SUMMARY
December 17, 2020

**2020COA172M**

**No. 19CA1676, *Ansel v. State Department of Human Services* — Colorado Children's Code — Institutional Abuse — Child Abuse or Neglect**

As a matter of first impression, a division of the court of appeals holds that, for purposes of a determination of institutional neglect as defined in section 19-1-103(66), C.R.S. 2020, the relevant standard is the "prudent parent," and not the "prudent parent who is also a licensed child care provider." Consequently, whether a licensed child care provider followed applicable regulations is not relevant to the determination of whether the provider acted as a prudent parent would have.

COLORADO COURT OF APPEALS **2020COA172M**

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Court of Appeals No. 19CA1676
City and County of Denver District Court No. 19CV30267
Honorable Eric M. Johnson, Judge

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Amanda Ansel,

Plaintiff-Appellant,

v.

State Department of Human Services,

Defendant-Appellee.

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JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE TOW
Navarro and Lipinsky, JJ., concur

Opinion Modified
On the Court's Own Motion

Announced December 17, 2020

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Pickard Law, P.C., Joe Pickard, Jay Pickard, Kevin Massaro, Jennifer Gehring, Littleton, Colorado, for Plaintiff-Appellant

Philip J. Weiser, Attorney General, Megan A. Embrey, Assistant Attorney General, Denver, Colorado, for Defendant-Appellee

OPINION is modified as follows:

**Page 11, the last sentence of ¶ 22 currently reads:**

to be considered a child's "legal custodian" as the term is used section 19-3-102(1)(b).

**Opinion now reads:**

to be considered a child's "legal custodian" as the term is used in section 19-3-102(1)(b).

¶ 1 El Paso County Department of Human Services (the County) found that plaintiff, Amanda Ansel, committed institutional abuse or neglect at her in-home child care facility when a child was injured while in her care. Ansel pursued an administrative appeal challenging the finding, and an administrative law judge (ALJ) agreed that Ansel's actions did not constitute child abuse or neglect. However, the Colorado Department of Human Services (CDHS), in a final agency action issued by CDHS's Office of Appeals, reversed the ALJ. The Office of Appeals issued a final agency decision concluding that Ansel had failed to comply with licensing regulations regarding supervision of children by licensed child care providers and that she had thus committed child abuse as defined in section 19-1-103(1)(a)(III), C.R.S. 2020. After unsuccessfully challenging the final agency decision in district court, Ansel asks us to reverse that decision.

¶ 2 To resolve this appeal, we must interpret the "prudent parent" standard found in section 19-1-103(1)(a)(III), as applied to a licensed child care provider. Contrary to the determination of CDHS and the district court, we conclude that, to support a finding of child abuse or neglect under section 19-1-103(1)(a)(III), the

"prudent parent" standard simply requires determining whether a licensed child care provider acted as a prudent parent would have under the circumstances. Because CDHS either misinterpreted the "prudent parent" standard or misapplied the standard to the facts of this case, we reverse the district court's judgment affirming the final agency decision and remand with directions.

## I. Background

¶ 3 On July 8, 2016, Ansel was supervising eight children at the family child care program she operated at her residence. At the time, Ansel homeschooled three children and was licensed by CDHS to provide child care from her home for up to five additional children.

¶ 4 One of the children in Ansel's care that day was D.A., an eleven-year-old boy. In the afternoon, D.A. and several other children went outside into Ansel's yard to play a game called "pets" — a game where one child pretends to be a pet while another pretends to be the pet's owner. Ansel stayed inside with the remaining children.

¶ 5 While Ansel was not watching, D.A. found a retractable dog leash and incorporated it into the game by tying it around his neck.

He then climbed up onto the roof of a playhouse and accidentally slipped off. Because he had placed the leash handle on a nearby tree branch, the leash tightened around his neck as he fell, causing significant ligature marks. D.A. later reported the he also "saw black" after he fell.

¶ 6 D.A. removed the leash and went inside to inform Ansel what happened. Approximately five minutes had elapsed from when D.A. went outside to play to when D.A. reported the incident to Ansel. Ansel was unaware of the incident until D.A. informed her about it.

¶ 7 Ansel tended to D.A. and contacted his father, who took D.A. to the emergency room. Hospital staff reported the incident to the County. Upon investigation, the County determined that Ansel was responsible for institutional neglect by failing to adequately supervise D.A. The County reported its finding to CDHS's statewide child abuse registry, known as "TRAILS."

¶ 8 Ansel appealed the County's finding of institutional abuse or neglect on the grounds that (1) the finding was not supported by a preponderance of credible evidence and (2) her actions did not meet the statutory or regulatory definitions of child abuse or neglect. A hearing was held before an ALJ, who determined that the licensing

rules for child care providers were irrelevant to the standard of care. Rather, the ALJ concluded, the appropriate level of supervision was that which a prudent parent would provide, which in this case would not require constant supervision of an eleven-year-old child playing in a fenced front yard. Because, the ALJ determined, Ansel provided a level of supervision that a prudent parent would have provided, her actions did not constitute child abuse or neglect under the relevant definitions found in section 19-1-103(1)(a)(III) and section 19-3-102(1)(b), C.R.S. 2020. Accordingly, the ALJ issued an initial decision reversing the County's finding.

¶ 9 CDHS filed exceptions to the ALJ's initial decision with CDHS's Office of Appeals, the body within CDHS responsible for final agency actions. CDHS argued that, under the "prudent parent" standard found in section 19-1-103(1)(a)(III), the ALJ was required to consider Ansel's status as a licensed child care provider and determine whether she complied with CDHS licensing rules. By failing to do so, it argued, the ALJ erred in its decision.

¶ 10 The Office of Appeals agreed with CDHS. Specifically, the Office of Appeals concluded that "[t]he 'parental decisions' made by [Ansel] and level of supervision must meet child care licensing rules

because that is what is reasonable under the circumstances in this case." Because Ansel failed to comply with the licensing rules by (1) not providing "developmentally appropriate" supervision while the child was in the front yard and (2) not knowing the location and activity of all of the children at all times, the Office of Appeals concluded that she failed to meet the standard of the "prudent parent." Dep't of Hum. Servs. Rules 7.707.741.A, 7.707.933.B, 12 Code Colo. Regs. 2509-8. The Office of Appeals thus issued a final agency decision reversing the ALJ's decision and upholding the County's finding.

¶ 11 Ansel sought judicial review of the final agency decision pursuant to section 24-4-106, C.R.S. 2020, arguing that the Office of Appeals erred in interpreting and applying section 19-1-103(1)(a)(III)'s "prudent parent" standard and that the Office of Appeals overstepped its authority by substituting its own findings of historical fact for those of the ALJ. The district court affirmed the final agency decision.

## II. The Office of Appeals Applied the Wrong Legal Standard

### A. Standard of Review

¶ 12 On appeal from a district court's review of a final agency action, we apply the same standard of review as the district court — the standard set forth in section 24-4-106(7). § 24-4-106(7), (11)(e); *Romero v. Colo. Dep't of Hum. Servs.*, 2018 COA 2, ¶ 25. In particular, "[i]n all cases under review, the court shall determine all questions of law and interpret the statutory and constitutional provisions involved and shall apply the interpretation to the facts duly found or established." § 24-4-106(7)(d). As relevant here, we may set aside a final agency action if it is "contrary to law." § 24-4-106(7)(b)(IX).

¶ 13 Additionally, whether the Office of Appeals erred by reversing the ALJ's decision turns on the interpretation of sections 19-1-103(1)(a)(III) and 19-3-102(1)(b), which we review de novo. *BP Am. Prod. Co. v. Colo. Dep't of Revenue*, 2016 CO 23, ¶ 9.

### B. Applicable Law

¶ 14 The Child Protection Act of 1987 (the Act) creates a structure by which incidents of child abuse are investigated, reported, and documented. §§ 19-3-301 to -317, C.R.S. 2020. When a county

department of human services investigates and confirms an incident of child abuse or neglect, it is statutorily required to submit a report to CDHS. § 19-3-307, C.R.S. 2020. Those found responsible for a confirmed incident of child abuse or neglect are then afforded an opportunity to appeal that finding to CDHS. § 19-3-313.5(3), C.R.S. 2020; Dep't of Hum. Servs. Rule 7.111, 12 Code Colo. Regs. 2509-2. Should CDHS and the appellant be unable or unwilling to resolve the appeal, CDHS "shall forward the appeal to the Office of Administrative Courts to proceed to a fair hearing before an [ALJ]," who issues an initial decision. Dep't of Hum. Servs. Rule 7.111.A, 12 Code Colo. Regs. 2509-2; Dep't of Hum. Servs. Rule 3.850.71, 9 Code Colo. Regs. 2503-8. The Office of Appeals must then review the initial decision of the ALJ and enter a final agency decision affirming, modifying, or reversing the initial decision. Dep't of Hum. Servs. Rule 3.850.72, 9 Code Colo. Regs. 2503-8.

¶ 15 Under CDHS regulations, a party may only appeal a finding of abuse or neglect on two grounds: (1) the finding is "not supported by a preponderance of credible evidence" or (2) "[t]he actions ultimately found to be abusive or neglectful do not meet the

statutory or regulatory definitions of child abuse or neglect." Dep't of Hum. Servs. Rules 7.111.B.1, .2, 12 Code Colo. Regs. 2509-2. At issue here is CDHS's finding as to the latter ground for appeal — whether Ansel's actions constituted institutional child abuse or neglect.

¶ 16 For purposes of the Act, "[i]nstitutional abuse" means "any case of abuse, as defined in [section 19-1-103(1)], that occurs in any public or private facility in the state that provides child care out of the home, supervision, or maintenance."[1] § 19-1-103(66). The CDHS regulation defining "child abuse and/or neglect" similarly adopts the definition provided in section 19-1-103(1). Dep't of Hum. Servs. Rule 7.000.2.A, 12 Code Colo. Regs. 2509-1. However, it also incorporates the definition found in section 19-3-102(1). *Id.* Hence, to determine whether Ansel's actions constituted institutional abuse or neglect, the Office of Appeals applied sections 19-1-103(1) and 19-3-102(1).

¶ 17 As relevant here, section 19-1-103(1) defines "abuse" or "child abuse or neglect" as

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[1] The parties do not dispute that Ansel's home qualifies as a child care facility within the meaning of that term in this definition.

> an act or omission . . . that threatens the health or welfare of a child . . . [in] [a]ny case in which a child is a child in need of services because the child's parents, legal guardian, or custodian fails to take the same actions to provide adequate . . . supervision that a prudent parent would take.

§ 19-1-103(1)(a)(III).[2] And section 19-3-102(1) provides, in pertinent part, that "[a] child is neglected or dependent if . . . [t]he child lacks proper parental care through the actions or omissions of the parent, guardian, or legal custodian." § 19-3-102(1)(b).

### C. Discussion

¶ 18 Ansel argues that the Office of Appeals erred in interpreting and applying sections 19-1-103(1)(a)(III) and 19-3-102(1)(b) in its decision. Thus, she argues, the decision by the Office of Appeals was contrary to law, and, accordingly, its decision should be reversed under section 24-4-106(7). We agree.

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[2] We note that neither the statute nor the regulations define "child in need of services" — or even "services" — as those terms are used in the Act. However, since neither party questions whether D.A. qualifies as a "child in need of services," we assume without deciding that he does.

1. Section 19-3-102(1)(b) Is Inapplicable

¶ 19 In its review of the ALJ's initial decision, the Office of Appeals appeared to apply both section 19-1-103(1)(a)(III) and section 19-3-102(1)(b) in determining whether Ansel's actions constituted child abuse or neglect. However, as to section 19-3-102(1)(b), only the actions or omissions of a child's "parent, guardian, or legal custodian" can meet the definition of neglect under the provision. And here, it is undisputed that Ansel was neither the child's "parent" nor "guardian" within the meaning of the statute. *See* § 19-1-103(60), (82) (defining those terms as used in Title 19). Nor, in our view, could Ansel have been considered the child's "legal custodian."

¶ 20 The term "custodian," as used in Title 19, refers to a "person who has been providing shelter, food, clothing, and other care for a child in the same fashion as a parent would, whether or not by order of court." § 19-1-103(35). Thus, in her capacity as a child care provider, Ansel was a "custodian" of the child.

¶ 21 However, while some statutes under Title 19, like section 19-1-103(1)(a)(III), use the term "custodian" on its own, others, like section 19-3-102(1)(b), instead use the more specific term "legal

custodian." The deliberate addition of the qualifier "legal," in our view, indicates that the term "legal custodian" references a different type of relationship with a child than that of a simple "custodian." Thus, while Ansel may have been the child's "custodian," she was not necessarily the child's "legal custodian" within the meaning of section 19-3-102(1)(b).

¶ 22 Though Title 19 does not define "legal custodian," it does provide a definition of "legal custody": "the right to the care, custody, and control of a child and the duty to provide food, clothing, shelter, ordinary medical care, education, and discipline for a child and, in an emergency, to authorize surgery or other extraordinary care." § 19-1-103(73)(a). Drawing from that definition, we conclude that a person must have "legal custody" of a child as defined in section 19-1-103(73)(a) to be considered a child's "legal custodian" as the term is used in section 19-3-102(1)(b). *See In re Marriage of Rodrick*, 176 P.3d 806, 811 (Colo. App. 2007) (defining "legal custodian," for purposes of section 19-5-203(1)(k) — governing a child's availability for adoption — as one who is a "custodian" of a child under section 19-1-103(35) and has "legal custody" of the child under section 19-1-103(73)(a)).

¶ 23 Absent a court order, only a child's parent has the right to care, custody, or control of the child. *See Troxel v. Granville*, 530 U.S. 57, 68 (2000) (parents have a fundamental right founded in the constitution to make decisions concerning the care, custody, and control of their children); § 19-1-103(73)(a) (providing that the right to care, custody, and control of a child "may be taken from a parent only by court action"). And here, the record indicates that Ansel was neither a parent of the child nor ordered by a court to care for the child in any specific capacity. Rather, Ansel's sole relationship to the child was that of a paid child care provider. Because Ansel therefore did not have the right to care, custody, or control of the child, she did not have "legal custody" of the child. Thus, she could not be considered the child's "legal custodian" under section 19-3-102(1)(b). Accordingly, because Ansel was neither the child's parent or guardian, nor his legal custodian, section 19-3-102(1)(b) is inapplicable in determining whether Ansel's actions constituted child abuse or neglect.

### 2. We Decline to Defer to the Department's Interpretation of Section 19-1-103(1)(a)(III)

¶ 24 Turning to section 19-1-103(1)(a)(III), as part of our de novo review of the statute, we "may consider and even defer to an agency's interpretation." *BP Am. Prod. Co.*, ¶ 15.

> However, while we may give deference to an agency's interpretation of a statute it administers, administrative interpretations are most useful to the court when the statutory language is susceptible to more than one reasonable interpretation and the subject involved calls for the exercise of technical expertise which the agency possesses.

*Com. Fed. Sav. & Loan Ass'n v. Douglas Cnty. Bd. of Equalization*, 867 P.2d 17, 20 (Colo. App. 1993). Thus, "[w]e need not defer to the agency's interpretation unless a statutory term is reasonably susceptible of more than one interpretation, and the agency has employed its expertise to select a particular interpretation." *Int'l Truck & Engine Corp. v. Colo. Dep't of Revenue*, 155 P.3d 640, 642 (Colo. App. 2007); *accord Colo. State Pers. Bd. v. Dep't of Corr., Div. of Adult Parole Supervision*, 988 P.2d 1147, 1150 (Colo. 1999).

¶ 25 Here, although CDHS presented expert testimony regarding the regulatory requirements governing child care providers, we do not believe that CDHS's expertise is necessary to interpret section

19-1-103(1)(a)(III). Rather, as we discuss more fully below, interpreting this statute merely requires examining the construction and plain language of the statute — a task well within the capabilities and purview of this court. And in any event, "courts are not bound by the agency's interpretation." *BP Am. Prod. Co.*, ¶ 15. Thus, we decline to afford CDHS's interpretation of section 19-1-103(1)(a)(III) deference in our review.

3. The Department Misinterpreted the "Prudent Parent" Standard in Section 19-1-103(1)(a)(III)

¶ 26 In the ALJ's initial decision, the ALJ applied section 19-1-103(1)(a)(III)'s "prudent parent" standard to determine whether Ansel had abused or neglected the child. Looking to the plain language of the statute, the ALJ concluded that the "prudent parent" standard required determining whether Ansel had exercised the supervision expected of a reasonably prudent parent under the circumstances. Because the ALJ concluded that Ansel had done so, the ALJ reversed the County's finding of institutional child abuse or neglect.

¶ 27 On review, however, the Office of Appeals determined that the ALJ interpreted the statute too narrowly. It concluded that, in the

context of institutional abuse or neglect, the ALJ was required to consider Ansel's role as a licensed child care provider. Specifically, the Office of Appeals determined that the "prudent parent" standard requires that a licensed child care provider act as would a reasonable licensed child care provider — not a reasonable parent — under the circumstances. The Office of Appeals further determined that a reasonable licensed child care provider would comply with the Child Care Licensing Act, sections 26-6-101 to -122, C.R.S. 2020, and CDHS's child care facility licensing rules found in 12 Code Colorado Regulations 2509-8. Thus, it concluded that a level of supervision inconsistent with those laws and regulations cannot satisfy the "prudent parent" standard. Because the Office of Appeals found that Ansel's supervision of the child was not consistent with two child care licensing rules (i.e., the requirements to provide developmentally appropriate supervision and to know the child's activities at all times) it found that Ansel's actions amounted to child abuse or neglect under section 19-1-103(1)(a)(III).

¶ 28 We disagree with the Office of Appeals's interpretation of the "prudent parent" standard because this interpretation is

inconsistent with the plain language of the statute in two fatal ways.

¶ 29 First, the statute only provides that, to constitute child abuse or neglect, a "child's parents, legal guardian, or custodian" must "fail[] to take the same actions . . . that a prudent parent would take." § 19-1-103(1)(a)(III). In articulating the "prudent parent" standard, the statute specifically refers to how a "parent" — not a licensed child care provider — would act. And, notably, it does not reference any other statute or any department regulation for guidance as to how a "prudent parent" would act. Thus, in our view, the statute simply provides that, for purposes of a finding of institutional abuse or neglect, child abuse or neglect can be found where one has failed to act as a prudent parent would under the circumstances.

¶ 30 As CDHS points out, the "prudent parent" standard appears to be modeled on the common law tort concept of the reasonable person standard, which requires that an actor "conform his or her conduct to a standard of objective behavior measured by what a reasonable person of ordinary prudence would or would not do under the same or similar circumstances." *United Blood Servs. v.*

*Quintana*, 827 P.2d 509, 519 (Colo. 1992). But we disagree with CDHS's suggestion that, like the reasonable person standard, the circumstances of one's profession must also be considered under the "prudent parent" standard where one is acting in a professional capacity. *See id.* The plain language of the statute specifically refers to how a prudent "parent" would act, not a prudent "professional," or, more broadly, a prudent "person." *See* § 19-1-103(1)(a)(III). Thus, CDHS's assertion, and the Office of Appeals's conclusion, that section 19-1-103(1)(a)(III) holds licensed child care providers to the standard of a prudent child care professional, as opposed to a prudent "parent," is not supported by the statute.

¶ 31 Moreover, the Office of Appeals's interpretation effectively incorporates the entirety of CDHS's licensing rules into the "prudent parent" standard where a licensed child care provider is involved. Essentially, CDHS argues that the definition of "child abuse or neglect" changes when the alleged neglect occurs in an institutional setting because the rules governing that institution are grafted onto the concept of neglect.

¶ 32 Thus, under the Office of Appeals's interpretation, the "prudent parent" standard asks not whether a child care provider has acted as a prudent parent would — the standard articulated in the statute — but whether the provider has complied with CDHS's licensing rules. In other words, the Office of Appeals's interpretation of the "prudent parent" standard requires an entirely different analysis than that presented by the statute's plain language.

¶ 33 This interpretation, however, misreads the interplay between two definitional provisions. As noted above, "[i]nstitutional abuse" refers back to the general definition for "abuse" in section 19-1-103(1), which includes neglect that occurs in an enumerated facility. § 19-1-103(66). Simply stated, the determination of whether there was institutional abuse is a two-step inquiry: (1) Was there abuse?; and (2) Did such abuse occur in a covered facility? But the first determination is independent of the second, and nothing in either definition suggests that one modifies the other, or that the latter creates a different standard from the former.

¶ 34 The second fatal flaw in the Office of Appeals's interpretation is that the statute's construction indicates that the same "prudent

parent" standard applies regardless of whether the supervising adult is a child's parent, legal guardian, or custodian (like Ansel). Indeed, the statute states that an act or omission may constitute child abuse or neglect where "the child's parents, legal guardian, or custodian fails to take the same actions . . . that a prudent parent would take." § 19-1-103(1)(a)(III). The statute does not distinguish between the three enumerated classes of supervising adults or otherwise suggest that one should be held to a higher standard than the others. In other words, it does not say "take the same actions . . . that a prudent parent, *legal guardian, or custodian* would take." Thus, contrary to the Office of Appeals's conclusion, the statutory language does not indicate that licensed child care providers should be held to a different standard because of their status as professionals. Rather, the construction of the statute indicates an intent that the same standard that applies to parents applies equally to legal guardians and custodians (including licensed child care providers). And, as the ALJ noted, a reasonably prudent parent may well engage in conduct that would not necessarily be consistent with every CDHS licensing rule.

¶ 35 The Office of Appeals's interpretation, however, requires a separate analysis under the "prudent parent" standard for licensed child care providers that is distinct from parents or guardians. Specifically, it requires that licensed child care providers, but not parents or guardians, comply with the Child Care Licensing Act and CDHS regulations and otherwise act as a reasonable professional would under the circumstances. Thus, the Office of Appeals interpreted the "prudent parent" standard such that licensed child care providers are held to a higher standard solely because of their status as a type of "custodian." *See* § 19-1-103(35). But applying a heightened standard only to licensed child care providers is inconsistent with a plain reading of the statute.

¶ 36 We note that the Office of Appeals's analysis under section 19-1-103(1)(a)(III) could be interpreted as applying the proper "prudent parent" standard — that is, how a prudent parent would have acted under the circumstances — but considering Ansel's status as a licensed child care provider as a circumstance that informed its analysis. In other words, the Office of Appeals's decision may be construed as concluding that a prudent parent who was acting as a licensed child care provider would conform

their behavior to CDHS's licensing rules. But such an application of the "prudent parent" standard would be erroneous, as it would again effectively incorporate the CDHS's licensing rules into the "prudent parent" standard and apply a heightened standard to licensed child care providers. Thus, as discussed above, such application of the standard would contravene section 19-1-103(1)(a)(III).

¶ 37 We are not persuaded by the out-of-state authority relied on by CDHS. Most of the cases CDHS cites did not involve an agency finding of institutional neglect. Rather, they were tort cases brought by the parents of injured children alleging that their respective day care facilities had been negligent in caring for the children. But we are not, nor was the Office of Appeals, presented with the question of what standard of care Ansel owed the child in a tort action.[3] Instead, the issue before us — and the issue the Office of Appeals erroneously analyzed — was Ansel's duty in the context of an administrative finding of institutional abuse as that term is

[3] Because the issue is not before us, we express no opinion as to whether a child care provider's failure to comply with the regulatory requirements would establish the provider's negligence in a tort action.

defined by statute. Thus, most of the cases on which CDHS relies are inapposite.

¶ 38 Only one out-of-state case cited by CDHS, *Lindsay v. Department of Social Services*, 791 N.E.2d 866 (Mass. 2003), involved a finding of institutional neglect. In *Lindsay*, however, the operative statutory and regulatory language was not stated in terms of what actions a "prudent parent" would take. *Id.* at 872 (noting that the regulatory definition of neglect "allows [the department] to identify and provide services to any child whose caretaker is failing to provide a 'minimally adequate' level of 'essential' care for that child" (quoting 110 Mass. Code Regs. § 2.00)).[4] Because the relevant language we must interpret is different, we glean no guidance from *Lindsay*.

¶ 39 In sum, we conclude that the proper inquiry under section 19-1-103(1)(a)(III)'s "prudent parent" standard is simply whether the child's parent, legal guardian, or custodian acted as a prudent

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[4] Significantly, the neglectful act at issue in *Lindsay v. Department of Social Services*, 791 N.E.2d 866 (Mass. 2003), was leaving a four-year-old child unattended and buckled into a seat in a vehicle for nearly two hours on a summer day. *Id.* at 868-69. This act would likely not satisfy the "prudent parent" standard even assuming it were applicable.

parent would have acted under the circumstances. We also conclude that, in applying that standard, it is improper to consider a supervising adult's status as a licensed child care provider as a circumstance that informs the analysis. Because the Office of Appeals failed to apply the correct "prudent parent" standard, or, at the very least, applied the standard in a manner inconsistent with the plain language of section 19-1-103(1)(a)(III), its decision was contrary to law.[5] Accordingly, we reverse the district court's judgment affirming the Office of Appeals's decision.

§ 24-4-106(7)(b)(IX).[6]

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[5] In light of our resolution of this issue, we need not address Ansel's parallel contention that the Office of Appeals erred by creating a new standard without following the procedures set forth in the State Administrative Procedure Act, sections 24-4-101 to -204, C.R.S. 2020.

[6] We do not express any opinion on whether CDHS may take action against Ansel's license as a result of her failure to comply with the regulations. We only hold that a licensed child care provider's failure to comply with licensing regulations has no bearing on whether the provider has acted as a prudent parent would — and thus whether the provider has committed institutional abuse or neglect resulting in being listed on the statewide child abuse registry.

## III. The Agency Review of the ALJ's Findings of Evidentiary Fact Does Not Independently Require Reversal

¶ 40 Ansel also argues that the Office of Appeals failed to give adequate deference to the hearing officer's factual findings. Because, on remand, the Office of Appeals will need to apply the correct legal standard to the appropriately determined facts, we must address this contention.

### A. Applicable Law and Standard of Review

¶ 41 "The findings of evidentiary fact, as distinguished from ultimate conclusions of fact, made by the [ALJ] . . . shall not be set aside by the agency on review of the initial decision unless such findings of evidentiary fact are contrary to the weight of the evidence." § 24-4-105(15)(b), C.R.S. 2020. "The negative phrasing of this standard establishes a baseline assumption that the hearing officer's findings of evidentiary fact are accurate." *Samaritan Inst. v. Prince-Walker*, 883 P.2d 3, 10 (Colo. 1994). This standard is "more deferential than the substantial-evidence standard, and ultimately requires the agency to discover a clear error in the hearing officer's determinations to set them aside." *Id.*

¶ 42 In contrast, findings of ultimate fact "are 'conclusions of law and fact that are based on evidentiary facts and determine the rights and liabilities of the parties,' [which] require less deference" by the agency to the hearing officer. *Colo. Custom Maid, LLC v. Indus. Claim Appeals Off.*, 2019 CO 43, ¶ 12 (quoting *Federico v. Brannan Sand & Gravel Co.*, 788 P.2d 1268, 1272 (Colo. 1990)).

¶ 43 If the agency improperly substitutes its own findings of evidentiary fact for those of the ALJ, the agency exceeds its statutory authority. *Samaratin Inst.*, 883 P.2d at 10. When an agency exceeds its statutory authority, we must reverse the agency's decision. § 24-4-106(7)(b)(IV).

B. Discussion

¶ 44 At the outset, we note that Ansel does not identify any specific evidentiary fact she claims was improperly rejected. The final agency decision reflects disagreement with only two findings of evidentiary fact: (1) that in the game of "pets," "[t]he owner gives the pet commands, . . . which the pet then obeys or not"; and (2) that Ansel filed a written report with the County regarding the incident. The Office of Appeals found that the first finding was "not supported by the weight of the evidence in the record." And it noted it "cannot

find support in the record" for the second. While the review was not stated in the precise statutory language of "contrary to the weight of the evidence," we discern no reversible error.

¶ 45 As to the first finding, the Office of Appeals correctly observed that there is no evidence in the record to suggest that the child playing the pet "then obeys or not." All the testimony about the game explained that the child who plays the pet acts in an unruly and disobedient manner. According to Ansel's own testimony, that was the purpose of the game. Thus, because the ALJ's finding was contrary to the weight of the evidence, the rejection of that finding provides no basis for reversal.

¶ 46 As to the second finding, we note that, in CDHS's exceptions filed with the Office of Appeals, CDHS did not dispute the finding that the document was filed; rather, it merely asserted that the document was filed with CDHS (as the regulations required) and not with the County. Yet, the Office of Appeals found no evidence that the form was filed at all. The record supports a finding that the form was filed with CDHS. Thus, the Office of Appeals's finding that the form was not filed at all is clearly erroneous. *See* § 24-4-106(7)(b)(VII) (providing that a court reviews the agency's

factual findings to determine whether they are "clearly erroneous on the whole record"). But so is the ALJ's finding that the form was filed with the County. Ultimately, however, this finding has no bearing on whether Ansel committed institutional neglect. Thus, because the final agency decision is not "[b]ased upon" this clearly erroneous finding, *see id.*, reversal on this ground is not warranted.

¶ 47 All of the other instances in which the Office of Appeals disagreed with the ALJ involved the ultimate question of fact, i.e., whether Ansel appropriately supervised the child. For the reasons previously discussed, those ultimate findings and conclusions are erroneous because they rely on the application of an erroneous legal standard.[7] But they are not examples of the Office of Appeals giving insufficient deference to findings of *evidentiary* fact.

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[7] At oral argument, CDHS argued that the Office of Appeals concluded that, even applying the prudent parent standard without regard to the licensing regulations, Ansel's supervision was sufficiently inadequate to constitute institutional neglect. We disagree that the final agency decision can be fairly read to include such a conclusion. Thus, it remains for the Office of Appeals to resolve that question on remand.

## IV. Conclusion

¶ 48 The district court's judgment affirming the Office of Appeals's final decision is reversed. The case is remanded to the district court with directions to reverse the Office of Appeals's decision and remand the case to the Office of Appeals to review the ALJ's initial decision consistent with this opinion.

JUDGE NAVARRO and JUDGE LIPINSKY concur.

SUMMARY
December 17, 2020

**2020C0A172**

**No. 19CA1676, *Ansel v. State Department of Human Services* — Colorado Children's Code — Institutional Abuse — Child Abuse or Neglect**

As a matter of first impression, a division of the court of appeals holds that, for purposes of a determination of institutional neglect as defined in section 19-1-103(66), C.R.S. 2020, the relevant standard is the "prudent parent," and not the "prudent parent who is also a licensed child care provider." Consequently, whether a licensed child care provider followed applicable regulations is not relevant to the determination of whether the provider acted as a prudent parent would have.

COLORADO COURT OF APPEALS **2020C0A172**

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Court of Appeals No. 19CA1676
City and County of Denver District Court No. 19CV30267
Honorable Eric M. Johnson, Judge

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Amanda Ansel,

Plaintiff-Appellant,

v.

State Department of Human Services,

Defendant-Appellee.

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JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE TOW
Navarro and Lipinsky, JJ., concur

Announced December 17, 2020

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Pickard Law, P.C., Joe Pickard, Jay Pickard, Kevin Massaro, Jennifer Gehring, Littleton, Colorado, for Plaintiff-Appellant

Philip J. Weiser, Attorney General, Megan A. Embrey, Assistant Attorney General, Denver, Colorado, for Defendant-Appellee

¶ 1 El Paso County Department of Human Services (the County) found that plaintiff, Amanda Ansel, committed institutional abuse or neglect at her in-home child care facility when a child was injured while in her care. Ansel pursued an administrative appeal challenging the finding, and an administrative law judge (ALJ) agreed that Ansel's actions did not constitute child abuse or neglect. However, the Colorado Department of Human Services (CDHS), in a final agency action issued by CDHS's Office of Appeals, reversed the ALJ. The Office of Appeals issued a final agency decision concluding that Ansel had failed to comply with licensing regulations regarding supervision of children by licensed child care providers and that she had thus committed child abuse as defined in section 19-1-103(1)(a)(III), C.R.S. 2020. After unsuccessfully challenging the final agency decision in district court, Ansel asks us to reverse that decision.

¶ 2 To resolve this appeal, we must interpret the "prudent parent" standard found in section 19-1-103(1)(a)(III), as applied to a licensed child care provider. Contrary to the determination of CDHS and the district court, we conclude that, to support a finding of child abuse or neglect under section 19-1-103(1)(a)(III), the

"prudent parent" standard simply requires determining whether a licensed child care provider acted as a prudent parent would have under the circumstances. Because CDHS either misinterpreted the "prudent parent" standard or misapplied the standard to the facts of this case, we reverse the district court's judgment affirming the final agency decision and remand with directions.

## I. Background

¶ 3 On July 8, 2016, Ansel was supervising eight children at the family child care program she operated at her residence. At the time, Ansel homeschooled three children and was licensed by CDHS to provide child care from her home for up to five additional children.

¶ 4 One of the children in Ansel's care that day was D.A., an eleven-year-old boy. In the afternoon, D.A. and several other children went outside into Ansel's yard to play a game called "pets" — a game where one child pretends to be a pet while another pretends to be the pet's owner. Ansel stayed inside with the remaining children.

¶ 5 While Ansel was not watching, D.A. found a retractable dog leash and incorporated it into the game by tying it around his neck.

He then climbed up onto the roof of a playhouse and accidentally slipped off. Because he had placed the leash handle on a nearby tree branch, the leash tightened around his neck as he fell, causing significant ligature marks. D.A. later reported the he also "saw black" after he fell.

¶ 6 D.A. removed the leash and went inside to inform Ansel what happened. Approximately five minutes had elapsed from when D.A. went outside to play to when D.A. reported the incident to Ansel. Ansel was unaware of the incident until D.A. informed her about it.

¶ 7 Ansel tended to D.A. and contacted his father, who took D.A. to the emergency room. Hospital staff reported the incident to the County. Upon investigation, the County determined that Ansel was responsible for institutional neglect by failing to adequately supervise D.A. The County reported its finding to CDHS's statewide child abuse registry, known as "TRAILS."

¶ 8 Ansel appealed the County's finding of institutional abuse or neglect on the grounds that (1) the finding was not supported by a preponderance of credible evidence and (2) her actions did not meet the statutory or regulatory definitions of child abuse or neglect. A hearing was held before an ALJ, who determined that the licensing

rules for child care providers were irrelevant to the standard of care. Rather, the ALJ concluded, the appropriate level of supervision was that which a prudent parent would provide, which in this case would not require constant supervision of an eleven-year-old child playing in a fenced front yard. Because, the ALJ determined, Ansel provided a level of supervision that a prudent parent would have provided, her actions did not constitute child abuse or neglect under the relevant definitions found in section 19-1-103(1)(a)(III) and section 19-3-102(1)(b), C.R.S. 2020. Accordingly, the ALJ issued an initial decision reversing the County's finding.

¶ 9 CDHS filed exceptions to the ALJ's initial decision with CDHS's Office of Appeals, the body within CDHS responsible for final agency actions. CDHS argued that, under the "prudent parent" standard found in section 19-1-103(1)(a)(III), the ALJ was required to consider Ansel's status as a licensed child care provider and determine whether she complied with CDHS licensing rules. By failing to do so, it argued, the ALJ erred in its decision.

¶ 10 The Office of Appeals agreed with CDHS. Specifically, the Office of Appeals concluded that "[t]he 'parental decisions' made by [Ansel] and level of supervision must meet child care licensing rules

because that is what is reasonable under the circumstances in this case." Because Ansel failed to comply with the licensing rules by (1) not providing "developmentally appropriate" supervision while the child was in the front yard and (2) not knowing the location and activity of all of the children at all times, the Office of Appeals concluded that she failed to meet the standard of the "prudent parent." Dep't of Hum. Servs. Rules 7.707.741.A, 7.707.933.B, 12 Code Colo. Regs. 2509-8. The Office of Appeals thus issued a final agency decision reversing the ALJ's decision and upholding the County's finding.

¶ 11 Ansel sought judicial review of the final agency decision pursuant to section 24-4-106, C.R.S. 2020, arguing that the Office of Appeals erred in interpreting and applying section 19-1-103(1)(a)(III)'s "prudent parent" standard and that the Office of Appeals overstepped its authority by substituting its own findings of historical fact for those of the ALJ. The district court affirmed the final agency decision.

## II. The Office of Appeals Applied the Wrong Legal Standard

### A. Standard of Review

¶ 12 On appeal from a district court's review of a final agency action, we apply the same standard of review as the district court — the standard set forth in section 24-4-106(7). § 24-4-106(7), (11)(e); *Romero v. Colo. Dep't of Hum. Servs.*, 2018 COA 2, ¶ 25. In particular, "[i]n all cases under review, the court shall determine all questions of law and interpret the statutory and constitutional provisions involved and shall apply the interpretation to the facts duly found or established." § 24-4-106(7)(d). As relevant here, we may set aside a final agency action if it is "contrary to law." § 24-4-106(7)(b)(IX).

¶ 13 Additionally, whether the Office of Appeals erred by reversing the ALJ's decision turns on the interpretation of sections 19-1-103(1)(a)(III) and 19-3-102(1)(b), which we review de novo. *BP Am. Prod. Co. v. Colo. Dep't of Revenue*, 2016 CO 23, ¶ 9.

### B. Applicable Law

¶ 14 The Child Protection Act of 1987 (the Act) creates a structure by which incidents of child abuse are investigated, reported, and documented. §§ 19-3-301 to -317, C.R.S. 2020. When a county

department of human services investigates and confirms an incident of child abuse or neglect, it is statutorily required to submit a report to CDHS. § 19-3-307, C.R.S. 2020. Those found responsible for a confirmed incident of child abuse or neglect are then afforded an opportunity to appeal that finding to CDHS. § 19-3-313.5(3), C.R.S. 2020; Dep't of Hum. Servs. Rule 7.111, 12 Code Colo. Regs. 2509-2. Should CDHS and the appellant be unable or unwilling to resolve the appeal, CDHS "shall forward the appeal to the Office of Administrative Courts to proceed to a fair hearing before an [ALJ]," who issues an initial decision. Dep't of Hum. Servs. Rule 7.111.A, 12 Code Colo. Regs. 2509-2; Dep't of Hum. Servs. Rule 3.850.71, 9 Code Colo. Regs. 2503-8. The Office of Appeals must then review the initial decision of the ALJ and enter a final agency decision affirming, modifying, or reversing the initial decision. Dep't of Hum. Servs. Rule 3.850.72, 9 Code Colo. Regs. 2503-8.

¶ 15 Under CDHS regulations, a party may only appeal a finding of abuse or neglect on two grounds: (1) the finding is "not supported by a preponderance of credible evidence" or (2) "[t]he actions ultimately found to be abusive or neglectful do not meet the

statutory or regulatory definitions of child abuse or neglect." Dep't of Hum. Servs. Rules 7.111.B.1, .2, 12 Code Colo. Regs. 2509-2. At issue here is CDHS's finding as to the latter ground for appeal — whether Ansel's actions constituted institutional child abuse or neglect.

¶ 16 For purposes of the Act, "[i]nstitutional abuse" means "any case of abuse, as defined in [section 19-1-103(1)], that occurs in any public or private facility in the state that provides child care out of the home, supervision, or maintenance."[1] § 19-1-103(66). The CDHS regulation defining "child abuse and/or neglect" similarly adopts the definition provided in section 19-1-103(1). Dep't of Hum. Servs. Rule 7.000.2.A, 12 Code Colo. Regs. 2509-1. However, it also incorporates the definition found in section 19-3-102(1). *Id.* Hence, to determine whether Ansel's actions constituted institutional abuse or neglect, the Office of Appeals applied sections 19-1-103(1) and 19-3-102(1).

¶ 17 As relevant here, section 19-1-103(1) defines "abuse" or "child abuse or neglect" as

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[1] The parties do not dispute that Ansel's home qualifies as a child care facility within the meaning of that term in this definition.

> an act or omission . . . that threatens the health or welfare of a child . . . [in] [a]ny case in which a child is a child in need of services because the child's parents, legal guardian, or custodian fails to take the same actions to provide adequate . . . supervision that a prudent parent would take.

§ 19-1-103(1)(a)(III).[2] And section 19-3-102(1) provides, in pertinent part, that "[a] child is neglected or dependent if . . . [t]he child lacks proper parental care through the actions or omissions of the parent, guardian, or legal custodian." § 19-3-102(1)(b).

### C. Discussion

¶ 18 Ansel argues that the Office of Appeals erred in interpreting and applying sections 19-1-103(1)(a)(III) and 19-3-102(1)(b) in its decision. Thus, she argues, the decision by the Office of Appeals was contrary to law, and, accordingly, its decision should be reversed under section 24-4-106(7). We agree.

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[2] We note that neither the statute nor the regulations define "child in need of services" — or even "services" — as those terms are used in the Act. However, since neither party questions whether D.A. qualifies as a "child in need of services," we assume without deciding that he does.

1. Section 19-3-102(1)(b) Is Inapplicable

¶ 19 In its review of the ALJ's initial decision, the Office of Appeals appeared to apply both section 19-1-103(1)(a)(III) and section 19-3-102(1)(b) in determining whether Ansel's actions constituted child abuse or neglect. However, as to section 19-3-102(1)(b), only the actions or omissions of a child's "parent, guardian, or legal custodian" can meet the definition of neglect under the provision. And here, it is undisputed that Ansel was neither the child's "parent" nor "guardian" within the meaning of the statute. *See* § 19-1-103(60), (82) (defining those terms as used in Title 19). Nor, in our view, could Ansel have been considered the child's "legal custodian."

¶ 20 The term "custodian," as used in Title 19, refers to a "person who has been providing shelter, food, clothing, and other care for a child in the same fashion as a parent would, whether or not by order of court." § 19-1-103(35). Thus, in her capacity as a child care provider, Ansel was a "custodian" of the child.

¶ 21 However, while some statutes under Title 19, like section 19-1-103(1)(a)(III), use the term "custodian" on its own, others, like section 19-3-102(1)(b), instead use the more specific term "legal

custodian." The deliberate addition of the qualifier "legal," in our view, indicates that the term "legal custodian" references a different type of relationship with a child than that of a simple "custodian." Thus, while Ansel may have been the child's "custodian," she was not necessarily the child's "legal custodian" within the meaning of section 19-3-102(1)(b).

¶ 22 Though Title 19 does not define "legal custodian," it does provide a definition of "legal custody": "the right to the care, custody, and control of a child and the duty to provide food, clothing, shelter, ordinary medical care, education, and discipline for a child and, in an emergency, to authorize surgery or other extraordinary care." § 19-1-103(73)(a). Drawing from that definition, we conclude that a person must have "legal custody" of a child as defined in section 19-1-103(73)(a) to be considered a child's "legal custodian" as the term is used section 19-3-102(1)(b). *See In re Marriage of Rodrick*, 176 P.3d 806, 811 (Colo. App. 2007) (defining "legal custodian," for purposes of section 19-5-203(1)(k) — governing a child's availability for adoption — as one who is a "custodian" of a child under section 19-1-103(35) and has "legal custody" of the child under section 19-1-103(73)(a)).

¶ 23 Absent a court order, only a child's parent has the right to care, custody, or control of the child. *See Troxel v. Granville*, 530 U.S. 57, 68 (2000) (parents have a fundamental right founded in the constitution to make decisions concerning the care, custody, and control of their children); § 19-1-103(73)(a) (providing that the right to care, custody, and control of a child "may be taken from a parent only by court action"). And here, the record indicates that Ansel was neither a parent of the child nor ordered by a court to care for the child in any specific capacity. Rather, Ansel's sole relationship to the child was that of a paid child care provider. Because Ansel therefore did not have the right to care, custody, or control of the child, she did not have "legal custody" of the child. Thus, she could not be considered the child's "legal custodian" under section 19-3-102(1)(b). Accordingly, because Ansel was neither the child's parent or guardian, nor his legal custodian, section 19-3-102(1)(b) is inapplicable in determining whether Ansel's actions constituted child abuse or neglect.

### 2. We Decline to Defer to the Department's Interpretation of Section 19-1-103(1)(a)(III)

¶ 24 Turning to section 19-1-103(1)(a)(III), as part of our de novo review of the statute, we "may consider and even defer to an agency's interpretation." *BP Am. Prod. Co.*, ¶ 15.

> However, while we may give deference to an agency's interpretation of a statute it administers, administrative interpretations are most useful to the court when the statutory language is susceptible to more than one reasonable interpretation and the subject involved calls for the exercise of technical expertise which the agency possesses.

*Com. Fed. Sav. & Loan Ass'n v. Douglas Cnty. Bd. of Equalization*, 867 P.2d 17, 20 (Colo. App. 1993). Thus, "[w]e need not defer to the agency's interpretation unless a statutory term is reasonably susceptible of more than one interpretation, and the agency has employed its expertise to select a particular interpretation." *Int'l Truck & Engine Corp. v. Colo. Dep't of Revenue*, 155 P.3d 640, 642 (Colo. App. 2007); *accord Colo. State Pers. Bd. v. Dep't of Corr., Div. of Adult Parole Supervision*, 988 P.2d 1147, 1150 (Colo. 1999).

¶ 25 Here, although CDHS presented expert testimony regarding the regulatory requirements governing child care providers, we do not believe that CDHS's expertise is necessary to interpret section

19-1-103(1)(a)(III). Rather, as we discuss more fully below, interpreting this statute merely requires examining the construction and plain language of the statute — a task well within the capabilities and purview of this court. And in any event, "courts are not bound by the agency's interpretation." *BP Am. Prod. Co.*, ¶ 15. Thus, we decline to afford CDHS's interpretation of section 19-1-103(1)(a)(III) deference in our review.

3. The Department Misinterpreted the "Prudent Parent" Standard in Section 19-1-103(1)(a)(III)

¶ 26 In the ALJ's initial decision, the ALJ applied section 19-1-103(1)(a)(III)'s "prudent parent" standard to determine whether Ansel had abused or neglected the child. Looking to the plain language of the statute, the ALJ concluded that the "prudent parent" standard required determining whether Ansel had exercised the supervision expected of a reasonably prudent parent under the circumstances. Because the ALJ concluded that Ansel had done so, the ALJ reversed the County's finding of institutional child abuse or neglect.

¶ 27 On review, however, the Office of Appeals determined that the ALJ interpreted the statute too narrowly. It concluded that, in the

context of institutional abuse or neglect, the ALJ was required to consider Ansel's role as a licensed child care provider. Specifically, the Office of Appeals determined that the "prudent parent" standard requires that a licensed child care provider act as would a reasonable licensed child care provider — not a reasonable parent — under the circumstances. The Office of Appeals further determined that a reasonable licensed child care provider would comply with the Child Care Licensing Act, sections 26-6-101 to -122, C.R.S. 2020, and CDHS's child care facility licensing rules found in 12 Code Colorado Regulations 2509-8. Thus, it concluded that a level of supervision inconsistent with those laws and regulations cannot satisfy the "prudent parent" standard. Because the Office of Appeals found that Ansel's supervision of the child was not consistent with two child care licensing rules (i.e., the requirements to provide developmentally appropriate supervision and to know the child's activities at all times) it found that Ansel's actions amounted to child abuse or neglect under section 19-1-103(1)(a)(III).

¶ 28 We disagree with the Office of Appeals's interpretation of the "prudent parent" standard because this interpretation is

inconsistent with the plain language of the statute in two fatal ways.

¶ 29 First, the statute only provides that, to constitute child abuse or neglect, a "child's parents, legal guardian, or custodian" must "fail[] to take the same actions . . . that a prudent parent would take." § 19-1-103(1)(a)(III). In articulating the "prudent parent" standard, the statute specifically refers to how a "parent" — not a licensed child care provider — would act. And, notably, it does not reference any other statute or any department regulation for guidance as to how a "prudent parent" would act. Thus, in our view, the statute simply provides that, for purposes of a finding of institutional abuse or neglect, child abuse or neglect can be found where one has failed to act as a prudent parent would under the circumstances.

¶ 30 As CDHS points out, the "prudent parent" standard appears to be modeled on the common law tort concept of the reasonable person standard, which requires that an actor "conform his or her conduct to a standard of objective behavior measured by what a reasonable person of ordinary prudence would or would not do under the same or similar circumstances." *United Blood Servs. v.*

*Quintana*, 827 P.2d 509, 519 (Colo. 1992). But we disagree with CDHS's suggestion that, like the reasonable person standard, the circumstances of one's profession must also be considered under the "prudent parent" standard where one is acting in a professional capacity. *See id.* The plain language of the statute specifically refers to how a prudent "parent" would act, not a prudent "professional," or, more broadly, a prudent "person." *See* § 19-1-103(1)(a)(III). Thus, CDHS's assertion, and the Office of Appeals's conclusion, that section 19-1-103(1)(a)(III) holds licensed child care providers to the standard of a prudent child care professional, as opposed to a prudent "parent," is not supported by the statute.

¶ 31 Moreover, the Office of Appeals's interpretation effectively incorporates the entirety of CDHS's licensing rules into the "prudent parent" standard where a licensed child care provider is involved. Essentially, CDHS argues that the definition of "child abuse or neglect" changes when the alleged neglect occurs in an institutional setting because the rules governing that institution are grafted onto the concept of neglect.

¶ 32 Thus, under the Office of Appeals's interpretation, the "prudent parent" standard asks not whether a child care provider has acted as a prudent parent would — the standard articulated in the statute — but whether the provider has complied with CDHS's licensing rules. In other words, the Office of Appeals's interpretation of the "prudent parent" standard requires an entirely different analysis than that presented by the statute's plain language.

¶ 33 This interpretation, however, misreads the interplay between two definitional provisions. As noted above, "[i]nstitutional abuse" refers back to the general definition for "abuse" in section 19-1-103(1), which includes neglect that occurs in an enumerated facility. § 19-1-103(66). Simply stated, the determination of whether there was institutional abuse is a two-step inquiry: (1) Was there abuse?; and (2) Did such abuse occur in a covered facility? But the first determination is independent of the second, and nothing in either definition suggests that one modifies the other, or that the latter creates a different standard from the former.

¶ 34 The second fatal flaw in the Office of Appeals's interpretation is that the statute's construction indicates that the same "prudent

parent" standard applies regardless of whether the supervising adult is a child's parent, legal guardian, or custodian (like Ansel). Indeed, the statute states that an act or omission may constitute child abuse or neglect where "the child's parents, legal guardian, or custodian fails to take the same actions . . . that a prudent parent would take." § 19-1-103(1)(a)(III). The statute does not distinguish between the three enumerated classes of supervising adults or otherwise suggest that one should be held to a higher standard than the others. In other words, it does not say "take the same actions . . . that a prudent parent, *legal guardian, or custodian* would take." Thus, contrary to the Office of Appeals's conclusion, the statutory language does not indicate that licensed child care providers should be held to a different standard because of their status as professionals. Rather, the construction of the statute indicates an intent that the same standard that applies to parents applies equally to legal guardians and custodians (including licensed child care providers). And, as the ALJ noted, a reasonably prudent parent may well engage in conduct that would not necessarily be consistent with every CDHS licensing rule.

¶ 35 The Office of Appeals's interpretation, however, requires a separate analysis under the "prudent parent" standard for licensed child care providers that is distinct from parents or guardians. Specifically, it requires that licensed child care providers, but not parents or guardians, comply with the Child Care Licensing Act and CDHS regulations and otherwise act as a reasonable professional would under the circumstances. Thus, the Office of Appeals interpreted the "prudent parent" standard such that licensed child care providers are held to a higher standard solely because of their status as a type of "custodian." *See* § 19-1-103(35). But applying a heightened standard only to licensed child care providers is inconsistent with a plain reading of the statute.

¶ 36 We note that the Office of Appeals's analysis under section 19-1-103(1)(a)(III) could be interpreted as applying the proper "prudent parent" standard — that is, how a prudent parent would have acted under the circumstances — but considering Ansel's status as a licensed child care provider as a circumstance that informed its analysis. In other words, the Office of Appeals's decision may be construed as concluding that a prudent parent who was acting as a licensed child care provider would conform

their behavior to CDHS's licensing rules. But such an application of the "prudent parent" standard would be erroneous, as it would again effectively incorporate the CDHS's licensing rules into the "prudent parent" standard and apply a heightened standard to licensed child care providers. Thus, as discussed above, such application of the standard would contravene section 19-1-103(1)(a)(III).

¶ 37 We are not persuaded by the out-of-state authority relied on by CDHS. Most of the cases CDHS cites did not involve an agency finding of institutional neglect. Rather, they were tort cases brought by the parents of injured children alleging that their respective day care facilities had been negligent in caring for the children. But we are not, nor was the Office of Appeals, presented with the question of what standard of care Ansel owed the child in a tort action.[3] Instead, the issue before us — and the issue the Office of Appeals erroneously analyzed — was Ansel's duty in the context of an administrative finding of institutional abuse as that term is

[3] Because the issue is not before us, we express no opinion as to whether a child care provider's failure to comply with the regulatory requirements would establish the provider's negligence in a tort action.

defined by statute. Thus, most of the cases on which CDHS relies are inapposite.

¶ 38 Only one out-of-state case cited by CDHS, *Lindsay v. Department of Social Services*, 791 N.E.2d 866 (Mass. 2003), involved a finding of institutional neglect. In *Lindsay*, however, the operative statutory and regulatory language was not stated in terms of what actions a "prudent parent" would take. *Id.* at 872 (noting that the regulatory definition of neglect "allows [the department] to identify and provide services to any child whose caretaker is failing to provide a 'minimally adequate' level of 'essential' care for that child" (quoting 110 Mass. Code Regs. § 2.00)).[4] Because the relevant language we must interpret is different, we glean no guidance from *Lindsay*.

¶ 39 In sum, we conclude that the proper inquiry under section 19-1-103(1)(a)(III)'s "prudent parent" standard is simply whether the child's parent, legal guardian, or custodian acted as a prudent

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[4] Significantly, the neglectful act at issue in *Lindsay v. Department of Social Services*, 791 N.E.2d 866 (Mass. 2003), was leaving a four-year-old child unattended and buckled into a seat in a vehicle for nearly two hours on a summer day. *Id.* at 868-69. This act would likely not satisfy the "prudent parent" standard even assuming it were applicable.

parent would have acted under the circumstances. We also conclude that, in applying that standard, it is improper to consider a supervising adult's status as a licensed child care provider as a circumstance that informs the analysis. Because the Office of Appeals failed to apply the correct "prudent parent" standard, or, at the very least, applied the standard in a manner inconsistent with the plain language of section 19-1-103(1)(a)(III), its decision was contrary to law.[5] Accordingly, we reverse the district court's judgment affirming the Office of Appeals's decision.

§ 24-4-106(7)(b)(IX).[6]

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[5] In light of our resolution of this issue, we need not address Ansel's parallel contention that the Office of Appeals erred by creating a new standard without following the procedures set forth in the State Administrative Procedure Act, sections 24-4-101 to -204, C.R.S. 2020.

[6] We do not express any opinion on whether CDHS may take action against Ansel's license as a result of her failure to comply with the regulations. We only hold that a licensed child care provider's failure to comply with licensing regulations has no bearing on whether the provider has acted as a prudent parent would — and thus whether the provider has committed institutional abuse or neglect resulting in being listed on the statewide child abuse registry.

## III. The Agency Review of the ALJ's Findings of Evidentiary Fact Does Not Independently Require Reversal

¶ 40 Ansel also argues that the Office of Appeals failed to give adequate deference to the hearing officer's factual findings. Because, on remand, the Office of Appeals will need to apply the correct legal standard to the appropriately determined facts, we must address this contention.

### A. Applicable Law and Standard of Review

¶ 41 "The findings of evidentiary fact, as distinguished from ultimate conclusions of fact, made by the [ALJ] . . . shall not be set aside by the agency on review of the initial decision unless such findings of evidentiary fact are contrary to the weight of the evidence." § 24-4-105(15)(b), C.R.S. 2020. "The negative phrasing of this standard establishes a baseline assumption that the hearing officer's findings of evidentiary fact are accurate." *Samaritan Inst. v. Prince-Walker*, 883 P.2d 3, 10 (Colo. 1994). This standard is "more deferential than the substantial-evidence standard, and ultimately requires the agency to discover a clear error in the hearing officer's determinations to set them aside." *Id.*

¶ 42 In contrast, findings of ultimate fact "are 'conclusions of law and fact that are based on evidentiary facts and determine the rights and liabilities of the parties,' [which] require less deference" by the agency to the hearing officer. *Colo. Custom Maid, LLC v. Indus. Claim Appeals Off.*, 2019 CO 43, ¶ 12 (quoting *Federico v. Brannan Sand & Gravel Co.*, 788 P.2d 1268, 1272 (Colo. 1990)).

¶ 43 If the agency improperly substitutes its own findings of evidentiary fact for those of the ALJ, the agency exceeds its statutory authority. *Samaratin Inst.*, 883 P.2d at 10. When an agency exceeds its statutory authority, we must reverse the agency's decision. § 24-4-106(7)(b)(IV).

B. Discussion

¶ 44 At the outset, we note that Ansel does not identify any specific evidentiary fact she claims was improperly rejected. The final agency decision reflects disagreement with only two findings of evidentiary fact: (1) that in the game of "pets," "[t]he owner gives the pet commands, . . . which the pet then obeys or not"; and (2) that Ansel filed a written report with the County regarding the incident. The Office of Appeals found that the first finding was "not supported by the weight of the evidence in the record." And it noted it "cannot

find support in the record" for the second. While the review was not stated in the precise statutory language of "contrary to the weight of the evidence," we discern no reversible error.

¶ 45 As to the first finding, the Office of Appeals correctly observed that there is no evidence in the record to suggest that the child playing the pet "then obeys or not." All the testimony about the game explained that the child who plays the pet acts in an unruly and disobedient manner. According to Ansel's own testimony, that was the purpose of the game. Thus, because the ALJ's finding was contrary to the weight of the evidence, the rejection of that finding provides no basis for reversal.

¶ 46 As to the second finding, we note that, in CDHS's exceptions filed with the Office of Appeals, CDHS did not dispute the finding that the document was filed; rather, it merely asserted that the document was filed with CDHS (as the regulations required) and not with the County. Yet, the Office of Appeals found no evidence that the form was filed at all. The record supports a finding that the form was filed with CDHS. Thus, the Office of Appeals's finding that the form was not filed at all is clearly erroneous. *See* § 24-4-106(7)(b)(VII) (providing that a court reviews the agency's

factual findings to determine whether they are "clearly erroneous on the whole record"). But so is the ALJ's finding that the form was filed with the County. Ultimately, however, this finding has no bearing on whether Ansel committed institutional neglect. Thus, because the final agency decision is not "[b]ased upon" this clearly erroneous finding, *see id.*, reversal on this ground is not warranted.

¶ 47 All of the other instances in which the Office of Appeals disagreed with the ALJ involved the ultimate question of fact, i.e., whether Ansel appropriately supervised the child. For the reasons previously discussed, those ultimate findings and conclusions are erroneous because they rely on the application of an erroneous legal standard.[7] But they are not examples of the Office of Appeals giving insufficient deference to findings of *evidentiary* fact.

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[7] At oral argument, CDHS argued that the Office of Appeals concluded that, even applying the prudent parent standard without regard to the licensing regulations, Ansel's supervision was sufficiently inadequate to constitute institutional neglect. We disagree that the final agency decision can be fairly read to include such a conclusion. Thus, it remains for the Office of Appeals to resolve that question on remand.

## IV. Conclusion

¶ 48 The district court's judgment affirming the Office of Appeals's final decision is reversed. The case is remanded to the district court with directions to reverse the Office of Appeals's decision and remand the case to the Office of Appeals to review the ALJ's initial decision consistent with this opinion.

JUDGE NAVARRO and JUDGE LIPINSKY concur.