DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE OF DIRECTOR

ACTION REFERRAL

TO	DATE
Roberts	5-8-15

DIRECTOR'S USE ONLY	ACTION REQUESTED
1. LOG NUMBER 000243	[ ] Prepare reply for the Director's signature DATE DUE _____
2. DATE SIGNED BY DIRECTOR _____	[ ] Prepare reply for appropriate signature DATE DUE _____ [ ] FOIA DATE DUE _____ [X] Necessary Action

APPROVALS (Only when prepared for director's signature)	APPROVE	* DISAPPROVE (Note reason for disapproval and return to preparer.)	COMMENT
1.			
2.			
3.			
4.			

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

1

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.

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-

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.

---

[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.

[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.

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 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.

---

[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.

[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.

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 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-

[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.

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.

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

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,

[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.

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

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 22nd day of March 2005

By: Brigitte M. Baskin
Judicial Law Clerk

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.

---

[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.

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

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

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.

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

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]

---

[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

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

---

[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.

Beverly A. H. Buscemi, Ph.D.
State Director
David A. Goodell
Associate State Director
Operations
Susan Kreh Beck
Associate State Director
Policy
Thomas P. Waring
Associate State Director
Administration

3440 Harden Street Ext (29203)
PO Box 4706, Columbia, South Carolina 29240
803/898-9600
Toll Free: 888/DSN-INFO
Website: www.ddsn.sc.gov

COMMISSION
Christine Sharp
Chairman
Fred Lynn
Vice Chairman
Eva R. Ravenel
Secretary
William O. Danielson
Katherine W. Davis
Katherine Llamas Finley
Harvey E. Shiver

TO: Approved Providers of Medicaid HCBS Waiver-funded Behavior Support Services
Executive Directors-DSN Boards
CEOs-Contracted Service Providers

FROM: Susan Kreh Beck, Associate State Director – Policy

DATE: September 16, 2014

RE: BCBA Requirement Update

As was announced previously, certification by the Behavior Analyst Certification Board as a Board Certified Behavior Analyst (BCBA) or as a Board Certified Assistant Behavior Analyst (BCaBA) will be required for providers of Home and Community Based Services (HCBS) Waiver-funded Behavior Support Services in South Carolina effective July 1, 2015. In order to maintain the current level of provider availability when this new requirement takes effect, DDSN has recommended, and DHHS has agreed to, the allowance of a grace period for those providers who were approved prior to July 1, 2015 and who have embarked upon their pursuit of either the BCBA or the BCaBA credential.

Behavior Support Services providers enrolled as of June 30, 2015 who do not hold BCBA or BCaBA certification, but who are in good standing (with regard to quality assurance reviews), will be allowed to remain as providers of Behavior Support Services if they are actively engaged in pursuit of either the BCBA or the BCaBA certification. These providers will be allowed to continue to provide services without one of these credentials through June 30, 2018 as long as they remain in good standing and in continuous (i.e., uninterrupted except by semester breaks), active pursuit of certification.

The included attachment contains details of the acceptable documentation for proof of continuous active pursuit of the certification. This will need to be provided to DDSN by June 1st and December 1st of each year subsequent to the initial request to continue as a Behavior Support provider for individuals. If pursuit of certification is not established prior to July 1,

Behavior Support Provider Certification Requirement Allowance

Acceptable Documentation of Continuous Pursuit of Certification

In order to demonstrate continuous pursuit of certification, **initially and twice per year** (by June 1st and December 1st of each year), DDSN Behavior Support providers without the BCBA or BCaBA certification must provide documentation in order to satisfy the following requirements:

- **Initially** and prior to July 1, 2015, Behavior Support providers must submit a copy of course registration documents for the course in which you are enrolled.
  - If not in session (e.g., during summer break), then a copy of a transcript showing a passing grade for one or more of the required courses (during the most recently completed semester) will be acceptable.
  - If you have not yet begun the coursework, you must submit documentation of acceptance to a university/college that offers a course sequence approved by the BACB. Evidence of the BACB's approval of the course sequence being offered must be attached.
  - Each submission must be accompanied by a statement of the projected date of certification no later than July 1, 2018.
  - Documentation should be submitted to Mr. Jacob Chorey through US mail (P.O. Box 4706, Columbia, SC 29240) or scanned through email to jchorey@ddsn.sc.gov. Receipt of documentation will be acknowledged via email.
- **Twice per year**, by December 1st and June 1st each year until certification, Behavior Support providers must submit the appropriate evidence according to your progress, as defined below.
  - Until the requisite coursework has been completed, submit a copy of course registration documents for the course in which you are enrolled. If not in session (e.g., during summer or holiday season), then a copy of a transcript showing a passing grade for one or more of the required courses (during the most recently completed semester) will be acceptable.
  - After the requisite coursework has been completed and until the required supervision hours have been completed, submit written verification of an active agreement for supervision by a BCBA and a statement of the number of supervision hours completed to date.
  - After the required supervision has been completed, submit evidence of application to take the BCBA or BCaBA Exam.
  - Each submission must be accompanied by a statement of the projected date of certification, which may be no later than July 1, 2018.
  - Documentation should be submitted to Mr. Jacob Chorey through US mail (P.O. Box 4706, Columbia, SC 29240) or scanned through email to jchorey@ddsn.sc.gov. Receipt of documentation will be acknowledged via email.

If continuous pursuit of certification is not maintained and reported according to the schedule described above, DDSN will recommend to DHHS that the waiver provider's enrollment status be terminated due to failure to comply with certification requirements.

If pursuit of certification is not established prior to July 1, 2015, DDSN will recommend to DHHS that the waiver provider's enrollment status be terminated due to failure to comply with certification requirements.

Behavior Support Provider Certification Requirement Allowance

Acceptable Documentation of Continuous Pursuit of Certification

In order to demonstrate continuous pursuit of certification, **initially and twice per year** (by June 1st and December 1st of each year), DDSN Behavior Support providers without the BCBA or BCaBA certification must provide documentation in order to satisfy the following requirements:

- **Initially** and prior to July 1, 2015, Behavior Support providers must submit a copy of course registration documents for the course in which you are enrolled.
  - If not in session (e.g., during summer break), then a copy of a transcript showing a passing grade for one or more of the required courses (during the most recently completed semester) will be acceptable.
  - If you have not yet begun the coursework, you must submit documentation of acceptance to a university/college that offers a course sequence approved by the BACB. Evidence of the BACB's approval of the course sequence being offered must be attached.
  - Each submission must be accompanied by a statement of the projected date of certification no later than July 1, 2018.
  - Documentation should be submitted to Mr. Jacob Chorey through US mail (PO Box 4706, Columbia, SC 29240) or scanned through email to jchorey@ddsn.sc.gov. Receipt of documentation will be acknowledged via email.
- **Twice per year**, by December 1st and June 1st each year until certification, Behavior Support providers must submit the appropriate evidence according to your progress, as defined below.
  - Until the requisite coursework has been completed, submit a copy of course registration documents for the course in which you are enrolled. If not in session (e.g., during summer or holiday season), then a copy of a transcript showing a passing grade for one or more of the required courses (during the most recently completed semester) will be acceptable.
  - After the requisite coursework has been completed and until the required supervision hours have been completed, submit written verification of an active agreement for supervision by a BCBA and a statement of the number of supervision hours completed to date.
  - After the required supervision has been completed, submit evidence of application to take the BCBA or BCaBA Exam.
  - Each submission must be accompanied by a statement of the projected date of certification, which may be no later than July 1, 2018.
  - Documentation should be submitted to Mr. Jacob Chorey through US mail (PO Box 4706, Columbia, SC 29240) or scanned through email to jchorey@ddsn.sc.gov. Receipt of documentation will be acknowledged via email.

If continuous pursuit of certification is not maintained and reported according to the schedule described above, DDSN will recommend to DHHS that the waiver provider's enrollment status be terminated due to failure to comply with certification requirements.

If pursuit of certification is not established prior to July 1, 2015, DDSN will recommend to DHHS that the waiver provider's enrollment status be terminated due to failure to comply with certification requirements.

As you and I have discussed, the Insurance Reserve Fund, on behalf of its insureds, is willing to pay Ten Thousand Dollars as attorney's fees and costs in exchange for a dismissal of the pending appeal in the Fourth Circuit and Ms. Mullis's execution of a full and complete Release of All Claims and Agreement to be prepared by me. If Ms. Mullis is agreeable to these terms, kindly confirm by return email. Additionally, please complete or have Ms. Mullis complete the attached Medicare form. Once I have the completed Medicare form, I can order the settlement check.

With best regards.

Sincerely,

Vance

Vance J. Bettis

VJB/ehg
Enclosure

cc: Richard A. Hepfer, Esq. (w/ encl) (via email)