, but N.S. required hospitalization for five days. N.S. had a punctured lung and a permanent scar from the wound.

When asked why she left pencils out with N.S. present, Asia testified that she was keeping the pencils close, working on her project. She took precautions of having N.S. at the opposite end of the room and kept N.S. in her sight; Asia acknowledged that she did not actually observe [*48] N.S. taking the pencil and admitted that she should [**6] have known better than to have the pencils out where N.S. would have access to them.

Dennis Bishop, a child protection investigator with DCFS, also testified on behalf of DCFS. He investigated the incident along with Josey Faulkner, another child protection investigator. Bishop observed N.S. on February 16, 2009, approximately six weeks after the incident, at Asia's home. Bishop testified that N.S. had a small mark from the pencil and appeared to be appropriately dressed and smiling. Bishop testified that he spoke to Asia on that occasion. She told him that on the day of the incident, she was sitting in the living room doing schoolwork. N.S. was cruising on the table, fell to the floor, and leaned to the side, at which point the pencil lodged in her neck. Asia told Bishop that the pencil was on top of the coffee table and that N.S. "somehow grabbed it."

Bishop also testified that after the investigation, a report was issued containing an indicated finding for "Allegation No. 57," which was an indication for neglect. Bishop testified that in order to indicate someone for neglect, it needed to be shown that the minor's injuries were a direct result of the perpetrator's neglectful acts. [**7] In Asia's case, Bishop testified that "we felt that they failed to protect the minor by failing to insure that there [were] [no] object[s] that the minor could grasp. And so she was indicated. Had the mother prevented that, then the minor would not have had that accident." Bishop opined that Asia was blatantly disregarding her parental responsibilities because she was aware that N.S. was physically able to cruise and it was not the first time that N.S. had cruised; he opined that "[n]atural mother should have been able to make sure that there were no objects where the minor could harm herself" and that the situation was inevitable.

Lisa, Asia's mother, testified on Asia's behalf. Lisa testified that Asia was a "great mom" and educated herself about being a parent. Lisa testified that Asia kept sharp objects and small objects away from N.S. and locked away cleaning fluid and other items in a cabinet. Lisa testified that on the day of the incident, she was in bed, sick with the flu. She heard a noise and asked if everything was all right. When she received no response, she left her bed and observed Asia holding N.S. and saying that everything was fine. Lisa went back to bed but after [**8] a few seconds, Asia told Lisa that "'[s]omething's wrong with the baby.'" Asia ran toward Lisa, saying that N.S. was unable to breathe, and gave N.S. to Lisa. Lisa assumed that N.S. had something in her throat and attempted the Heimlich maneuver, which was unsuccessful. Asia told Lisa that N.S. had something in her neck; when Lisa turned N.S., she observed a pencil embedded in her neck. N.S. was breathing, not crying, but appeared "very grayish-pale." N.S. never lost consciousness, but appeared to be "getting a little bit sleepy." Asia called 911 but was in shock and became hysterical, so Lisa took the telephone and explained the situation. N.S.'s father, Dionete Dotson, was also called and came to the home. When N.S. was released from the hospital, she was released into the custody of her father.

Lisa testified that at the hospital, Asia told her about the incident. Asia had her work spread out, since she was working on a school project. She was using colored pencils as part of the project. Asia observed N.S. pick up a pencil and called out to her. Lisa testified that "when you call out to [N.S.], she will try to beat you. She knows that you want something or you see her doing something [**9] [*49] wrong." N.S. turned to run from Asia, tripped, and fell. Lisa believed that Asia was unaware that N.S.'s neck had been pierced until later.

Lisa testified that since the incident, Asia became "more mindful" and continued to improve her parenting skills. She testified that N.S. was "doing great."

Rosaura Maldonado, a case manager with Catholic Charities who worked at several high schools to assist girls with child-related services, also testified on Asia's behalf. Maldonado testified that Asia was an active participant in her group, where they discussed child development topics and parenting skills. Maldonado testified that Asia was a very effective and enthusiastic student, calling her "a model student" and "one of our top group participants in the program." Maldonado further testified that Asia was a good student at school, as well as being "serious about her role as a mother." Maldonado testified that a component of their group discussion was safety, and Asia was present during discussion of that topic.

The ALJ also admitted several exhibits into evidence. One of the exhibits included the medical records of N.S. at the hospital. The records indicated that N.S. had been impaled with [**10] the pencil on the front of her neck, just to the right of the anterior midline. The pencil was pointing downward at approximately a 45-degree angle. The records also included a note by Dr. Michele Lorand[1] stating:

> "The angle of the impalement and the fact that the pencil went through the skin with a not freshly sharpened point is certainly unusual and suspicious for abuse given the age and developmental stage of the baby as are the historical circumstances which suggest some risk factors for abuse, but it is impossible to say with certainty if this was the result of abuse/intentionally inflicted injury, or a very freak non-intentional situation. It

should be noted that the depth of the injury itself in this particular area is not helpful as there is a lot of free space and easily transversed tissue once the pencil made it through the skin."

1 Dr. Lorand's signature line included a notation that she was a division chair in the pediatric department of Stroger Hospital. Other documents in the record, such as DCFS's investigative report, describe her as a "Child Protection Service Doctor."

On July 15, 2009, the ALJ made written findings of fact and conclusions of law. The ALJ found "[t]hat [**11] a blatant disregard for parental responsibilities was demonstrated in Appellant putting out or leaving out sharp objects (multiple colored pencils for an art project put and left on the floor and table) within 'a few feet' of the infant at all times, with the Appellant's admitted knowledge the infant could 'cruise' around." The ALJ further found that the incident was not the first time that N.S. had cruised around the coffee table; "that the danger from multiple attractively colored pencils to a cruising mobile infant was so imminent and apparent that no responsible caretaking parent would have failed to take protective action to remove the infant or to place the objects in question well beyond the infant's reach;" and that the colored pencils were easily available to N.S. The ALJ concluded that the indicating finding of "child neglect Allegation of Harm #57, Wounds," was supported by a preponderance of the evidence and recommended that Asia's request for expungement be denied. The ALJ further recommended that the Director consider amending the retention period of the report to 5 years instead of the usual time period of 20 years, based on Asia's young age and her "earnest efforts [**12] to master adequate parenting skills to meet her responsibilities [*50] to her child." On July 22, 2009, the Director issued a final administrative hearing decision and adopted the ALJ's recommendations, denying her request for expungement and ordering that the report remain on the State Central Registry for five years.

On August 19, 2009, Asia filed a complaint for administrative review in the circuit court of Cook County. DCFS filed its answer in administrative review, containing the record of administrative proceedings, under seal on January 7, 2010. Some time later, Asia's counsel informed DCFS's counsel that testimony was missing from the record. DCFS's counsel reviewed the tape recordings of the administrative hearing, identified the missing testimony, and amended the record with the transcript of the additional testimony, filed under seal on March 5, 2010. On April 1, 2010, the circuit court allowed the parties to file under seal an agreed bystander's report of missing testimony from the proceedings on June 8, 2009, containing additional testimony from the administrative hearing that was not included in the record or in its supplement.

On August 12, 2010, the circuit court issued a written [**13] opinion affirming the Director's decision. The court found that the ALJ's decision was supported by the evidence in the record, since Asia's responses of "I don't know" and "I didn't realize that that had happened" "demonstrate her lack of awareness as to what [N.S.]'s activities and surroundings were. Lacking this knowledge prevented Slater from exercising the necessary precautionary measures. Slater failed to protect [N.S.] from injury and thus demonstrated a blatant disregard of parental responsibility to keep sharp objects away from an active and inquisitive infant." The court further rejected Asia's argument that the ALJ's decision was erroneous as a matter of law, finding that "[d]ue to Slater's failure to ensure the colored pencils remained out of [N.S.]'s reach, it is not unreasonable for the Administrative Law Judge to have concluded that Slater's actions constitute blatant disregard of parental duties." Finally, the circuit court found that DCFS provided a sufficient record, noting that the Illinois Administrative Procedure Act (5 ILCS 100/1-1 *et seq*. (West 2004)) "only mandates that a record 'adequately insure the preservation of testimony' rather than expecting perfection" [**14] and that the record did not deprive Asia of her constitutional rights. This appeal follows.

ANALYSIS

On appeal, Asia raises three arguments in support of reversal: (1) the ALJ erred in finding that the colored pencil that injured N.S. was sharp, (2) the ALJ incorrectly determined that Asia's conduct constituted neglect, and (3) DCFS's failure to preserve testimony from the administrative hearing violated Asia's rights.

I. Abused and Neglected Child Reporting Act

The Abused and Neglected Child Reporting Act (the Act) (325 ILCS 5/1 *et seq*. (West 2004)) requires DCFS to maintain a central register of all cases of suspected child abuse or neglect reported and maintained under the Act. 325 ILCS 5/7.7 (West 2004). DCFS investigates all reports and classifies them as "'indicated,'" "'unfounded,'" or "'undetermined.'" 325 ILCS 5/7.12 (West 2004); *Lyon v. Department of Children & Family Services*, 209 Ill. 2d 264, 267, 807 N.E.2d 423, 282 Ill. Dec. 799 (2004). A report is "'indicated'" "if an investigation determines that credible evidence of the alleged abuse or neglect exists." 325 ILCS 5/3 (West 2004). "'Credible evidence of child abuse or neglect' means that the available facts, when viewed in light of surrounding circumstances, [**15] [*51] would cause a reasonable person to believe that a child was abused or neglected." 89 Ill. Adm. Code 300.20 (2007).

A subject of an indicated report may request that DCFS amend the record of the report or remove the record of the report from the State Central Register. 325 ILCS 5/7.16 (West 2004). If DCFS does not do so, the subject of the report has the right to an administrative hearing within DCFS to determine whether the record of the report should be amended or removed. 325 ILCS 5/7.16 (West 2004). During the hearing, DCFS has the burden of proof in justifying the refusal to amend, expunge, or remove the record, and DCFS must prove that a preponderance of the evidence supports the indicated finding. 89 Ill. Adm. Code 336.100(e) (2010). After the hearing, the Director receives the ALJ's recommendation and may accept, reject, amend, or return the recommendation. 89 Ill. Adm. Code 336.220(a)(2) (2010). The Director's decision is the final administrative decision by DCFS. 89 Ill. Adm. Code 336.220(a)(2). If the subject of the report prevails, the report is released and expunged. 325 ILCS 5/7.16 (West 2004).

In the case at bar, DCFS entered an indicated finding of neglect against Asia. [**16] The Act provides definitions of when a child is considered to be abused or neglected. A "'[n]eglected child'" includes "any child who *** 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." 325 ILCS 5/3 (West 2004). Based on the Act's definitions of abuse and neglect, DCFS promulgated regulations detailing a number of child abuse and neglect allegations, "essentially defining problematic conduct." *Walk v. Department of Children & Family Services*, 399 Ill. App. 3d 1174, 1181, 926 N.E.2d 773, 339 Ill. Dec. 298 (2010).

Under the regulations, in order for DCFS to accept a report of child abuse or neglect, the person making the report must allege that the act or omission of the perpetrator caused one of a number of "allegations of harm." 89 Ill. Adm. Code 300 app. B (2010). Asia's conduct was categorized as allegation No. 57,[2] "wounds." A wound is defined as "a gunshot or stabbing injury. Verification must come from a physician, a law enforcement officer or by a direct admission from the alleged perpetrator." 89 Ill. Adm. Code 300 [**17] app. B. Accordingly, in the administrative hearing, DCFS was required to prove by a preponderance of the evidence that N.S. sustained a wound caused by Asia's neglectful conduct.

> 2 "Many of the allegations of harm can be categorized as resulting from either abuse or neglect. All abuse allegations of harm are coded with a one or two digit number under 50. All neglect allegations of harm are coded with a two digit number greater than 50." 89 Ill. Adm. Code 300 app. B.

II. ALJ's Findings

Turning to the merits of Asia's case, we first consider Asia's arguments concerning the ALJ's findings. The decision of the Director, which adopted the ALJ's recommendations, is an administrative decision and judicial review is governed by the Administrative Review Law (735 ILCS 5/3-101 *et seq*. (West 2008)). 325 ILCS 5/7.16 (West 2004). 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. *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 531, 870 N.E.2d 273, 312 Ill. Dec. 208 (2006) (*per curiam*). Under the Administrative [*52] Review Law, actions to review a final administrative decision "shall extend to all questions of law [**18] and fact presented by the entire record before the court." 735 ILCS 5/3-110 (West 2008). Additionally, "[t]he findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct." 735 ILCS 5/3-110 (West 2008). The reviewing court is not to reweigh the evidence or make an independent determination of the facts. *Kouzoukas v. Retirement Board of the Policemen's Annuity & Benefit Fund*, 234 Ill. 2d 446, 463, 917 N.E.2d 999, 334 Ill. Dec. 924 (2009).

A. Factual Findings

Asia first challenges the ALJ's factual finding that the colored pencil that injured N.S. was sharp. The propriety of the agency's findings of fact will be upheld unless they are against the manifest weight of the evidence. *Kouzoukas*, 234 Ill. 2d at 463; *Marconi*, 225 Ill. 2d at 532 (*per curiam*). "An administrative agency decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident." *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88, 606 N.E.2d 1111, 180 Ill. Dec. 34 (1992). The fact that the opposite conclusion is reasonable or that the reviewing court may have reached a different outcome does not justify reversal of the administrative findings. *Abrahamson*, 153 Ill. 2d at 88. [**19] "If the record contains evidence to support the agency's decision, it should be affirmed." *Abrahamson*, 153 Ill. 2d at 88-89.

In the case at bar, Asia claims that the ALJ's findings of fact were against the manifest weight of the evidence because the ALJ's finding that Asia left out "sharp objects" within "'a few feet'" of N.S. was not supported by the record. Asia argues that the "clear and undisputed evidence in the record" established that the pencil that pierced N.S.'s neck was not sharp because Asia testified that the pencil was "dull" and the doctor's note indicated that the pencil was "not freshly sharpened." We agree with DCFS that the validity of the ALJ's finding should not "turn[] on the precise degree of 'sharpness' of the particular colored pencil that injured N.S." and cannot find the ALJ's factual finding to be against the manifest weight of the evidence. There is no dispute that the pencil was sharpened to some degree; Asia had been using the pencil to complete her schoolwork, so it could not have been an entirely unsharpened pencil. Additionally, the pencil was sharp enough to distinguish between the "flat end" and the "pointed end." Thus, there is evidence in the record [**20] that the pencil was at least somewhat sharp. We cannot find the ALJ's finding to be against the manifest weight of the evidence merely because the ALJ characterized the pencil as "sharp" instead of emphasizing that the pencil was not freshly sharpened.

B. Neglect Determination

Asia also argues that the ALJ's conclusion that she was neglectful was clearly erroneous because N.S.'s injury was the result of a "'freak' accident." An administrative agency's decision on a mixed question of law and fact is reviewed for clear error. *Elementary School District 159 v. Schiller*, 221 Ill. 2d 130, 143, 849 N.E.2d 349, 302 Ill. Dec. 557 (2006). This standard of review is deferential to the agency's expertise in interpreting and applying the statutes that it administers. *Schiller*, 221 Ill. 2d at 143. "'[W]hen the decision of an administrative agency presents a mixed [*53] question of law and fact, the agency decision will be deemed clearly erroneous only where the reviewing court, on the entire record, is left with the definite and firm conviction that a mistake has been committed.'" (Internal quotation marks omitted.) *Schiller*, 221 Ill. 2d at 143 (quoting *Comprehensive Community Solutions, Inc. v. Rockford School District No. 205*, 216 Ill. 2d 455, 472, 837 N.E.2d 1, 297 Ill. Dec. 221 (2005)).

Initially, [**21] we note that both parties' arguments employ a definition of "neglect" that we are unable to apply. As noted, the Act provides that a "'[n]eglected child'" includes "any child who *** 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." 325 ILCS 5/3 (West 2004). DCFS's regulations categorize harm resulting from neglect and abuse into allegations, including allegation No. 57, "wounds." A wound is "a gunshot or stabbing injury. Verification must come from a physician, a law enforcement officer or by a direct admission from the alleged perpetrator." 89 Ill. Adm. Code 300 app. B.

DCFS's internal procedures set forth further guidelines for determining whether a person's actions constitute neglect:

> "Another important change is the way in which NEGLECT is defined and used in those allegations of harm, which may be attributable to either abuse or neglect. A child may sustain a harm (e.g., brain damage, death, etc.) because of the 'blatant disregard' of the parent or caretaker in his or her responsibility [**22] to oversee and protect the child. In such instances, the harm is the same to the child, but the cause is attributable to NEGLECT, not abuse. To constitute neglect, the allegations require that the harm to the child must have been the result of a

> **blatant disregard** of parental or caretaker responsibilities.
>
> '**Blatant disregard**' is defined as incidents where the risk of harm to the child was so imminent and apparent that it is unlikely that a parent or caretaker would have exposed the child to such obvious danger without exercising precautionary measures to protect the child from harm." (Emphasis in original.) Illinois Department of Children and Family Services Procedures 300 app. B(h).

Both parties frame their arguments around the "blatant disregard" standard for finding neglect. However, this standard is not contained in the Act or in the regulations promulgated pursuant to the Act, but is found in a document explaining DCFS's internal procedures. Neither party provides us with any authority for using a definition solely located in DCFS's procedures as the legal standard for behavior that constitutes neglect, nor is there any caselaw applying the "blatant disregard" standard in the context [**23] of an indicated finding of neglect. Accordingly, we analyze Asia's claim using the definition of neglect found in the Act.

The Illinois Supreme Court has said that neglect is the "'failure to exercise the care that circumstances justly demand,'" and can arise from either wilful or unintentional disregard of duty. *In re N.B.*, 191 Ill. 2d 338, 346, 730 N.E.2d 1086, 246 Ill. Dec. 621 (2000) (discussing neglect in the context of the Juvenile Court Act)(quoting *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 624, 104 N.E.2d 769 (1952)). Issues concerning abuse and neglect are decided on a case-by-case basis because abuse and neglect findings "rely on "'amorphous concept[s] which cannot be defined with particularity.'"" [*54] *Walk*, 399 Ill. App. 3d at 1182 (quoting *In re Edricka C.*, 276 Ill. App. 3d 18, 26, 657 N.E.2d 78, 212 Ill. Dec. 383 (1995), quoting *In re B.M.*, 248 Ill. App. 3d 76, 79, 618 N.E.2d 374, 187 Ill. Dec. 783 (1993)).

In the case at bar, we find that the ALJ's determination that Asia neglected N.S. [*55] was clearly erroneous. There is no doubt that N.S. was seriously injured by one of Asia's colored pencils. However, it cannot be the case that the existence of the injury itself automatically results in a finding of neglect. Instead, the ALJ was required to determine whether N.S.'s injury was the result [**24] of Asia's neglectful conduct. See 89 Ill. Adm. Code 300 app. B.

As noted, the essential facts of this case are not in dispute. Asia was working on a school project involving the use of colored pencils. She was sitting on the floor, working at a coffee table, with colored pencils near her on the floor and on the table. N.S. was at the opposite end of the coffee table, a few feet from Asia. At some point while Asia was putting her pencils away, N.S. took one of the pencils and fell upon it, injuring herself. DCFS entered an indicated finding of neglect against Asia, on the basis that "we felt that they failed to protect the minor by failing to insure that there [were] [no] object[s] that the minor could grasp."

We cannot find that Asia's conduct demonstrated that N.S. was not receiving "care necessary for *** her well-being." 325 ILCS 5/3 (West 2004). Instead, the evidence in the record demonstrates that N.S.'s injury here is the result of an isolated incident that could happen to anyone. Asia was generally attentive to N.S., placing N.S. within her eyesight and on the other side of the coffee table, while keeping the colored pencils nearby. Nevertheless, N.S. was able to take a pencil [**25] during a moment when Asia was distracted or unaware of N.S.'s quick movements. While Asia could have made a different decision, such as completing her schoolwork on a higher table or arranging for Lisa to watch N.S. while Asia completed her schoolwork, the evidence in the record clearly demonstrates that Asia was concerned about the whereabouts of N.S. while she was working and her history of being a good mother was not refuted. See *Lyons v. Department of Children & Family Services*, 368 Ill. App. 3d 557, 561, 858 N.E.2d 542, 306 Ill. Dec. 745 (2006) (reversing finding of abuse in part because "[e]ven if plaintiff's decision *** was not the correct one, it does not follow that he was guilty of abuse"). This is not a case where a mother left her child unsupervised or even a case where the mother was working with an obviously dangerous object, such as a knife. This is simply a case where Asia was using pencils near her daughter and failed to observe her daughter for a slight moment. While the resulting injury to N.S. was truly unfortunate, we cannot accept the ALJ's conclusion that merely having pencils in the same room as an infant, when the child was otherwise being supervised, is neglectful conduct. Based on the record, [**26] we are left with the definite and firm impression that a mistake has been committed and therefore find that the ALJ's decision that DCFS had met its burden was clearly erroneous.

III. Record on Appeal

Finally, Asia argues that DCFS failed to maintain a complete and accurate record of the administrative hearing. She claims that DCFS's failure violates the Illinois Administrative Procedure Act (5 ILCS 100/1-1 *et seq*. (West 2004)) and violates her right to due process. Since we have determined that the ALJ's decision upholding the indicated finding of neglect was clearly erroneous, we need not consider this issue.

CONCLUSION

The ALJ's finding that the colored pencil that injured N.S. was sharp was not against the manifest weight of the evidence. However, the ALJ's determination that Asia was neglectful was clearly erroneous. Accordingly, the indicated finding of neglect against Asia should be expunged.

Reversed with directions.

ORDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
CHANCERY DIVISION

Cody Manley,	)	
Petitioner,	)	
v.	)	**01 CH 15589**
DCFS, et al.	)	**Judge Stephen A. Schiller**
Respondents.	)	

I. Motion

This matter comes before the Court on Petitioner Cody Manley's complaint for administrative review (styled as "Motion for Judgment Reversing Final Administrative Hearing Decision") seeking reversal of the final administrative hearing decision of Respondent Illinois Department of Children and Family Services.

II. Facts

Petitioner Cody Manley ("Cody") is a 32-year-old fork-lift operator from Marengo, Illinois who works for a lumber company . Cody is married to Deanna Manley ("Deanna"). The couple have a six-year-old daughter named Zoe.

At the time of the incidents giving rise to this cause, Kristin H. ("Kristin") was 12 years old. Kristin is the daughter of Sandra H. ("Sandra"), who was close friends with Deanna and Cody. Kristin is not related to Cody or Deanna, but generally refers to them as "aunt" and "uncle." Until the allegations discussed here were made, Sandra and Kristin spent a significant amount of time with the Manleys, and relations between the two households were very good, and of a familial quality. Sandra had a key to the Manley home, and Cody did household repairs for Sandra. Sandra once sent her older daughter –Kristin's half-sister Danielle C. ("Danielle," who was about 16 years old during the times referenced here) –to live with the Manleys for a period of about two months, apparently so that she could attend a new school and be distanced from a troublesome peer group. Sandra, Cody and Deanna often socialized together.

Kristin began baby-sitting for Zoe shortly after she was born (Zoe was about 3 ½ years old at the time of the alleged incidents described herein). Kristin would care for Zoe once or twice a week, typically when Cody and Deanna planned to spend the evening at a local bar or attending a party. Sandra would often accompany Cody and Deanna on these outings.

On December 31, 1999 the Manleys hosted a New Year's Eve party at their residence. Approximately twelve adult guests attended the party, as did Kristin, who the Manleys had hired to look after the young children of some of the adult party-goers. At some point, the adults left the party and went to a local bar to celebrate. They returned to the Manley home shortly before midnight, toasted the New Year, and continued to socialize (Kristin was present and awake during these festivities) until around 2:00 a.m., at which point some of the guests left. Several individuals decided to spend the night at the Manley home: Cody, Deanna, and their daughter Zoe; Kristin and a friend she had brought along, Brittany F. ("Brittany," who was then 11 years old); Clay Manley ("Clay," Cody's older brother); Maria (last name unknown, Clay's girlfriend); and Mystique X. ("Mystique;" Clay's daughter from a previous relationship, who was then 14 years old). Kristin alleges that after everyone else had gone to sleep, Cody molested her by fondling her breasts and vagina. Cody denies that this ever took place.

Regardless of what did or did not happen in the early morning hours of January 1, 2000, Kristin continued to baby-sit for the Manleys. She claims that nearly every weekend, Cody molested her in the same manner that he allegedly did after the New Year's Eve party. Cody denies all such allegations.

Kristin babysat for the Manleys until Saturday, May 20, 2000, on which date the Manleys, apparently concerned that Kristin had been running up their phone bill, stealing, and entertaining older boys at their residence while she was supposed to be babysitting, called a meeting to discuss possibly terminating her employment. Kristin claims that she and Cody had sexual contact for the last time on the very day of this meeting.

The following Monday (May 22, 2000), Kristin claims that she told two of her friends at school about the alleged encounters with Cody. Kristin claims that she asked her friends to keep the matter as a secret, but her friends told her that if she did not inform her mother, they would. Kristin then informed a school counselor ("Ms. Koontz") about her alleged experiences with Cody. As a result, a report was made to DCFS (presumably by Koontz), and an investigation was initiated. Around this time, Kristin also told Sandra about the alleged incidents. Sandra initially refused to believe Kristin, apparently because Kristin had lied to her in the past (about typical adolescent concerns, but not about sexual abuse), but eventually put credence in her story when, according to Kristin, Danielle told Sandra that Cody had once attempted to molest her during the time that Danielle was living with the Manleys.

DCFS Child Protective Investigator Harley Gold ("Gold") was assigned to the case. He interviewed Kristin at her school, and then arranged for her to be interviewed by Christine Massie ("Massie") –a female police canine unit officer[1] –on May 24, 2000. Gold, an Assistant State's Attorney and Marengo Police Department Officer Paul Fritz ("Fritz") observed the interview through a two-way mirror and took notes.

On May 26, 2000 Kristin was taken to Memorial Hospital for a physical examination. No signs of sexual abuse were detected. On July 26, 2000 Kristin was interviewed a second time, this time on videotape.

[1] Sandra had insisted that Kristin only be interviewed by a female officer, and Massie, although a canine officer without sexual abuse crimes experience, was the only one available.

On August 4, 2000 DCFS officially declared the case to be "indicated," meaning that it had determined that there was credible evidence to conclude that Cody had abused Kristin by perpetrating "sexual molestation" and "[digital] sexual penetration" upon her. An indicated finding means that, for 50 years, the State Central Register ("SCR") will retain the indicated report against Cody. Although, in general, access to the SCR is confidential and governed by state law, SCR makes the information available when one undergoes a background check for certain occupations, etc.

Cody appealed the indicated findings, contending that they were inaccurate and should be expunged from the SCR. That appeal was denied on June 4, 2001. Cody now seeks administrative review in this Court.

III. Discussion

Cody argues, *inter alia*, that the admission of Kristin's videotaped testimony and the denial of Cody's motion to produce her to testify deprived him of a fair hearing.

The admission of the videotape into evidence does not necessarily conflict with the Illinois Administrative Code itself. The Code explicitly provides that, in DCFS abuse cases, the ALJ shall:

> 9) allow into evidence all evidence helpful in determining whether an alleged perpetrator abused or neglected a child, including oral and written reports, which the Administrative Law Judge and the Director may rely upon to the extent of its probative value, *even though not competent under the civil rules of evidence*;

89 Ill. Adm. Code 336.120, (b)(9) (emphasis added).

and

> 10) allow into evidence previous statements made by the child relating to abuse or neglect *as hearsay exceptions*;

89 Ill. Adm. Code 336.120, (b)(10) (emphasis added).

However, the question as to whether Cody was deprived of the due process he was entitled to is more complex. "It is, of course, well recognized that not all the accepted requirements of due process in the trial of a case are necessary at an administrative proceeding." *Petersen v. Chicago Plan Comm'n*, 302 Ill. App. 3d 461, 469 (1st Dist. 1998). Even so, an administrative proceeding must conform to certain standards of due process. The Seventh Circuit offers these guidelines as to due process in an administrative context:

> Due process does not always require the opportunity to confront and cross-examine witnesses in the setting of an informal administrative investigation. For example, due process may not require such procedures when credibility determinations are not made during the initial administrative investigation but are

reserved for a later hearing where these safeguards are available. [...] Similarly, these procedures have not been required where the administrative agency in question has a purely "investigatory" function with no "adjudicatory" component.[2]

However, confrontation and cross-examination are important procedural safeguards, especially where factual determinations are made. *See Goldberg v. Kelly* ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."). Therefore, there are times when due process requires these procedures even during an informal administrative investigation. This requirement may be triggered when the function of the proceeding is to adjudicate rather than merely investigate claims. [...] *See also Jenkins v. McKeithen*, (noting that confrontation and cross-examination are required where a possible result of an administrative agency investigation is public condemnation of the individual investigated for criminal activity). And it may arise when the investigators engage in important credibility determinations where the erroneous dismissal of meritorious claims without adequate review is a serious concern. *See Goldberg* (finding confrontation and cross-examination required procedures during hearing where credibility determinations would be made prior to the termination of welfare benefits).

Cooper v. Salazar, 196 F.3d 809, 815 (7th Cir. 1999) (some citations omitted).

Given the reasoning in *Cooper*, it would seem that the underlying proceedings herein falls into the class of administrative hearings which should ordinarily require that an accused be afforded the opportunity to confront and cross-examine his or her accuser: The effect of an "indicated" finding is "adjudicatory" in nature to the extent that it requires Cody's name to registered with the SCR, which will obviously preclude him from certain kinds of employment in the future. Furthermore, the consequence of the administrative determination is plainly one which will produce the possible result of "...public condemnation of the individual investigated for criminal activity." *See Cooper* at 815.

When a case involves a child accusing an adult of sexual misconduct, a court may be confronted with additional concerns which require a balancing test. In *Papapetropoulous v. Milwaukee Transport Services, Inc.*, 795 F.2d 591 (7th Cir. 1986), the Seventh Circuit considered a case where a young girl was allegedly molested by her school bus driver. After the girl reported the incident, the driver was fired. The driver then filed a grievance with his union.

At the ensuing proceeding, the girl was called to testify. During cross-examination, the girl broke down and was unable to continue, so the arbitrator excused her from further

[2] As to the difference between, "investigatory" and "adjudicatory" administrative proceedings, Illinois courts have held that "[i]nvestigations conducted by administrative agencies attempt to discover and produce evidence not for the purpose of adjudicating guilt or proving a pending complaint but rather for the purpose of determining whether facts exist to justify the institution of a complaint." *Board of Education v. Eckmann*, 103 Ill. App. 3d 1127, 1135 (2d Dist. 1982).

cross-examination. The driver moved to dismiss the arbitration proceeding alleging a lack of opportunity to complete his cross-examination of the complaining witness. The arbitrator noted that "if the testimony of the complaining witness were the sole evidence adduced at hearing by the Company to prove its assertions against grievant, in the absence of full and complete cross-examination, the undersigned would strike the testimony of complaining witness and dismiss the grievance." However, the arbitrator found that the young woman's story was corroborated by the psychiatric social worker who treated her. (*See Papapetropoulous* at 593) The driver appealed, alleging that his inability to cross-examine the girl amounted to a constitutional violation.

Citing *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Seventh Circuit first identified the factors which generally should be considered in determining whether the requirements of due process are satisfied:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved in the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Papapetropoulous at 598. *Accord, Folbert v. Department of Human Rights*, 303 Ill. App. 3d 13, 23 (1st Dist. 1999) (quoting the same factors from *Mathews*).

It would seem that, generally, these factors would weigh in favor of the petitioner. Given the nature of child sexual abuse cases though, the *Papapetropoulous* court further noted that "the fear of the young children in testifying could negate the right to confrontation that in other contexts not similarly fraught with countervailing risks to child-accusers and not protected by adequate alternative procedures may well be considered so fundamental as to be an essential element of procedural due process." *Id.* at 599 (citations omitted). *See also Maryland v. Craig*, 497 U.S. 836, 852-53 (1990) (holding that the State's interest in the physical and psychological well-being of a child abuse victim is sufficiently important to outweigh, "at least in some cases," a defendant's right to face his accuser in court.). However, dispensing with confrontation and cross-examination of a child-accuser is only proper where "the circumstances demonstrate the procedures used during the hearing adequately protect the plaintiff's rights." *Papapetropoulous* at 599.

Unlike in *Papapetropoulous*, the case now before the Court offers no independent corroborative evidence that the abuse took place, such as testimony by a treating social worker or physician. In fact, the only physical examination which was conducted found no signs of sexual abuse. Fundamentally, the testimony which Kristin gave on videotape was not given under oath or sworn to in any other manner by her. Thus, she may not have been reasonably impressed with the importance of being truthful. In fact, the primary purpose of a *voir dire* to qualify a minor to testify is the ascertainment of whether the minor witness possesses the ability to appreciate the moral duty to tell the truth. *People v. Ballinger*, 36 Ill. 2d 620 (1967). The United States Supreme Court has held that the decision as to whether to excuse the production of a child witness must be made on a case-by-case basis, requires a determination that the use of an alternate procedure (such as testimony via closed-circuit TV, videotape, etc.) is necessary to protect the child witness' welfare; that the child would be traumatized not by the courtroom generally, but by the defendant's presence; and a finding that the emotional distress suffered by the child being in the defendant's presence is more than *de minimis*. *See Craig* at 855-56 (distinguishing *Coy v. Iowa*, 487 U.S. 1012 (1988)). In this case, the hearing officer made no such findings, nor is there evidence in the record which would support them. Although the underlying proceeding in the instant case was not criminal in nature, as in *Craig*, the principals set forth by the Supreme Court in that case provide sensible guidelines that are applicable here.

Moreover, this case presents a situation where the outcome of the hearing was *directly dependent* on the credibility of a witness (Kristin) whose sometimes conflicting statements [3] were received by the hearing officer. In such situations, the opportunity for cross-examination is imperative. *Colquitt v. Rich Twp. High Sch. Dist. No. 227*, 298 Ill. App. 3d 856, 864 (1st Dist. 1998).

As pointed out in *Papapetropoulous*, the trauma that could conceivably be inflicted by compelling young children to testify about sensitive issues "could negate the right to confrontation that in other contexts not similarly fraught with countervailing risks to child-accusers .... may well be considered so fundamental as to be an essential element of procedural due process." *Id.* at 599. However, the mere existence of such a risk does not, in every case, justify reliance on written witness reports in administrative hearings, absent a showing of a significant risk of harm. *See Colquitt* at 865 (finding that reliance on witnesses statements in high school expulsion proceeding improperly denied the accused his right to cross examination, where there was no showing that compelling witnesses to testify in person would expose them to risk of retaliation). Here, there has been no showing that Kristin would have been harmed had she testified at Cody's hearing. Nor has there been any explanation given for the omission of any means calculated to impress the declarant with the importance of being truthful. Accordingly, admission of her videotaped statements was improper. *See Colquitt* at 866.

IT IS HEREBY ORDERED:

The Petitioner's prayer for relief, seeking reversal of the final administrative decision of the DCFS and expungement of the indicated report, SCR 867297A, is granted.

ENTERED

Enter: ______________________

Judge Stephen A. Schiller MAY 2 2 2003

JUDGE
STEPHEN A SCHILLER-167

[3] For example, Kristin stated to Massie that Cody masturbated during the first alleged incident, but never makes reference to such activity by Cody in the subsequent videotaped interview. Fritz testified that at the first interview, Kristin stated that she fell asleep in Zoe's room on New Year's Eve –but in the videotaped interview, she testified that she fell asleep in the living room. Moreover, Mystique, who was in the room the night of the alleged New Year's abuse, did not testify as to anything untoward happening between Cody and Kristin. As to the inconsistency between the location of the initial alleged abuse, DCFS attributes this to the first interview being conducted by someone (Massie, who is a canine unit officer) who was not skilled in this sort of investigation.