STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Select Health of South Carolina, Inc., agent for South Carolina Department of Health and Human Services, Appellant, vs. [Minor Child] Respondent.	Docket No. 18-ALJ-08-0446-AP **ORDER AFFIRMING**

STATEMENT OF THE CASE

This appeal comes before the South Carolina Administrative Law Court pursuant to a Notice of Appeal filed by Select Health of South Carolina, Inc. ("Select") and the South Carolina Department of Health and Human Services ("Department"). Select seeks review of the November 7, 2018 Final Administrative Decision issued by the Department's Division of Appeals and Hearings ("DAH"). Following a thorough and thoughtful review, this Court affirms the decision.

BACKGROUND

Select is a Managed Care Organization contracted to provide insurance coverage to South Carolina Medicaid beneficiaries. Minor Child ("M.C.") is a twelve year old Medicaid beneficiary enrolled in Select's Medicaid plan. This case concerns Select's denial of preapproval coverage for thirty days of inpatient treatment at an Arkansas psychiatric residential treatment facility ("PRTF"). M.C. suffers from psychiatric and behavioral issues due to the prolonged and frequent sexual abuse she suffered at the hands of her biological father. In 2011, prior to her fourth birthday, M.C. was placed with her adoptive parents. Sometime between 2015 and 2016, M.C. perpetrated sexual abuse on two of her adoptive younger siblings. After becoming aware of M.C.'s actions, her adoptive parents obtained family and individual therapy from Jerry Martin, a licensed clinical therapist who specializes in sexual behavior disorders. Mr. Martin determined that M.C. suffered from numerous psychological problems and would benefit from placement in a PRTF. As a result, in October of 2017, M.C. was admitted to Three Rivers Center for Behavioral Health ("Three Rivers"). Mr. Martin continued providing therapy to M.C. and her family.

Within M.C.'s first month at Three Rivers, her adoptive mother ("Mother") became

concerned her daughter's needs were not being met at the facility. Mother complained of record inconsistencies, failure to adequately document her daughter's behavior, and lack of continuity in her daughter's therapy. Following an incident of sexual misconduct in November of 2017, Mr. Martin wrote a detailed letter to Three Rivers. He described M.C.'s psychological state as suffering from Adjustment Disorder and Post Traumatic Stress Disorder. The letter underscored M.C.'s continued sexual behavior, including her failure to respect other's personal space, and her need to compulsively masturbate in public and private settings. Mr. Martin warned Three Rivers that M.C. would create situations with the intention of sexual gratification. These situations may not appear nefarious to facility workers who lack training in sexual reactive disorders. Of note, Mr. Martin suspected that M.C. had endured enough therapy to manipulate her treatment sessions. Thusly, in his professional opinion, he believed M.C. required a high-level of supervision and a therapist experienced in sexual behavioral disorders.

As time went on, M.C. continued to exhibit sexually inappropriate conduct. In February of 2018, Mr. Martin once again wrote Three Rivers a letter recommending M.C. be placed in "a secure setting with a program that provides services for children with sexual behavior problems." To no avail, Mother attempted to locate a South Carolina PRTF that treated female children with sexual behavioral issues. Piney Ridge Treatment Facility in Arkansas was the closest PRTF that would accept M.C. and provide specialized treatment and supervision.

In early April of 2018, Piney Ridge sought Select's preauthorization for thirty days of inpatient treatment. On April 18, 2018, Select denied the request for preauthorization. In its denial letter, Select stated the following

> [A] Medical Doctor and board certified psychiatrist reviewed the clinical information received and had determined the inpatient level of care criteria for InterQual Child and Adolescent [PRTF] was not met for [M.C.]. The reported symptoms of inappropriate sexual behaviors is being managed by the current treatment facility in which member is making progress."

Mother immediately appealed the denial on her daughter's behalf. On May 14, 2018, Select denied M.C.'s appeal. Select's denial letter was virtually identical to its original denial letter. Shortly thereafter, on May 21, 2018, Mother requested a fair hearing before the DAH.

As will be discussed in further detail, the Hearing Officer issued a prehearing order on May 29, 2018. In the order, the Hearing Officer requested the production of documents. Select failed to comply with the Hearing Officer's request and was sanctioned with the burden of proof. On

July 18, 2018, the hearing commenced. The following witnesses testified: (1) Benita Tipton, Select's Appeals Supervisor; (2) Dr. Mayank Dalal, Select's Medical Director; (3) Betsy Price, Three Rivers Therapist; (4) Mother; and (5) Mr. Martin. A second day of testimony was required. Due to scheduling conflicts, the hearing was not reconvened until October 8, 2018. During the second day of the hearing, Leslie Johnson, a Continuum of Care employee was called to testify. In addition, Mr. Martin, Ms. Price, and Mother were reexamined.

On November 7, 2018, the Hearing Officer issued a thorough twenty-seven-page decision. In her well-written decision, the Hearing Officer explained that M.C., as a Medicaid beneficiary, was entitled to Early and Periodic Screening, Diagnostic, and Treatment Services ("EPSDT").[1] Social Security Act § 1902(a)(43) (42 U.S.C. § 1396a(a)(43)). As she described, EPSDT services entitle M.C. to treatment that will "correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State." § 1905(r)(5) (§ 1396d(r)(5)). Pertinent to M.C., she was entitled to rehabilitative services that produce "the maximum reduction of physical or mental disability and restoration . . . to the best possible functional level." § 1905(a)(13) (§ 1396(d)(13)). Accordingly, Select, in its review of M.C.'s preauthorization request, was legally required to determine whether Piney Ridge's rehabilitative services were medically necessary. The Hearing Officer found that Select erroneously conducted the EPSDT analysis due to its incorrect standard of determining medical necessity. In her opinion, Select simply focused on whether M.C. was improving at Three Rivers. However, the correct inquiry was whether Three Rivers was rehabilitating M.C. to the best possible functional level, and if not, whether Piney Ridge was better equipped to undertake the challenge. In addition, the Hearing Officer found other errors in Select's necessity review. More specifically, she determined that Select failed to rely on credible facts when assessing M.C.'s improvement and ignored the distinctiveness of her situation. The Hearing Officer, therefore, concluded that Select failed to prove that its denial was proper. Mother, on the other hand, provided sufficient evidence that specialized inpatient treatment at Piney Ridge was necessary. Accordingly, the Hearing Officer reversed Select's denial of coverage and granted M.C.'s request to receive treatment at Piney Ridge. This appeal resulted.

[1] For the sake of brevity, this Court will not cite or otherwise discuss the complex laws and regulations governing Medicaid and Managed Care Organizations.

STANDARD OF REVIEW

Appeals from DAH decisions are heard by this Court pursuant to the Administrative Procedures Act. S.C. Code Ann. § 44–6–190. Absent irregularities in the agency's procedure, this Court's review is limited to the record. S.C. Code Ann. § 1-23-380(4). This Court "may modify or reverse the decision of the agency when substantial rights of the appellant have been prejudiced" in one or more of the following ways:

> [T[he administrative findings, inferences conclusions, or decisions are [found to be] (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.

§ 1-23-380(5).

In the underlying matter, Select argues that its substantial rights were violated when the Hearing Officer acted in excess of her statutory authority, abused her discretion, acted arbitrarily, and rendered a clearly erroneous decision lacking substantial evidence. The standards by which the Court evaluates these alleged errors will be discussed while addressing Select's corresponding arguments.

DISCUSSION

Select's appeal presents three main issues of error. First, Select claims that the Hearing Officer exceeded her authority and abused her discretion by requiring it to produce specific documents. Similarly, this error was repeated when the Hearing Officer assigned Select with the burden of proof for failing to produce such documents. Second, Select alleges an abuse of discretion based on the Hearing Officer's refusal to subpoena certain records and witnesses. Thirdly, Select argues that the Hearing Officer's final decision was arbitrary and capricious or erroneous as lacking substantial evidence. Prior to conducting an analysis of the merits, this Court notes that Select has alleged numerous due process violations. These issues are unpreserved and will not be addressed. *See Carson v. S.C. Dep't of Natural Res.*, 371 S.C. 114, 120, 638 S.E.2d 45, 48 (2002); *Grant v. S.C. Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995) (holding that a due process claim raised for the first time on appeal is not preserved).

Document Production and Sanctions

On May 29, 2018, the Hearing Officer issued an order titled "Prehearing Conference Order—EPSDT Consideration." Among other things, the Hearing Officer required the parties to conduct a conference to try and resolve the appeal. Both parties were instructed to file summary statements discussing what, if anything, they agreed upon. The Hearing Officer also ordered Select to attach a copy of the "rules, policies, regulations, laws, etc., used in making the decision about [M.C.'s] case, as well as any specific information about that [sic] was used in the decision, such as medical records, audit records, or similar items . . . . Select must include in its summary an analysis of [M.C.'s] EPSDT rights."

In Select's summary, it explained that Dr. Mukherjee, its reviewing physician, conducted a further review during the prehearing conference. Dr. Mukherjee clarified that M.C. continued to engage in sexual self-gratification and "has exhibited increased episodes of sexual behavior since being in the facility." Nonetheless, Dr. Mukherjee concluded, based on what he referred to as "clinical documentation," that denial was proper. Dr. Mukherjee's reasons for denial was that M.C. "has had decreased episodes of inappropriate sexual behavior while in school and her behavior is being monitored by video." Along with its summary, Select failed to include any documentation, EPSDT analysis, or even an explanation supporting Dr. Mukherjee's conclusion. Consequently, on June 20, 2018, the Hearing Officer issued a Hearing Notice stating the following:

> I did not receive any medical criteria or policy, any records considered, or an analysis of [M.C.'s] EPSDT rights. As a result of this failure to timely respond, I am reversing the burden of proof and, therefore, placing the burden of proof on Select. This means Select has the burden to show its decision was correct. In addition, Select is Ordered to provide these already-requested items to me and to Mother no later than 5 p.m. on July 2. If it does not, any related evidence or argument will be excluded from the hearing and a negative evidentiary inference taken against Select on any missing facts or policy.

On June 29, 2018, Select provided several of the requested documents, including an EPSDT analysis. Yet, Select failed to provide the standards and documents cited in its initial and appealed denial letters—e.g., clinical information and the InterQual behavioral health standards. As a result, the Hearing Officer issued a final notice to Select requesting "any rules, policies, regulations, laws, etc., used in making the decision." Finally, on July 3, 2018, Select Health produced the InterQual standards and M.C.'s psychiatric records.[2]

[2] On the eve of the July 18, 2018 hearing, Select Health attempted to submit "clinical" notes. The Hearing Officer

Having explained the Hearing Officer's actions, I turn to Select's claim that the Hearing Officer exceeded her statutory authority by requesting the aforementioned information. The authority vested in a DAH hearing officer is found in 27 S.C. Code Regs. § 126.154, which states the following:

> 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."

(Emphasis added). As demonstrated in the regulation's wording, this statutory list of powers is not exhaustive. While requiring a party to produce documents or additional analysis is not specifically noted in § 126.154, it can certainly be assumed that the Hearing Officer had such authority in the case *sub judice*. The only method of evaluating Select's denial of coverage, including whether it properly conducted a medical necessity analysis, was to obtain the records Select relied upon in making its decision. Select is the only party that could supply this information, especially considering that Mother was unable to acquire Select's documents prior to the Hearing Officer's involvement. Requiring the production of outcome determinative documents and summaries of analysis that are solely in the possession of only one party falls within the ambit of statutory authority expressed in § 126.154.

Moreover, I find the Hearing Officer properly exercised her discretion in ordering the production of the relevant documents. As applicable to this issue, "[a]n abuse of discretion occurs when a decision is based upon an error of law . . . 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). In light of her authority and the significance of the documents at issue, the Hearing Officer's request was well within her discretion.

Select also maintains a separate but related argument concerning the Hearing Officer's authority to sanction Select with the burden of proof. Both parties provided extensive arguments regarding which party is encumbered with the burden of proof in Medicaid fair hearings. There is no settled law on this issue and this Court will not attempt to resolve it herein. Instead, this Court

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described the documents as Select Health's review log for M.C.'s inpatient stay at Three Rivers. The notes logged correspondence and information regarding M.C.'s coverage determination. The Hearing Officer excluded this evidence as untimely.

finds that assigning the burden of proof is a sanction the Hearing Officer had the authority to utilize. As already stated, § 126.154 provides a Hearing Officer with the authority to perform many actions. Imposing sanctions is not listed therein, nor is there any controlling authority that discusses this action. Even so, this Court deduces that imposing sanctions for failure to comply with discovery orders qualifies as an action the General Assembly envisioned when including the phrase "*among other things*" within the text of § 126.154. Indeed, the statute states that a hearing officer may impose the ultimate sanction of dismissal "for failure to comply with requirements under this Subarticle." This Court has ruled that the Hearing Officer had the power to order the production of certain documents. It follows, then, that the Hearing Officer also had the authority to impose sanctions if Select failed to comply with her order. In addition, considering Select's willful refusal to provide the requested documents, an abuse of discretion cannot be found.

Subpoenas

Select's next assignment of error concerns the Hearing Officer's denial of its request to subpoena a Three River's doctor and the facility's complete records. On August 28, 2018, more than a month after the first day of the hearing, but prior to the second day of the hearing, Select requested the subpoenas. The Hearing Officer denied Select's requests because the subpoenas "would cause undue delay and the contents [would] be repetitious as compared to their probative value."

The Hearing Officer's refusal to issue a subpoena is reviewed for an abuse of discretion. *See Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 436, 319 S.E.2d 695, 698 (1984)(quoting *Marroquin-Manriquez v. I.N.S.*, 699 F.2d 129 (3d Cir. 1983)). As it relates to the Hearing Officer's ruling, the Court may find an abuse of discretion if the "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 . . . ." *State v. Allen*, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006). I find merit in the Hearing Officer's determination that Select's subpoena requests would have caused undue delay. M.C.'s fair hearing was encumbered with numerous delays, taking well over four months for the hearing completion. It was unreasonable for Select to further delay the proceedings by seeking the subpoenas over a month after the first hearing date, mere weeks before the scheduled second hearing date. Moreover, the records had minimal probative worth considering Select's admission that it did not use such records in making its denial determination. Select never utilized the requested records in the very decision that this appeal is

predicated upon. An abuse of discretion cannot be found.

Erroneous, Arbitrary and Capricious

Select's final argument is titled "Evidence on the Whole Record" and states that the hearing officer's decision was "arbitrary, capricious, and erroneous in view of the reliable, probative and substantial evidence on the whole record considering the testimony that a PRTF is the most restrictive form of therapy and . . . [M.C.] was responding to therapy and appropriate for discharge." This section of Select's brief is comprised of reassertions of previous arguments already addressed and riddled with hasty evidentiary complaints. Nonetheless, this Court garners that Select believes the Hearing Officer's ultimate legal conclusion was arbitrary and capricious and her factual findings were unsupported by substantial evidence.

As it relates to Select's allegation of an arbitrary and capricious decision, it appears that Select takes aim at the weight and credibility the Hearing Officer gave to Jerry Martin's and Betsy Price's testimonies. However, since Select makes brief allegations of evidentiary errors without providing any legal support or citations regarding the alleged error's arbitrary nature, this Court is not obligated to provide further analysis. *Shapemasters Golf Course Builders, Inc. v. Shapemasters, Inc.*, 360 S.C. 473, 480, 602 S.E.2d 83, 87 n.4 (Ct. App. 2004)("It is not necessary for this court to address Appellants' remaining issues because Appellants fail to provide legal authority to support their arguments."); SCALC Rule 60(b)(3)("The brief shall be divided into as many parts as there are issues to be argued, and each such part shall bear an appropriate caption, followed by a discussion and citation of authority.").

This Court also rejects Select's argument that the Hearing Officer's decision is without substantial evidence. Although somewhat unclear, Select seems to advance a claim that Ms. Price's testimony that M.C. was ready for discharge rendered Select's denial proper. I disagree. In her order, the Hearing Officer found that Ms. Price's testimony was inconsistent and her credibility questionable. It is within the Hearing Officer's purview, as the trier of fact, to weigh the credibility of a witness. *See Woodall v. Woodall*, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996). After all, the Hearing Officer is in the best position to judge the demeanor and veracity of the witness's testimony. In this case, the Hearing Officer elected to believe Mr. Martin's testimony that M.C. was in need of a secure setting with a program that services children with sexual behavioral problems. This Court will not overturn the Hearing Officer's finding "unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the

finding was based." *Lark v. Bi–Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)(quoting *Indep. Stave Co. v. Fulton*, 251 Ark. 1086, 476 S.W.2d 792 (1972)). Thusly, I find no merit to Select's contention that the Hearing Officer's findings were without substantial evidence.

Attorney's Fees

Lastly, this Court will address M.C.'s request for attorney's fees. M.C. claims that Select's appeal is without substantial justification, thereby permitting recovery of fees pursuant to South Carolina's fee-shifting statute promulgated in S.C. Code Ann. § 15-77-300. This statute authorizes the allowance of attorney's fees to the prevailing party "[i]n any civil action brought by the State . . . if: (1) the court finds that the agency acted without substantial justification in pressing its claim against the party; and (2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust." The South Carolina Supreme Court has interpreted this statute as having the following three basic prerequisites to recovery: (1) the party seeking attorney's fees is the prevailing party; (2) the agency lacked substantial justification in pressing its claim against the contesting party; and (3) no special circumstances exist which would render an award of attorney's fees unjust. *Heath v. Aiken County*, 295 S.C. 416, 420, 368 S.E.2d 904, 906 (1988). Whether to award attorney's fees pursuant to § 15-77-300 is in this Court's discretion. *See Heath v. County of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990).

While M.C. satisfies the first perquisite to recovery, she has failed to demonstrate that Select lacked substantial justification in pursuing this appeal. Substantial justification has been interpreted to mean "justified to a degree that could satisfy a reasonable person." *Heath*, 302 S.C. at 183, 394 S.E.2d at 712 (quoting *Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 2541 (1988)). Moreover, the fact that Select "los[t] on the merits does not create a presumption that its position was not substantially justified." *Id.* (citing *Video Gaming Consultants, Inc. v. S.C. Dep't. of Revenue*, 358 S.C. 647, 650, 595 S.E.2d 890, 892 (Ct. App. 2004)). The Hearing Officer's decision raised novel questions of law. For example, there is no precedential authority pertaining to which party maintains the burden of proof in Medicaid fair hearings. In addition, whether DAH hearing officers have the power to sanction a party with the burden of proof presents a genuine issue of law. As a result, I find Select substantially justified in pursuing this appeal. The allowance of fees in this situation is inappropriate.

ORDER

Based upon the foregoing, the Hearing Officer's Order of reversal is hereby Affirmed.

AND IT IS SO ORDERED.

SHIRLEY C. ROBINSON
SC Administrative Law Judge

June 11, 2019
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 11 day of June, 2019

By: _____
Judicial Law Clerk