

TO THE DIVISION OF APPEALS AND HEARINGS
SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES
CASE # 12-PA-024

LAURENS PEDIATRIC CLINIC,

Petitioner/Appellant

vs.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND
HUMAN SERVICES,

Respondent

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SC Court of Appeals

PETITION FOR DISMISSAL

Nilsa I. Nazario, M.D., F.A.A.P.
Laurens Pediatric Clinic
P.O. Box 1367
Laurens, S.C. 29360-1367
864-984-4263; fax 864-984-4158
ninazario@aol.com
REPRESENTATIVE FOR APPELLANT

Mr. Evan Gessner, Esquire
SCDHHS
1801 Main Street
Columbia, S.C. 29201
803-898-0063; fax 803-898-0063
ATTORNEY FOR RESPONDENT

PETITION FOR DISMISSAL

To The Division Of Appeals And Hearings Of South Carolina

Laurens Pediatric Clinic, Petitioner/Appellant

vs.

South Carolina Department Of Health And Human Services, Respondent

Ref: Case # 12-PA-024

August 29, 2016

To Chief Officer Mr. Robert French:

On October 31, 2012, you presided over a program assessment hearing in which I was appealing a judgment for overpayment of \$11, 149.49, after an audit held by SC Medicaid at Laurens Pediatric Clinic in November of 2011. The instructions for this hearing stated in bold print that anything to be discussed in the hearing needed to be copied in 8 1/2" x 11" paper, and handed to the Chief Officer and the other party. Laurens Pediatric Clinic presented copies to you and SCDHHS Counsel Mr. Bruce Carter. These were over a thousand pages organized for my presentation.

SCDHHS failed to bring copies to you or myself (petitioner/appellant). Once the hearing began and before testimony from SCDHHS, I warned the court that I had brought copies but had received none. You allowed SCDHHS to proceed. I am going prose and both you and Counsel are professionally trained in the law. You allowed arguments and evidence to be introduced without having any copies to you as chief officer, and myself as appellant, from SCDHHS. This was in clear violation of procedural rules for the hearing, and my civil rights to fair due process.

According to the rules put forth by you for this hearing, all arguments and evidence introduced by SCDHHS were inadmissible. Thus, subsequent rulings are based on inadmissible evidence.

I have enclosed copies of the letter of instructions for the hearing and pertinent passages of the

beginning of the hearing, outlining the failure by SCDHHS, and this court to comply with them. (See Appendix).

I hereby request this court to rule for dismissal of Case 12-PA-024.

Respectfully,



Nilsa I. Nazario, M.D., F.A.A.P. - August 29, 2016

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cc. SCDHHS Counsel – Mr. Evan Gessner
Administrative Law Court, Jana Shealy-Clerk Of Court
SC Court Of Appeals- Clerk Of Court
The South Carolina Supreme Court- Clerk Of Court

**APPENDIX
PETITION FOR DISMISSAL
TO THE DIVISION OF APPEALS AND HEARINGS
SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES**

Table Of Contents:

Letter dated July 17, 2012 from Mr French Appeals Case #12-PA-024 with notice of hearing and rules to follow for the proceedings.....pp. 02-07

Record On Appeal, Volume 1-pertinent portions of transcript of the Hearing held October 31, 2012
French is Mr. Robert French- presiding
Carter is Mr. Bruce Carter – counsel for SCDHHS
Casey is Cheryl Casey – auditor
Nazario- is Nilsa I. Nazario, MD, FAAP – appellant
From the record – transcript pp. R0087- hearing begins, R0088 (lines 9-16)....., pp.08-10



Anthony E. Keck, Director
Nikki R. Haley, Governor

July 17, 2012

CERTIFIED & REGULAR FIRST CLASS MAIL

Nilsa I. Nazario, M.D.
Laurens Pediatric Clinic
P.O. Box 1367
Laurens, SC 29360

RE: Fair Hearing of Laurens Pediatric Clinic v. SCDHHS
Appeals' Case # 12-PA-024 (Program Assessment)

- NOTICE OF HEARING -

Dear Dr. Nazario:

We received your request for a fair hearing on Thursday, June 14, 2012 and have scheduled the hearing for **Wednesday, October 31, 2012 at 12:30 PM, in the Ninth Floor Conference Room of the Jefferson Square Building, 1801 Main Street (corner of Main and Laurel Streets), Columbia, South Carolina.** The hearing will be about the disallowance of Medicaid payments in the amount of 11,199.49 for services rendered certain Medicaid recipients.

The rules for the hearing are enclosed with this letter. The appeal hearing is a formal process of review and adjudication of Department decisions. You may call witnesses to testify, present documents, and cross-examine the other party. You may represent the provider or request representation by someone else, including an attorney. You, or your representative, should be prepared to say why the decision you are appealing is wrong.

If either, or both, parties intend to offer documents as evidence for entry into the record, then it will be necessary for that party(ies) to make copies of the documents so that the other party and the Hearing Officer may each have a copy of the document(s). Further, should either party as a part of their testimony intend to refer to a particular paragraph or section of a policy or procedure manual, directive, memorandum, etc., then it will be necessary for the party(ies) to make copies in duplicate of these referenced sections. Also, should either party intend to utilize charts, graphs, visual aids, etc., as a part of their presentation, then it will be necessary for that party to have these items photocopied on 8 1/2 x 11 inch paper so that they may be easily integrated into the case record.

If you cannot meet on the date above or have questions, and you live in the Columbia area, you may contact me at (803) 898-2600; otherwise, if you live outside the Columbia area, you may contact me toll-free at 1-800-763-9087.

Nilsa I. Nazario, M.D.

July 17, 2012

Page Two

Sincerely,



Robert French, Chief Hearing Officer
Division of Appeals and Hearings

RF/sbs

Enclosure

cc: Bruce Carter, Esquire, Assistant General Counsel, SCDHHS
Nancy Pittman, Division of Program Integrity, SCDHHS
Kathleen Snider, Bureau Chief, Compliance & Performance Review, SCDHHS
B J Church, Director Program Integrity, SCDHHS

HEARING PROCESS & PROCEDURES

South Carolina Department of Health and Human Services (SCDHHS) hearings are in person, please be on time and make sure your witnesses are available on the date, time and location of the hearing. Make sure you have all the documents received from the agency and at least two (2) copies of exhibits that you want the Hearing Officer to consider in making the decision.

Nature of an administrative hearing: An administrative hearing is similar to a court trial but less formal. Like a trial, it is a contested proceeding and the purpose is to gather facts through testimony, documents and other evidence. The Petitioner is the person challenging an agency decision. The Respondent is the agency.

Speaking with the Hearing Officer prior to the hearing: No party is allowed to speak to the Hearing Officer about the case without all the other parties being involved. You may speak with the Hearing Officer about procedural and scheduling matters, but no one in the Hearing Officer's office can give you legal advice and you should never attempt to discuss the facts of your case with any Hearing Officer or employee of the SCDHHS Division of Appeals and Hearings. Your opportunity to explain the facts and your position is at the hearing.

Things you will need for the hearing:

1. All the exhibits that you have that you want the Hearing Officer to consider. Remember to bring at least two (2) copies of your exhibits-one for the Hearing Officer and one for the opposing party.
2. A written list of points you want to make.
3. A written list of any questions that you want to ask of all the witnesses, both your own and the opposing party's.
4. Pen and paper so that you can take notes during the hearing.

Hearing Procedure: The hearing procedure is as follows:

Conduct: Proper conduct to witnesses, agency representatives and the Hearing Officer is required. The hearing is recorded so you must speak clearly and concisely- focus on the key issues in the case. Do not interrupt witness testimony or talk with another witness during the hearing. If you need to discuss something with any of the witnesses, inform the Hearing Officer and he will go off the record and stop the recording.

Hearing preamble: The Hearing Officer will identify the parties, explain procedure and explain the rights of the parties.

Identification of issue: The Hearing Officer will identify the issue or issues to be decided in the case.

Identification of exhibits: The exhibits will be admitted into the hearing record, unless either party objects. To be "admitted" means that the Hearing Officer will consider them in reaching a decision in the case.

Oath: Testimony is taken under oath. If an individual's religious beliefs prevent him/her from swearing an oath, he/she will be asked to affirm that the information that they will give at the hearing is the truth.

Order of testimony and evidence: The Hearing Officer, pursuant to South Carolina Code of Regulations 126-154 will determine the order in which the parties present their arguments and any evidence. In most cases, the Respondent (SCDHHS) presents their case first. Then the Petitioner and the Hearing Officer have the option to cross-examine each of the Respondent's witnesses. The Respondent then has the option of presenting any follow-up testimony and the Petitioner has the option of recross examination of the Respondent's witnesses. Next, the Petitioner presents his/her case and the Respondent and Hearing Officer has the option to cross-examine each of the Petitioner's witnesses. The Petitioner then has the option to present any follow-up testimony and the Respondent has the option of recross examination of the Petitioner's witnesses. After all testimony is given, the Respondent has the option of presenting a closing statement in which the Respondent will point out the evidence (testimony and exhibits) and the law, which supports the Respondent's position. Then the Petitioner has the option of presenting a closing statement in which the Petitioner will point out the evidence (testimony and exhibits) and the law, which supports the Petitioner's position.

Burden of presenting evidence: In general, whoever is relying on a particular fact has the burden of proving it to the Hearing Officer. Therefore, you should be ready to present evidence (testimony and exhibits) supporting your position.

Keeping the record open: As the hearing progresses, one party may realize that the Hearing Officer does not have all the available information (such as medical reports) to make an accurate decision. If so, the party may ask the Hearing Officer to hold the record open, that is, to permit the party to submit more documents after the hearing ends. The Hearing Officer may or may not grant the request. However, it is each party's responsibility to ensure that they bring all exhibits with them to the hearing that they wish to present.

The decision: The Hearing Officer will not tell you the decision on the day of the hearing. After the hearing has ended and the record closes (that is, no more evidence will be considered), the Hearing Officer will review all the evidence and testimony. Each party will receive a lengthy written decision in the mail.

CHAPTER 126.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
(Statutory Authority: 1976 Code Section 44-6-90)

ARTICLE I
ADMINISTRATION
SUBARTICLE 3.

APPEALS AND HEARINGS

126-150. Definitions.

- A. Agency-The Department of Health and Human Services and its employees.
- B. Appeal-The formal process of review and adjudication of Agency determinations, which shall be afforded to any person possessing a right to appeal pursuant to statutory, regulatory and/or contractual law; Provided, that to the extent that an appellant's appellate rights are in any way limited by contract with the Agency or assigned to the Agency, said contractual provision shall control.
- C. Hearing Officer-Any Agency employee appointed by the Director to make Decisions either affirming or reversing Agency program determinations by setting forth findings of fact and conclusions of law in appeals arising under this regulation.
- D. Person-An individual, partnership, corporation, association, governmental subdivision, or public or private agency or organization.
- E. Provider-A person who provides services to individuals under programs administered by the Agency.

126-152. Appeal Procedure.

- A. An appeal shall be initiated by the filing of a notice of appeal within thirty (30) days of written notice of the Agency action or decision which forms the basis of the appeal. The failure to file the requisite notice of appeal within the thirty (30) day period specified above shall render the Agency action or decision final; provided, that should the written notice specify some period to appeal other than thirty (30) days, that period shall apply; provided, that the requirement that written notice be given by the Agency shall not be applicable to situations where applicants for Medicaid benefits acquire the right to appeal when the Agency fails to act on the application within the time period specified by federal regulation.
- B. The notice of appeal shall be in writing and shall be directed to Appeals and Hearings, Department of Health and Human Services, Post Office Box 8206, Columbia, South Carolina 29202-8206. In appeals by providers, the notice of appeal shall state with specificity the adjustment(s) or disallowance(s) in question, the nature of the Issue(s) in contest, the jurisdictional basis of the appeal and the legal authority upon which the appellant relies.
- C. If a notice of appeal does not satisfy the requirements of paragraph (B) above, the Hearing Officer, upon his own motion or by motion by an adverse party, may require a more definite and certain statement.

126-154. Hearing Officer.

A Hearing Officer has the authority, among other things to: direct all procedures; issue interlocutory orders; schedule hearings and conferences; preside at formal proceedings; rule on procedural and evidentiary issues; require the submission of briefs and/or proposed findings of fact and conclusions of law; call witnesses and cross-examine any witnesses; recess, continue, and conclude any proceedings; dismiss any appeal for failure to comply with requirements under this Subarticle.

126-156. Prehearing Conferences.

The Hearing Officer, within his discretion, may direct the parties in any appeal to meet prior to a formal hearing for the purpose of narrowing the issues and exploring the possibilities of settlement of matters in contest.

126-158. Hearing Procedures.

A. All parties to an appeal shall have the right to be represented by counsel, call witnesses, submit documentary evidence, cross-examine the witnesses of an adverse party, and make opening and closing statements.

B. Representation in Proceedings. A business entity, an agency, or an organization may elect to be represented by a non-attorney in an administrative hearing with the approval of the presiding hearing officer; non-lawyer persons including Certified Public Accountants, an officer of a corporation, or an owner of an interest in the business entity must present proof of unanimous consent of the owners or officers of the business entity before being allowed to proceed as representatives. Attorneys licensed in other jurisdictions must obtain a Limited Certificate of Admission, or such other leave as required by the South Carolina Supreme Court, before being allowed to proceed as representatives. This regulation in no way limits a person's right to self-representation, or to be represented by an attorney, or to be represented by a nonattorney of his or her own choosing, when such non-attorney representation is allowed by law.

THE STATE OF SOUTH CAROLINA
IN THE ADMINISTRATIVE LAW COURT

Appeal from the Division of Appeals and Hearings
South Carolina Department of Health and Human Services

Robert French, Hearing Officer

Docket Number: 15-ALJ-08-0109-AP

Laurens Pediatric Clinic,

Appellant,

v.

South Carolina Department of Health
and Human Services,

Respondent.

RECORD ON APPEAL

VOLUME 1

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(803) 255-8210 Fax
ATTORNEY FOR RESPONDENT

1 FRENCH: We are on the record. This is an administrative appeal brought by Nilsa
2 Nazario, M.D. This hearing concerns the South Carolina Department of
3 Health and Human Services, Division of Appeals and Hearings, Case
4 Number 12-PA-024. The present date is October 31, 2012. My name is
5 Robert French and I'll be the presiding officer in this matter. I'll conduct
6 this hearing in accordance with the South Carolina Administrative
7 Procedures Act and the South Carolina Department of Health and Human
8 Services Regulations 126-150 through 126-158. Those are the regulations
9 that tell me how to handle an appeal and how to conduct a hearing. I won't
10 make a decision today but when I make my decision both parties will
11 receive that decision in writing. During the hearing, each party has the
12 following rights. The right to ask questions, the right to call witnesses and
13 present documents, the right to cross-examine witnesses and examine
14 documents of the other party, and the right to review testimony of the other
15 party. The Petitioner is Laurens Pediatric Clinic who is being represented
16 by Dr. Nilsa Nazario. Also with Dr. Nazario is Gloria Holiday and I
17 understand that Ms. Holiday isn't going to be giving testimony.
18 NAZARIO: Correct.
19 FRENCH: Okay. All right, the Respondent is the South Carolina Department of Health
20 and Human Services who is being represented by Mr. Bruce Carter who is
21 an Attorney in the Office of General Counsel. Also giving testimony is
22 going to be Ms. Cheryl Casey who is a Nurse Medical Reviewer, okay, in
23 Program Integrity. Also giving testimony possibly is Ms. Nancy Pittman
24 who is a Supervisor in the Office of Program Integrity at the Agency, South
25 Carolina Department of Health and Human Services. And we've got a
26 number of observers. Ms. Karen Fanning who is a Nurse Medical Reviewer
27 at the Agency, Ms. Tresa Martin is also in Medical Review at the
28 Department of Health and Human Services, and Ms. Audrey Lutts, and I
29 assume that Ms. Lutts, Ms. Fanning, and Ms. Martin are also in Program
30 Integrity. Is that's correct?
31 VOICE: Yes.

1 FRENCH: Okay. Also as observers we have Mr. Luke Hughes who is an Attorney and
2 he one of the newest contracted hearing officers that will be working out of
3 the Division of Appeals and Hearings. Also, Mr. Bryan Jeffries who is also
4 an Attorney, also one of the newest contracted hearing officers out of the
5 Division of Appeals and Hearings. So that is everybody that we've got here
6 at the hearing today. The...

7 NAZARIO: Can I ask a question?

8 FRENCH: Yes ma'am?

9 NAZARIO: I have a question sir.

10 FRENCH: Okay.

11 NAZARIO: These are the copies for you and for the other party as requested of what
12 I'm going to present.

13 FRENCH: Okay.

14 NAZARIO: So I haven't received any copies of what they're going to present.

15 FRENCH: Okay. I'm sure that you're going to get that as soon as Mr. Carter starts
16 presenting his case.

17 NAZARIO: Thank you.

18 FRENCH: Okay. All right. Now we've all got to agree on the issue, okay, so the issue
19 as far as I can see it and either side, please correct me if I'm wrong, is
20 whether the decision of the Respondent, the South Carolina Department of
21 Health and Human Services to recoup \$11,199.49 from the Petitioner,
22 Laurens Pediatric Clinic, due to improperly filed claims on Medicaid
23 recipients during the review period of September 1, 2009 through August
24 31, 2011 is proper. Dr. Nazario, is that how you understand the issue?

25 NAZARIO: I understand that the claim I didn't—that I overbilled and I, but I...

26 FRENCH: But is that the issue as you understand it? I know you don't agree with what
27 the Agency did...

28 NAZARIO: Right, that's why I'm appealing.

29 FRENCH: But do you—okay. But do you agree that that's the issue?

30 NAZARIO: That's the issue.

31 FRENCH: Okay. And how about you, Mr. Carter?

To The Division Of Appeals And Hearings
South Carolina Department Of Health And Human Services

Case No. 12-PA-024

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SC Court of Appeals

Laurens Pediatric Clinic, Appellant
vs.
South Carolina Department Of Health and Human Services, Respondent

PROOF OF SERVICE

This is to certify that I am sending by US Postal Service copy of the Petition for Dismissal with Appendix to SCDHHS, SCALC, and SC Court Of Appeals, and The Supreme Court Of South Carolina, this 29th day of August, 2016.

Nilsa I. Nazario M.D., F.A.A.P.

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REPRESENTATIVE FOR APPELLANT

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ATTORNEY FOR RESPONDENT

cc. SC Administrative Law Court (SCALC)-Clerk Of Court
Edgar A. Brown Building, 1205 Pendleton St, Suite 224,
Columbia, SC 29201
Docket # 15-ALJ-08-0109-AP

SC Court Of Appeals- Clerk Of Court
P.O. Box 11629, Columbia, SC 29211
Case No. 2015-002088

The Supreme Court Of South Carolina-Clerk Of Court
P.O. Box 11330, Columbia, SC 29211
Case No. 2016-000328

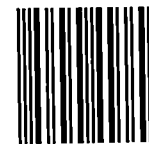
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