STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Susan Edge, Appellant, vs. South Carolina Department of Health and Human Services, Respondent.	)	Docket No. 10-ALJ-08-0501-AP ORDER
Jimmy W. Eubanks, Jr., Appellant, vs. South Carolina Department of Health and Human Services, Respondent.	)	Docket No. 10-ALJ-08-0502-AP
Michelle Morgan, Appellant, vs. South Carolina Department of Health and Human Services, Respondent.	)	Docket No. 10-ALJ-08-0503-AP
Albert Cooper Myers, Appellant, vs. South Carolina Department of Health and Human Services, Respondent.	)	Docket No. 10-ALJ-08-0504-AP

I. STATEMENT OF THE CASE

These matters are before the South Carolina Administrative Law Court ("ALC" or "Court") in its appellate jurisdiction pursuant to S.C. Code Ann. § 1-23-600(D) (Supp. 2010). Susan Edge, Jimmy W. Eubanks, Jr., Michelle Morgan, and Albert Cooper Myers ("Appellants") appeal the final administrative decisions of the South Carolina Department of Health and Human Services ("HHS") to reduce or discontinue services and/or supplies under the Mental Retardation/Related Disabilities ("MR/RD") waiver program.[1] The changes concerning the MR/RD waiver program were imposed as a consequence of substantial reductions in State budget appropriations for the agency.

Upon careful review of these matters, considering the Record on Appeal, the briefs, and applicable law, these matters must be remanded to HHS to conduct evidentiary hearings for each individual.

II. FACTUAL BACKGROUND

A. Susan Edge

Susan Edge ("Edge") is a recipient of Medicaid Services and is currently receiving services under the MR/RD waiver program, a federally approved and state-administered Medicaid program. On January 1, 2010, the five-year renewal of the MR/RD waiver was approved by the Center for Medicare and Medicaid Services ("CMS"). The renewed waiver included a cap or limit on some services and termination of some prior authorized services. Prior to the MR/RD waiver renewal on January 1, 2010, Edge was authorized to receive 32 cases, annually, of liquid nutrition. Under the renewal of the MR/RD waiver, Edge was authorized to receive the cap of 24 cases, annually, of liquid nutrition.

B. Jimmy W. Eubanks, Jr.

Jimmy W. Eubanks, Jr. ("Eubanks") is a recipient of Medicaid Services and is currently receiving services under the MR/RD waiver program. Prior to the MR/RD waiver renewal on January 1, 2010, Eubanks was authorized to receive fifty-two (52) hours of Personal Care Aide II services per week and one hundred four (104) hours of Respite Care per week. After the renewal was effective, Eubanks' Personal Care Aide services were reduced to twenty-eight (28) hours per week; however, he did not receive a reduction of services regarding Respite Care.

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[1] Each Appellant filed an individual appeal to challenge HHS's decisions. After the appeals were made to the ALC, by order dated October 4, 2010, the four individual appeals were consolidated as each concerned the same question of law.

C. Michelle Morgan

Michelle Morgan ("Morgan") is a recipient of Medicaid Services and is currently receiving services under the MR/RD waiver program. Prior to the MR/RD waiver renewal on January 1, 2010, Morgan was authorized to receive fifty-six (56) hours of Personal Care Aide II services per week. After the renewal was effective, Morgan's Personal Care Aide services were reduced to twenty-eight (28) hours per week.

D. Albert Cooper Myers

Albert Cooper Myers ("Myers") is a recipient of Medicaid Services and is currently receiving services under the MR/RD waiver program. Prior to the MR/RD waiver renewal on January 1, 2010, Myers was authorized to receive the following: Dental; 5 units per week of Community Services; 5 units per week of Day Activity; Specialized Medical Equipment; Supplies and Assistive Technology – Peri Wash; Attend Wash clothes; Diapers; 4 units per week of Physical Therapy; 45 hours per week of Personal Care Aide II services; 48 units annually of Daily Respite; and 456 units annually of Hourly Respite. After the renewal was effective, Myers' retained the same authorized services as modified: twenty eight (28) hours per week of Personal Care Aide II services; twenty-four (24) units per week of Personal Care Aide I services; and sixty-eight (68) units per month of Respite care, with an exception granting Myers an additional 33 units per month (for a total of 101 units of Respite Care per month).

III. PROCEDURAL BACKGROUND

A. Susan Edge

On January 19, 2010, the Director of the South Carolina Department of Disabilities and Special Needs ("DDSN") notified Edge in writing that the decision to reduce her services based upon the MR/RD waiver renewal on January 1, 2010 was upheld. DDSN upheld the decision based upon its inability to exceed the established limits of the MR/RD waiver. On February 12, 2010, Edge, through counsel, appealed the decision to reduce her services. On March 3, 2010, the Department's hearing officer issued an Interlocutory Order asking Edge for a written statement of any allegation of any error made by the agency in its modification of the Medicaid sponsored waiver services provided through DDSN.[2] Edge responded to the Interlocutory Order on March 22, 2010, and counsel for the

[2] A revised Interlocutory Order was sent to counsel on March 5, 2010, which corrected a typographical error in the original order.

Department submitted his reply to the allegations contained within Edge's response to the Interlocutory Order. Based upon the filings made by each party, the Department hearing officer issued an Order of Dismissal on May 12, 2010. No evidentiary hearing was conducted prior to the hearing officer's Order of Dismissal.

Based upon Edge's filings, the Department hearing officer determined that her arguments concerned the validity of the modified MR/RD waiver limits, effective January 1, 2010, and no argument was made concerning the application of the waiver program limits to Edge, individually. In the order, the hearing officer determined that Edge failed to state any error of law with regard to the new limits of the waiver program, and thus, the appeal was dismissed. On May 26, 2010, Edge submitted a motion for reconsideration of the hearing officer's May 12, 2010 Order of Dismissal. On June 18, 2010, Edge filed a Notice of Appeal with the ALC to challenge the Department's May 12, 2010 Order of Dismissal. To date, the Department hearing officer has not ruled upon Edge's motion for reconsideration.

B. Jimmy W. Eubanks, Jr.

On January 11, 2010, the Director of DDSN notified Eubanks, through counsel, in writing that the decision to reduce his services based upon the MR/RD waiver renewal on January 1, 2010 was upheld. DDSN upheld the decision based upon its inability to exceed the established limits of the MR/RD waiver. On February 5, 2010, the Department's hearing officer issued an Interlocutory Order asking Eubanks for a written statement of any allegation of any error made by the agency in its modification of the Medicaid sponsored waiver services provided through DDSN. Eubanks responded to the Interlocutory Order on February 24, 2010, and counsel for the Department submitted his reply to the allegations contained within Eubanks' response to the Interlocutory Order. Based upon the filings made by the parties, the Department hearing officer issued an Order of Dismissal on April 29, 2010. No evidentiary hearing was conducted prior to the hearing officer's Order of Dismissal.

Based upon Eubanks' filings, the Department hearing officer determined that Eubanks' arguments concerned the validity of the modified MR/RD waiver limits, effective January 1, 2010, and no argument was made concerning the application of the waiver program limits to Eubanks, individually. In the order, the hearing officer determined that Eubanks failed to state any error of law with regard to the new limits of the waiver program, and thus, the appeal was dismissed. On May

17, 2010, Eubanks submitted a motion for reconsideration of the hearing officer's April 29, 2010 Order of Dismissal. On June 18, 2010, Eubanks filed a Notice of Appeal with the ALC to challenge the Department's May 17, 2010 Order of Dismissal. The Department hearing officer denied Eubanks' motion for reconsideration on May 24, 2010.

C. Michelle Morgan

On January 13, 2010, the Director of DDSN notified Morgan, through counsel, in writing that the decision to reduce her services based upon the MR/RD waiver renewal on January 1, 2010 was upheld. DDSN upheld the decision based upon its inability to exceed the established limits of the MR/RD waiver. On February 11, 2010, Morgan appealed the decision to reduce her services. On March 1, 2010, the Department's hearing officer issued an Interlocutory Order asking Morgan for a written statement of any allegation of any error made by the agency in its modification of the Medicaid sponsored waiver services provided through DDSN. Morgan responded to the Interlocutory Order on March 18, 2010, and counsel for the Department submitted his reply to the allegations contained within Morgan's response to the Interlocutory Order. Based upon the filings made by each party, the Department hearing officer issued an Order of Dismissal on May 17, 2010. No evidentiary hearing was conducted prior to the hearing officer's Order of Dismissal.

Based upon Morgan's filings, the Department hearing officer determined that her arguments concerned the validity of the modified MR/RD waiver limits, effective January 1, 2010, and no argument was made concerning the application of the waiver program limits to Morgan, individually. In the order, the hearing officer determined that Morgan failed to state any error of law with regard to the new limits of the waiver program, and thus, the appeal was dismissed. On June 1, 2010, Morgan submitted a motion for reconsideration of the hearing officer's May 17, 2010 Order of Dismissal. On June 18, 2010, Morgan filed a Notice of Appeal with the ALC to challenge the Department's May 17, 2010 Order of Dismissal. The Department hearing officer denied Morgan's motion for reconsideration on August 8, 2010.

D. Albert Cooper Myers

On January 13, 2010, the Director of DDSN notified Myers in writing that the decision to reduce his services based upon the MR/RD waiver renewal on January 1, 2010 was upheld. DDSN upheld the decision based upon its inability to exceed the established limits of the MR/RD waiver. On February 25, 2010, the Department's hearing officer issued an Interlocutory Order asking Myers

and/or his representative for a written statement of any allegation of any error made by the agency in its modification of the Medicaid sponsored waiver services provided through DDSN. Myers' counsel responded to the Interlocutory Order on March 15, 2010, and counsel for the Department submitted his reply to the allegations contained within Myers' response to the Interlocutory Order. Based upon the filings made by Myers, the Department hearing officer issued an Order of Dismissal on May 6, 2010. No evidentiary hearing was conducted prior to the hearing officer's Order of Dismissal.

Based upon Myers' filings, the Department hearing officer determined that his arguments concerned the validity of the modified MR/RD waiver limits, effective January 1, 2010, and no argument was made concerning the application of the waiver program limits to Myers, individually. In the order, the hearing officer determined that Myers failed to state any error of law with regard to the new limits of the waiver program, and thus, the appeal was dismissed. On May 21, 2010, Myers submitted a motion for reconsideration of the hearing officer's May 6, 2010 Order of Dismissal. On June 18, 2010, Myers filed a Notice of Appeal with the ALC to challenge the Department's May 6, 2010 Order of Dismissal. To date, the Department hearing officer has not ruled upon Myers' motion for reconsideration.

E. Filings in Other Forums

i. South Carolina Supreme Court

Appellants, among others, filed a Petition with the South Carolina Supreme Court in December 2009 and requested the Court to issue an injunction to prevent the changes to the MR/RD waiver program becoming effective January 1, 2010. The Petition was denied on February 4, 2010.

ii. United States District Court, District of South Carolina

Appellants Eubanks and Morgan (and another unrelated plaintiff) filed a petition in the United States District Court, District of South Carolina, Greenville Division and alleged that the reduction in their services provided under the state's MR/RD waiver program violated the Americans with Disabilities Act ("ADA"). In their filings, Eubanks and Morgan seek declaratory and injunctive relief for alleged violations of the ADA. On November 24, 2010, a federal magistrate judge issued a Report and Recommendation that recommended that the Department be ordered to maintain and/or return services to the quality enjoyed by Eubanks and Morgan prior to January 1, 2010. To date, a federal district judge has not ruled upon Eubanks and Morgan's motion for preliminary injunction.

F. Procedural History of consolidated cases before the ALC

On September 15, 2010, Appellants filed a motion for extension of time and consolidation. The Department filed a return to the motion and cross-motion to dismiss on September 24, 2010. In its motion to dismiss, the Department argued that Appellants did not timely file their appeals as the motions for reconsideration did not toll the time to file the notice of appeals with the ALC. Appellants filed their replies on October 12, 2010.

By order dated October 4, 2010, the undersigned consolidated the individual appeals of Appellants. Further, the Court denied the department's motion to dismiss. The Court determined that the motions for reconsideration were valid, and pursuant to Rule 59(e), SCRCP, stayed the time for an appeal for all parties. On February 18, 2011, Appellants filed their brief, and the Department filed its appellate brief on March 22, 2011. Appellants filed a reply brief on April 4, 2011.

IV. ISSUES ON APPEAL

Appellants raise the following issues on appeal:

1. Have the Appellants' due process rights to be heard before an unbiased tribunal been violated by the Department because the hearing officers were predisposed to rule against them?

2. Has the Department violated 42 U.S.C. 1396a(a)(3), the requirements of 42 C.F.R. 431.210 and the Appellants' constitutional due process rights by failing to provide evidentiary hearings and a final decision within ninety days of Appellants' requests for a fair hearing?

V. STANDARD OF REVIEW

This Court's appellate review of final decisions of the Department is governed by standards provided in S.C. Code Ann. § 1-23-380. See also S.C. Code Ann. § 1-23-600(E). Section 1-23-380 provides that this Court "may not substitute its judgment for the judgment of the [Department] as to the weight of the evidence on questions of fact." § 1-23-380(5). However, this Court, pursuant to § 1-23-380(5),

> may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the [Respondent];
> (c) made upon unlawful procedure;
> (d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id.; see also Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981) (stating "'[s]ubstantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the Record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action.") Id. at 135, 276 S.E.2d at 306. "The findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence." Hull v. Spartanburg County Assessor, 372 S.C. 420, 424, 341 S.E.2d 909, 911 (Ct. App. 2007) (citing Kearse v. State Health and Human Servs. Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995). Accordingly, "[t]he 'possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" Grant v. S.C. Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995) (citing Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm., 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)).

Further, an abuse of discretion occurs when an administrative agency's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or, when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious. State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006) (application of standard to circuit court), citing Fontaine v. Peitz, 291 S.C. 536, 539, 354 S.E.2d 565, 566 (1987); see also Converse Power Corp, 350 S.C. 39, 47 564 S.E.2d 341, 345 (Ct. App. 2002), quoting Deese v. State Bd. of Dentistry, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985) ("A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards.").

VI. DISCUSSION

A. Generally

i. Medicaid

Medicaid is an optional state program created under Title XIX of the Social Security Act. It enables states to receive federal financial assistance specifically for the medical care of needy individuals. See 42 C.F.R. § 1396; Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 502 (1990); Doe v. Kidd, 501 F.3d 348, 351 (4th Cir. 2007). States are not required to participate in Medicaid; however, if they choose to do so, they must comply with all federal Medicaid laws and regulations. Wilder, 496 U.S. 498; Doe, 501 F.3d at 351; see also Antrican v. Odom, 290 F.3d 178 (4th Cir. 2002) ("Although North Carolina may retain a special sovereignty interest in choosing whether to participate in the Medicaid program, once it elects to participate, it is not entitled to assert that interest to insulate itself from the requirements of the federal program."), cert. denied, Odom v. Antrican, 537 U.S. 973 (2002). As a prerequisite to receiving federal assistance, a state must submit a detailed plan, referred to as the "State Plan," to the Center for Medicare/Medicaid Services ("CMS") for approval. 42 C.F.R. § 1396a.

In South Carolina, HHS is the state agency responsible for administering and supervising the state's Medicaid programs. S.C. Code Ann. § 44-6-30(1); Doe, 501 F.3d at 351. Furthermore, DDSN is responsible for the state's treatment and training programs for people with mental retardation and related disabilities. Doe, 501 F.3d at 351. Accordingly, in some instances, such as the case at hand, DDSN can act as an agent for HHS. Id.

Medicaid provides funding for state-run homes and community-based care through a waiver program. See 42 C.F.R. § 1396n(c). The waiver program provides Medicaid reimbursement to participant states for providing community-based services to individuals who would otherwise require institutional care. Id. In this appeal, the waiver program at issue is the MR/RD waiver Program.

ii. MR/RD Waiver Program

States must seek approval for these waiver programs from the CMS. If a waiver is approved, the CMS waives compliance with state program requirements while permitting states to remain eligible for reimbursement with federal grants. Id. Waivers are approved for a period of two to three years and may be renewed thereafter. Under a program operated by DDSN, CMS has waived the

requirement that an individual live in an institution to receive services. The MR/RD Waiver Program permits a recipient to receive services at home or in the community, rather than in an Intermediate Care Facility for the Mentally Retarded ("ICF/MR") such as a nursing home. Doe, 501 F.3d at 351.

After receiving approval from CMS, South Carolina's MR/RD waiver renewal became effective on January 1, 2010.

B. Department Hearing Officers

Appellants assert that a fundamental element of due process is that a hearing must be provided before an unbiased tribunal. Because the hearing officers are employed by the Department, Appellants essentially argue that their due process rights have been violated because the hearing officers are predisposed to rule in favor of their employer, the Department. Further, Appellants argue that the Department participated in ex parte communications with DDSN.

It is well-settled that "[a] fair trial in a fair tribunal is a basic requirement of due process, [and] [t]his applies to administrative agencies which adjudicate as well as to courts." Garris v. Governing Bd. of South Carolina Reinsurance Facility, 333 S.C. 432, 443, 511 S.E.2d 48, 54 (1998) (quoting Withrow v. Larkin, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712, 723 (1975)). The simple fact that "investigative, prosecutorial, and adjudicative functions are performed within the same agency, or even performed by the same persons within an agency, does not, without more, constitute a violation of due process." Garris, 333 S.C. at 443, 511 S.E.2d at 54. Furthermore, "[a]gency official or members who adjudicate a matter are presumed to be honest, fair, and unbiased." Id. at 444, 511 S.E.2d at 54.

In this matter, the fact that the hearing officers are employed by the Department does not, alone, constitute a violation of due process. See Babcock Center, Inc., v. Office of Audits, 286 S.C. 398, 334 S.E.2d 112 (1985) (holding that administrative agency may adjudicate appeals by panels composed of other persons within the same agency who did not participate in investigative or prosecutorial capacities). Unlike the administrative process outlined in Garris, the hearing officers do not conduct any investigative or prosecutorial functions; rather, the hearing officers serve only in an adjudicatory capacity. There is simply nothing in the record to indicate that the hearing officers were "predisposed" to rule against the Appellants by the mere fact that the hearing officers were employed by the Department.

Appellants next argue that they are unable to receive a hearing before an unbiased tribunal based upon the following allegations: 1) employees of the Department participated in ex parte communication with the Department's Division of Hearings and Appeals and employees of DDSN; 2) the Department and its hearing officers intentionally omitted documents from the record on appeal; and 3) the Department argued in other judicial forums Appellants' cases should be dismissed so that the cases can be litigated in the state administrative appeals process while simultaneously arguing before the ALC that the appeals before the ALC should be dismissed.

i. Ex parte Communication

On February 18, 2010, the MR/RD waiver program coordinator for DDSN sent a memorandum to the Director of the Department's Division of Appeals concerning the reductions in service for each Appellant. Based upon this memo, Appellants argue that the Department and DDSN participated in ex parte communication regarding each Appellant's case, and thus, it is impossible to receive a hearing before an unbiased tribunal. I disagree. Pursuant to S.C. Code Ann. § 1-23-360, employees of an agency, authorized to determine decisions in a contested case, may not communicate with a party unless notice and an opportunity is given to all parties to participate in such communication:

> Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. An agency member:
> (1) May communicate with other members of the agency; and
> (2) May have the aid and advice of one or more personal assistants.

The individuals named in the memo do not perform any adjudicatory functions with regard to the cases before the Department. In fact, the Department's Director of the Division of Appeals and Hearings is responsible for assigning cases to be heard by the Department's hearing officers. The Department's hearing officers are responsible for "making findings of fact and conclusions of law," and no hearing officer was included in the February 18, 2010 communication. Furthermore, pursuant to section 1-23-360, agency members may participate in permissible communication with other members of the agency. The Department and DDSN are separate agencies, but as discussed above, these agencies work together as the Department administers and manages the state's Medicaid

programs and DDSN is responsible for the state's treatment and training programs for people with mental retardation and related disabilities. Moreover, even if the February 18, 2010 memo could be construed as impermissible ex parte communication, Appellants have not shown how the memo resulted in prejudice against each Appellant. See Ross v. MUSC, 328 S.C. 51, 492 S.E.2d 62 (1997) (discussing that when determining whether ex parte communication by an administrative agency warrants reversal of the agency's decision, the court does not follow a per se rule automatically reversing the agency decision; rather, the court considers whether prejudice resulted from the ex parte communication).

Appellant Edge also argues that the Department participated in ex parte communication with regard to her case. Specifically, Appellant argues that the Department's Director of the Division of Appeals and Hearing personally contacted Edge's mother by phone after Edge's counsel filed her appeal with the Department. The Department's Director did contact Edge's mother by phone; however, the record reflects that a second appeal to the Department was filed by Edge's parents. The Department's Director contacted Edge's mother to clarify Edge's representation before the Department's hearing. Once Edge's mother confirmed that counsel would be representing Edge in any appeal before the Department, no further communication occurred between the Director and Edge's mother. Thus, the Director did not engage in ex parte communication with Appellant or any member of her family. Furthermore, Appellant has not shown how she was prejudiced by such communication. See Ross v. MUSC, 328 S.C. 51, 492 S.E.2d 62.

ii. Incomplete Record

Appellants next argue that they are unable to receive a fair hearing before an unbiased Department hearing officer based upon intentional acts of misconduct. Specifically, Appellants argue that the Department intentionally omitted certain documents from the record in an attempt to cause Appellants to miss the deadline to appeal to the ALC. While some documents were omitted from the record in this matter, all documents omitted are now a part of the record. There is nothing in the record – and Appellants do not provide any credible evidence – to suggest that the omission of the documents was an intentional act of the Department. Moreover, Appellants do not cite any legal authority to support their allegations. Glasscock, Inc. v. U.S. Fidelity and Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

iii. Other Judicial Forums

Finally, Appellants argue that they are unable to receive a fair hearing before an unbiased Department hearing officer as shown by the fact that the Department argued in other judicial forums Appellants' cases should be dismissed so that the cases can be litigated in the state administrative appeals process while simultaneously arguing before the ALC that the appeals before the ALC should be dismissed. Appellants do not provide any credible evidence or point to any reference in the record to substantiate this allegation. Moreover, Appellants do not cite any legal authority to support their allegations. Glasscock, Inc., 348 S.C. at 81, 557 S.E.2d at 691.

C. Fair Hearing

Appellants primarily argue that their due process rights have been violated by the Department because it failed to provide adequate notice and an evidentiary hearing and a final decision within ninety days of Appellants' requests for fair hearings.

i. Notice

Appellants appear to challenge the Department's failure to provide adequate written notice of the reduction in services pursuant to the waiver renewal as required under 42 C.F.R. 431.210. However, I find this ground on appeal has not been preserved for appellate review. Appellants refer to this alleged violation within the "Facts" section of the brief. Appellants do not include this issue as a separate ground on appeal and there is no reference or citation to any legal authority contained within the discussion section of their brief. Thus, I conclude that this ground on appeal has been abandoned. Glasscock, Inc., 348 S.C. at 81, 557 S.E.2d at 691.

ii. Opportunity for a Fair Hearing

The procedures for appealing a decision regarding Medicaid services provided under the MR/RD waiver program are set forth in the Code of Federal Regulations. See 42 C.F.R. §§ 441.200 et. seq. Those regulations provide that a state-level hearing for Medicaid recipients under a state waiver "must meet the due process standards set forth in Goldberg v. Kelly, 397 U.S. 254 (1970)." 42 C.F.R. § 431.205(d). The state agency must grant an opportunity for a hearing to any applicant who requests it because his claim for services is denied, 42 C.F.R. § 431.220(a)(1), or if the state agency takes action to suspend, terminate or reduce services. 42 C.F.R. § 431.200(b). However, the agency is not required to grant a hearing if the sole issue is a federal or state law requiring an automatic change adversely affecting some or all recipients. 42 C.F.R. § 431.220(b). As a state

agency administering the Medicaid program, the Department must comply with all federal Medicaid laws and regulations. Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 502 (1990); Doe v. Kidd, 501 F.3d 348, 351 (4th Cir. 2007).

The Department presents two arguments in support of the dismissals of Appellants' cases without hearings: 1) the Department argues that the reduction of benefits imposed on Appellants pursuant to the revised waiver is an issue involving a change in state or federal law; thus, no hearing is required pursuant to 42 C.F.R. § 431.220(b) (stating that the agency need not grant a hearing if the sole issue is a federal or state law requiring an automatic change adversely affecting some or all recipients); and 2) the Department argues that the administrative process afforded to Appellants met the requirements of due process and the federal regulations because the Department offered Appellant an opportunity to present written arguments in response to the interlocutory order.

I disagree with the Department's argument that the revised waiver is an issue involving a change in state or federal law, and thus, no hearing is required pursuant to 42 C.F.R. § 431.220(b). As discussed above, South Carolina must seek approval for waiver programs from the CMS. However, CMS' approval of the waiver does not have the force and effect of law because the waiver reduction was not promulgated as a regulation. While South Carolina has not directly addressed this question, other states have concluded that the provisions of a waiver document must be promulgated as regulations under the state's APA in order to be enforceable as a rule or binding norm. See McCrann v. N.C. Dept. Health and Human Services, 704 S.E.2d 899 (N.C. App. 2011) (holding that it was error of law for the agency to rely upon the provisions of a waiver to deny services to a Medicare beneficiary, and that the provisions of the waiver limiting benefits were "rules" that must be promulgated as regulations pursuant to the state APA in order to carry the force of law); Hoban v. State of Vermont, Op. No. 200-4-05, Lexis 40 (Vt. Super. 2005) (holding that a cap on HCBS contained in a Medicaid waiver program was void due to the agency's failure to promulgate the cap as a regulation under the state APA); Mullins v. N. Dakota Dept. of Human Services, 454 N.W.2d 732 (N.D. 1990) (invalidating unpromulgated manual provisions claiming to define individuals eligible for benefits). Thus, Appellants' cases do not fall within the exception contained in 42 C.F.R. § 431.220(b).

The Department next asserts that because Appellants failed to adequately respond to the interlocutory orders issued by the hearing officers "with an allegation of error in fact or in law,"

Appellants failed to avail themselves of the opportunity the Department offered for a hearing. The Department cites Zaman v. South Carolina State Board of Medical Examiners, 305 S.C. 281, 285, 408 S.E.2d 213, 215 (1991) to support its argument that Appellants "cannot complain of a due process violation if [they have] recourse to constitutionally sufficient administrative procedure but merely decline[] or fail[] to take advantage of it." The Department further asserts that pursuant to Rosen v. Goetz, 410 F.3d 191 (6th Cir. 2005), only an opportunity for a written argument is minimally required in some cases, such as Appellants'. A prior Administrative Law Court decision has addressed this issue, and this Court agrees with its determination. See Hickey v. S.C. Dep't of Health and Human Svcs., (10-ALJ-08-0656-AP, J. Durden (July 19, 2011)). As discussed in Hickey, the Rosen case arose in a different context. Like Hickey, I find the hearing requirements applicable to this case to be controlled by the federal regulations and the standard enunciated by the Supreme Court in Goldberg v. Kelly, 397 U.S. 254, 268- 269, 90 S. Ct. 1011, 1021, 25 L. Ed.2d 287 (1970). The Goldberg Court held:

> The city's procedures presently do not permit recipients to appear personally with or without counsel before the official who finally determines continued eligibility. Thus a recipient is not permitted to present evidence to that official orally, or to confront or cross-examine adverse witnesses. These omissions are fatal to the constitutional adequacy of the procedures. The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decision maker in writing or second-hand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important....Therefore a recipient must be allowed to state his position orally.

The controlling federal regulations specifically require the Department to "meet the due process standards set forth in Goldberg." 42 C.F.R. § 431.205(d). Moreover, federal regulations require the Department to grant an opportunity for a hearing to any applicant who requests it because his claim for services is denied, 42 C.F.R. § 431.220(a)(1), or if the state agency takes action to suspend, terminate or reduce services. 42 C.F.R. § 431.200(b). Because the Department seeks to reduce Appellants' benefits and each requested an individual hearing, it was error for the Department to deny hearings to the Appellants on the basis of Appellants' failure to state a claim upon which relief can be granted. Evans v. State Retirement, 344 S.C. 60, 543 S.E.2d 547 (2001) ("As a general rule,

important questions of novel impression should not be decided on a . . . motion to dismiss. Instead, a novel issue is best decided in light of the testimony to be adduced at trial. However, where the dispute is not as to the underlying facts but as to interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss for failure to state a claim." (citations omitted)).

ORDER

For the reasons set forth above,

IT IS HEREBY ORDERED that the Department's decisions to reduce and/or terminate Appellants' services and/or supplies are **REVERSED.**

IT IS FURTHER ORDERED that before taking any further action regarding Appellants' benefits under the MR/RD waiver, the Department must provide each Appellant with an evidentiary hearing consistent with the reasoning set forth above, within 60 days from the date of this Order.

AND IT IS SO ORDERED.

SHIRLEY C. ROBINSON
Administrative Law Judge

November 11, 2011
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the interagency Mail Service addressed to the party(ies) or their attorney(s).
This 9 day of November 2011
By: Jacklyn Henderson
Judicial Law Clerk

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Barbara Hickey, Appellant, vs. South Carolina Department of Health and Human Services, Respondent.	Docket No. 10-ALJ-08-0656-AP **FINAL ORDER AND DECISION**

STATEMENT OF THE CASE

This matter is before me pursuant to the appeal of Barbara Hickey (Appellant), from a final decision of the Respondent, South Carolina Department of Health and Human Services (DHHS or Department). This appeal is made in response to Respondent's January 1, 2010 cut in Personal Care Aide (PCA II) services to all those persons who, like the Appellant, rely on these services to live in the community and avoid institutionalization, and to Respondent's denial of Appellant's right to contest this withdrawal of necessary services at a hearing.

On December 1, 2009, Appellant received a letter from Respondent, stating that her in-home PCA II hours had been cut from 50 per week to 28 per week. Petitioner appealed that decision on January 15, 2010. Department of Disability and Special Needs (DDSN) responded to her appeal stating that the "limits cannot be exceeded and must be applied to all [Mental Retardation/Related Disabilities (MR/RD)] Waiver participants." Appellant appealed that decision on January 25, 2010. The hearing officer issued an "interlocutory order" dated January 29, 2010 which stated that she believed that the DHHS had the authority to administer the Medicaid Program in South Carolina, and that the Center for Medicare and Medicaid Services (CMS) had approved the revised Waiver, including the service caps. Petitioner responded on February 12, 2010 stating that she did not understand the decision and requesting a hearing. On

February 17, 2010 the hearing officer dismissed appellant's case stating that she failed to respond to his Interlocutory Order with an allegation of error in fact or in law as ordered. On March 1, 2010, counsel for Appellant filed a Motion to Alter or Amend Judgment and a supporting Affidavit in response to the decision to dismiss Appellant's case and requested a fair hearing be held. On March 10, 2010, DHHS filed a Reply to Appellant's Motion requesting the hearing officer uphold its dismissal of Appellant's case and deny her a hearing. The hearing officer issued a final decision on July 20, 2010 dismissing Appellant's case without a hearing. Appellant received the final decision on July 28, 2010 and appealed to this Court on August 27, 2010. Both parties were represented by counsel at Oral Arguments on April 12, 2011 at the offices of the ALC in Columbia, South Carolina.

Issues on Appeal

1. Has the Department treated its PCA II benefit cap as a binding norm such that promulgation as a regulation is necessary for it to be enforceable?
2. Does inclusion in the waiver document make the PCA II cap enforceable without promulgation?
3. Does S.C. Code § 44-6-90 exempt the Department from promulgating regulations to carry out its duties?
4. Did the Department err in refusing to provide Hickey with a hearing?
5. Did the Department's decision contain erroneous findings of fact?

Standard of Review—

This matter is before the ALC in its appellate jurisdiction pursuant to S.C. Code Ann. § 1-23-600(D) (Supp. 2010). Accordingly, the Administrative Procedures Act's standard of review governs this appeal. See S.C. Code Ann. §§ 1-23-600(E), 1-23-380 (Supp. 2010); see also Byerly Hosp. v. S.C. State Health & Human Servs. Fin. Comm'n, 319 S.C. 225, 229, 460 S.E.2d 383, 385 (1995). The standard used by appellate bodies, including the ALC, to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5) (Supp. 2010). This section provides:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of

the agency or remand the case for further proceedings. The court may reverse or modify the decision [of the agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5) (Supp. 2010).

A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion reached by the agency. Bilton v. Best Western Royal Motor Lodge, 282 S.C. 634, 321 S.E.2d 63 (Ct. App. 1984). Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence that, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached in order to justify its action. Hargrove v. Titan Textile Co., 360 S.C. 276, 289, 599 S.E.2d 604, 611 (Ct. App. 2004). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's finding from being supported by substantial evidence. Id.; Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 467 S.E.2d 913 (1996); Grant v. S.C. Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995). However, § 1-23-380(5) requires the reviewing tribunal to consider not only the amount of evidence, but also the quality of that evidence; it must be both "reliable" and "probative," as well as "substantial." See S.C. Code Ann. § 1-23-380(5) (Supp. 2010).

An abuse of discretion occurs when a decision is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or when the judge is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case. Ex Parte Capital U-Drive-It, Inc., 369 S.C. 1, 5, 630 S.E.2d 464, 467 (2006). A decision is arbitrary or capricious when no rational basis for the conclusion exists, when it is based on one's will and not upon any course of reasoning and

exercise of judgment. Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control, 350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002); Deese v. S.C. State Bd. of Dentistry, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985). A decision may be arbitrary or capricious when it is made at one's pleasure without adequate determining principles, or is governed by no fixed rules or principles. Deese, 286 S.C. at 184-85, 332 S.E.2d at 341. Non-uniform, inconsistent, or selective application of authority can indicate arbitrariness. See Mungo v. Smith, 289 S.C. 560, 571, 347 S.E.2d 514, 521 (Ct. App. 1986).

Medicaid MR/RD Waiver Program

Medicaid is an optional state program created under Title XIX of the Social Security Act. It enables states to receive federal financial assistance specifically for the medical care of needy individuals. See 42 U.S.C.A. § 1396; Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 502 (1990); Doe v. Kidd, 501 F.3d 348, 351 (4th Cir. 2007). States are not required to participate in Medicaid; however, if they choose to do so, they must comply with all federal Medicaid laws and regulations. Wilder, 496 U.S. 498; Doe, 501 F.3d at 351; see also Antrican v. Odom, 290 F.3d 178 (4th Cir. 2002) ("Although North Carolina may retain a special sovereignty interest in choosing whether to participate in the Medicaid program, once it elects to participate, it is not entitled to assert that interest to insulate itself from the requirements of the federal program."), cert. denied, Odom v. Antrican, 537 U.S. 973 (2002). As a prerequisite to receiving federal assistance, a state must submit a detailed plan, referred to as the "State Plan," to the CMS for approval. 42 U.S.C.A. § 1396a.

In South Carolina, DHHS is the state agency responsible for administering and supervising the state's Medicaid programs. S.C. Code Ann. § 44-6-30(1); Doe, 501 F.3d at 351. DDSN is responsible for the state's treatment and training programs for people with mental retardation and related disabilities. Doe, 501 F.3d at 351. Accordingly, in some instances, such as the case at hand, DDSN can act as an agent for DHHS. Id.

Medicaid normally provides funding for individuals with mental disabilities who live in an institution. However, states may make a request to the CMS for a "waiver" to pay for otherwise non-covered Home and Community Based Services (HCBS) for Medicaid-eligible persons who might otherwise be institutionalized as long as the services are cost effective. 42 U.S.C.A. § 1396n(c).

States must seek approval for these waiver programs from the CMS. If a waiver is approved, the CMS waives compliance with state program requirements while permitting states to remain eligible for reimbursement with federal grants. Id. The waiver program provides Medicaid reimbursement to participant states for providing HCBS to individuals who would otherwise require institutional care. See 42 U.S.C.A. § 1396n(c). Waivers are approved for a period of two to three years and may be renewed thereafter. Under a program operated by DDSN, CMS has waived the requirement that an individual live in an institution to receive services. In this appeal, the waiver program at issue is the MR/RD Waiver Program. The MR/RD Waiver Program permits a recipient to receive services at home or in the community, rather than in an Intermediate Care Facility Mental Retardation (ICF/MR) such as a nursing home. Doe, 501 F.3d at 351.

On January 1, 2010 a new MR/RD waiver renewal became effective following approval by CMS. The renewed waiver document includes a cap of 28 hours per week for PCA II services. PCA II services consist of hands-on personal care to help a participant accomplish the activities of daily living such as bathing, toileting, dressing and eating.

I. Has the Department treated its PCA II benefit cap as a binding norm such that promulgation as a regulation is necessary for it to be enforceable?

The central issue raised by the Appellant in this case is whether the Department is entitled to rely on an amendment to the MR/RD waiver document to cut Appellant's PCA II services from 50 to 28 hours per week. It is uncontroverted that the cap on PCA II services was not promulgated as a regulation under the Administrative Procedures Act, S.C. Code Title 1, Chapter 23 (APA). The Department makes three arguments in support of its position that it properly applied the cap on PCA II services in this case without promulgating the cap provision as a regulation.

The Department first asserts that the cap on CPA II services is not a rule that must be promulgated as a regulation in order to be enforceable. "[W]hether an agency's action or statement amounts to a rule--which must be formally enacted as a regulation -- or a general policy statement -- which does not have to be enacted as a regulation -- depends on whether the action or statement establishes a 'binding norm.'" Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 636 S.E.2d 598 (2006). In order for an agency to create a "binding" rule

it must be promulgated as a regulation. Home Health Serv., Inc. v. S.C. Tax Comm'n, 312 S.C. 328, 440 S.E.2d 375 (1994). The key factor in determining whether a policy statement establishes a "binding norm" is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not follow the policy at issue in a particular situation. Home Health Serv. Inc. v. S.C. Tax Comm'n, 312 S.C. 324, 328, 440 S.E.2d 375, 378 (1994). If the policy at issue "so fills out the statutory scheme" that the agency will only look to whether the policy's criteria are met in taking action or rendering a decision, the policy will be considered a "rule" or "regulation." Id. As long as the agency remains free to consider the individual facts in taking action or rendering a decision, the policy at issue will not be considered a "binding norm." Id. Thus, to determine whether a policy or guideline establishes a "binding norm," courts look to the actions of the agency, not to the labels given by the agency.

In this case, the Department argues that it has not treated the cap on PCA II services as a binding norm. I find no support for this argument in the record; the Department has consistently treated the PCA II services cap as a binding norm. In its initial letter denying Hickey's request for continued PCA II services benefits at the level she formerly received, the Department stated,

> [L]imits or caps were placed on services in the MR/RD Waiver. Approval for these limits or caps was obtained from the [CMS]. These approved limits cannot be exceeded and must be applied to all MR/RD Waiver participants. While we understand and appreciate the hardship these changes may place on you, we are not at liberty to exceed the established limits.

In response to Hickey's appeal of that decision, the hearing officer upheld the Department's decision denying Hickey a hearing in part because, the Department

> need not grant a hearing if the sole issue is a Federal or State law requiring an automatic change adversely affecting some or all recipients. The reduction in Petitioner's PC II hours was imposed by caps and limits on these, and other services specified in the MR/RD Waiver as renewed effective January 1, 2010, and imposed upon all Waiver participants. These changes in the Waiver were approved in advance by ...CMS....For the purposes of this decision, it is presumed that this approval, inclusive specifically of the changes approved, by CMS carries the force and effect of law.

Thus, because the Department's decisions in this case look only to whether the services Hickey received were within the cap and not to any other standard or factual issues, the cap on PCA II services was treated as a binding norm and not as a general policy statement. The Department did not treat the cap as a policy statement that it was free to exercise its discretion to

follow or not follow according to the particular facts in Hickey's situation. See Ryder, 717 F.2d at 1377-1378.

II. Does inclusion in the waiver document make the PCA II cap enforceable without promulgation?

The Department next argues that it is not required to promulgate the provisions of the waiver document in order to enforce them because they are a contract between the state and federal government contemplated by the agency statutes and regulations and are entitled to deference as a "federal directive."[1] The Department cites its regulation S.C. Code Ann. Regs. 126-300 and its general grants of authority contained in S.C. Code Ann. § 44-6-30 to 40 in arguing that the PCA II service cap should be enforced.

I find no legal support for this argument. On the contrary, other states which have considered this precise question have held that the provisions of a waiver document must be promulgated as regulations under the state's APA in order to be enforceable as a rule or binding norm. In McCrann v. N.C. Dept. Health and Human Services, 704 S.E.2d 899 (N.C. App. 2011), the North Carolina Court of Appeals held that it was error of law for the agency to rely upon the provisions of a waiver to deny services to a Medicare beneficiary. The court held that the provisions of the waiver limiting benefits were "rules" that must be promulgated as regulations pursuant to the state APA in order to carry the force of law. Likewise, in Hoban v. State of Vermont, Op. No. 200-4-05, Lexis 40 (Vt. Super 2005). the Superior Court of Vermont held that a cap on HCBS contained in a Medicaid waiver program was void due to the agency's failure to promulgate the cap as a regulation under the state APA. See also, Mullins v. N. Dakota Dept. of Human Services, 454 N.W.2d 732 (N.D. 1990) (invalidating unpromulgated manual provisions purporting to define individuals eligible for benefits). Compare, Rennich ex rel. Rennich v. N. Dakota Dept. of Human Services, 2008 ND 171, 756 N.W.2d 182, 188 (N.D. 2008) (distinguishing situation where conditions of eligibility are set by federal statute and regulation).

III. Does S.C. Code § 44-6-90 exempt the Department from promulgating regulations to carry out its duties?

[1] For purposes of this discussion I assume without deciding that the Department's characterization of the waiver document as a "federal directive" is accurate. It appears that the waiver document was authored by the Department and approved by the federal agency, CMS.

Lastly, the Department asserts that South Carolina statutes do not require the Department to promulgate regulations to carry out its duties. In support of this position the Department cites S.C. Code Ann. § 44-6-90, which states, "The department may promulgate regulations to carry out its duties." The Department's argument is that because § 44-6-90 allows, but does not require, the Department to promulgate regulations, that the Department is exempt from the requirements of the APA when carrying out its duties. In South Carolina the cardinal rule of statutory interpretation requires the trier of fact to ascertain the intent of the legislature. State v. Scott, 351 SC 584, 588, 571 S.E.2d 700, 702 (2002). In doing so, the court must give a reasonable and practical construction to the statute that is consistent with the purpose and policy expressed in the statute. Davis v. NationsCredit Fin. Servs. Corp., 326 SC 83, 484 S.E.2d 471 (1997). Where there is one statute addressing an issue in general terms and another statute dealing with the issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect. Capco of Summerville, Inc. v. Gayle Construction Company, Inc., 368 S.C. 137, 628 S.E.2d 38 (2006). Statutes in apparent conflict should, if reasonably possible, be construed so as to allow both to stand and to give effect to each. Higgins v. State, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992). I conclude that the general language allowing the Department to promulgate regulations does not override the more specific requirements of the APA. To interpret Section 44-6-90 as urged by the Department would imply that every agency given general authority to promulgate regulations is thereby exempted from the requirements of the APA. Such an interpretation does not yield a reasonable and practical construction consistent with the purpose and policy expressed in either the APA or § 44-6-90. Therefore, the Department erred in treating the cap on PCA II services as a binding and enforceable rule without promulgating the cap as a regulation pursuant to the APA.

IV. Did the Department err in refusing to provide Hickey with a hearing?

The procedures for appealing a decision regarding Medicaid services provided under a HCBS waiver are set forth in the Code of Federal Regulations. See 42 C.F.R. §§ 441.200 *et. seq.* Those regulations provide that a state hearing system for Medicaid recipients under a state waiver "must meet the due process standards set forth in Goldberg v. Kelly, 397 U.S. 254 (1970)." 42 C.F.R. § 431.205(d). The state agency must grant an opportunity for a hearing to any applicant who requests it because his claim for services is denied, 42 C.F.R. § 431.220(a)(1),

or if the state agency takes action to suspend, terminate or reduce services. 42 C.F.R. § 431.200(b). However, the agency need not grant a hearing if the sole issue is a federal or state law requiring an automatic change adversely affecting some or all recipients. 42 C.F.R. § 431.220(b). As a state agency administering the Medicaid program, the Department must comply with all federal Medicaid laws and regulations. Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 502 (1990); Doe v. Kidd, 501 F.3d 348, 351 (4th Cir. 2007).

The Department advances two arguments in support of its dismissal of Hickey's matter without a hearing. First, the Department argues that the reduction of benefits carried out pursuant to the revised waiver's cap on PCA II services is an issue involving a change in state or federal law and so no hearing is required pursuant to 42 C.F.R. § 431.220(b) (stating that the agency need not grant a hearing if the sole issue is a federal or state law requiring an automatic change adversely affecting some or all recipients). I am unpersuaded by this argument because, as discussed in detail above, the PCA II cap contained in the revised waiver document does not have the force and effect of law. Thus, Hickey's request for a hearing does not fall within the exception to the hearing requirement provided by 42 C.F.R. § 431.220(b).

Second, the Department argues that the process afforded Hickey met the requirements of Due Process and the federal regulations because the Department offered Hickey an opportunity to present written argument in response to the interlocutory order. The Department argues that because Hickey responded to the interlocutory order by requesting a hearing rather than by submitting written statements demonstrating a "valid factual dispute" that she failed to avail herself of the opportunity the Department offered for a hearing. The Department cites Rosen v. Goetz, 410 F.3d 191 (6th Cir. 2005) in support of its argument that only an opportunity for a written argument is minimally required in some cases. Because the Rosen case arose in the context of a challenge of a procedure by hundreds of plaintiffs concerned with the enforcement of a consent order and not in the context of an individual request for a hearing preceeding a reduction in Medicaid benefits, I find the reasoning contained therein insufficient to overcome the hearing requirements applicable to this case pursuant to the controlling federal regulations and the standard enunciated by the Supreme Court in Goldberg. The Goldberg Court held:

> The city's procedures presently do not permit recipients to appear personally with or without counsel before the official who finally determines continued eligibility. Thus a recipient is not permitted to present evidence to that official orally, or to

> confront or cross-examine adverse witnesses. These omissions are fatal to the constitutional adequacy of the procedures. The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decision maker in writing or second-hand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important....Therefore a recipient must be allowed to state his position orally.

Goldberg v. Kelly, 397 U.S. 254, 268- 269, 90 S. Ct. 1011, 1021, 25 L. Ed.2d 287 (1970). The controlling federal regulations specifically require the Department to "meet the due process standards set forth in Goldberg." 42 C.F.R. § 431.205(d). Moreover, federal regulations require the Department to grant an opportunity for a hearing to any applicant who requests it because his claim for services is denied, 42 C.F.R. § 431.220(a)(1), or if the state agency takes action to suspend, terminate or reduce services. 42 C.F.R. § 431.200(b). Because the Department seeks to reduce Hickey's benefits and she requested a hearing, it was error for the Department to deny her a hearing. It was not enough to demand that she present issues of fact in writing and to dismiss her appeal when she requested an in-person hearing. Moreover, where a case involves important questions of novel impression, such as the issues presented here concerning the enforceability of the unpromulgated waiver document and the issues of compliance with the Americans with Disabilities Act currently pending in federal district court,[2] it is error to dismiss the case for failure to state a claim. Evans v. State Retirement, 344 S.C. 60 543 S.E.2ed 547 (2001).

V. Did the Department's decision contain erroneous findings of fact?

Appellant raises several additional issues concerning whether findings of fact and recitations of the history of the proceedings contained in the Department's decision are erroneous. Although I note the lack of support in the record for the challenged findings and statements, the consideration of the remaining issues is unnecessary because the Department's decision is reversed on the grounds discussed above. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (concluding that an appellate

[2] Hickey v. Forkner, 4:10-CV-02696-TLW-TER (D.S.C. 2010)

court need not address remaining issues when disposition of a prior issue is dispositive of the case).

ORDER

IT IS HEREBY ORDERED that, the Decision of the South Carolina Department of Health & Human Services reducing Appellant's PCA II services from 50 hours per week to 28 hours per week is **REVERSED**.

IT IS FURTHER ORDERED that before taking further action to reduce Appellant's benefits under the MR/RD waiver, the Department must provide Appellant with a hearing consistent with this Order and Decision; the benefit limitations contained in the January 1, 2010 MR/RD waiver renewal may not serve as the legal basis for a reduction in benefits unless they are promulgated pursuant to the requirements of the South Carolina Administrative Procedures Act.

AND IT IS SO ORDERED.

Deborah Brooks Durden
Administrative Law Judge

July 19, 2011
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Robin E. Coleman

Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

July 19, 2011
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Lennie Mullis, Appellant, vs. South Carolina Department of Health and Human Services, Respondent.	)	Docket No. 10-ALJ-08-0775-AP **ORDER**

I. STATEMENT OF THE CASE

This matter is before the Administrative Law Court ("ALC" or "Court") in its appellate jurisdiction pursuant to S.C. Code Ann. § 1-23-600(D) (Supp. 2010). Lennie Mullis ("Appellant") appeals the final administrative decision of the South Carolina Department of Health and Human Services ("Respondent" or "SCHHS") to terminate Appellant as an approved provider of behavior support services under the South Carolina Mental Retardation/Related Disabilities Medicaid Waiver Program.

Upon careful review of this matter, considering the Record on Appeal, the briefs, and applicable law, this matter is reversed.

II. BACKGROUND

A. Factual Background

Appellant contracts with Respondent as an approved provider of behavior support services under the South Carolina Mental Retardation/Related Disabilities ("MR/RD") Medicaid Waiver Program.[1] Under the provisions of the contract, Appellant provides psychological counseling and behavioral support services to individuals with mental retardation and related disabilities. Also as part of her contract, Appellant, as an approved provider, is subject to periodic performance reviews. In July 2002, the South Carolina Department of Disabilities and Special Needs ("DDSN") sent a

[1] Appellant has thirty years of experience working with persons with developmental disabilities. She holds a B.S. degree in Psychology from Northeastern University and a M.S. degree in psychology from Francis Marion College. Appellant has been a Medicaid Waiver Provider since 1994.

memorandum to all providers informing them that a new quality assurance process was being implemented to evaluate providers' behavior support services under MR/RD waivers, and that the quality assurance process would include thirteen (13) criteria by which providers would be reviewed. A Quality Assurance review was performed in October 2008 to determine Appellant's compliance with the MR/RD waiver services standards. The process of selecting the cases to be reviewed involved randomly selecting five of Appellant's cases, and then selecting three of the five cases for review. Appellant's work on the three selected cases was evaluated based on the 13 criteria; and based on the results of the review, Respondent determined that Appellant failed to meet twelve (12) of the 13 criteria.

Respondent mailed a notice to Appellant on October 27, 2008 providing the results of the evaluation and requesting that Appellant take corrective action. Appellant submitted her corrective action plan on November 18, 2008.[2] A follow-up review was performed in 2010. For the follow-up review, two of Appellant's cases were selected at random, and a repeat review was performed on one of the samples evaluated during the 2008 review. The results of the follow-up review revealed that nine (9) of the 13 criteria were not met. Based on the results of the follow-up review, DDSN recommended to Respondent that Appellant's name be removed from the list of providers qualified to offer Behavioral Support Services.

B. Procedural Background

On May 18, 2010, DDSN recommended to Respondent that Appellant be terminated as an approved provider of Behavior Support Services under the MR/RD waiver program. Pursuant to DDSN's recommendation, Respondent notified Appellant on May 25, 2010 that it was terminating Appellant's contract as an approved provider. On June 2, 2010, Appellant requested an appeal of her termination. On June 11, 2010, DDSN sent a memorandum to all Service Coordinator Supervisors instructing that Appellant's authorization to provide Behavior Support Services be suspended immediately. Appellant subsequently voiced her concern over this letter, and DDSN sent a second memorandum on June 18, 2010 indicating that Appellant could continue to provide services pending the outcome of her appeal.

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[2] In addition to submitting her plan of correction to DDSN, Appellant wrote a letter to the Director of Mental Retardation at DDSN, addressing her concerns with the October 2008 review. Appellant also wrote a second letter to the Director and requested that the reviewer (who had conducted the October 2008 review) not participate in her follow-up review because he had already reviewed her work on four different occasions. This request was denied.

In addition to requesting an appeal, Appellant requested several documents from Respondent she believed were relevant to her removal from the list of providers qualified to offer Behavioral Support Services. The hearing officer denied Appellant's discovery request.

The appeal was heard by a hearing officer on August 19, 2010.[3] On September 20, 2010, the hearing officer issued a Final Administrative Decision affirming Respondent's decision to terminate its contract with Appellant.

On October 20, 2010, Appellant filed a notice of appeal with the ALC to challenge Respondent's Final Administrative Decision.

III. ISSUES ON APPEAL

1. Did the hearing officer err in holding the decision to terminate Appellant was not arbitrary and capricious and was this finding characterized by an abuse of discretion?

2. Did the hearing officer err in holding that Respondent can properly terminate Appellant pursuant to the terms of the non-contracted Medicaid provider agreement even when the termination relies on decisions and rules from privately contracted experts and a state agency other than the single state agency that administers the federal Medicaid program?

3. Was the hearing officer's decision clearly erroneous in view of the reliable, probative and substantial evidence on the record as a whole?

4. Did the hearing officer err in holding Appellant's constitutional right to procedural due process was not violated?

5. Did the hearing officer abuse her discretion by refusing to admit the 2005 ALC Order and the Roddy reviews into evidence and by refusing to grant Appellant's discovery request?

IV. STANDARD OF REVIEW

This Court's appellate review of final decisions of Respondent is governed by standards provided in S.C. Code Ann. § 1-23-380. See also S.C. Code Ann. § 1-23-600(E). Section 1-23-380 provides that this Court "may not substitute its judgment for the judgment of the [Respondent] as to the weight of the evidence on questions of fact." § 1-23-380(5). However, this Court, pursuant to § 1-23-380(5), may reverse or modify the decision if substantial rights of the appellant have been

[3] During the hearing Appellant requested to admit two documents into the record: 1) an Administrative Law Court decision issued in 2005; and 2) reviews of provider Kim Roddy. Both of the requests to admit were denied by the hearing officer.

prejudiced because the administrative findings, inferences, conclusions or decisions are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the [Respondent];
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id.; see also Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981) (stating "'[s]ubstantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the Record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action.") Id. at 135, 276 S.E.2d at 306. "The findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence." Hull v. Spartanburg County Assessor, 372 S.C. 420, 424, 341 S.E.2d 909, 911 (Ct. App. 2007) (citing Kearse v. State Health and Human Servs. Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995). Accordingly, "[t]he 'possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" Grant v. S.C. Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995) (citing Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm., 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)).

Further, an abuse of discretion occurs when an administrative agency's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or, when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious. State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006) (application of standard to circuit court), citing Fontaine v. Peitz, 291 S.C. 536, 539, 354 S.E.2d 565, 566 (1987); see also Converse Power Corp, 350 S.C. 39, 47 564 S.E.2d 341, 345 (Ct. App. 2002), quoting Deese v. State Bd. of Dentistry, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985) ("A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or

is governed by no fixed rules or standards.").

V. DISCUSSION

In this matter, Appellant argues that Respondent erred in terminating her as a Qualified Provider for Behavior Support Services under the MR/RD Medicaid waiver program. In support of her argument, Appellant cites to documents in the record, various state and federal laws, and the policies of Respondent and DDSN. In response, Respondent argues that there is substantial evidence in the record to affirm the hearing officer's decision.

A. Medicaid, generally

Medicaid is an optional state program created under Title XIX of the Social Security Act. It enables states to receive federal financial assistance specifically for the medical care of needy individuals. See 42 C.F.R. § 1396; Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 502 (1990); Doe v. Kidd, 501 F.3d 348, 351 (4th Cir. 2007). States are not required to participate in Medicaid; however, if they choose to do so, they must comply with all federal Medicaid laws and regulations. Wilder, 496 U.S. 498; Doe, 501 F.3d at 351; see also Antrican v. Odom, 290 F.3d 178 (4th Cir. 2002) ("Although North Carolina may retain a special sovereignty interest in choosing whether to participate in the Medicaid program, once it elects to participate, it is not entitled to assert that interest to insulate itself from the requirements of the federal program."), cert. denied, Odom v. Antrican, 537 U.S. 973 (2002). As a prerequisite to receiving federal assistance, a state must submit a detailed plan, referred to as the "State Plan," to the Center for Medicare/Medicaid Services ("CMS") for approval. 42 C.F.R. § 1396a.

In South Carolina, HHS is the state agency responsible for administering and supervising the state's Medicaid programs. S.C. Code Ann. § 44-6-30(1); Doe, 501 F.3d at 351. HHS has contracted with DDSN to operate the MR/RD Medicaid waiver program; thus, DDSN is the agency responsible for the state's treatment and training programs for people with mental retardation and related disabilities. Doe, 501 F.3d at 351. Accordingly, in some instances, such as the case at hand, DDSN can act as an agent for HHS. Id.

B. Qualified Provider, generally

The Appellant is a Qualified Provider for Behavior Support Services ("BSP"), which is a Medicaid reimbursable service run by DDSN and operated under the MR/RD Medicaid waiver program. Participants in the waiver program can purchase expertise to learn behaviors that are

appropriate and replace inappropriate behavior. This service is provided to individuals who live outside of an institution; and the professional is hired to work with the caretakers, not with the Medicaid recipients directly.

In order to become a provider, a person must be qualified and additionally, is subject to Quality Assurance Reviews using 13 review criteria established by DDSN. The Respondent contracts with the Center for Disability Resources ("CDR") at the USC School of Medicine to conduct the Quality Assurance Reviews. CDR in turn hires outside experts to assist with the quality assurance reviews. Once the reviews are completed, CDR provides the review results to the Director of the Division of Mental Retardation at DDSN who in turn communicates the review results to the BSP. If there are problems, the BSP is asked to submit a plan for correcting any noted deficiencies. Once the BSP submits a plan for correction, a follow-up review is conducted to again measure compliance with the 13 criteria.

When a provider comes up for review, CDR determines the location where the services are being provided and asks for a list of every service recipient. CDR then randomly selects 5 names from this list, and requests the complete files on the selected recipients. Subsequently CDR reduces the list down to 3 recipients to whom they will conduct a full quality assurance review. Thereafter three individuals review the material and perform the review which consists of on-site reviews, individual interviews with the service coordinator, interviews with the supervisor of the service at the residence, interviews with a workshop or work-site employee who works with the recipient, and a brief interview with the person receiving services. Each reviewer completes an individual report which is eventually merged into a summary report focusing on the 13 criteria. If a Provider does not meet 100% of the 13 criteria during the initial review, she may continue if she submits an acceptable plan of correction and has no negative findings on the follow-up review. There is no established rule that compliance must be in the 90% to 100% range, but compliance must be sufficient to show the service being purchased is what the caretaker is receiving. Each BSP is reviewed by the same standard: only those 13 criteria are used to measure quality and compliance. Quality assurance reviews are performed on every provider.

C. Hearing Officer's Decision

In the final administrative order, the hearing officer found and concluded that Appellant

"consistently failed to meet the required criteria in her Quality Assurance Reviews and demonstrated sub-standard work." Thus, the hearing officer agreed with Respondent's decision to terminate its contract with Appellant. In response, Appellant argues that the decision was arbitrary and capricious and is characterized by an abuse of discretion.

"A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." Deese v. State Bd. of Dentistry, 286 S.C. 182, 184-5, 332 S.E.2d 539, 541 (Ct. App. 1985). Furthermore, an "abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." Wright v. Craft, 372 S.C. 1, 34, 640 S.E.2d 486, 504 (Ct. App. 2006) (citing Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 568, 629 S.E.2d 690, 696 (Ct. App. 2006)).

I find in this instance that the hearing officer's decision was an abuse of discretion. The record indicates that the criteria are subjective and arbitrary, the process used to summarize the individual reports and terminate a provider is arbitrary, and the final determination of whether a provider passes or fails the review is also arbitrary. During the review process, 3 cases are selected for review. Each case is then reviewed by one reviewer, and that reviewer measures and scores the qualified provider's performance using the 13 criteria, and reports whether each criterion is met or unmet. The record substantiates Appellant's claim that the 13 criteria used to measure the performance of providers are arbitrary and capricious. For example, one criterion measures whether an appropriate method has been used to analyze the intervention effect. This criterion is extremely subjective because it allows the reviewer complete discretion in determining whether the analysis method is "appropriate." The criterion does not specify what type of analysis method must be used, and there is no policy in writing to guide reviewers in the review process. Furthermore, a Department witness testified that there is no formal protocol as to what type of functional assessment is appropriate or required and no examples of protocols are given to providers. The lack of objectivity in this criterion and in other criteria leads to decisions which are arbitrary and capricious because the criteria do not provide adequate determining principles or fixed rules or standards. Therefore, a decision based on these subjective criteria is based only on the reviewer's will and subjective opinion about whether a method is "appropriate."

Once the individual reports are completed, all three reports are merged together into a summary report. A Department witness testified that the provider cannot score a "yes" in the final summary report unless she scores a "yes" on that criterion in all three of the individual case reports. However, this "system" was not consistently followed in Appellant's review: Appellant received a "yes" on one of the three individual case reports for criteria 1, 5, 6, and 11, but still received a "yes" on the final summary report for these criteria. On the contrary, Appellant received a "yes" for criteria 4, 8, and 9 on two of the three individual reports, but didn't receive a "yes" for these criteria on the summary report. Thus, the process of summarizing Appellant's individual reports, which ultimately led to the decision to terminate Appellant was clearly arbitrary and capricious as it was "based alone on one's will," made "without adequate determining principles" and "governed by no fixed rules or standards." See Deese v. State Bd. of Dentistry, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985).

Additionally, the final determination of whether a provider failed the review and should be terminated is also arbitrary. A Department witness testified that DDSN has "not established a hard and fast rule" as to the percentage of compliance providers must meet in order to pass a review." She also testified that the review must "be sufficient to show that the service that we are purchasing is being provided" and "DDSN says whether it is sufficient or not." This testimony establishes that the decision to terminate Appellant was "governed by no fixed rules or standards," but was simply based on the will of DDSN who "says whether it is sufficient or not." Id.

Appellant was prejudiced by these errors: the errors, combined with the arbitrariness of Respondent's review and termination process, caused Appellant's work to be improperly reviewed and her certification as an approved provider of Medicaid services was improperly revoked.

D. Privately Contracted Experts

42 C.F.R. § 431.10 requires that a State Medicaid plan must "specify a single State agency established or designated to administer or supervise the administration of the plan." In South Carolina, Respondent is the single State agency given this statutory authority. Appellant argues that Respondent improperly delegated is authority – not only to another State agency (DDSN) – but also to private individuals, in violation of 42 C.F.R. § 431.10. Thus, Appellant argues that Respondent improperly delegated administrative discretion and the authority to issue policies, rules, and regulations to DDSN and other contracted, private individuals. I disagree.

In South Carolina, HHS is the state agency responsible for administering and supervising the state's Medicaid programs. S.C. Code Ann. § 44-6-30(1). HHS has contracted with DDSN to operate the MR/RD Medicaid waiver program, as provided for under 42 C.F.R. § 431.10:

> (a) Basis and purpose. This section implements section 1902(a)(5) of the Act, which provides for designation of a single State agency for the Medicaid program.
>
> (b) Designation and certification. A State plan must--
> (1) Specify a single State agency established or designated to administer or supervise the administration of the plan; and
>
> . . .
>
> (e) Authority of the single State agency. In order for an agency to qualify as the Medicaid agency--
> (1) The agency must not delegate, to other than its own officials, authority to--
> (i) Exercise administrative discretion in the administration or supervision of the plan, or
> (ii) Issue policies, rules, and regulations on program matters.
> (2) The authority of the agency must not be impaired if any of its rules, regulations, or decisions are subject to review, clearance, or similar action by other offices or agencies of the State.
> (3) If other State or local agencies or offices perform services for the Medicaid agency, they must not have the authority to change or disapprove any administrative decision of that agency, or otherwise substitute their judgment for that of the Medicaid agency with respect to the application of policies, rules, and regulations issued by the Medicaid agency.

The regulation clearly provides that Respondent may delegate some duties under the federal Medicaid program so long as Respondent does not give such agencies authority to make final, binding determinations upon Respondent or issue any policies or regulations on program matters. In this matter, there is no evidence in the record that Respondent delegated its authority to make a final determination with regard to Appellant's contractual status with Respondent. A recommendation was made regarding her status; however, Respondent retained the ultimate authority to make the final determination.

Appellant cites RCJ Medical Services, Inc. v. Bonta, 91 Cal.App.4th 986 (2001) as a distinguishable case from the present matter. However, I disagree. This case explicitly states that 42 C.F.R. § 431.10 "does not require states to use only one agency to carry out every task that is part of the State Plan." RCJ Medical, 91 Cal. App.4th at 1008. All that is required under the regulation is

for the single state agency – here, Respondent – "'to administer or to supervise the administration of the plan.'" Id. citing King by King v. Sullivan, 776 F.Supp.645, 656-657 (D.R.I. 1991) (emphasis in original). That is precisely what Respondent has done: while some of the functions within the Medicaid program have been delegated to DDSN, Respondent supervises the administration of the plan and retains ultimate authority with regard to final determinations.

E. Substantial Evidence

Appellant next argues that Respondent's final decision was clearly erroneous in view of the reliable, probative and substantive evidence on the record as a whole. I agree.

A reviewing court may reverse the decision of an administrative agency "if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are . . . clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2008). Substantial evidence is "evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its decision." Lark v. BiLo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Here, the hearing officer's conclusion that Respondent's decision "was not arbitrary and capricious" is clearly erroneous in view of the substantial evidence in the record. Specifically in this matter, when considering the record as a whole, the record is completely devoid of any evidence that would allow a reasonable mind to reach the conclusion that the review and termination process was not arbitrary and capricious. See generally Weaver v. S.C. Coastal Council, 309 S.C. 368, 423 S.E.2d 340 (1992) (administrative agency decision reversed when the record before the hearing officer was devoid of evidentiary support for the agency's finding).

For the review process to meet the standards of S.C. Code Ann. 1-23-380(A)(6), it must be based on a fixed rule or standard. Deese, 286 S.C. 182, 332 S.E.2d 539; Hatcher v. S.C. District Council of Assemblies of God, Inc., 267 S.C. 107, 226 S.E.2d 253 (1976). Here, however, there is a total absence of consist and credible evidence in the record with regards to a fixed rule or standard by which Appellant was measured. Three of the Department's witnesses were questioned as to the existence of a fixed rule or standard. Their testimony establishes that no fixed rule or standard exists. For example, a witness testified that the DDSN did not have a specific number or percentage which constituted a passing score. In addition, another Department witness would not specify the

minimal number of criteria a provider must meet to pass, but only testified that "[i]f somebody was missing one criteria, DDSN is not going to recommend that they be removed from the list." Yet, a third Department witness completely contradicted the previous testimony when he testified that a provider must "meet all the criteria to pass." As a result of the absence of credible evidence and consistent testimony as to what a provider is required to do to pass a review, the hearing officer's conclusion that Appellant's termination was not arbitrary and capricious was clearly erroneous.[4]

Section 1-23-280 also provides that a reviewing court may reverse an administrative agency's decision if the Appellant has been prejudiced due to findings in the decision which are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Here, at least one of the hearing officer's findings is clearly erroneous: the order held that "DDSN has never had a BSP continue with only 1 out of 13 in compliance or 4 out of 13 in compliance such as in this case." There is nothing in the record to support the finding that DDSN has never had a provider continue with 4 out of 13 in compliance.

Appellant was prejudiced by these errors because as a result of the errors and the arbitrariness of Respondent's review and termination process, Appellant's work was improperly reviewed and her certification as an approved provider of Medicaid services was improperly revoked.

F. Procedural Due Process

Appellant next argues that she was denied procedural due process in the review and termination process. Specifically, Appellant asserts that she has a protected property interest in the certification, and thus, she is required to have "a pretermination opportunity to respond and a post-termination procedure." Ross v. MUSC, 328 S.C. 51, 66, 492 S.E.2d 62, 71 (1997). In response, Respondent does not challenge Appellant's assertion that she has a protected property interest in the certification; however, it argues that she was provided all due process protections required by law.

"Procedural due process requirements are not technical, and no particular form of procedure is necessary." Olson v. S.C. Dep't of Health and Envtl. Control, 379 S.C. 57, 69, 663 S.E.2d 497,

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[4] The hearing officer also held that Appellant's "failure to meet the required criteria in both the initial Quality Assurance Review and the follow-up Quality Assurance Review satisfies Respondent's grounds for termination." This holding is also erroneous because it is not based on any type of document or firm answer as to how many criteria must be met to pass the review. The hearing officer's decision could not have been based on substantial evidence, because no consistent evidence exists as to the standard by which Appellant is measured. Further, the hearing officer failed to make a finding of fact as to how many criteria must be met. See Porter v. S.C. Pub. Serv. Comm'n, 333 S.C. 12, 22 n.3, 507 S.E.2d 328, 333 n.3 (1998) (the Court will not "*sua sponte* search the record for substantial evidence supporting a decision when an administrative agency's order inadequately sets forth the agency's findings of fact and reasoning").

503 (Ct. App. 2008). "Rather, due process is flexible and calls for such procedural protections as the particular situation demands." Id. at 69, 663 S.E.2d at 504. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Id. While a full evidentiary pretermination hearing is not required, "some kind of hearing is required prior to the discharge of an employee who has a constitutionally protected interest in employment." Ross v. MUSC, 328 S.C. at 66, 492 S.E.2d at 71. As part of this pretermination hearing, Appellant is entitled to: "1) oral or written notice of the charges against him, 2) an explanation of the employer's evidence, and 3) and opportunity to present his explanation." Id. "To prevail on a claim of denial of due process, there must be a showing of substantial prejudice." See Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 435, 319 S.E.2d 695, 698 (1984).

Furthermore, "[u]nder the law of the case doctrine, 'a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court.'" Sloan Const. Co., Inc. v. Southco Grassing, Inc., 395 S.C. 164, 169, 717 S.E.2d 603, 606 (2011) (citing Judy v. Martin, 381 S.C. 455, 458-59, 674 S.E.2d 151, 153 (2009) quoting Bakala v. Bakala, 352 S.C. 612, 632, 576 S.E.2d 156, 166 (2003)). "The law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case." Id. at 170, 717 S.E.2d at 606. The 2005 ALC Order addressed this very issue. In that order, the ALC determined that the Department's procedures regarding the review and termination process were "fundamentally flawed and greatly increase the risk that a provider will be erroneously deprived of his or her property interest in continued certification." Thus, the ALC found that "Appellant was not afforded procedural due process in the review and termination process." The Department did not appeal the 2005 order, and it has not changed any part of its procedures in response to the Court's 2005 Order. Thus, the law of the case in this matter remains that the Department's procedures, as applied to Appellant, do not afford procedural due process in the review and termination process.

Accordingly, the hearing officer erred in holding that Appellant was provided a meaningful opportunity to be heard. Appellant was prejudiced by this error because as a result of the error, Appellant's certification as an approved provider of Medicaid services was improperly revoked.[5]

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[5] Appellant further argues that she was not provided a pretermination opportunity to respond or answer Respondent's contentions regarding the quality of her work because her name was removed for the approved provider list prior to the hearing. However, the record reflects that Appellant's status as a behavior support provider remains

G. Requests to Admit and Discovery Request

The decision to admit or exclude evidence should be reversed on appeal if the Hearing Officer abused her discretion and if the Appellant has been prejudiced as a result. See Wright v. Craft, 372 S.C. 1, 33-34, 640 S.E.2d 486, 503-504 (Ct. App. 2006). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." Id. (citing Menne, 368 S.C. 557, 568, 629 S.E.2d 690, 696 (Ct. App. 2006)). Prejudice occurs if there is a "reasonable probability the [decision] was influenced by the challenged evidence or the lack thereof." Id. (citing Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)).

i. Provider Kim Roddy's Reviews

Appellant next argues that the hearing officer's denial of her request to admit Kim Roddy's reviews into evidence was based on an error or law. Appellant sought to admit the reviews to support her assertion that the review process is arbitrary. However, the hearing officer refused to admit the reviews because Ms. Roddy was not present to testify regarding the reviews. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies." Watson v. State, 370 S.C. 68, 71, 634 S.E.2d 642, 644 (2006) quoting Dawkins v. State, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001). Here, Ms. Roddy was not present to testify regarding the reviews, and the hearing officer properly ruled that the reviews could not come into evidence. [6]

ii. 2005 Administrative Law Court Order

Appellant next argues that the hearing officer erred in denying her request to admit the 2005 ALC Order into evidence. At the hearing, Respondent objected to Appellant's attempt to enter the

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uninterrupted. Although a June 11, 2010 DDSN memo informed DDSN supervisors that Appellant was to be removed for the approved provider list, a follow-up memorandum on June 18, 2010 informed the DDSN supervisors that the previous memo was incorrect: Appellant was immediately placed on the approved provider list pending the outcome of this appeal.

[6] Notably, the hearing officer stated in her order that "DDSN has never had a [provider] continue with only 1 out of 13 in compliance or 4 out of 13 in compliance." However, no testimony was given during the hearing to substantiate this claim, and there is no document in the record to substantiate this statement.

2005 ALC Order into evidence and argued that the 2005 Order was "non-precedential" and "has no relevance" to the case at hand. The hearing officer sustained the Department's objection. This ruling was based on an error of law because prior orders from the ALC can be relevant and precedential in certain circumstances. See 330 Concord St. Neighborhood Ass'n v. Campsen, 309 S.C. 514, 518, 424 S.E.2d 538, 540 (Ct. App. 1992) (holding that an administrative agency is generally not bound by the principle of stare decisis, but could be if the cases are not distinguishable and if the agency acts arbitrarily in failing to follow prior decisions)). Further, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. The 2005 ALC Order is clearly relevant to the present matter. It involved the same parties and was in regards to the same issue – Respondent's review and termination of Appellant. The Order is also relevant because it discusses shortcomings in Respondent's review and termination process. The refusal to admit the Order was based on error of law and factual conclusions with no evidentiary support. Moreover, the record provides no support for the hearing officer's decision that the Order was irrelevant.

Furthermore, the hearing officer acted arbitrarily and improperly in refusing to admit the 2005 ALC Order. Her decision was based on information improperly communicated by Dr. Lacy, the Associate Director of DDSN. Prior to the hearing, Dr. Lacy sent the hearing officer an *ex parte* email stating that, "I believe [the Appellant] wants to bring up a previous appeal, likely 6 years ago where her appeal for disenrollment was overturned by the [hearing officer]. It has nothing to do with the current issue." This was in response to an *ex parte* email from the hearing officer which stated, "I need your input about this." Thus, the hearing officer's decision to exclude the 2005 ALC order was not only unsupported by the Record and based on an error of law, but was also based on Dr. Lacy's improper opinion about the relevancy of the Order.[7]

iii. Requested Documents Related to Appellant's Termination

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[7] Pursuant to Section 1-23-360, it is improper for "members or employees of an agency assigned to render a decision" to communicate, in connection with any issue of fact, with any person or party. It is also improper for the person assigned to render a decision to communicate, "in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate." S.C. Code Ann. 1-23-360. However, communication is not improper if the communication only relates to procedural matters and does not discuss the merits of an issue. Holly Hill Farm Corp. v. U.S., 447 F.3d 258, 269 (4th Cir. 2006). Here, the communication between the hearing officer and Dr. Lacy clearly involved the merits of the discovery issue and the merits of the relevance of the 2005 ALC Order.

Appellant also argues that the hearing officer erred in refusing to grant Appellant's request for documents relevant to her termination. Appellant requested documents regarding the Department's involvement in the review and termination process. Appellant believed the documents were relevant because they provide support for her claims that the review and termination process is arbitrary and capricious and that it violates 42 C.F.R. § 431.10. The hearing officer denied Appellant's request and based this denial on Dr. Lacy's *ex parte* communication. Again, this denial of Appellant's request to admit was based on an error of law because it relied upon Dr. Lacy's improper opinion regarding the relevancy of the documents.

All of these errors prejudiced Appellant because they substantially hindered her ability to present evidence as to why her termination was improper and arbitrary. Cf. Ross, 328 S.C. 51, 492 S.E.2d 62 (finding that denial of a discovery request did not prejudice party requesting discovery when the denial did not substantially hinder his ability to respond to the charges against him which led to his termination).

ORDER

For the reasons set forth above,

IT IS HEREBY ORDERED that Respondent's decision to terminate Appellant as a Qualified Provider for Behavior Support Services under the South Carolina MR/RD Medicaid waiver program is **REVERSED**.

AND IT IS SO ORDERED.

SHIRLEY C. ROBINSON
Administrative Law Judge

April 23rd, 2012
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 23 day of April 2012

By: Judicial Law Clerk

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Lennie Schlager Mullis, Appellant, vs. South Carolina Department of Disabilities and Special Needs and South Carolina Department of Health and Human Services, Respondents.	Docket No. 04-ALJ-30-0194-AP **ORDER**

APPEARANCES: For the Appellant: David B. Summer, Jr., Esquire
For the Respondent S.C. Department of Disabilities and Special Needs: James R. Hill, Esquire
For the Respondent S.C. Department of Health and Human Services: Byron R. Roberts, Esquire

REVERSED

STATEMENT OF THE CASE

Pursuant to S.C. Code Ann. §§ 1-23-380(A)(6) (Supp. 2003), 44-6-190 (Supp. 2003), and Rule 33 of the Rules of Procedure for the Administrative Law Court (Court or ALC), Lennie Schlager Mullis (Appellant) appealed the May 11, 2004 Final Order and Decision of Robert E. Leonard, Hearing Officer of the Respondent, South Carolina Department of Health and Human Services (HHS). The decision upheld the determinations of the Respondents, South Carolina Department of Disabilities and Special Needs (DDSN) and HHS to terminate Appellant's status as an approved provider of psychological counseling and behavior support services to persons with mental retardation and related disabilities under the South Carolina Mental Retardation or

Related Disabilities (MR/RD) Medicaid Waiver Program (Program). Oral arguments were held before me at the offices of the ALC in Columbia, South Carolina on October 13, 2004.

After a review of the entire record, the Court finds that DDSN failed to provide procedural due process to Appellant in its review and termination process and that the Final Order and Decision of the Hearing Officer, which adopted the determination by DDSN, was arbitrary and capricious. Furthermore, the Court finds that Respondents must, within thirty (30) days of the date of this Order, place Appellant on their approved provider list and authorize her to provide services under the Program.

BACKGROUND

Review of qualification of Medicaid enrolled providers of psychological services-

According to Section 1915(c) of the Social Security Act, any state seeking to provide home and community based waiver services under the Program must satisfy six assurances required by the United States Department of Health and Human Services to obtain the condition of waiver approval. The third of these six assurances provides that Respondents must ensure that only qualified providers furnish these services to waiver participants and that the waiver participants receive the services which meet their needs.

In order to meet the intent of this assurance, both Respondents reviewed the qualifications of all providers in the Program. After completing the review, Respondents found that the qualifications of their providers were not sufficient to meet the intent of the third assurance. DDSN also found that the psychological services being provided to the participants in the Program needed to be separated into two separate areas: counseling and behavior support.

Provider qualification and requalification process-

On April 20, 2000, HHS issued a Medicaid Bulletin (Bulletin) which required all Medicaid enrolled providers of psychological services and MR/RD Waiver providers of psychological services to update their qualifications, as outlined in its revised MR/RD Waiver participation criteria, by December 31, 2000. The revised MR/RD Waiver participation criteria set forth specific educational and experience requirements for providers and mandated that each provider must meet one of four qualifications. Each qualification required that the provider have "relevant experience" working with people with mental retardation or related disabilities. Eleven

criteria were outlined which could be considered as "relevant experience" to satisfy this requirement. Furthermore, the process for a provider to update his/her qualifications was also outlined. It required a provider to fill out an application and submit it to DDSN, which would then interview the provider, review his/her work samples, and thereafter make a determination on qualifying the provider. If an applicant received an unfavorable determination, he could appeal the decision by requesting an administrative hearing with HHS.

Appellant, an approved provider of psychological counseling and behavior support services, participated in and completed the updating process. As part of this process, Appellant provided samples of her work, including behavior support plans (BSPs).[1] On October 30, 2000, DDSN notified her that she had been approved to continue as a contract provider of behavior support and counseling services under the Program.[2]

On July 8, 2002 Dr. Stanley Butkus, State Director of DDSN, sent a memorandum (Memo) to all approved providers under the Program informing them of additional changes to their qualification requirements. The Memo further stated that the changes would be implemented on September 1, 2002. The changes incorporated a Quality Assurance (QA) process which mandated that their "work samples" (case files) would henceforth be reviewed annually or whenever DDSN received a complaint.[3] Attached to the Memo was a thirteen question QA Review checklist that DDSN staff would use when reviewing providers' work samples and performing the QA review. In the Memo, all providers were also notified that they must thereafter re-qualify as a provider and complete continuing education requirements every two (2) years.

QA Review of Appellant's Case Files-

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1 BSPs are written plans that include behavior intervention actions for use by staff members and others who have daily interaction with a consumer.

2 Under her contract with Respondents, Appellant provided psychological counseling and behavior support services to consumers who live in South Carolina. During all times relevant to this matter, Appellant was an approved provider of these services and was required to maintain continuing credentialing requirements to remain on the approved list. Appellant received compensation from Medicaid (through HHS) for these services.

3 These changes refer only to the review of a provider's "work sample" and do not limit the quality assurance review to behavior support plans only.

On August 29, 2002, DDSN notified Appellant that it would conduct a review of her work.[4] On September 12, 2002, eleven days after the new regulations providing for QA reviews went into effect, Dr. David A. Rotholz, a member of the DDSN Behavior Support Team, and Dr. Michelle E. Ford, Director of the Office of Behavioral Support and of the Division of Mental Disabilities for DDSN (review team), went to the offices of the York County Board of Disabilities and Special Needs (York County DDSN) to conduct a QA review of Appellant's work. They reviewed case files on three consumers she was working with. They prepared a report which stated that they observed the consumers, reviewed the written BSPs, reviewed the files on residential, vocational and service coordination, and interviewed the house manager (on two of the three consumers) as well as the day program staff.

On October 18, 2002, Dr. Ford notified Appellant by letter of the findings of the review team from its QA review on September 12, 2002. It stated that Appellant's work in the area of behavior support did not meet the established criteria under the Program. Dr. Ford further stated that the letter constituted a formal warning notice to Appellant. Appellant was informed that she could forward a plan of correction to DDSN within thirty (30) days and that a follow-up review of additional sample cases would be conducted approximately sixty (60) days from the date of delivery of the reply letter.

On November 16, 2002, Appellant forwarded a plan of correction to DDSN, which it accepted. The plan was to be effective November 18, 2002. The plan stated that: (1) the behavior support plans would include behaviors defined in measurable terms; (2) staff, family members (when warranted), and consumers would be part of the functional assessment process; (3) consumers would be observed in settings where the problem occurs; (4) an appropriate data collection system would be utilized to collect data to measure the level of behavior of the consumer and assist in assessing the motivation of the behavior, and that the data would be analyzed on a monthly basis to determine the function of the behavior; (5) staff would be initially trained in the data collection system and new staff would be trained on a monthly basis; (6) staff

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4 On August 19, 2002, the York County Disabilities and Special Needs Board sent a letter to DDSN expressing concern about Appellant's July 2002 billing. Although this matter was an issue in the case sub judice, the parties stipulated during this hearing that this issue had been resolved. Accordingly, it is not addressed in this Order.

would be initially trained and thereafter receive additional training monthly to assist in implementing the behavior support plans; (7) the BSPs would include interventions based on a functional assessment that would have a majority focus on the prevention of the problem, a focus on positive reinforcement of appropriate behavior, and would address the function of the problem behavior; (8) data would be analyzed monthly to determine the effectiveness of the interventions; and (9) each BSP would be revised to address the function of the problem if progress was not made within ninety (90) days.

Appellant further stated in the plan of correction that she would utilize a checklist in each case to document the behavior support process. Under the plan, Appellant would implement the following: (1) conduct monthly meetings to discuss consumers' behaviors with residential and work center staff in those counties where she had multiple consumers; (2) train new staff hires monthly on the BSPs; (3) utilize a behavior support form to document any behavior supports provided to a consumer during any month; and (4) analyze data every three (3) months utilizing tables and/or graphs.

Appellant noted that she had been an approved provider of BSPs for several years and that she would "implement the correction procedure immediately for ALL plans as they are revised."[5] She further stated that it was her understanding that her work would be sampled for quality review in December 2002 and that the correction procedures would have been implemented and completed in nine specific cases by that time, i.e. two cases in Berkeley County, five cases in Greenville County, one case in Union County (consumer "B.I.") and one case in Dillon County. Appellant further commented on various alleged inaccuracies in the information collected by the review team during the September QA review, stating that it would have been helpful if she had been provided an opportunity to provide input.[6]

On January 8, 2003, the review team went to the offices of the Union County Disabilities and Special Needs Board to conduct a follow-up QA review of Appellant's work. Dr. Ford

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5 During the time of the QA review process, Appellant had over 120 active behavior support plans.

6 One of Appellant's complaints about the review process was that one of the three behavior support plans reviewed was not authored by her. Appellant also complained that DDSN apparently was not informed by the staff they interviewed during the review that numerous training sessions Appellant had scheduled with them were cancelled by York.

requested that its staff pull two files containing Appellant's work samples as well as the file on "B.I." (the only file reviewed which Appellant had stated in her plan of correction procedures would be implemented and completed for the QA review process).[7] The review team made no effort to communicate with Appellant either before or after this visit to seek input on files to be reviewed or on the files which were reviewed.

Removal of Appellant from the Approved Provider List-

On March 21, 2003, Dr. Ford sent Appellant a letter notifying her of the results of the follow-up QA review. Dr. Ford informed Appellant that the review team had reviewed the file on "B.I." and noted that although it contained a BSP, it was not complete. She stated that behavioral guidelines and replacement behaviors were written in the plan but that there was no functional assessment completed for the target behaviors in the plan.[8] The letter also stated that the review team found that the three BSPs reviewed were not individualized and that each contained the same interventions for different target behaviors. She further informed Appellant that the review team had concluded that Appellant had not made reasonable progress nor taken sufficient corrective action in her cases since the start of the QA process. Furthermore, Appellant was informed that she did not meet established criteria under the Program and that she was being removed from the approved provider list effective April 15, 2003. As in the prior review, DDSN did not interview Appellant as part of the review process prior to making the decision to terminate her provider status.

On April 4, 2003, HHS (the state agency responsible for administering the program), notified Appellant that she was terminated as a provider of behavior support services and that she

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7 DDSN accepted Appellant's plan of correction which stated that only nine plans would have BSPs completed within the sixty (60) day review process. The review team was aware of the plans that were being corrected by Appellant and Appellant informed them that it would take more than sixty (60) days for her to make corrections to all her plans. Notwithstanding, the review team intentionally dictated that plans not included in the plan of correction be a part of the review process.

8 Appellant could not complete her functional assessment without an in-home visit with "B.I." On January 17, 2003, Appellant was finally able to visit in the home of "B.I." and observe him in that setting. She had tried to visit before Christmas but excuses from "B.I.'s" mother prevented her from doing so. From information obtained during that visit, along with other observations, interviews and data, Appellant developed a BSP for "B.I." on January 18, 2003 which was forwarded to the Union County DSN office.

could appeal. On April 21, 2003, Appellant filed an appeal and requested a hearing pursuant to 26 S.C. Code Ann. Regs. 126-150 through 126-158.

Hearing and Final Order and Decision of the Hearing Officer-

Pursuant to its established procedures, HHS appointed Robert E. Leonard, a Hearing Officer of its Division of Appeals and Hearings, to conduct the hearing. A two day hearing on this matter was held by Mr. Leonard on September 30, 2003 and October 1, 2003. On May 11, 2004, he issued a Final Order and Decision (Order).

The Order contained forty-two (42) pages. After some introductory provisions on page one, there is a section captioned "Background" which contains a chronology of the events as they occurred. The next section, captioned "Findings of Fact," contains both facts and legal conclusions. Finally, there is a section entitled "Conclusions of Law." Under it are three numbered cites: Social Security Act Section 1915, Medicaid Bulletin OMP-PSY 00-01, dated April 20, 2000, and DDSN's July 8, 2002 Revision of Provider Requirements. These three items were incorporated verbatim into the Order. The final page of the Order contains the "Order" provision.[9]

STANDARD OF REVIEW

The APA governs appeals from final decisions of an agency or board. S.C. Code Ann. § 1-23-380 (Supp. 2003). Although Section 1-23-380(A)(6) provides that the Court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact," the Court may reverse or modify a final decision of a board if substantial rights of an appellant have been prejudiced because the administrative findings or decisions are "affected by...error of law," are "clearly erroneous in view of the reliable, probative and substantial

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9 Our courts have consistently held that written final orders and decisions issued by an agency after a contested case hearing must comply with the statutory requirements of the Administrative Procedures Act (APA). The APA requires specific findings of fact and conclusions of law. See S.C. Code Ann. § 1-23-350 (Supp. 2003); Porter v. S.C. Pub. Serv. Comm'n, 333 S.C. 12, 507 S.E.2d 328 (1998). In footnote 3 of the Porter case, our Supreme Court held that it would not, "sua sponte, search the record for substantial evidence supporting a decision when an administrative agency's order inadequately sets forth the agency's findings of fact and reasoning." However, the Supreme Court further held in Porter that "an administrative agency is not required to present its findings of fact and reasoning in any particular format, although the better practice is to present them in an organized and regimented manner." Id. at 21. Although it is questionable whether the order below meets the standards of the APA, in the interest of judicial economy, I am addressing the appeal on its merits.

evidence on the whole record," or are "arbitrary or capricious." S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2003); see also Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

The Court has the authority to review agency rulings on issues of law, and may substitute its judgment for that of the agency when necessary. 2 Am. Jur. 2d Administrative Law § 523 (1994). These purely legal issues are fit for review if they will not be clarified by further factual development and include an agency's construction of statutes and its interpretation of its own regulations. Id. But, in conducting such review, the construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overturned absent compelling reasons. Dunton v. S.C. Bd. of Exam'rs in Optometry, 291 S.C. 221, 353 S.E.2d 132 (1987). However, the agency, not its staff, is entitled to deference from the courts. S.C. Coastal Conservation League, et al, v. S.C. Dep't of Health and Envtl. Control, et al, S.C. Sup. Ct. (Opinion No. 25944, filed February 22, 2005). See also S.C. Code Ann. § 1-23-610(A) (Supp. 2003); Dorman v. Dep't of Health and Envtl. Control, 350 S.C. 159, 565 S.E.2d 119 (Ct. App. 2002). Nevertheless, the final responsibility for the interpretation of the law rests with the courts, Stone Mfg. Co. v. S.C. Employment Sec. Comm'n, 219 S.C. 239, 64 S.E.2d 644 (1951), and an agency's mistaken interpretation of a statute or regulation will constitute reversible error of law. See, e.g., Adkins v. Comcar Indus., Inc., 316 S.C. 149, 447 S.E.2d 228 (Ct. App. 1994).

A more deferential standard of review is applied by this Court in reviewing findings by an agency that are not pure matters of law. Such findings will not be disturbed unless they are clearly erroneous in light of the substantial evidence in the record. S.C. Code Ann. § 1-23-380(A)(6)(e). "'Substantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." Lark v. Bi-Lo, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Accordingly, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Id. at 307. Where there is a conflict in the evidence, the administrative agency's findings of fact are conclusive. Jennings v. Chambers Dev. Co., 335 S.C. 249, 259, 516 S.E.2d

453, 458 (Ct. App. 1999) This Court cannot substitute its judgment for that of the Board upon a question as to which there is room for a difference of intelligent opinion. E.g., Chem. Leamen Tank Lines v. S.C. Pub. Serv. Comm'n, 258 S.C. 518, 189 S.E.2d 296 (1972). However, while a decision of an administrative agency will normally be upheld, the findings may "not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it." Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 443, 458 S.E.2d 76, 83 (Ct. App. 1995). Furthermore, although a reviewing court employs a deferential standard of review when reviewing a decision and will affirm that decision when substantial evidence supports it, this deferential standard of review does not mean that the court will accept an administrative agency's decision at face value without requiring the agency to explain its reasoning. See Heater of Seabrook, Inc. v. Pub. Serv. Comm'n of South Carolina, 324 S.C. 56, 60, 478 S.E.2d 826 (1996); Porter v. S.C. Pub. Serv. Comm'n, 333 S.C. 12, 5, 507 S.E.2d 328 (1998).

Finally, a reviewing court may reverse an agency's final decision as arbitrary if the decision is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards. Deese v. S.C. Bd. of Dentistry, 286 S.C. 182, 332 S.E.2d 539 (Ct. App. 1985). However, if the actions taken by an agency are within the guidelines established by law, this Court cannot characterize those actions as arbitrary and capricious under the law.

Accordingly, in this case the burden is on the Appellant to show that the Order of the Hearing Officer is affected by an error of law, is without evidentiary support, or is arbitrary or capricious as a matter of law. See Hamm v. Am. Telephone & Telegraph Co., 315 S.C. 119, 432 S.E.2d 454 (1993); Hamm v. Pub. Serv. Comm'n of S.C., 310 S.C. 13, 425 S.E.2d 28 (1992).

ISSUES ON APPEAL

Did the Hearing Officer's decision violate Appellant's procedural due process rights, and was it arbitrary, capricious and characterized by abuse of discretion in upholding the decision of DDSN:

1. in that DDSN erred by not using established criteria under the Program in conducting the review activities of Appellant's work?

2. in that DDSN erred by not providing adequate notice to the Appellant of the specific criteria it would use to review her work or its failure to provide specific instances of error allegedly found during the review?

3. in that DDSN erred by not properly following its review process and the procedures it established in reviewing Appellant's work?

4. in that DDSN erred by not providing Appellant adequate time to respond to the alleged deficiencies prior to the follow-up review?

5. in that DDSN erred by not allowing Appellant time to complete the corrective process prior to her termination?

ANALYSIS

DDSN terminated its contract with Appellant to provide behavioral support services based on its determination that she failed to comply with its requirements for the preparation of BSPs. This termination occurred after QA reviews in September 2002 and January 2003. Appellant argued at the hearing before the Hearing Officer and before this Court that she was denied procedural due process in the review and termination process because DDSN failed to adhere to its review process and procedures, failed to use established criteria, failed to provide her with specific criteria to be used in preparing BSPs, and failed to provide her with an opportunity to respond to alleged deficiencies and/or to correct the alleged deficiencies in her BSPs. Therefore, the Court must determine if Appellant was denied procedural due process in the termination process used by DDSN and whether the decision by the Hearing Officer was arbitrary and capricious.

Due Process-

The guarantee for due process found in the Fourteenth Amendment of the Federal Constitution declares that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Due process of law is one of the most important guarantees found in the United States Constitution. Anonymous v. State Bd. of Medical Examiners, 323 S.C. 260, 264, 473 S.E.2d 870, 872 (1997). The due process clause sets forth the

guarantee of basic fairness before a tribunal for all citizens. Its fundamental requirement is the opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). Although due process was originally and primarily applied to the judicial court system, its applicability to administrative hearings has been clearly established. See Goldberg v. Kelly, 397 U.S. 254 (1970).

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth [applicable to the federal government] or Fourteenth Amendment [applicable to the states]." Mathews v. Eldridge, 424 U.S. 319, 332 (1976). Unlike some legal rules, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 895, reh'g denied, 368 U.S. 869 (1961). The exact contours of due process remain fluid and contextual; it is a flexible process which calls for "such procedural protection as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). The phrase expresses the requirement of 'fundamental fairness'...." Lassiter v. Dep't of Social Services, 452 U.S. 18, 24, 101 S.Ct. 2153, 2158, 68 L.Ed.2d 1023 (1981). "Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." Lassiter, 452 U.S. at 24-25.

In applying the Fourteenth Amendment's prohibition against a state's deprivation of life, liberty, or property without due process of law, a court must determine if the asserted interest is encompassed within the Fourteenth Amendment's protection and, if implicated, what procedures constitute due process of law. Ingraham v. Wright, 430 U.S. 651 (1977). The South Carolina Supreme Court has held that when this "state seeks to revoke a professional license, procedural due process rights must be met." Zaman v. South Carolina State Bd. of Medical Examiners, 305 S.C. 281, 408 S.E.2d 213, 214, cert. denied, 502 U.S. 869 (1991).

Appellant's certification as a provider is a property interest protected by the Fourteenth Amendment. Accordingly, this Court must determine whether Appellant was afforded procedural due process by Respondents. To do so, this Court must examine whether Appellant "may be

'condemned to suffer grievous loss....'" Goldberg v. Kelly, 397 U.S. 254, 262-63, citing Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951). The U.S. Supreme Court has developed a balancing test consisting of three factors to decide procedural due process issues:

(1) the private interest that will be affected by the official action;

(2) 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

(3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews, supra, 424 U. S. at 334-35.

This Court will first analyze the private and governmental interests that are affected to determine whether the administrative procedures utilized by DDSN in the review and termination process complied with procedural due process requirements.

Appellant obtained a B.S. degree in Psychology from Northeastern University in 1980 and a M.S. degree in Psychology from Francis Marion College in 1985. She was a teacher in the Sumter County schools and the Lancaster County schools from September 1981 through December 1986 where she provided educational and living skills to children with developmental disabilities. From December 1986 through May 1994 she was the Executive Director for the Lancaster Disabilities and Special Needs Board and the Executive Director for Carenet, Inc., from August 1994 through December 1996. Since October 1994, she has contracted with Respondents as Medicaid Waiver Provider #WP9974.

To become an approved provider under the Program, one must meet specific educational and experience requirements and certain qualifications. Furthermore, a provider must have relevant experience working with people with mental retardation or related disabilities. There is a small pool of people in this State who can meet these qualifications for certification as a provider under the Program. Certification as a provider certainly equates to a property right or interest which is encompassed within the Fourteenth Amendment's protection, and Appellant therefore has a protected private interest. Furthermore, Appellant has a substantial protected interest in her right to practice her chosen profession and in protecting her good name from allegations of unprofessional conduct. Clearly, her ability to earn a living is at stake. Since her termination,

Appellant has been denied the right to engage in substantial gainful activity as a provider and has suffered substantial financial hardship.

Pursuant to the balancing test contained in Mathews, the Court must also examine the interest of the State in these approval and termination matters. Unquestionably, the State has a valid interest in administering the Program and in ensuring that only qualified individuals provide services to consumers. The question, then, is whether the procedures Appellant advances would impose an undue burden upon the State. In this case, Appellant contends, *inter alia,* that the Respondents should have followed their own procedures for QA review; that they should have afforded her adequate time to respond to the alleged deficiencies in her BSPs; and that they should have adhered to the course of action outlined in the plan of correction. The cost to Respondents in following the procedures suggested by Appellant would be minimal at most. For instance, a telephone conference prior to the issuance of the report would have sufficed to allow the Appellant to identify errors or deficiencies in the preliminary findings before they were made final.

As applied in this case, Respondents' procedures, which afforded Appellant virtually no opportunity to answer Respondents' contentions regarding the BSPs and the quality of her work, are fundamentally flawed and greatly increase the risk that a provider will be erroneously deprived of his or her property interest in continued certification. Moreover, the flaws in these procedures could be easily remedied by adhering to the approved plan of correction and by allowing a provider to answer any questions concerning the adequacy of their work product prior to the issuance of a final report. Therefore, I find that Appellant was not afforded procedural due process in the review and termination process.

Arbitrary and Capricious -

Additionally, Appellant contends that the Hearing Officer's Order is arbitrary and capricious. A decision is arbitrary when it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards. Deese v. S.C. Bd. of Dentistry, 286 S.C. 182, 332 S.E.2d 539 (Ct. App. 1985). The Hearing Officer's decision in

this case is arbitrary and constitutes an abuse of discretion because many of its conclusions were made without evidentiary support or any underlying reasoning.

The Hearing Officer found that the evidence supported DDSN's determination to terminate Appellant because she failed to comply with the criteria outlined in the Bulletin and the Memo. However, he failed to list any specific criteria Appellant failed to comply with and he did not provide any reasoning for his conclusion. DDSN argues that these criteria are "injunctive statements requiring compliance in the development of behavioral support services as illuminated by the BSP."[10] See Respondent's Brief, p. 11. Since the Hearing Officer refers to the criteria listed in the Bulletin and Memo, he apparently concluded that all criteria must be addressed in every BSP.

Appellant argues to the contrary, noting that the Bulletin and Memo do not state that all criteria must be included in a BSP. She contends she complied with the requirements of the Bulletin and the Memo, with its checklist, because the BSPs she prepared contained those relevant criteria which were applicable and needed in each particular case. The criteria consist of various processes to be conducted during the entire review process of a case by a provider. For example, they include a staff interview for preliminary information, defining behavior in objective and measurable terms, designing data collection systems and the application of the data, training staff to collect data and to observe the behavior of the client, and designing interventions. DDSN has never published or distributed to its providers official written specifications or requirements for the essential content to be contained in a BSP or for the appropriate format of a BSP. Furthermore, the Bulletin, by its terms, applies only to the qualifications of providers, not the requirements of a BSP, and the QA process, as contained in the Memo, only references a review program for behavior support services and not behavior support plans. Nowhere in the Bulletin or the Memo is there any requirement that all the criteria be included in a BSP. The Hearing Officer's conclusion to the contrary is simply not supported by the plain wording of the Bulletin and Memo. Accordingly, I find that the Hearing Officer's conclusion is arbitrary.

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10 The record does not reveal any communication from Respondents to Applicant at any time or by the review staff with Appellant during the review process which defines which criteria or if all the criteria must be incorporated in each BSP.

Furthermore, the Hearing Officer found that the three plans reviewed on January 8, 2003 were not individualized and that they did not contain established criteria. He did not provide any analysis or reasoning to support these conclusions and did not delineate any required criteria that were missing. Without any reasoning to support his conclusions, this Court can not determine if there was sufficient evidence to support this conclusion. Accordingly, the Court finds this conclusion to be arbitrary.

Finally, the Hearing Officer stated that he lacked the authority to find that DDSN should have conducted an interview with Appellant prior to her termination. He also stated that he lacked authority to determine if the policy of DDSN not to conduct pre-termination interviews was arbitrary, unreasonable, capricious, or discriminatory. He offered no reasoning for making these "findings." Accordingly, I find that they are arbitrary. As a result of the Hearing Officer's arbitrary decision, Appellant has been deprived of her property interest as an approved provider of behavioral support services to individuals with mental retardation and related disabilities in this State.

CONCLUSION

DDSN failed to provide procedural due process to Appellant in the termination process. It did not have a written process for reviewing the work of a provider or for terminating a provider. It intentionally reviewed two plans not included in a plan of correction it had approved, and it failed to provide an opportunity for Appellant to explain any deficiencies in the one case it reviewed that was included in the plan of correction. DDSN must have a fair and impartial procedure for review and termination that provides safeguards to ensure procedural due process is complied with. "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." Addington v. Texas, 441 U.S. 418 (1979). There is no harm to the State if DDSN reviews only files listed in an acceptable plan of correction and then counsels with and seeks input from a provider prior to completing its report. These reasonable safeguards, which are necessary in a termination procedure in order to comply with procedural due process, ultimately benefit both the providers and the State. Consequently, the Court finds that these actions in the termination process by DDSN were arbitrary, not subject to any rules, left to its sole judgment,

discretion, notion or whim. The Order by the Hearing Officer which adopted this process or failed to rule on this process was also arbitrary.

Therefore, for all the foregoing reasons, the Court finds that DDSN failed to provide procedural due process to Appellant in its termination process and that the Order of the Hearing Officer in many of its conclusions of law was arbitrary. Accordingly, this Court finds that the Order must be reversed and Respondents must within thirty (30) days of this Order place Appellant on its list of approved providers under the Program.

ORDER

Accordingly, it is hereby

ORDERED that the Order dated May 11, 2004 is REVERSED; and it is further

ORDERED that Respondents must place Appellant on their list of approved providers under the Program not later than thirty (30) days from the date of this Order.

AND IT IS SO ORDERED.

Marvin F. Kittrell
Chief Administrative Law Judge

March 22, 2005
Columbia, South Carolina

Jennifer Katie Elledge, Appellant,

v.

South Carolina Department of Health and Human Services, Respondent.

Appellate Case No. 2011-185006

ORDER

Settlement Agreement

the parties have complied with Rules 260(b) and 261(b), SCACR, and bmitted a comprehensive settlement agreement signed by all the relevant part approve the parties' settlement agreement and dismiss this matter accordingl

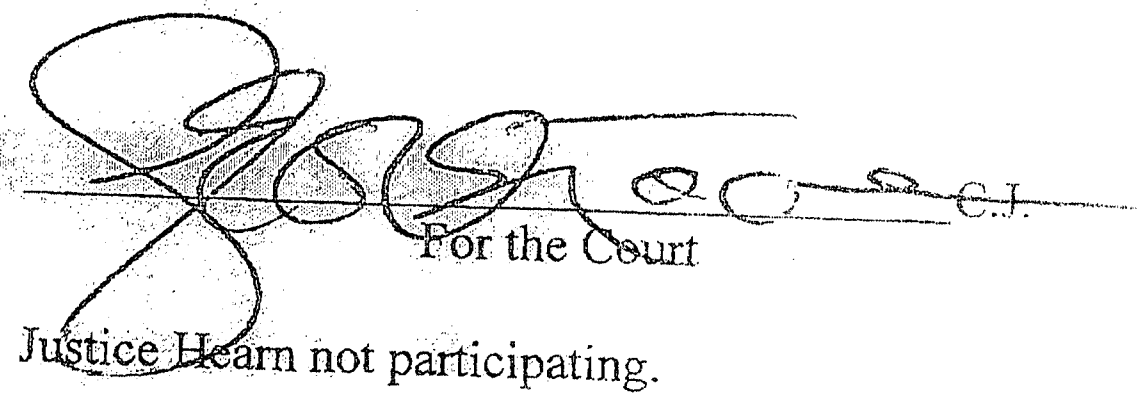
Motion to Seal

spondent moves to seal Subsection A of the settlement agreement and spondent's letter dated April 16, 2012. We deny the motion to seal.

le 261, SCACR, provides "any agreement submitted to the appellate court sh public unless a motion to seal is filed, and the appellate court determines that matters should be sealed under the standard provided by Rule 41.1, SCRCP. le 41.1(a) noted South Carolina has a long history of maintaining open court ceedings and records, and Rule 41.1 is intended to establish guidelines for verning the filing under seal of settlements and other documents." *Id.* When iding whether to seal a settlement, the Court weighs the public and private erests utilizing the factors contained in Rule 41.1(c). Respondent does not

challenge the applicability of Rule 41.1, SCRCP, and argues that it should be permitted to seal the settlement agreement after weighing the factors listed in Rule 41.1, SCRCP. However, we need not weigh these factors because Rule 41.1(c) unequivocally states, "Under no circumstances shall a court approve sealing a settlement agreement which involves a public body or institution." *Id.* Because Respondent, DHHS, is a public institution, the settlement must remain public.

Thus, we approve the settlement agreement, but deny Respondent's motion to seal.



C.J.

For the Court

Justice Hearn not participating.

Columbia, South Carolina
May 29, 2012
cc:
Anna Maria Darwin
Sarah Garland St. Onge
Stephen R. Suggs
Emily Jackson Miller