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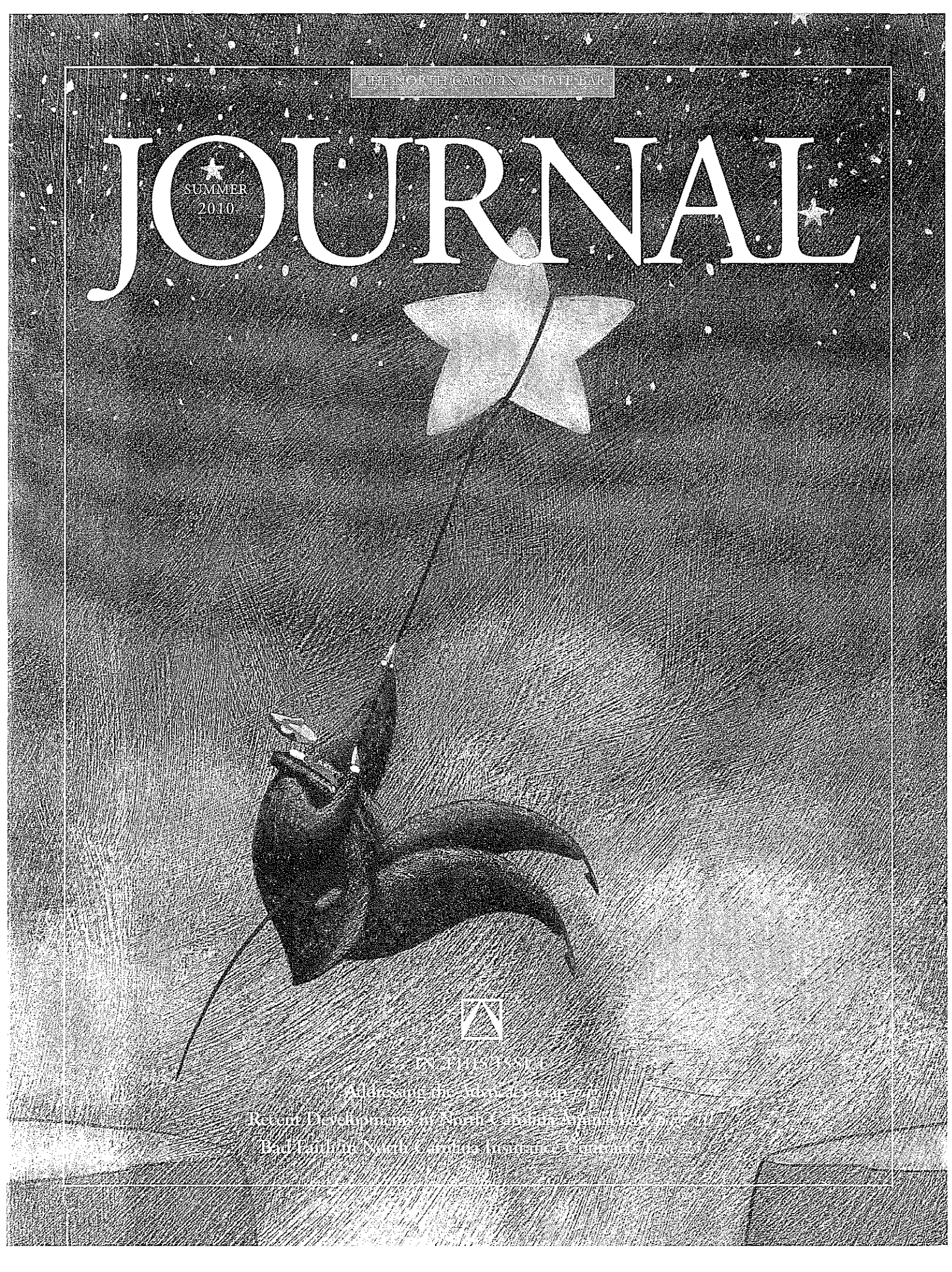


Addressing the Advocacy Gap—

Medicaid Recipients Filing for Medicaid Benefits

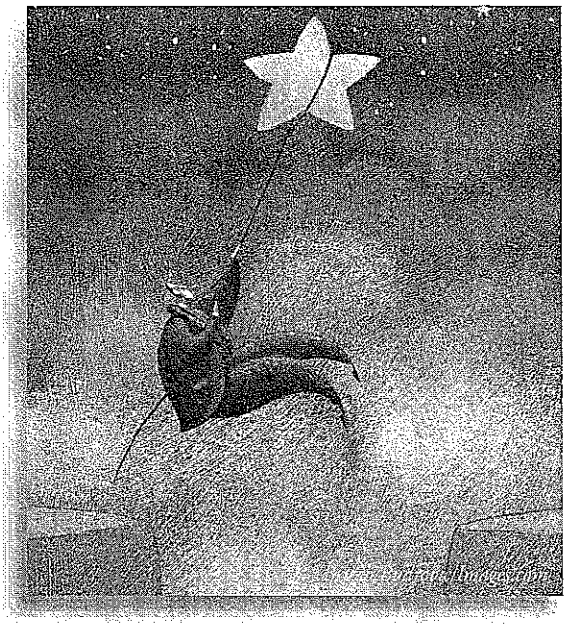
By Ann Shy

First the good news...

There are several particularly good things about Medicaid in North Carolina. For one, we have traditionally had some of the highest reimbursement rates in the country for healthcare providers serving Medicaid recipients.[1] That translates into more providers and better access to services for recipients. Another highlight is that the state has implemented a mediation program[2] whereby roughly 80% of all claims brought for Medicaid benefits by recipients are resolved through mediation, eliminating the need for an administrative hearing before an administrative law judge.[3] Approximately ten percent of claims are dismissed, either because of post-mediation settlement or because the party dropped the case (for reasons not examined here). For those recipients who proceed to a hearing, due process procedures were improved in 2009 which greatly increase efficiency for all parties.[4] Protracted litigation is not the model here. Finally, because our state has a large number of Medicaid recipients, many are well-served by these advantages.[5] These benefits aren't just nice, they're significant.

The not-so-good news...

What happens to Medicaid recipients whose problems aren't resolved in mediation? Fortunately, the process is efficient thanks to the recent legislation that condenses the timelines.[6] Resolving problems quickly is beneficial for all. The petitioner's time is no longer tied up in the dispute, and Medicaid, which must continue paying for disputed services throughout the hearing process, can stop paying an invalid claim if that's the case.[7] An expedited process reduces expenses from all sides. However, recipients rarely have legal representation at the hearing, so the *pro se* litigant faces off with the Attorney General's Office. To further complicate matters for the *pro se* Medicaid recipient, the administrative law judge's decisions are reviewed by the Department of Health and Human Services (DHHS), home to the Medicaid Agency. This is analogous to courtroom defendants having the power to overturn judges who rule against them. Technically, the Medicaid Agency can only reject the administrative law judge's ruling if the findings of fact are clearly contrary to the evidence presented in the hearing. This may seem like a limitation on the Medicaid Agency's power to overturn decisions; however, 81% of all decisions that favor the recipient have been overturned pursuant to Medicaid's power to render the final agency decision, and no decisions favoring Medicaid have been overturned. This suggests that either administrative law judges are prone to error in their decisions for recipients while correct at all times in their decisions for Medicaid,[8] or that *pro se* litigants are rarely capable of navigating the hearing in a way that will survive final agency review. The former explanation is unlikely, thus highlighting the critical need for advocacy for recipients during the hearing. A more detailed record from the hearing could offer greater protection of recipients' cases during final agency review. This simple fact to the legal profession may be entirely lost upon others, including Medicaid recipients claiming benefits rights.



After the Medicaid Agency overturns the administrative law judge's decision, the recipient can appeal in superior court for *de novo* review, again underscoring the need for a thorough record from the administrative hearing. In practice, recipients rarely have the resources to appeal. For those that do, the process comes to a screeching halt due to extremely overcrowded dockets. Of note, Medicaid stops paying for the disputed benefit once it renders its final agency decision unless the superior court grants a stay. I was recently told that a Medicaid case filed for appeal in mid-July 2009, and fully briefed back in September, was not argued until early February 2010. The wait time between that final agency decision and the appeal in superior court (seven months) was longer than the five month lifespan of a Medicaid denial running the full gamut of mediation, hearing, agency review, and filing an appeal.

Children can become Medicaid ineligible by turning 18 or 19 years old. A stalled appeal could render a claim moot if the petitioner becomes ineligible for the benefit due to age while waiting for the appeal process to run its course.[9] Worse still, the long-term effects of untreated and under-treated physical and mental health problems can extend and exac-

erbate long into adulthood. Put bluntly, there is bigger bang for the buck in healthcare dollars spent on children, and worse outcomes for longer periods when services are denied to young patients in need. This result underscores how the burden is not only on the individual family, but also eventually escalates into a burden on the state as a whole.

The best news yet...

One solution has been identified that could foster improvement beyond what's already in place. A group of legal professionals from law schools, from the judiciary, and practitioners recently discussed how post-mediation claimants fall through the cracks. The group crafted a fresh approach to expand the already notable success of North Carolina's response to handling claims against Medicaid.

Here's how it could work...

North Carolina is home to seven law schools and 24 Legal Aid of NC offices. Rather than a single law school developing a Medicaid law clinic, the group envisioned a network model that coordinates existing resources. Each law school would work on an ongoing basis with a particular set of Legal Aid offices in which the school's externship coordinator would place its externs. For example, if all seven schools participated in the network, each school would develop a placement relationship with three or four Legal Aid offices. First, externs would undergo a one-week substantive training on Medicaid procedure and appeals, then take those Medicaid-specific skills to the Legal Aid office. Externs would be assigned clients at whatever stage in the continuum claimants are in (i.e., pre-mediation, negotiation, hearing, appeal). A network coordinator would oversee the system, working closely with schools, Legal Aid, and trainers to ensure that academic requirements are met, court schedules are kept, clients are reached, cases are handed off smoothly between students, and attorney-to-student practice ratios are satisfied.

Why bother?

1. *Legal Advocacy for Medicaid Recipients:* A clear need has been identified. Medicaid recipients are already medically and economically burdened. The additional burden of navigating alone through the legal process is frequently too great despite the best efforts of the current system to assist them.

2. *Improved Due Process:* Petitioners are further disadvantaged by a system whereby final agency decisions overturn the vast majority of administrative law judge decisions favoring recipients. Without adequate legal representation, this routine practice may continue, creating an unfortunate appearance of bias. Further, the hearing record is often insufficient for adequate *de novo* review in superior court for those few petitioners who pursue an appeal.

3. *Clinical Opportunity for Law Students:* Students would have the opportunity to handle actual cases with attorney guidance and supervision. A single case can span alternative dispute resolution, an administrative hearing, and superior court review. With teleconferencing, these future lawyers would get early exposure to bringing geographically distant parties together through technology. Students would be exposed to public interest practice, health law, discovery with the Attorney General's Office, advocacy before administrative law judges and potentially in superior court.

4. *Economic Benefit for Medicaid Agency:* A coordinated network that manages claims for Medicaid benefits would further decrease the financial burden on Medicaid to continue paying for disputed services throughout the mediation, hearing, and review process by enhanced efficiency of process. Additional cost savings could occur for Medicaid if a formal network of legal expertise could eliminate the burden on Medicaid to train recipients (over 1.5 million in NC) on the hearing process. The October 2009 DHHS legislative report describes Medicaid's intent to provide due process training for providers and recipients, and its inability as of 2009 to provide that training to recipients.[10]

5. *Benefit to Attorney General's Office:* The Attorney General's Office could streamline its pre-hearing communication directly to the extern rather than juggle communications with the parent, healthcare provider, and any other party acting in a supportive role in the child's case.

6. *Benefit to the State:* The number of North Carolinians on Medicaid is increasing. The economic downturn, lack of employment growth, and health insurance reform appear to suggest an increase in eligible applicants beyond the normal trajectory.[11] Setting up a network of expertise in existing Legal Aid offices to handle claims now while the numbers are still manageable can mitigate future dispute backlog.

This network model proposes a response that goes beyond fractional progress. By involving as many law schools and Legal Aid offices as are willing to participate, the burden does not fall on a single institution to build a clinic or secure a niche, and the educational opportunity is spread to each participating institution. According to 2009 statistics, as many as 300 hearing claims are filed each month. That represents substantial opportunity to get lawyers-in-training involved in pre-mediation preparation (in the interest of keeping the mediations straightforward, attorneys do not participate in the mediations). About 20% of claims are not resolved in mediation—that's about 60 cases a month where negotiations might be appropriate. Roughly 30 of those claims are set for hearing, and decisions that favor the recipient (about one third) would be overturned if the trend continues, leaving about ten cases a month to be briefed for superior court if appropriate. These numbers will grow as more families qualify for Medicaid.

It would be unreasonable to pursue benefits for everyone with a claim. The good news is that the goal discussed here is to secure benefits for those who rightly qualify but lack the legal resources to work their way through the system that lies beyond mediation. This is not a proposal to increase Medicaid spending. It is a proposal to accurately spend according to recipients' benefit rights.

Disputes around claims and benefits are often the result of miscommunication, misplaced paperwork, or inattention to detail between the parties. Mediation has proved to be the right remedy to address these problems. The result is increased assurance that services are being correctly delivered or correctly denied, as the case may be. Unfortunately, for those who pursue a claim against Medicaid, existing statistics suggest that even if they win at the hearing, the agency is very likely to overturn the decision. While the right to an appeal in superior court exists, going *pro se*, hiring an attorney, or securing *pro bono* help may be far-fetched for an already medically-burdened child living in poverty. A network approach that systematically places trained, supervised externs in the community on an ongoing basis to provide advocacy at each stage of every recipient's legal journey with Medicaid is certainly possible. ■

Ann Shy is an attorney and mediator at Dispute Redesign in Carrboro, NC. Prior to becoming a member of the NC Bar in 2009,

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Recent Developments in North Carolina Animal Law

By Calley Gerber and William Reppy Jr.

Animal law continues to be a controversial and changing area in North Carolina.

In 2009, an unprecedented number of bills addressing animal issues were filed in the General Assembly. The most significant recent[1] developments in the evolution of animal law in North Carolina arise out of amendments to core statutes by the General Assembly plus its enactment of a new law, and out of new or amended city and county ordinances. At least two packages of administrative rules impacting animals are worthy of note, along with a few judicial decisions.

Cruelty to Animals

The state's primary animal cruelty statute, G.S. 14-360, was amended in 2007 to make malicious killing of an animal by depriving it of sustenance a class A1 misdemeanor,[2] following affirmance in 2004 of a cruelty conviction based on evidence that dogs had been intentionally starved.[3] In 2005, cockfighting was upgraded from a class 2 misdemeanor to a class I felony.[4]

In 1893, the Supreme Court held that conducting a pigeon shoot violated the state's criminal animal cruelty statute,[5] but a century later, the statue having been substantially rewritten, a pigeon-shoot operator sought a declaratory judgment that the statute, as applied to the activities he wished to conduct, was unconstitutionally vague.[6] One of G.S.14-360's exemptions related to birds subject to hunting, but this did not extend to birds the Wildlife Resources Commission classified as not "wild birds," which by a rule of the commission included "the domestic pigeon (Columba livia)." The court of appeals agreed with the plaintiff that—because of use of the word "domestic"—the statute as applied resulted in a

denial of due process for failing to advise whether it removed from the statutory exemption feral pigeons that the plaintiff might use in a pigeon shoot.[7] The commission responded by deleting from its rule the word "domestic."[8]

It is generally believed that pigeon shoots are now as illegal as they were in 1893.

Since 1969, legislation unique to North Carolina[9] has granted private citizens and organizations standing to enjoin the same kind of animal cruelty that can be prosecuted criminally.[10] These are often referred to as "19A suits." In 2007, the court of appeals rejected the contention that granting standing to a person who had suffered no injury was unconstitutional under of the state constitution's provision that there exists "but one form of action for the enforcement or protection of private rights...."[11]

In 2003 and 2006,[12] the General Assembly amended the citizen-standing act to:

- clarify that cities and counties can be plaintiffs;
- authorize the court to appoint the plaintiff as custodian for animals at issue, with authority to provide them veterinary care and place them in foster homes;
- authorize the court to tax as costs the defendant owes the plaintiff sums spent by the plaintiff caring for the animals at issue;
- empower the court to terminate the defendant's ownership of the animals and vest ownership in the plaintiff or other suitable successor owner; and
- permit the court to enjoin the defendant from acquiring new animals for a specified period of time.

In recent years, over a dozen jurisdictions in North Carolina have passed anti-tethering ordinances to regulate or entirely ban the chaining of dogs while unattended. Some jurisdictions, such as New Hanover County, have completely banned tethering dogs while unattended.[13] Other jurisdictions, such as the City of Raleigh, have placed restrictions on tethering. Under the Raleigh ordinance, a dog cannot be tied outdoors for more than three hours in any 24-hour period and any device used for tethering must be at least ten feet long, attached in a manner to prevent strangulation or entanglement.[14]

Crimes Involving Dogs

Fleeing from policemen, a suspect ran into his sister's backyard and stationed himself behind his sister's German Shepherd mix. When an officer approached, the suspect pushed the dog at the officer, called the dog by name, and said "bite him."[15] After tackling the suspect, the officer was bitten by the dog, who later bit another officer. The suspect was convicted of assault with a deadly weapon, the dog, and appealed on the ground of insufficiency of the evidence. Over the dissent of Judge Elmore, who stressed that the appellant did not own the dog and that the animal was not large in comparison to the police officers, the appellate court affirmed.

But a Wake County trial court in 2010 held the precedent—the defendant there, also charged with assault with a deadly weapon, had let run without restraint two pit bulls he owned, which attacked a child.[16] Dismissing the charge, the superior court focused on the absence of evidence that the defendant intended the dogs to attack their victim.

With rising attention to dog bites, several North Carolina jurisdictions have responded by enacting bans on certain breeds. The North Carolina General Statutes already provided for determination and regulation of dangerous dogs based upon their behavior.[17] The new local ordinances ban dogs solely on their breed, regardless of behavior. The breeds most commonly banned are pit bulls, rottweilers, wolf hybrids, and any mix thereof.[18]

Animal Shelters

Part of the state's Rabies Control Act, G.S. 130A-192, has long provided that stray animals picked up for not wearing rabies tags had to be held for 72 hours before being euthanized or adopted out, to give the owner of the animal a chance to reclaim the lost pet. Amendments to this statute effective in 2010 provide that:

- the shelter staff must, if it can be done at a reasonable cost, scan the animal for a microchip that might have information leading to locating the animal's owner;
- before an animal at the shelter can be euthanized, it must be put up for adoption unless found to be unadoptable due to injury, health problems, or temperament;
- members of the public be allowed to view all animals at the shelter for at least four hours a day, three days a week;
- dogs and cats wearing rabies tags that are picked up for other violations (e.g., of a leash law) must be held for 72 hours, as must animals surrendered to the shelter by someone claiming to be the owner unless that person presents proof of ownership and signs a writing that authorizes euthanasia before the 72-hour period has elapsed.

Some counties[19] claim that feral cats are not subject to the 72-hour holding period. The issue was before the court of appeals in 2005[20] and focused on the definition at that time of "cat" in G.S. 130A-184(2)—"a domestic feline." Whether this included feral cats—if so, they had to be held for 72 hours—was not decided by the majority, which held the 19A suit should be dismissed on a procedural ground. But Judge Levinson's separate opinion convincingly explains why section 130A-192 covers feral cats:

> The 72-hour hold is one small item in a comprehensive rabies control statute, which applies the same definitions [i.e., of "cat"] to all statutes in the rabies control section. Consequently, if stray...cats are excluded from the provisions of G.S. § 130A-192 [because they are feral], then they are excluded from the rest of the rabies section. In that event, the animal control officer would have no authority to take crucial measures to reduce the spread of rabies—a truly absurd interpretation....[21]

This analysis would apply as well after the General Assembly in 2009 redefined "cat" in the Rabies Control Act[22]—"A domestic feline of the genus and species Felis catus."

In general, if the owner of property (such as a pet) loses the property, which is taken into possession by someone else, the owner has three years under G.S. 1-52(4) to sue to recover possession. After that, title effectively shifts to the new possessor. But if the lost animal is taken to a county animal shelter, under G.S. 130A-192(a), the owner's title is forfeited to the county if the owner does not claim the animal within 72 hours. (The period can be made longer by county ordinance.) Before the recent amendments to G.S. 130A-192, a private rescue organization taking in lost animals could not effectively adopt them out, as the true owner would have up to three years to sue to reclaim the pet from the party who thought he or she had adopted the animal from the rescue organization.

As of 2010, the statute authorizes rescue organizations approved by the county to partner with it to bring a lost animal to the

county shelter. It can take the pet back to the organization's premises while posting at the shelter a photo of the animal. After 72 hours the shelter is authorized to transfer ownership of the animal to the organization,[23] which now can place it with an adopting family that need not fear a claim-and-delivery action by the former owner.

Enacted in 2005, G.S. 19A-70[24] creates a procedure applicable in criminal prosecutions for animal cruelty and in 19A suits brought by a city, county, or a government-appointed cruelty investigator, after a county animal shelter has taken physical custody of animals allegedly subject to cruelty. A court may order the defendant owner or possessor of the animals to post funds to pay for the upkeep of the animals while trial is pending. The amount to be posted is for 30 days of care (renewable until the trial ends), determined at an evidentiary hearing.

If the defendant does not pay the funds to the clerk of court within five days of being ordered to do so, his or her ownership of the animals "is forfeited by operation of law," after which the shelter may adopt out the animals that are adoptable and euthanize others not needed as evidence in the pending litigation.

In 2005, the definition of "animal shelter" in the Animal Welfare Act was amended to include not only privately owned and operated shelters, but also shelters owned, operated, or under contract with local governments.[25] Additionally, the North Carolina Department of Agriculture and Consumer Services amended the North Carolina Administrative Code's Animal Welfare Section to provide greater reporting and protection requirements for animals in all such shelters. The new requirements addressed many facets of the shelter, from the facilities in which animals are housed to how those facilities shall be maintained.[26] They further require a written program of veterinary care shall be established and each dog and cat shall be observed daily by the animal caretaker or someone under his direct supervision. "Sick or diseased, injured, lame, or blind dogs or cats shall be provided veterinary care or be euthanized,..."[27] An unfortunate consequence of the Animal Welfare Section of the administrative code has been the burden placed on private rescue groups, where animals are housed in foster situations in private residences that cannot except at great expense comply with the separation, sanitation, and structural requirements of animal shelter facilities.[28]

A new shelter staff position, certified euthanasia technician (CET), was recently created. CET's are closely regulated by the Department of Agriculture and Consumer Services.[29] Only a CET and veterinarian are permitted by law to euthanize animals at county shelters.

Miscellany

A Nashville town ordinance bans maintaining more than three dogs (limit two on small lots). The court of appeals in 2009 rejected an argument that it was unconstitutionally arbitrary for not permitting more than three small dogs whose total weight was less than that of three dogs of normal size.[30]

A lease clause authorized Landlord to order Tenant to remove any dog that "creates a nuisance." Landlord learned that Tenant's rottweilers had attacked neighbors, but took no action. Later, one of the dogs lunged at a visitor lawfully on the premises, causing him to fall and suffer injuries. Reversing the dismissal ordered by the court of appeals, the NC Supreme Court in 2004 held that, although Landlord could not be held strictly liable for injuries inflicted by a dog known to be vicious as can an owner or keeper of the dog, in this case Landlord had enough control to be liable on a negligence theory.[31]

Conclusion

In recent years animal law in North Carolina has evolved to provide increased protections. Lawmakers are recognizing that many animals deserve a certain standard of care and are willing to write that into law. In the 2010 short session, the General Assembly will consider at least one major animal-protection bill, seeking to regulate puppy mills. Advocates of a bill, filed but not passed in 2009, that would have banned euthanasia of dogs and cats at animal shelters by administering carbon monoxide gas have plans to reintroduce the bill in 2011. Yet North Carolina was recently ranked, nationally, with respect to the extent of protection provided animals by law, in only the middle tier of states, along with such states in our region as South Carolina, Georgia, and Florida.[32] There will thus be even more legislative battles to be fought for animals in North Carolina.

Meanwhile, North Carolina cities and counties may enact more local laws perceived by some to be anti-animal—those limiting the number of pets a person may keep and banning various breeds of dogs. Battles over these kinds of issues are being fought in many other states as well. ■

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William Reppy Jr. is a professor of law and director of the Animal Law Program at Duke University.

Endnotes

1. This article updates Reppy, *A New Specialty: Animal Law*, NC State Bar *Journal*, spring 2002, at p. 12.
2. 2007 N.C. Stats, ch. 211, § 1. Section 2 added to the broad list in G.S. 14-360 of actors who are exempt from even felony prosecution for malicious infliction of suffering and for torture one who physically alters livestock to "conform[ ] with breed or show standards." Reppy, *Broad Exemptions in Animal-Cruelty Statutes Unconstitutionally Deny Equal Protection of the Law*, 70 Law & Contemp. Prob. 255 (2007), argues that G.S. 14-360's many exemptions make it unconstitutional because there is no rational basis for denying exemptions to unfavored actors who interact frequently with animals (such as horse trainers, dog groomers).
3. *State v. Coble*, 593 S.E.2d 109 (N.C. App. 2004).
4. 2005 N.C. Stats. ch. 437, § 1, amending N.C. Gen Stat. § 14-362.
5. *State v. Porter*, 16 S.E. 915 (N.C. 1893).
6. *Malloy v. Cooper*, 592 S.E.22d 17 (N.C. App. 2004). For the initial legislative response, see *Reppy*, supra n. 3, at 14.
7. 592 S.E.2d at 21-22.
8. 15A N.C. Admin Code 10B.0121, as recounted in *Malloy v. Cooper*, 678 S.E.22d 783, 785 (N.C. App. 2009).
9. N.C. Gen Stat. §§ 19A-1 *et seq*, discussed in detail in Reppy, *Citizen Standing to Enforce Anti-Cruelty Laws by Obtaining Injunctions: The North Carolina Experience*, 11 Animal Law 39 (2005).
10. *See* N.C. Gen. Stat. § 14-360. Oddly, cruelty is defined in this criminal statute so as to include inflicting of mental suffering on animals, but in the civil remedies legislation, the cruelty must be "physical." N.C. Gen. Stat. § 19A-1(2).
11. N.C. Const. art. IV, § 13, quoted in *Animal Legal Defense Fund v. Woodley*, 640 S.E.2d 772 (N.C. App. 2007).
12. 2006 N.C. Stats ch. 113; 2003 N.C. Stats, ch. 208.
13. Code County of New Hanover, North Carolina Sec. 5-4.
14. Raleigh Ord. No. 2009-552, § 2, 3-3-09, eff. 7-1-09.
15. *State v. Cook*, 594 S.E.2d 819, 820 (N.C. App. 2004).
16. The *News & Observer*, Jan. 21, 2010, p. B1.
17. N.C. Gen. Stat. § 67-4.1 and 67-4.2.
18. *Fayetteville Pets Examiner, Dog Breed Bans Taking Effect On More Military Bases*, www.examiner.com/x-5984-Fayetteville-Pets-Examiner-y2009m4d17-Dog-breed-bans-taking-effect-on-more-military-bases (2009).

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Red Dog Farm to the Rescue

By Mike Dayton

The Red Dog Farm Animal Rescue Network, established by Greensboro lawyer Garland Graham in 2006, draws its name and inspiration from Graham's golden retriever. As of February 2010, the nonprofit organization had rescued a menagerie of animals—887 and counting, including 346 cats, 343 dogs, 74 goats, 43 chickens, 23 horses, 14 rabbits, seven miniature horses, seven ducks, seven sheep, six pigs, five donkeys, four cows, three alpacas, two ponies, one turtle, one parakeet, and one emu.

When she's not rescuing animals in need, Graham practices law with Schell Bray Aycock Abel & Livingston PLLC, focusing on mergers and acquisitions, lending and finance, and general corporate. Graham has managed to find the balance between her law practice and a thriving nonprofit.

Graham's younger years were a million miles from farm life. She grew up at a beach in Florida, where she played tennis and swam on the local swim team.

"I had never been around any farm animals like horses or goats," she says.

Graham moved to North Carolina after college to be near her future husband. She brought her beloved golden retriever with her and immediately got involved with a golden retriever rescue group in the Greensboro area. Graham occasionally fostered other animals in search of a new home, and the word slowly got out.

"Somebody's daughter in college would find a stray dog, or somebody would find a litter of kittens in a parking lot, and they'd come find me," she says. "It was very informal, but we pretty much always had an extra dog or cat, or a litter of kittens in the house."

In 2003, Graham and her husband moved to his hometown of Summerfield, a small community about 12 miles north of Greensboro. They bought a house which adjoined a horse farm.

The couple's animal acquisition started innocently. Since there was more space on the new property, it felt natural to continue fostering other dogs and cats, Graham says.

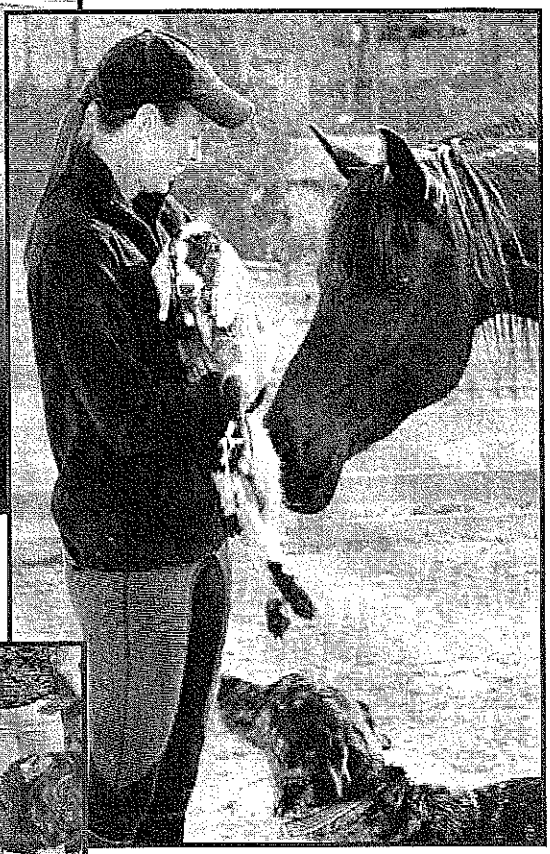
"I said, 'Let's get a couple of chickens,'" she says. "Then I picked up two stray dogs that I found beside the road as I was returning from a business law seminar. We ended up keeping one of those dogs."

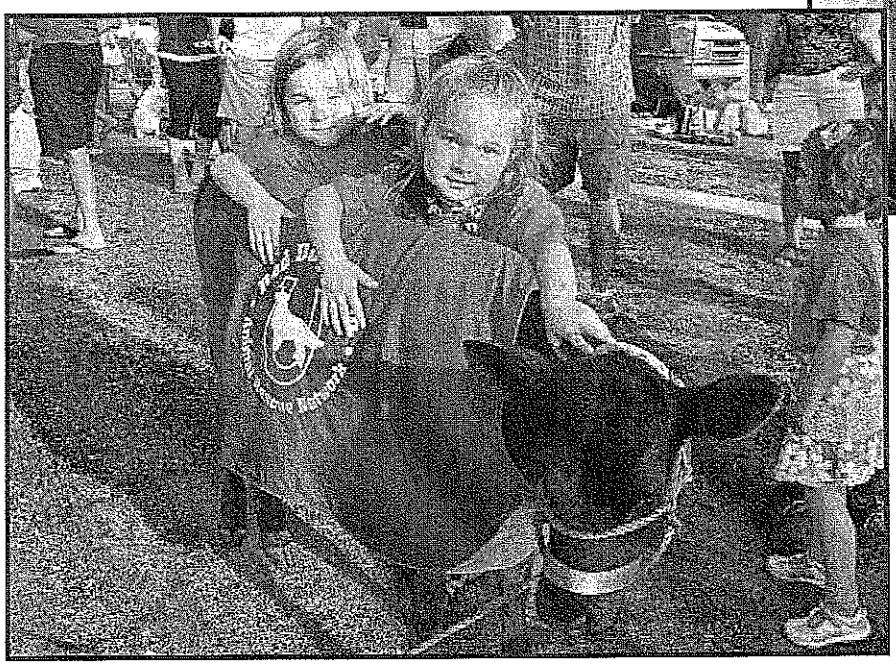
Then came the farm animals.

"People began to call us and say, 'My granddad just died and he had two old goats and an old horse, where do I take them?'" Graham recalls. "I did a little research and discovered there really wasn't anywhere to take them."

The United States Equine Rescue League accepted horses when room was available, but that group would not take

Above—Garland Graham with Red Dog Rescue Farm's mascot, Tallulah LaMoo. Tallulah (who is meeting some of her adoring fans in the photo below) was surrendered last year after being rejected by her mother due to being born with a cleft palate.





Above—Recently, Garland introduced her foster goat, Bella, (who she is currently bottle-feeding after she was surrendered by a farmer because her mother rejected her) to a friend's horse.

other farm animals.

"So my answer became, 'Bring them to me and I'll see if I can find a home for them,'" Graham says.

That's how the first goats and horses appeared at the Grahams' home. Graham knew very little about horses, so she learned as much as she could from the Equine Rescue League. She also began riding nearly every weekend, and she then bought a colt, which quickly became part of the expanding animal family.

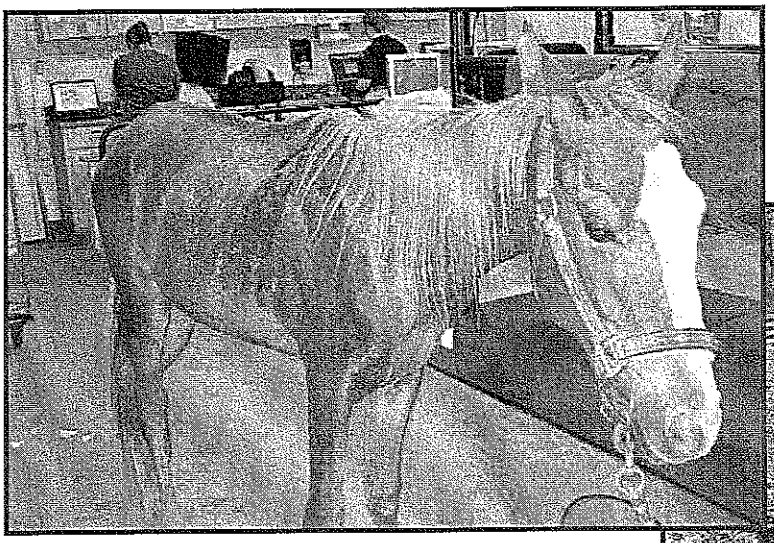
"Then my husband bought a horse, because he figured out pretty quickly if he wanted to spend any quality time with me, he needed to start riding also," she says.

As the two fell in love with their horses, they became more concerned about the plight of other farm animals that could no longer be cared for or that were being neglected.

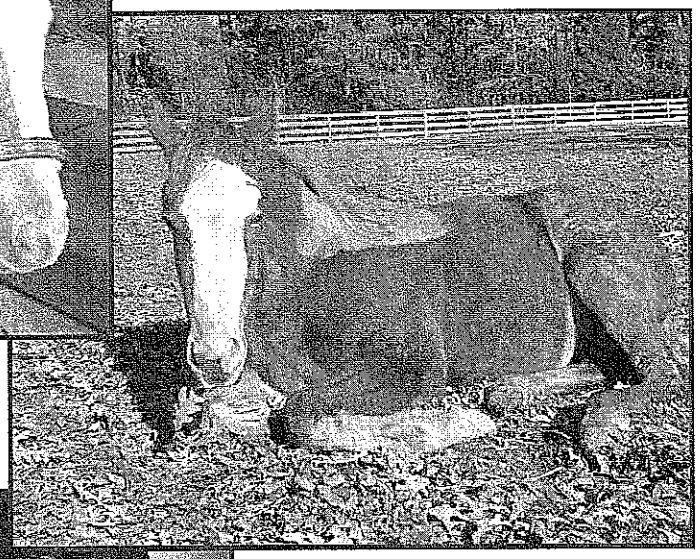
The Grahams suddenly found themselves with 18 animals, including two horses, two donkeys, an old pony, four goats, a pig, and four dogs. They also realized they had already adopted out 50 animals.

"We saw that the number coming in was quickly exceeding the number going out—and vet bills and feeding costs were getting exorbitantly expensive," she says. "And frankly, we were just running out of space. There was a need for another foster organization because the local groups could not handle the load, and no one could handle farm animals such as goats."

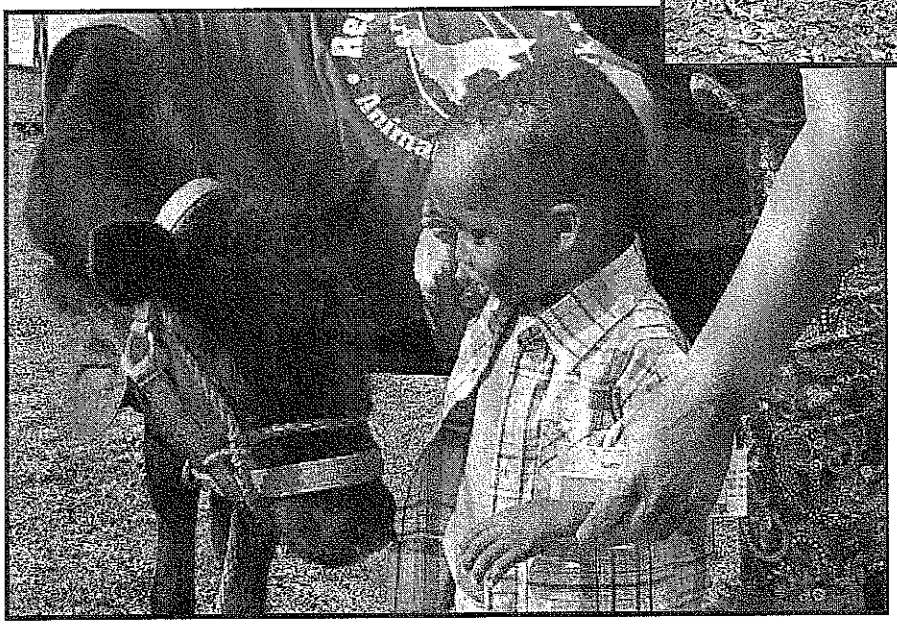
The idea for a nonprofit group took root from those realities. Jennifer L.J. Koenig, a trust and estate lawyer at Graham's firm who also handled nonprofit work, told Graham, "'You're running a nonprofit, but the difference is that you're paying for everything.'"



Nugget came to Red Dog Farm Rescue as a starvation case with four broken bones in his withers (shoulders). The photo to the left is from the day Nugget came to Red Dog (last September). "It breaks my heart to look at these now," Garland says.



You can see in the picture to the right where the veterinarian had to shave Nugget for surgery and his fur is now growing back in. According to Garland, "He is the sweetest horse ever!"



The time had come for an official organization. Graham sent out a letter to about 100 friends asking for their financial help in forming a nonprofit for animals of all sizes, with a special focus on farm animals.

"The response was overwhelming," she said. "We got pledges of well over $10,000, and that gave us the boost of adrenaline we needed," she says.

By September 2006, Graham had formed a North Carolina nonprofit and also applied for and received 501(c)(3) status.

Red Dog Farm's first big investment—a website.

"We spent about $2,000 of the money getting a website up and running," she says. "That seemed like a lot, but people told us you are only as good as your website. So we did that right."

The website allowed the group to post pictures and other updates of the foster animals coming in and being adopted by new families.

The group did not have a boarding facility, so instead it developed a patchwork of volunteers and foster homes, with the nonprofit covering all veterinary and food expenses. The nonprofit was run out of the Graham's home through the first half of 2008.

"It quickly took over our personal lives," Graham says. "With the organization outgrowing us, we needed to figure out a way to get our dining room back."

Thus began a search for inexpensive space where the organization could set up shop and adopters could come and meet volunteers and pick up animals.

In the summer of 2008, a Red Dog Farm volunteer saw the Guilford Sheriff's Department moving out of an old house it had been using as a substation in Bur-Mill Park. The park is a county-owned, city-operated facility on the north side of Greensboro. Within 48 hours, Red Dog Farm had signed a lease. The group has used the house as its headquarters since June 2008.

As Red Dog Farm expanded, Graham realized the nonprofit's day-to-day administration was outstripping her abilities to keep up.

"I was getting 30 to 40 e-mails a day and 50 calls a day," she says. "I was an attorney, and this is what I do for fun, but I can't do it all."

The group hired Lauren Riehle, who had been working with the Humane Society of the Piedmont, to help out three hours a day. Riehle's role was expanded to a full-time executive director by June 2009. Graham now handles the large animals, such as horses,

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while Riehle manages the group's small animal program.

Even with full-time help, the nonprofit was now consuming about half of Graham's time. Graham had made partner in her law firm in 2006, but the day came when she had to sit down with her managing partner and discuss her role in the firm.

"I felt like my firm was getting the raw end of the deal because I was out of the office a lot meeting with people about the nonprofit," she says. "I had a heart-to-heart with my managing partner and said I'd been here eight years. I loved the firm and wanted to stay but felt the nonprofit was cutting into some of the firm's time. I didn't feel right about it. I told him I could do both, but not on a full time basis."

The partnership worked out a plan, reducing her billable hour target and her compensation to a level where both parties were comfortable. They have been in that arrangement for two years.

"In December, when we're really busy at work, I must step back and be a full-time lawyer," she says.

The nonprofit is stable financially thanks to monthly fundraising events and several bigger fund raisers, including a dog fashion show, Dogs on the Catwalk, at a downtown theater.

Red Farm sends out a monthly e-letter and also mails a year-end letter to everyone who has adopted an animal or made a donation. This year, Red Farm sent out about 1,000 letters.

"The letter was short and sweet, saying this is where we are and what we've done in adopting out 1,000 animals," Graham says. "We included a pledge form and again raised about $10,000."

Graham and her husband have now personally fostered more than 250 animals.

"Right now I have an extra horse and three goats living with me," she says.

Asked about success stories, Graham lists the very sick, emaciated, and mistreated animals that flourish once they come under Red Farm's care.

"When I first saw the horse Coco, I thought she would not make it back to our farm alive," Graham recalls. "She was just that sick and thin. But she gained 330 pounds in 10 weeks living with us. She ended up being a stunning mare and now has a good home in Apex."

Red Farm still does not have a central kennel. The group's long-range goal is a consolidated location where it can care for all of the animals.

"Having animals in multiple foster locations is pretty inefficient," Graham says, "especially for animals that need to be quarantined until we have their shots in order. So five years down the road is about when we will be in the throes of a capital campaign and a building phase to build Second Chance Ranch." ■

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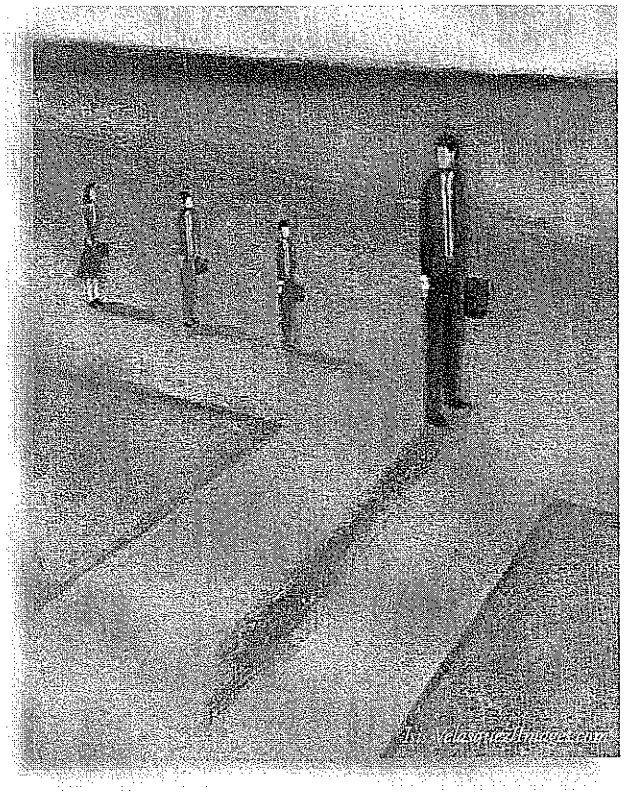
For additional information on Red Dog Farm Animal Rescue, please visit their website—www.reddogfarm.com.

The Intersection of the First Amendment and Professional Ethics for Government Attorneys

By Christopher B. McLaughlin

First Amendment protection exists for government employees, but not to the same extent as it does for everyone else. The ability of government employees to exercise their First Amendment rights is limited by their employers' interest in providing effective and efficient services to the public. Government employees who are also attorneys face additional limitations on their speech due to their professional responsibility obligations under State Bar rules.



Speech that would generally be protected by the First Amendment may be prohibited by an attorney's duty of confidentiality. Other speech required by an attorney's professional responsibility obligations may not be protected by the First Amendment. This imperfect overlap between the First Amendment and an attorney's ethical duties creates two interesting constitutional conundrums, which are analyzed at the end of this article.

The First Amendment and Government Employees

Until the mid-twentieth century, governments could condition public employment on the near-complete waiver of First Amendment rights. As Oliver Wendell Holmes observed when sitting on the Supreme Court of Massachusetts, "A policeman may have the constitutional right to talk politics, but he has no constitutional right to be a policeman."[1]

Beginning in the 1950s, the Supreme Court began to expand First Amendment protection for government employees. The court first struck down loyalty oaths banning membership in particular political parties and later invalidated statutes prohibiting public agencies from hiring members of "subversive" organizations.[2] In 1968 the Supreme Court expanded First Amendment protection for government employees when it ruled unconstitutional

the firing of a public school teacher for publicly criticizing the spending decisions of the local board of education. *Pickering v. Board of Education*, 391 U.S. 563 (1968), was the first high court case to make clear that public employees do not relinquish their First Amendment rights to comment on matters of public concern simply because they are employed by the government.

However, the government's authority to limit the free expression of its employees remains far greater than its ability to limit the free expression of common citizens. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."[3]

Two Foundational Cases

Two Supreme Court cases deserve extended analysis because of their foundational roles in government employee free speech jurisprudence and because they involve attorneys as plaintiffs. *Connick v. Myers*, 461 U.S. 138 (1983), firmly established the current test for whether the speech in question touches on a matter of public concern, while *Garcetti v. Ceballos*, 547 U.S. 410 (2006), added a new requirement that the speech be outside of the employee's job duties to receive First Amendment protection.

Connick v. Myers—In 1980 Harry Connick Sr., the New Orleans district attorney, fired an assistant district attorney, Sheila Myers, for her vocal opposition to a proposed transfer. Myers distributed a survey to her colleagues concerning internal office operations, which included a question about whether employees felt pressured to work on political campaigns. After her termination, Myers sued under 42 U.S.C. § 1983, claiming she was terminated for exercising her First Amendment right to free speech. She prevailed at trial and at the United States Court of Appeals for the Fifth Circuit.

In the Supreme Court, the key question was whether Myers's in-office survey constituted speech on a matter of public concern. "When employee expression cannot fairly be considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices without intrusive oversight by the judiciary in the name of the First Amendment," stated the Court.[4] The five-justice majority concluded that the primary purpose of Myers's survey was to "gather ammunition" for a battle with her supervisors over the transfer. But for the question about forced participation in political campaigns, Myers's survey was not related to a matter of public concern and therefore was not deserving of First Amendment retaliation protection.

As for the question involving political campaigns, the majority believed it touched upon a matter of public concern minimally, at best. Myers's limited First Amendment interest in that one question was outweighed by Connick's interest in maintaining an effective and successful office, largely because of the manner, time, and place of Myers's speech. Accepting Connick's characterization of Myers's conduct as a "mini-insurrection" that justified a harsh response, the Supreme Court rejected Myers's attempt to "constitutionalize an employee grievance" and ruled for her employer.

Garcetti v. Ceballos—Nearly 25 years after *Connick*, the Supreme Court heard a free speech case involving another fired district attorney, Richard Ceballos. When a defense attorney complained about inaccuracies in an affidavit used to obtain a critical search warrant, Ceballos investigated the matter and determined there were serious misrepresentations in the affidavit. After Ceballos's boss rejected his recommendation that the criminal case be dismissed, Ceballos claimed that he was transferred and denied a promotion because of his speech about the affidavit. He sued under 42 U.S.C. § 1983, lost in district court on summary judgment, but prevailed in the Ninth Circuit Court of Appeals.

In the Supreme Court, the case turned on the five-justice majority's conclusion that Ceballos's speech was made pursuant to his duties as an assistant district attorney. "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe upon any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."[5] To hold otherwise, wrote Justice Stevens, would be to commit the courts to an overly intrusive role of monitoring all business-related communications throughout all levels of government. The Supreme Court reversed the Ninth Circuit and found in favor of the government.

Current Five-Part Test

Since *Garcetti*, lower courts have applied a five-part test to First Amendment free speech claims raised by government employees. Although the order of the first two inquiries sometimes changes, these five questions now control claims similar to those brought by Myers and Ceballos:

1. Did the employee's speech touch upon a matter of public concern?
2. Was the speech made as part of the employee's job duties?
3. Did the government take adverse employment action that was substantially motivated by the employee's speech?
4. Did the government's legitimate interest in providing efficient and effective services to the public outweigh the employee's First Amendment rights?
5. Would the government have taken the adverse employment action even in the absence of the protected speech?

If the plaintiff produces enough evidence to answer the first three questions affirmatively, then the burden shifts to the government for the remaining two questions.[6]

1. Did the employee's speech touch upon a matter of public concern?

Connick makes clear that the speech in question must be more than simply a complaint about the employee's working conditions to warrant First Amendment protection. As the Fourth Circuit observed, "A government employee's right to gripe about the conditions of his or her job is protected to the same degree as that of private employees, as only under such condition is efficient government service possible."[7] Simply put, the First Amendment does not guarantee that all government employees will be treated nicely by their supervisors.[8] That said, speech that concerns public health and safety, corruption, or unconstitutional discrimination is almost always considered a matter of public concern, even if the speech also touches on individual working conditions.[9]

2. Was the speech made as part of the employee's job duties?

Garcetti held that speech within the scope of a government employee's official responsibilities does not warrant First Amendment protection. How should courts make this determination? Responding to criticism from a dissenting opinion in *Garcetti*, Justice Kennedy stated that formal job descriptions should not control; instead, "[t]he proper inquiry is a practical one."[10]

The *Garcetti* inquiry focuses on the *context* of the speech even more than its *content*. The same speech that is unprotected when uttered to a boss or coworker may be protected when uttered outside of the office, an "oddity" lower courts are obliged to respect after *Garcetti*.[11] As a result, courts generally treat internal speech different from external speech.

1. Internal speech generally is not protected, unless the speech concerns matters clearly outside the scope of the employee's job duties. Internal speech includes complaints directed up the employee's chain of supervisors, even to the agency's most senior officials, as well as comments made in response to an internal agency investigation.[12]
2. External speech, such as comments to the media, generally is protected regardless of content, unless the employee's job duties include the type of external speech at issue. Testimony in a civil or criminal judicial proceeding usually is considered protected external speech, even if the content of that speech is directly related to an employee's job duties.[13]

3. Did the government take adverse employment action that was substantially motivated by the employee's speech?

The definition of *adverse employment* action varies from circuit to circuit. All federal courts agree that this term includes a termination, demotion, or refusal to promote.[14] The Fourth Circuit is one of several that conclude the First Amendment also protects an employee who can show "that he was deprived of a valuable government benefit or adversely affected in a manner that, at the very least, would tend to chill his exercise of First Amendment rights."[15]

After producing evidence of an adverse employment action, the plaintiff must then demonstrate that the protected speech was a substantial or motivating factor behind that action. The protected conduct need not be the only reason or the primary reason for the adverse employment action, but merely one of the reasons.[16]

4. Did the government's legitimate interest in providing efficient and effective services to the public outweigh the employee's First Amendment rights?

The government's interests are most at risk when the contested speech occurs in the office and impedes other employees from accomplishing their job responsibilities.[17] The Fourth Circuit interprets this balancing test to require an analysis of the nature of the employee's position, the context of the employee's speech, and the extent to which it disrupts the department's activity.[18] Generally speaking, the more the employee's job requires "confidentiality, policy making, or public contact, the greater the state's interest in firing her for expression that offends her employer."[19]

5. Would the government have taken the adverse employment action even in the absence of the protected speech?

If the plaintiff produces evidence of an adverse employment action that was based at least in part on the plaintiff's protected speech, the government can still defeat the First Amendment claim by demonstrating that it would have made the same employment decision even if the plaintiff had not uttered that speech.[20]

The First Amendment and the Rules of Professional Conduct

When attorneys gain admission to the bar and enter into professional relationships with clients, they implicitly agree to restrain their speech on certain issues. The North Carolina Rules of Professional Conduct (RPC) do not trump the First Amendment, of course, but they can create additional limitations on when, where, and how a government attorney may engage in certain speech.

RPC Rule 1.6: Confidentiality

Attorneys are forbidden to disclose any "information acquired during the professional relationship" unless the client provides informed consent, a duty far broader than the attorney-client privilege. The privilege is an evidentiary rule that covers only confidential communications made for a non-criminal purpose between an attorney and client in the course of giving or seeking legal advice.[21] In contrast, the duty of confidentiality covers *all* information the attorney learns while working for the client, regardless of source, purpose, or context. The duty of confidentiality is so broad that it could forbid speech by a government attorney that would be protected by the First Amendment, a conundrum discussed in more detail below.

At least 13 states require disclosure by attorneys to prevent some types of criminal acts, usually those likely to cause injury or death.[22] North Carolina is not one of those states. North Carolina attorneys are permitted, but not required, to disclose a client's confidential information in seven situations, including when disclosure might prevent the commission of a crime by the client.

RPC Rule 1.13: Organization as Client

An attorney representing an organization must put the organization's interests above the interests of the organization's individual agents, employees, and officers. For example, an attorney representing a town must disclose to the town council a meeting involving the attorney, the mayor, and other parties despite the mayor's request that the attorney keep the meeting a secret.[23]

Unlike Rule 1.6, Rule 1.13 *requires* certain speech by organizational attorneys. A government attorney may be required by this rule to speak on subjects and in settings that do not trigger First Amendment protection, a second potential constitutional conundrum analyzed below. An attorney representing an organization is obligated to speak under Rule 1.13 when he or she knows that an employee, officer, or agent has acted or will act in a matter related to the attorney's representation and in a manner likely to cause substantial injury to the organization and the act is either (1) a violation of a legal obligation to the organization or (2) a violation of law that could be imputed to the organization.[24] When such a situation arises, the attorney is obligated to report the matter up the organization's chain of command to the "highest authority that can act on behalf of the organization," unless the attorney reasonably believes that such internal disclosure is not in the organization's best interests.

Are the voters the "highest authority" that can act on a government's behalf? Comment 5 to Rule 1.13 appears to rule out that interpretation by observing that an organization's highest authority is generally its "board of directors or similar governing body." For an attorney representing a local government, the highest authority should be the local governing board. For an attorney representing a discrete unit of local government, the highest authority is likely the head of that unit.[25] For an attorney representing the state, the highest authority could be a department secretary, the General Assembly, or the governor, depending on whom the attorney considers to be the client.[26]

If the issue is not resolved by the organi-

zation's highest authority, then Rule 1.13(c) permits, but does not require, the attorney to disclose the issue publicly if (1) it involves a clear violation of law and (2) it is likely to cause substantial injury to the organization. However, the attorney may do so only "to the extent permitted by Rule 1.6." This limitation, which does not appear in the American Bar Association's model version of the rule, means that unless the issue involves one of the exceptions to the Rule 1.6 duty of confidentiality discussed above, a North Carolina attorney is not permitted to make a public disclosure under Rule 1.13.

RPC Rule 3.3: Client Perjury

Under the RPC, the sanctity of the attorney-client relationship is trumped only by the integrity of the judicial process. The only situation in which a North Carolina attorney is obligated to disclose a client's confidences is when the client or the client's witness commits perjury or a similar fraud upon the court. Rule 3.3 requires an attorney to take all "reasonable remedial measures, including, if necessary, disclosure to the tribunal" once the lawyer realizes that the client has offered or will offer false material evidence or is engaged in fraudulent activity relating to the proceeding.

Could the obligation to remedy client perjury create a situation similar to that under Rule 1.13 in which speech is mandated by the RPC but unprotected by the First Amendment? Probably not. The mandated disclosure by a government attorney of a government client's perjury to the court would almost certainly be protected under the *Connick/Garcetti* test. First, the commission of a crime—perjury—by a government official should be considered a matter of public concern. Second, disclosing misconduct to an external agency—in this case, the court—is usually viewed as speech that falls outside of the scope of a government employee's duties. If either of these conditions apply, then the disclosure mandated by Rule 3.3 would be protected by the First Amendment.

RPC Rule 8.3: Reports of Professional Misconduct

Attorneys are required to report misconduct by another attorney "that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer." The North Carolina State Bar has applied this rule to the misappropriation of client funds, the deliberate violation of settlement conditions, and the abuse of a district attorney's trial calendaring authority.[27] Similar to Rule 1.13, the obligation to report another attorney's misconduct is restrained by Rule 1.6 and does not permit the reporting attorney to violate the duty of client confidentiality.[28] The obligation to report professional misconduct raises another possibility of an attorney being forced by the RPC to speak without assurance that the First Amendment will protect the attorney from retaliation from his or her government employer.

Two Constitutional Conundrums

Unfortunately for government attorneys, the First Amendment and the RPC are not perfectly aligned. Some speech may be protected by the First Amendment but still lead to adverse consequences under the RPC. Other speech may be permitted or even required by an attorney's ethical obligations but not protected by the First Amendment.

Speech protected by the First Amendment but prohibited by the RPC. The broad scope of Rule 1.6 means that a government attorney is prohibited by ethical considerations from speaking about many topics that would be protected by the First Amendment. Consider a scenario in which Attorney Smith, the recently hired county attorney for Carolina County, is terminated after disclosing to a newspaper reporter a pattern of "secret" business meetings by a majority of the county commissioners.

Smith's speech to the newspaper would probably be protected by the First Amendment. The commissioner's willful violation of state open meetings law is clearly a matter of public concern, and Smith's speech to the media seems likely to be outside the scope of normal job duties for a county attorney.[29] However, it seems equally likely that Smith's speech to the newspaper violates her duties under the RPC. Public disclosure of a violation of open meetings law does not appear to satisfy any of the exceptions to client confidentiality under Rule 1.6. The remedies for a violation of the open meetings law are civil in nature, not criminal.[30] Thus the most likely Rule 1.6 exception, that intended to prevent the commission of a crime by the client, would not apply.

Nor does Rule 1.13 offer any help to Attorney Smith. The county commissioners are the highest authority that can act on behalf of the county, meaning there is no opportunity for Smith to report the matter up the internal chain of command. The rule's option of reporting the misconduct externally is limited by the attorney's obligations under Rule 1.6; because no exceptions to the duty of client confidentiality apply, Rule 1.13 would not authorize external disclosure by Smith.

Could the county fire Smith for conduct protected by the First Amendment but prohibited by the RPC? The answer must be yes—it is almost unimaginable that a client would have the ability to seek ethical sanctions against an in-house attorney for violating the RPC but would not have the ability to terminate its employment relationship with that attorney.[31]

Speech required by the RPC but not protected by the First Amendment. The RPC mandates speech by attorneys in at least three circumstances:

1. to report serious wrongdoing up the internal chain of command (Rule 1.13);

2. to remedy client perjury or fraud upon the court (Rule 3.3);

3. to report another attorney's serious misconduct if the misconduct can be reported without violating the duty of confidentiality (Rule 8.3).

Is any of this compelled speech protected by the First Amendment? As discussed above, speech mandated by Rule 3.3 would likely be protected by the First Amendment because it would touch on a matter of public concern and be outside the scope of the attorney-employee's duties. The same is not always true of speech mandated by Rule 1.13 or Rule 8.3.

Consider the example of Attorney Jones, an assistant city attorney fired after informing the city manager of what Jones believes to be the inappropriate destruction of evidence by the city attorney. Does Jones have a viable First Amendment retaliation claim against the city? Probably not. Jones's reporting to the city manager of the city attorney's misconduct was likely required under Rule 1.13, but such speech is not necessarily protected by the First Amendment. Certainly destruction of evidence by the government should constitute a matter of public concern. But reporting legal misconduct by a supervisor up the internal chain of command could be considered part of the expected duties of an assistant city attorney. If so, then Jones's speech to the city manager would not be protected by the First Amendment, despite

the fact that it was required by the RPC.

Even if the First Amendment offers no protection, Jones still might be able to attack the city's decision to terminate his employment through a wrongful discharge claim. Most jurisdictions recognize these claims by in-house attorneys.[32] However, North Carolina appears to be one of several states that permits wrongful termination claims by in-house attorneys only if they can be proved without the disclosure of confidential information, a requirement that could effectively bar such claims.[33] State whistleblower statutes could provide an alternative for wronged government attorneys, but in North Carolina this option exists only for state employees, not local government employees.[34] ■

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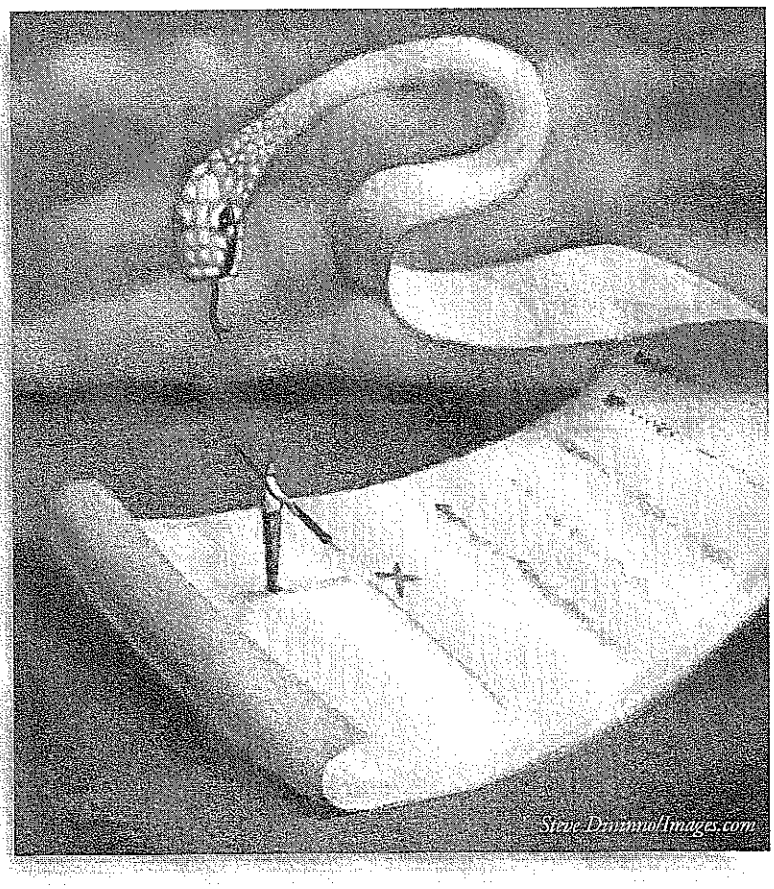
Endnotes

1. *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892).
2. *See Wiemann v. Updegraff*, 344 U.S. 183 (1952) (striking down loyalty oaths); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (striking down subversive organization statutes).
3. *Garcetti v. Ceballos*, 547 U.S. 410, 418-19 (2006).
4. *Connick v. Myers*, 461 U.S. 138, 146, 147 (1983).
5. *Garcetti*, 547 U.S. at 421-22, 424.
6. *See Eng v. Cooley*, 552 F.3d 1062 (9th Cir. 2009).
7. *Arvinger v. Mayor and City Council of Baltimore*, 862 F.2d 75 (4th Cir. 1988).
8. *Ruotolo v. City of New York*, 514 F.3d 184, 190 (2nd Cir. 2008) (concluding that "a generalized public interest in the fair or proper treatment of public employees" does not alone trigger First Amendment protection).
9. *See Jones v. Quintana*, F. Supp. 2d, 2009 WL 3126544 (D.D.C. 2009), in which the court concluded that a 911 dispatcher's complaints about a new system for routing 911 calls were intended to protect public safety and not simply to minimize the dispatcher's workload.
10. *Garcetti v. Ceballos*, 547 U.S. 410, 424-25 (2006).
11. *Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007) (speech by police officer to assistant district attorney part of job duties and therefore unprotected, but same speech as part of civil deposition testimony outside of job duties and therefore protected).
12. *Davis v. McKinney*, 518 F.3d 304 (5th Cir. 2008) (complaints made to both the employee's immediate supervisor and the president of her university division were not protected because the complaints concerned matters within employee's job responsibilities); *Vila v. Padron*, 484 F.3d 1334 (11th Cir. 2007) (complaints to university president and board of trustees about legal improprieties made by university vice-president/general counsel not protected); *Jackson v. Mecklenburg County*, 2008 WL 2982468 (W.D.N.C. 2008) (holding that allegations made during internal investigation of discrimination not protected because all agency employees were expected to cooperate with the investigation as part of their job duties); *Wright v. City of Salisbury*, F. Supp. 2d, 2009 WL 2957918 (E.D.Mo. 2009) (police officer's letter to city council about city's drunken driving enforcement policies protected because police officer's job duties did not include policy making).
13. *Andrew v. Clark*, 561 F.3d 261 (4th Cir. 2009) (indicating police officer's release of internal memo to newspaper could constitute protected speech); *Casey v. West Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323 (10th Cir. 2007) (school superintendent's reports to supervisors and federal agency about problems in the Head Start program not protected because her job duties required such reports, but complaints to state attorney general about open meeting law violations were protected because her job duties did not involve reporting such legal problems to external agencies); *Reilly v. Atlantic City*, 532 F.3d 216 (3rd Cir. 2008) (finding that police officer's testimony in a criminal prosecution of fellow officer was protected, after reviewing case law and noting that *Garcetti* did not address the plaintiff's testimony in that case). *But see Nixon v. City of Houston*, 511 F.3d 494 (5th Cir. 2007) (police officer's comments to media while on duty and in uniform at the scene of an accident were part of officer's job duties, despite fact that the comments were unauthorized and made against the wishes of his superiors).
14. *Ridpath v. Board of Governors Marshall Univ.*, 447 F.3d 292, 316 (4th Cir. 2006).
15. *Goldstein v. Chestnut Ridge Volunteer Fire Dep't Co.*, 218 F.3d 337, 352 (4th Cir. 2000) (suspension of volunteer firefighter constituted adverse employment action). In a footnote sometimes dismissed as dicta, the Supreme Court seemingly blessed an expansive definition of adverse employment action: "Moreover, the First Amendment, as the court below noted, already protects state employees not only from patronage dismissals but also from even an act of retaliation as trivial as failing to hold a birthday party for a public employee...when intended to punish her for exercising her free speech rights." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 76 n.8 (1990) (internal citations omitted). *But see Benningfield v. City of Houston*, 157 F.3d 369 (5th Cir. 1998) (reprimands and false accusation of criminal wrongdoing do not constitute adverse employment actions under First Amendment).
16. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Speigla v. Hill*, 371 F.3d 928, 942 (7th Cir. 2004) (citing unanimity among the circuits on this interpretation).
17. *Connick v. Myers*, 461 U.S. 138, 146, 151 (1983).
18. *McVey v. Stacy*, 157 F.3d 271, 278 (4th Cir. 1998).
19. *Sheppard v. Beerman*, 190 F. Supp. 2d 361, 374 (E.D.N.Y. 2002) (holding that a judge's interest in maintaining an effective workplace trumped the First Amendment interest of the judge's clerk because "a law clerk is often privy to a judge's thoughts and decision-making processes").
20. *See Eng v. Cooley*, 552 F.3d 1062 (9th Cir. 2009).
21. *In re Miller*, 357 N.C. 316, 335 (2003).
22. See Susan R. Martyn, Lawrence J. Fox & W. Bradley Wendel, *The Law Governing Lawyers: National Rules, Standards, Statutes, and State Lawyer Codes* (2009-2010 ed.).
23. N.C. Ethics Op. CPR 154.
24. RPC Rule 1.13(b).
25. *See NC State Bar v. Koenig*, 04 DHC 41 (2005) (disciplining attorney representing sheriff's office for failing to pursue allegations of sexual harassment to a final decision by the office's highest authority, the sheriff).
26. RPC Rule 1.13, Comment 9.
27. 89 NC Disciplinary Hearing Committee 5; NC Ethics Op. RPC 127; NC Ethics Op. RPC 243.
28. RPC Rule 8.3, Comment 3.
29. Even if an employee is expected to respond to media inquiries on certain topics, self-initiated comments to the media about topics the employer has demanded the employee keep confidential probably would be considered outside of the scope of that employee's job duties. *See Snelling v. City of Claremont*, 931 A.2d 1272 (N.H. 2007) (fact that tax assessor's job duties included talking to the media about certain tax issues did not mean that all comments to the media by the assessor were within his scope of employment).
30. *See* N.C. Gen. Stat. (hereinafter G.S.) § 143-318.16 (authorizing injunctive relief for violation of open meetings laws) and G.S. 143-318.16A (authorizing the invalidation of acts by a public body made in violation of open meetings laws).
31. *See Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364 (5th Cir. 1998) (public disclosure of client confidences by an in-house attorney that violated State Bar rules justified the termination of the attorney, despite the fact that the disclosures would have been considered "protected activity" under Title VII had they been made by a nonattorney employee). A lower court later relied on *Douglas* to conclude that an attorney most likely could not base a First Amendment retaliation claim on speech that violated the attorney's duty of confidentiality. *Washington v. Davis*, 2001 WL 1287125 (E.D.La. 2001).
32. *See Crews v. Buckman Laboratories Int'l, Inc.*, 78 S.W.3d 852 (Tenn. 2002) (permitting wrongful discharge claim by in-house counsel who alleged she was terminated after satisfying State Bar ethics obligation to report her supervisor's practice of law without a license); ABA Formal Ethics Op. 01-424 (Model Rules do not prohibit former in-house counsel from suing former employer for wrongful termination and from revealing confidential information necessary to establish claim).
33. *See Considine v. Compass Group USA, Inc.*, 145 N.C. App. 314 (2001) (dismissing attorney-employee's wrongful discharge action for failing to state a claim and, in the view of the dissent, "deny[ing] in-house attorney-employees the ability to allege with particularity their wrongful termination of employment claims" because of fear they will violate confidentiality duties under Rule 1.6). *Considine* appears to ignore a 2000 ethics opinion from the North Carolina State Bar that concluded an attorney-employee should be able to pursue a wrongful discharge claim by alleging just enough to put the employer on notice of the claim and then obtaining permission of the court to reveal confidential client information in further support of the claim. NC Ethics Op. 2000-11.
34. G.S. 126-84 and G.S. 126-85 prohibit the state from retaliating against employees for their disclosure of government misconduct. Importantly, the statute protects only reports to the employee's "supervisor, department head, or other appropriate authority," not disclosure to the media or public generally.

Bad Faith in North Carolina Insurance Contracts: A Growing Part of Insurance Practice

By Constance A. Anastopoulo

As insurance contracts and the obligations associated therewith grow more complicated and far-reaching, courts have witnessed an increase in the number of bad faith claims being filed and litigated, both nationally and regionally. It is important to realize that with each decision, the doctrine of bad faith—a judicially created doctrine—is subject to potential change. Since the business of insurance is greatly affected with public interest policies, this escalation in claims raises substantial implications regarding the insurer-insured relationship.



At the heart of most insurance contract disputes are several competing interests. Insureds, who lack equal bargaining power with the insurer, contract only to protect themselves against the specter of accidental or unavoidable loss. To the insured, therefore, a policy of insurance is only as good as the insurer's willingness to pay claims in whatever context the claim arises. Stated another way, the insured's confidence in the insurance contract is only as secure as his or her reasonable belief the policy will ade-

quately provide him or her protection. At the same time, insurance companies have a vested interest in being able to accurately predict their obligations and make appropriate business decisions that will foster economic success, which translates into its ability to pay its obligations for the benefit of its policyholders. This article seeks to provide an overview of bad faith in insurance contracts in general and as it presently exists in North Carolina.

Bad Faith in General

A claim for bad faith typically arises in either the first- or third-party context. *See, e.g., Rakes v. Life Inv. Ins. Co. of Am.*, 582 F.3d 886, 895-96 (8th Cir. 2009).

First-party bad faith deals with the insurer's conduct in determining whether to indemnify the insured for loss suffered personally. *See generally George J. Kefalos, et al., Bad-Faith Ins. Litigation in the South Carolina Practice Manual*, 13-AUG S.C. LAW. 18 (2001). Historically, courts construed a denial of benefits as a breach of contract and limited recovery accordingly. The nature of the insured-insurer contractual relationship, however, led to the emergence of a tort claim, providing additional theories of recovery intended to address the unique characteristics of the insurance contract. California was the first state to recognize an action for bad faith handling of a claim for first-party benefits in *Gruenberg v. Aetna Insurance Company*, 9 Cal. 3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032 (1973).

Third-party bad faith, on the other hand, concerns the insurer's conduct in handling the insured's claim for coverage under a liability insurance policy. In this context, an insured files a claim for a defense to a third party's suit instituted against the insured and indemnification for the costs of any judgment suffered. Stated another way, the insurer owes two duties: (1) to defend a claim even if some or most of the lawsuit is not covered by insurance; and (2) to indemnify—to pay the judgment against the policy holder up to the limit of coverage. As these are contractual obligations, insurers must act with the utmost good faith and fair dealing in determining whether to and ultimately carrying out these duties.

Once the insurer has assumed control of the defense, including the right to accept or reject settlement offers, the implied duty of good faith and fair dealing requires the insurer to put the insured's interests on equal footing with its own. Thus, there is a duty to settle a reasonably clear claim against the policyholder within the policy limits to avoid exposing the policyholder to the risk of a judgment in excess of the policy limits. *See, e.g., Frontier Insulation Constr. v. Merch. Mut. Ins. Co.*, 91 N.Y.2d 169, 175-78 (1997).

Closely tied to this "duty to settle" is the concept of the excess liability claim. The claim first arose in *Crisci v. Security Insurance Company*, 66 Cal. 2d 425, 426 P.2d 173 (1967), where a third party offered to settle within the policy limits. *Id.* at 428, 426 P.2d at 175. After the insurer refused the offer, the insured suffered a judgment at trial substantially exceeding the policy limits. *Id.* at 428, 426 P.2d at 176. The insurer thereafter paid out only the policy limit, which it considered the extent of its contractual obligation. *Id.* at 428, 426 P.2d at 176. Consequently, the insured sued the insurer for: (1) loss of property; (2) mental distress; and (3) the amount by which the judgment exceeded the policy limits, all of which were caused by the insurer's refusal to settle. *Id.* at 427, 426 P.2d at 175. The court looked to the insurer's conduct in handling the third-party claim to determine the insurer's excess liability. *Id.* Guiding this inquiry was whether a reasonably prudent insurer without policy limits would have accepted the settlement offer. *Id.* at 430-32, 426 P.2d at 176-78. Although inconclusive, a judgment in excess of the policy limits raises the inference that accepting the offer was reasonable. *Id.* at 430, 426 P.2d at 176-77. Furthermore, rejection of such an offer renders the insurer liable for the amount of the final judgment whether or not within policy limits. *Id.*

Bad Faith in North Carolina

As North Carolina courts carved out the state's own bad faith jurisprudence over the years, they wrestled with the bad faith tort-contract distinction as well as the type of damages recoverable in this peculiar cause of action. At the heart of this struggle, however, is a recognition that "[a]n insurance company is expected to deal fairly and in good faith with its policyholders." *Robinson v. NC Farm Bureau Ins. Co.*, 86 N.C. App. 44, 50, 356 S.E.2d 392, 395 (1987), *disc. review denied*, 321 N.C. 592, 364 S.E.2d 140 (1988). It is also axiomatic that damages for breach of contract should seek to place the injured party, as much as possible, in the position he or she would have occupied had the contract been performed. *See generally Burrell v. Sparkkles Reconstr. Co.*, 189 N.C. App. 104, 657 S.E.2d 712 (N.C. App. 2008). Logically therefore, a breach of contract claim should only yield the plaintiff damages in the amount of coverage called for by the policy. *Nationwide Mut. Ins. Co. v. Mabe*, 115 N.C. App. 193, 198, 444 S.E.2d 664, 667 (1994). Nevertheless, due to the ever-increasing number of claims for bad faith, the distinction between breach of contract and bad faith tort actions led courts to promulgate rules permitting recovery in tort, including punitive damages.

In 1976, the North Carolina Supreme Court in *Newton v. Insurance Company* reviewed the judicial history of attempts to obtain punitive damages in breach of contract cases and affirmed the trial court's dismissal of the punitive damages claim, reasoning:

> The breach of contract represented by defendant's failure to pay is not alleged to be accompanied by either fraudulent misrepresentation or any other recognizable tortuous behavior. [T]he allegations in the complaint of oppressive behavior by defendant in breaching the contract are insufficient to plead any recognizable tort. They are, moreover, unaccompanied by any allegation of intentional wrongdoing other than the breach itself even were a tort alleged. Punitive damages could not therefore be allowed even if the allegations here considered were proved.

291 N.C. 105, 114, 229 S.E.2d 297, 302 (1976). In other words, the plaintiff must show something more than a mere refusal to pay in order to recover punitive damages—the plaintiff must show: (1) a refusal to pay after recognition of a valid claim; (2) bad faith; and (3) aggravating or outrageous conduct. *Michael v. Metro Life Ins. Co.*, 631 F. Supp. 451, 455 (W.D.N.C. 1986). Generally, an insurer acts in bad faith when its refusal was "not based on honest disagreement or innocent mistake." *Daily v. Integon Gen. Ins. Corp.*, 75 N.C. App. 387, 396, 331 S.E.2d 148, 155 (1985), *disc. rev. den'd*, 314 N.C. 664, 336 S.E.2d 399 (1985). "Aggravation" has been defined to include fraud, malice, such a degree of negligence as indicates a reckless indifference to plaintiff's rights, oppression, insult, rude-

ness, caprice, and willfulness. *Newton v. Ins. Co.*, 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976). Thus, a bad faith refusal to provide the coverage or to pay a warranted claim may give rise to a claim for punitive damages. *von Hagel v. Blue Cross and Blue Shield*, 91 N.C. App. 58, 68, 370 S.E.2d 695, 691 (1988). A plaintiff satisfies the aggravation requirement by sufficiently pleading specific instances of willful or reckless conduct accompanying the breach of contract and the purported bad faith. *Payne v. NC Farm Bureau Mut. Ins. Co.*, 67 N.C. App. 692, 694, 313 S.E.2d 912, 913 (1984). This requirement stems, at least in part, from a desire to prevent surprise or confusion to the insurer and "to preclude recovery of punitive damages for breach of contract where there is no tortious conduct" accompanying the breach. *Shugar v. Guill*, 304 N.C. 332, 337, 283 S.E.2d 507, 510 (1981). Whether the alleged facts satisfy the aggravated conduct element so as to support a claim for punitive damages is ultimately a question for the trier of fact. *Smith v. Nationwide Mutual Fire Ins. Co.*, 96 N.C. App. 215, 219, 385 S.E.2d 152, 154 (1989), *disc. review denied*, 326 N.C. 365, 389 S.E.2d 816 (1990).

In addition to the potential avenues of recovery that rest primarily upon common law, the North Carolina General Statutes provide a mechanism by which wronged insureds can recover for the bad faith committed by their insurers. Working together, the Unfair Claim Settlement Practices Act, codified at N.C.G.S. § 58-63-15(11) (formerly codified at N.C.G.S. § 58-54.4(11)), and the Unfair Trade or Deceptive Practices Act [the UTPA] codified at N.C.G.S. § 75-1.1, *et seq.*, create a private right of action that allows a plaintiff to reference the behaviors outlawed by the Unfair Claim Settlement Practices Act in her claim brought pursuant to the UTPA. To understand how these statues work together, it is helpful to address each statue separately.

First, the Unfair Claim Settlement Practices Act, N.C. Gen. Stat. § 58-63-15 (2009), has 14 subparts which detail practices and acts by insurers that the North Carolina legislature recognizes as constituting unfair claims practices. N.C. Gen. Stat. § 58-63-15 (2009). The factors may also constitute bad faith in North Carolina. *See generally Robinson v. North Carolina Farm Bureau Ins. Co.*, 86 N.C. App. 44, 49-50, 356 S.E.2d 382, 395-96 (N.C. Ct. App. 1987). Of particular note are subsections (f), (h), (m), and (n) which provide:

- (f) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;
- (h) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled;
- (m) Failing to promptly settle claims where liability has become reasonably clear;
- (n) Failing to promptly provide a reasonable explanation of the basis in the policy in relation to the facts or law for denial of the claim or for the offer of compromise settlement; *Id.*

However, the Unfair Claim Settlement Practices Act, N.C. Gen. Stat. § 58-63-15 (2009), does not provide for a private right of action; in fact, it specifically provides that "no violation of this subsection shall of itself create any cause of action in favor of any person other than the commissioner." *Id.*

An aggrieved insured, however, is not without recourse because conduct that violates the Unfair Claim Settlement Practices Act also violates the UTPA. *See Gray v. NC Ins. Underwriting Ass'n*, 352 N.C. 61, 71, 529 S.E.2d 676, 683 (2000) (holding "conduct that violates subsection (f) of N.C.G.S. § 58-63-15(11) constitutes a violation of N.C.G.S. § 75-1-1, as a matter of law."); *see also United States Virginia Bank v. Air-Lift Assocs.*, 79 N.C. App. 315, 319020, 339 S.E.2d 90, 93 (1986) ("The purpose of G.S. 75-1.1 is to provide a civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within [North Carolina] ...."). Therefore, a plaintiff harmed by an insured engaging in actions outlawed by the Unfair Claim Settlement Practices statute may pursue her claim by filing a private right of action alleging violations of the UTPA; however, the allegations must be plead properly. A notable benefit to bringing a bad faith claim under Chapter 75 is

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Impact of Sit-Ins on American Civil Rights Movement Explored at Elon Law Forum

BY PHILIP CRAFT

Franklin McCain, one of the four NC A&T students who energized the civil rights movement in 1960 by sitting at a segregated lunch counter in Greensboro, NC, was the featured speaker at Elon University School of Law's second annual Martin Luther King Jr. forum on January 14.

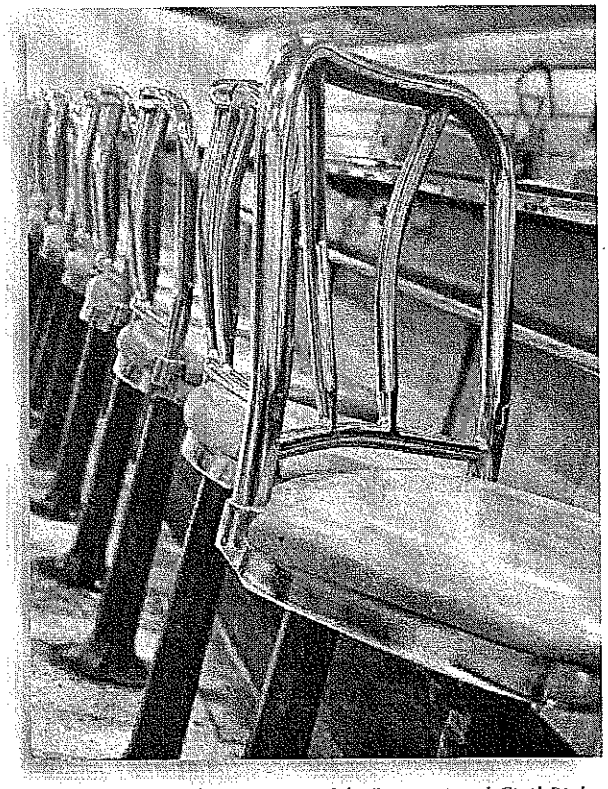

Photo courtesy of the International Civil Rights Center & Museum

The forum took place two weeks prior to the 50th anniversary of the sit-ins, which began in Greensboro on February 1, 1960. The importance of the sit-ins in American history is underscored by the fact that 50 years later, to the day, Greensboro celebrated the opening of the International Civil Rights Center and Museum in the exact location where McCain and his three friends, Ezell Blair Jr. (also known as Jibreel Khazan), David Richmond, and Joseph McNeil, initiated the historic sit-ins.

The focus of Elon Law's forum was on the legal and societal hurdles that sit-in participants had to overcome, as well as the historical and legal context of the civil rights movement within which the sit-ins took place.

Historical Context

Duke University historian William H. Chafe began the forum by describing what he called the "progressive mystique of the South, a much more genteel form of social control where the thinking was, 'we should be nice to people but not necessarily change the status quo.'"

"Manners became a substitute for progress, and that is one of the difficulties that people like Franklin McCain faced when they had to find some way to puncture that aura of civility, which was basically a very effective means of keeping things quiet and maintaining social control," Chafe said.

Chafe explained that the sit-ins were preceded by a well-established tradition of protests for equality by African Americans in North Carolina, particularly at colleges and high schools. In a news report about the Elon Law forum, *Carolina Peacemaker* editor Afrique I. Kilimanjaro wrote that Chafe, "cited Bennett College President David D. Jones, who refused to hire construction firms to work on the campus unless the firm had black construction workers; and Dudley High School science teacher Vance Chavis, who told his students that he never sat at the

back of the bus and encouraged them to stand up and be assertive."

Even while acknowledging the contributions of a broad set of individuals in the region for civil rights, Chafe said that the sit-ins were unique in their approach and impact.

"What happened on February 1 was the decisive tipping point which led to so much else happening, including basically the creation of the direct action student civil rights movement, which is responsible for the 1964 Civil Rights Act, the '65 Voting Rights Act, and the '68 Housing Act. All that really had its inception in the direct action started by Franklin McCain and others," Chafe said.

A Personal Account

Franklin McCain then described how he and his friends arrived at the decision to initiate the sit-ins, noting how angry they had become at a system that denied them equal rights.

"We determined that to be decent human beings and to get that respect, we had to demand it, because it represented power in the eyes of a lot of people in the opposition, and we knew full well that the opposition does not give up power, you had to take it," McCain said.

Knowing about the injustices of segregation but doing nothing about it was intolerable, McCain said.

"We concluded that we were probably the worst of the lot," McCain reflected. "We are aware of all these things and we do absolutely nothing? You don't feel good when you take that kind of inventory and make that kind of assessment. I had to find a way to redeem Franklin McCain and find some sense of relief and manhood, and I thought I owed something to the legacy of my parents, my grandparents, and my ancestors."

McCain also explained the group's thought process in choosing the sit-ins as a form of protest.

"We didn't pick the Woolworth's counter just out of a hat," McCain said. "We picked Woolworth's because it represented a real dichotomy of treatment and offerings and service. It was a representation of another big lie, meaning that you could go to a Woolworth's in New York City or Philadelphia, and visit all 44 counters, including the lunch counter. You could come a little farther south, to Greensboro, and do your business at 43 counters and not number 44. And we thought, this is sinister. This is a place where we have a legitimate right and a way to attack it."

Asked if he was afraid as he walked toward the Woolworth's that day, McCain responded, "Hell no, I wasn't afraid. I was too angry to be afraid. Anxiety, yes—one of two things could happen. I knew my days as a student were going to be over. If I were lucky, I would go to jail for a long, long time. If I were not quite so lucky, I could come back to campus in a pine box. But it did not matter, because the way we were living was probably worse than either of those options."

McCain concluded by explaining the rewarding feeling he had in taking action for a just cause.

"Twenty seconds after I sat on that dumb stool, I had the most wonderful feeling. I had a feeling of self-fulfillment. I had a feeling of dignity 100 feet tall. I had a feeling of invincibility. I was somebody through my own accord and through my own action," McCain said.

Elon Law student Samantha Gilman said McCain's account of the sit-ins was inspiring.

"As an undergraduate at Elon, I took a civil rights class, read books about the sit-ins, and visited sit-in locations, but to talk to someone who participated in it was really meaningful," Gilman said. "You can see it in movies and you can read all the books you can, but to hear it first-hand and feel what they were feeling at the moment really makes an impact."

Legal Context

Romallus Murphy, former general counsel for the North Carolina NAACP and past-president of the Guilford County Black Lawyer's Association, reviewed 1950s civil rights litigation preceding the sit-in movement.

Murphy said that legal actions taken by the NAACP under the leadership of Charles Hamilton Houston and Thurgood Marshall began with a strategy Houston called Equalization Theory, and ended, ultimately, in overturning the separate but equal doctrine of *Plessy v. Ferguson.*

"They concluded that *Plessy v. Ferguson* had no basis in law and therefore they should make an attack upon separate but equal. Well, there was a disagreement. There were those who felt that would be a fatal attack, based upon *steri decisis,* the Supreme Court precedent, they should not attack separate but equal head on—they should use *Plessy v. Ferguson* to put the 'equal' along with 'separate' because they really had separate but unequal."

In cases spearheaded by the NAACP, Murphy said, Houston and Marshall won equal pay for teachers and upgraded higher education facilities for minorities all over the south.

"The idea was that it would become too costly to have duplicate equal facilities all over the country, and therefore *Plessy v. Ferguson* would just die on its own, but that did not happen," Murphy said.

Describing the plaintiffs in these cases, Murphy said they deserved more credit for their contributions to civil rights in the United States.

"The plaintiffs were young black males or females who had recently graduated from college," Murphy said. "If you were to sue the state of Texas or the state of Maryland in those days, your name and picture would be in the paper, they would know who your mother and father are, they would know where you live and where they work, and in some cases you may be subjected to economic reprisals."

Elon Law student Jeremy Ray said he valued Murphy's account of cases that laid a foundation for the sit-ins.

"Without hearing from those who were directly involved in the legal actions of the civil rights movement, you don't really get an idea of the true players who actually created the larger change that happened, especially some of the plaintiffs who took these law suits and just wore down the states until equal rights was finally developed," Ray said.

The Future of Civil Rights

Concluding the forum, panelists discussed political and social matters they thought law students and the broader public should address as part of the civil rights legacy in the country.

McCain said he was disappointed to see so many residents in the region "practicing casual citizenship." He urged all residents, and particularly women and minorities, to take advantage of the hard-won right to vote in democratic elections.

Chafe said the nation is at a critical moment in its history, and that citizens should reflect on the philosophy of its founders for inspiration to become more open

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Advocates for the Arts: The Mahler and the State Bar

By Susan Friday Lamb

Did you know that the building which now houses the North Carolina State Bar in downtown Raleigh was a bustling department store more than 25 years ago? In 2001, in the midst of renovations, the State Bar decided to enhance the building's large storefront windows, once filled with the latest fashions. These windows facing Fayetteville Street provided an ideal showcase in a prime location.

Rory Parnell, left, and Megg Rader

The renovation architects came up with an intriguing idea. Why not feature a changing display of paintings by different contemporary North Carolina artists? Not only would this provide visual interest to passers-by, it would also promote the state's artists and creative industry.

Pursuing this idea, Alice Neece Mine, assistant executive director of the State Bar, soon turned to Rory Parnell, owner of Raleigh Contemporary Gallery (now The Mahler Fine Art). Parnell agreed to take on the task of selecting one artist's paintings to highlight every three months. Additionally, she would send information about each artist to the *Journal* for a feature article. And thus, a successful partnership was born.

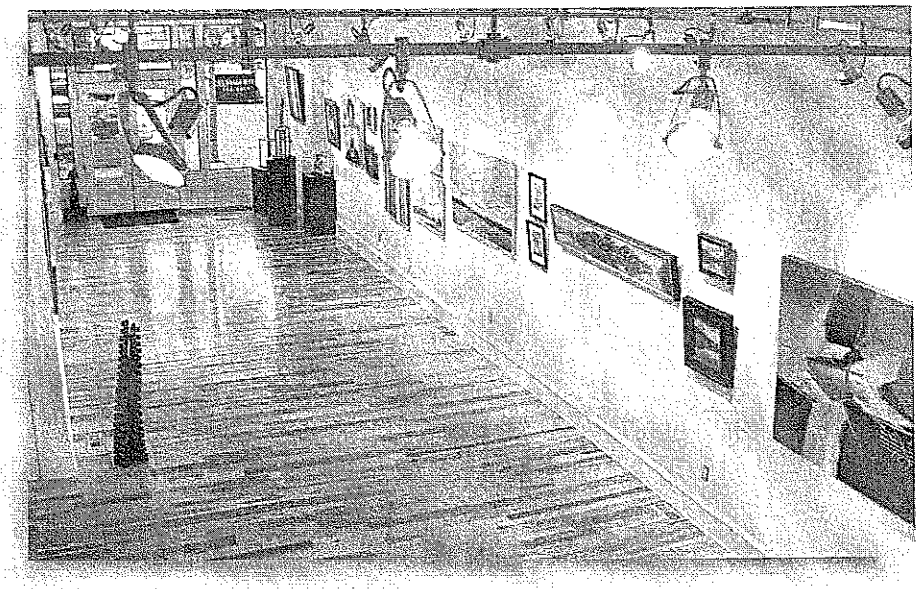
"As an advocate for the arts, I was impressed with the State Bar's commitment to promoting the work of North Carolina artists," recalls Parnell.

When Megg Rader joined Parnell as a professional partner in 2005, she brought her extensive arts experience into the picture. Now both women enjoy working with the State Bar while managing busy careers as owners of the sister galleries The Mahler and The Collectors Gallery, also located on Fayetteville Street.

"The Mahler specializes in fine art in multiple visual disciplines, and The Collectors Gallery focuses exclusively on North Carolina fine craft," says Rader of these thriving businesses.

Although they have 35 years of collective experience in the arts, you may be surprised to discover that Rader and Parnell have many ties to the legal community. For example, Parnell helped found Mediation Services of Wake Inc., after moving to Raleigh with her husband, Dr. Jerry Parnell, in 1981. She and a group of dedicated volunteers began this service because they believed in helping people settle disputes outside the court system with assistance from a trained mediator. Parnell volunteered with the organization for a decade.

"It was a very rewarding experience," states Parnell, who also managed Raleigh Contemporary Gallery at the time. "It was a



way for me to balance my advocacy of art with my interest in social service work."

Rader graduated from Campbell University School of Law in 1987. Prior to law school, she earned a degree in art history and art administration from Mary Baldwin College in Virginia. On a personal note, her husband, Wake County Chief District Court Judge Robert Rader, is a past-chair of the State Bar's CLE Board.

During the 1990s, Rader poured her energy into serving as executive director of Artspace, a non-profit visual art center in the heart of the capital city. She and Parnell continue to serve on numerous boards and committees of non-profit organizations, such as Artspace, the Raleigh Arts Commission, the Visual Art Exchange, and the Conservation Trust of North Carolina. They are also active members of the Downtown Raleigh Alliance.

"We believe that giving back to our community also helps to enrich the cultural life of North Carolina," emphasizes Rader.

Similarly, the State Bar is investing in the state's culture by promoting works by North Carolina artists through its partnership with Rader and Parnell.

"This partnership has really been a win-win for the State Bar, the galleries, and the artists," remarks Mine. "It has worked beautifully." ■

Susan Friday Lamb is a freelance writer.

The Mahler and The Collectors Gallery are distinctive showplaces with unique and diverse offerings. The Mahler opened its doors in 2009 in the carefully restored 1876 Mahler Building. The high ceilings and wooden floors of the historic building provide a pleasing setting for the visual treats within—paintings, sculptures, pottery, mixed media pieces, and more.

"The Mahler offers the best in regional and national fine art by emerging and established artists," says Rader. The gallery's professional staff provides art consulting for residential and corporate clients, which includes numerous Raleigh law firms. For more information, call 919-896-7503, e-mail info@themahlerfineart.com or go to www.themahlerfineart.com.

The Collectors Gallery relocated last fall to a brand-new glass pavilion located at the City Plaza. The gallery features fine craft made by North Carolina artists. Shoppers discover treasures at every turn: unusual and one-of-a-kind pottery, sculpture, jewelry, and glass and wooden objects. Check out the online store at www.thecollectorsgallery.com. Call 919-828-6500 or e-mail info@thecollectorsgallery.com for additional details. ■

Addressing the Gap (cont.)

she worked in health policy and research. Please send comments to Ann Shy at Ann@DisputeRedesign.com

Endnotes

1. While reimbursement recently dropped due to severe constraints to federal and state budgets, both of which are sources of funding for NC Medicaid, rates remain within 95% of Medicare; fee-for-service prevails rather than a managed care model; and physician input remains central to reimbursement and care plan policies.
2. S.L. 2008-118 s.3.13 requires NC Department of Health and Human Services (DHHS) to transfer $2 million to the Office of Administrative Hearings to effectuate a mediation and appeals process.
3. Multiple mediation centers participate. No uniform reporting mechanism exists, hence the estimate.
4. Changes and clarifications were made in the Medicaid appeals process and passed into law as part of S.L. 2009-550/House Bill 274, effective August 28, 2009.
5. In NC, more children are covered by Medicaid (62% of all NC children) than the national average (59.7%), and fewer children are uninsured (18.7% of all NC children) than the national average (19.7%). However, more children in NC are living in poverty (26% of all NC children) than the national average (23%). These data refer to 2007-2008, taken from Medicaid Fact Sheets from the Kaiser Family foundation at http://www.kff.org/MFS/.
6. *See* note 4.
7. According to DHHS' legislative report on the appeal process submitted in October 2009, the new efficiencies (specifically, the expedited hearing process and accompanying document management system) saved $10.3 million in ten months in maintenance of service costs by eliminating 165,200 days of service that would otherwise have been paid for by Medicaid under the previous appeal process. *See* www.dhhs.state.nc.us/dma/legis/100109Appeal.pdf page 4 and Table VI on page 13.
8. Of the decisions adopted by the Medicaid Agency since 2009 as their final agency decision, 89% were ALJ rulings in favor of the Medicaid Agency and 11% were ALJ rulings in favor of the recipient. One hundred percent of the decisions overturned by the Medicaid Agency were ALJ rulings in favor of the recipient. The Medicaid Agency overturned 81% of all cases that favored the recipient. OAH-generated report, updated March 1, 2010.
9. If an existing service was denied, Medicaid would be compelled to continue paying for the service until a final decision was rendered. But if a request for a new service was denied, the child may never receive that service if their Medicaid eligibility expired due to age before a final decision to initiate the service was rendered.
10. State of N.C., Dep't of Health and Human Serv., Div. of Med. Assistance, Appeal Process for Medicaid Applicants and Recipients Established Under S.L. 2008-118, Sec. 3.13 and S.L. 2008-107 Sec. 10.15A (h6), at 5 (2009).
11. Estimates now say an additional 16 million low-income people will be added to Medicaid including parents and some childless adults. "Proposed Changes in the Final Health Care Bill," *The New York Times*, March 22, 2010.

Sit-Ins (cont.)

to the needs and perspectives of minorities in the country.

"By 2050, we will no longer be a majority white nation," Chafe said. "Our own state has seen a 600% increase in the Latino population in the last ten years, and we are facing a cultural test of where our values are. Do we actually believe in the common good and what is the common good? Our country was founded, the white part of the country, by the Puritans who talked about a model of Christian charity, about caring for each other, about loving each other, about bearing each other's pain. We haven't been there for a while, we haven't really understood the importance of hearing the other side."

Asked about current social movements, including the gay rights movement, Chafe concluded saying there was a need to "recognize the indivisibility of human rights."

Elon Law student Tiffany Atkins said the forum sent the right message to law students.

"They each gave a different perspective on the importance of the sit-ins and how the law played a part in a movement that shaped our country," Atkins said. "I thought it was great that they challenged us to be empowered to really make change."

Elon Law student Amanda Tauber said the forum was important in helping law students consider their roles as attorneys.

"It was a great charge to all of us to be active," Tauber said. "We can't sit on our hands and wait for change to happen. As lawyers, we will have the influence, the intelligence, and the creativity to really make an active change in our communities and in the world."

Elon Law presented the forum in partnership with the law school's Black Law Students Association and Phi Alpha Delta chapter, and with support from the Law School Admission Council as part of DiscoverLaw.org Month. The Admissions Office at Elon Law sponsored this forum, inviting college and high school students from minority communities currently underrepresented in the legal profession to attend, providing an opportunity to consider what careers in the law can achieve. ■

Philip Craft is the director of communications for Elon University School of Law.

Fire Investigator available to conduct origin and cause, and other fire investigation services. Retired police fire investigator, certified, licensed, and insured. Visit my website at www.pyropi.com. Contact me at 919-625-8556 or scott.hume@nc.rr.com.

Bad Faith (cont.)

that a successful plaintiff may seek both treble damages and attorney's fees. *See generally* N.C.G.S. Chapter 75-16, *et. seq.*; *see also Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981).

To succeed in a claim for unfair or deceptive trade practices under the UTPA, a plaintiff generally must show: "(1) defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) that plaintiff was injured thereby." *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998). *See also* N.C. Gen. Stat. § 75-1.1 (2005). "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). Interpreting the Unfair Claim Settlement Practices statute, North Carolina courts have held that "[n]ot attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonable clear," is "inherently unfair, unscrupulous, and injurious to consumers." *Country Club of Johnston City, Inc. v. US Fidelity & Guar. Co.*, 150 N.C. App 231, 247, 563 S.E.2d 269, 280 (2002) (quoting N.C. Gen. Stat. § 58-63-15(11)(f) (2005)). Therefore, a plaintiff alleging bad faith should allege the insurer's actions violate the Unfair Claim Settlement Practices Act and therefore constitute an unfair trade practice, which the UTPA creates a private right of action to pursue.

A final distinction worthy of note is that causes of action for unfair or deceptive practices are distinct from breach of contract actions. *Boyd v. Drum*, 129 N.C. App. 586, 593, 501 S.E.2d 91, 97 (1998), *aff'd per curiam*, 350 N.C. 90, 511 S.E.2d 304 (1999). The cause of action for violation of the statute exists independently of whether the contract was breached. *Bernard v. Cen. Carolina Truck Sales, Inc.*, 68 N.C. 228, 230, 314 S.E.2d 582, 584 (Ct. App. 1984), *disc. review den'd*, 311 N.C. 751, 321 S.E.2d 126 (1984). However, damages may be recovered either for the breach of contract claim, or for the violation of §75-1.1, but not for both. *United Laboratories, Inc. v. Kuykendall*, 437 S.E.2d 374, 379, 335 N.C. 183 (N.C. 1993). *See also, Vasquez v. Allstate Ins. Co.*, 529 S.E.2d 480, 137 N.C.App.741 (N.C.App. 2000).

Conclusion

Bad faith litigation continues to grow and expand and courts are faced with the question of defining what constitutes an insurer's obligation to act in good faith, or to not act in bad faith. While all courts are agreed that an insurer owes some duty in this respect, courts wrestle with what constitutes that duty, or a breach thereof. State legislatures have circumscribed those duties to some extent but questions remain. As the concept evolves, it is important to understand ways in which bad faith will be characterized and delineated. It is also important for practitioners on both sides to recognize the potential areas that create the greatest risk of a bad faith claim, and what steps can be taken to address those areas before the claim arises. Exploring these matters in detail will hopefully provide practitioners tools to assist them as they navigate this evolving area of law. ■

A graduate of the University of North Carolina School of Law, Constance Anastopoulo is an assistant professor of law at the Charleston School of Law. In addition to teaching Insurance and Torts, Professor Anastopoulo enjoys her role as a consultant in litigation involving novel and complex issues related to the obligation of insurers.

A Kinder, Gentler Bar—Take Two

BY SUZANNE LEVER

In the Summer 2009 *Journal*, I wrote an article discussing a proposed amendment to Rule 1.8(e) then under consideration by the Ethics Committee. Rule 1.8(e) prohibits a lawyer from making or guaranteeing a loan to a client for living expenses. The impetus for the proposed amendment was regular calls to State Bar Ethics Counsel from lawyers seeking to assist clients who have become unable to provide for themselves or their families after a serious accident. The proposed amendment provided that a lawyer representing an indigent client could provide financial assistance for essential needs such as food, housing, and utilities, as long as there was no obligation to repay and there was no representation to the client prior to the legal representation that such financial assistance would be provided.

Lawyers were opposed to the proposed amendment on the ground that approval of the amendment would result in an unfair advantage to large firms with deep pockets. The fear was that clients would learn which law firms had a reputation for providing financial assistance to their clients and would select their lawyer based on that factor. The proposed amendment was not adopted.

The Ethics Committee is now considering an inquiry from a personal injury lawyer as to the feasibility of setting up a not-for-profit organization to assist needy clients. The inquiring lawyer states that the idea for the organization arose from his desire to help clients deal with the financial and emotional consequences of catastrophic injuries. The lawyer describes his proposed organization as similar to the North Carolina Crime Victim's Compensation Fund, but with the aim of assisting personal injury victims.

The proposed organization would accept tax-deductible donations and would be available to provide funding, housing assistance, and food to personal injury clients in need. Applications for assistance would be reviewed by the organization's review committee and assistance would be provided to those persons considered to be most worthy of need. The review committee would be made up of volunteer lawyers. Any law firm could submit applications for assistance for their clients.

Seems like a great idea. What could be wrong with something that makes you feel so warm and fuzzy? But wait, what if, just what if, some lawyers attempt to use the organization for personal gain rather than for the greater good? How can such an organization function without becoming a conduit for a lawyer's funds that are earmarked and disbursed to the lawyer's own client? And, what will prevent firms participating in the organization from gaining an unfair advantage in attracting clients?

The inquiring lawyer has recommended certain safeguards aimed to prevent such shenanigans. Safeguards suggested thus far include the requirement that application review be "blind" as to the amount of contributions made to the organization by a particular lawyer or firm. Lawyers serving on the review board would also not be allowed to participate in reviewing applications when they have a conflict of interest. In addition, lawyers would not be allowed to advertise their service on the organization's review board, their contributions to the organization, or their past successes in obtaining financial assistance for their clients from the organization.

What do you think? Would an organization established by lawyers to provide financial assistance to needy clients provide a solution to the current ethical/moral conundrum? Or is the State Bar being tempted by a wolf in sheep's clothing? The ethics inquiry will be discussed at the next quarterly meeting of the Ethics Committee. If you would like to comment on the ethical issues surrounding the establishment of a not-for-profit organization to assist needy clients, please send your written comments to Suzanne Lever, The North Carolina State Bar, PO Box 25908, Raleigh, NC 27611, slever@ ncbar.gov. ■

Suzanne Lever is assistant ethics counsel for the North Carolina State Bar.

Animal Law (cont.)

19. E.g., Burke. *See* the Morganton News Herald, Jan 28, 2010 (2010 WLNR 1860747), discussing a 2010 amendment to a county ordinance attempting to classify feral cats as wild animals to the end that they can be immediately euthanized upon arrival at the shelter.
20. *Justice for Animals v. Lenoir County SPCA, Inc.*, 607 S.E.2d 317 (N.C. App. 2005).
21. *Id.* at 324.
22. 2009 N.C. Stats ch. 327, § 1.
23. N.C. Gen. Stat. § 130A-192(c).
24. It was enacted partly in response to reports that Orange County incurred in one year $90,000 at its shelter caring for 45 pit bulls that were evidence in a pending felony dog-fighting prosecution [Chapel Hill Herald, July 6, 1999, at p 1] and that Durham County's shelter spent over $40,000 in 13 months caring for 12 pit bulls that were evidence in a pending criminal prosecution [The *News & Observer*, Jan. 31, 2002, p A1 (Durham edition)].
25. N.C. Gen. Stat. § 19A-23.
26. 2 N.C. Admin Code 52J.0101 *et seq.*
27. 2 N.C. Admin Code 52J.0210.
28. 2 N.C. Admin Code 52J.0201 *et seq.* For example, a home with carpet or furniture cannot comply with the requirement under 52J.0201 that any interior surface with which animals come into contact shall be impervious to moisture.
29. 2 N.C. Admin Code 52J.0404 *et seq.*
30. *State v. Maynard*, 673 S.E.2d 877 (N.C. App. 2009).
31. *Holcomb v. Colonial Associates*, 597 S.E.2d 710 (N.C. 2004).
32. Based upon rankings by the Animal Legal Defense Fund. www.aldf.org/article.php?id=1142

NOTES

Overview: Due to the sea change in our mental health system, DSS's relationship with our Local Management Entity has altered. As Exhibit 1 I point to this admission from Davidson County's LME taken from a recent court case:

"PBH admits it has no obligation to insure that necessary care was provided to Petitioner; PBH's role is to approve or deny requests for Medicaid funds for a particular Medicaid consumer's service request. PBH admits that it is the responsibility of a consumer or a consumer's guardian to request Medicaid funding for a particular service, which service, if approved, will be provided by a third party provider under contract with PBH. "

Under the new system, LME's are going to act like insurance companies and therefore, as advocates for our foster children, we are going to have to respond by aggressively asserting their rights. A response which will require that we navigate the maze of administrative Medicaid appeals.

I. Administrative Hearings Process—after an initial informal reconsideration handled by the LME or the state, a formal appeal of a Medicaid denial means proceeding through the Office of the Administrative Hearings (OAH).

   (a) Procedure covered in G.S. 150B Article 3 and Chapter 3 of Title 26 of the North Carolina Administrative Code;

   (b) Initial step is filing a timely appeal (within 30 days of the **MAILING** of Notice of Decision;

   (c) Key word in the Administrative hearing process is "contested case"—all rights to a hearing depend on

attaining this status which you do when you timely appeal an adverse Medicaid decision;

(d) What you can appeal- you can appeal any adverse decision to deny, terminate, suspend or reduce Medicaid covered services;

(e) The Notice- Notice of a decision has to be mailed to recipient of service, applicant and provider of the rejected service at least 10 days before the effective date of an adverse decision. It has to:

(1) explain what service is being denied, reduced, terminated, suspended or reduced;

(2) the reason for the decision (quoting the specific statutory authority that supports that action);

(3) the effective date of the adverse decision;

(4) explain in detail the recipient's rights to appeal and if the service is in place, to continue it at the current level as long as the appeal is pending (but if you lose the appeal you will have to reimburse the costs);

(f.) Once a contested case is commenced by the receipt of an appeal request form, the OAH notifies the Mediation Network of NC which contacts the petitioner within 5 days to offer mediation. A petitioner has to either accept or decline mediation. If accepted, it has to occur within 25 days of the appeal. (TIP- contact the LME/ opposing counsel to determine whether there is anything to mediate—my experience has been that mediation was not an option in a

denial of services. Also there is no penalty for declining mediation through the OAH;

(g) Hearing date- To the extent possible, OAH is mandated to schedule all hearings for Medicaid appeals within 55 days of initial appeal. (TIP- Knowing this proceeding is going to be fast tracked, it is essential that you retain or obtain expert medical witness (it can be a treating physician/ psychiatrist/ psychologist or retained profession) and have them prepared for the hearing.

(h) Pretrial Conference/ order- Prior to the scheduling of the hearing, you may be asked to participate in a pre-trial conference (can be by telephone) and be ordered to prepare with the other side a pre-trial order containing stipulations of fact, witness lists , suggested issues and any outstanding motions/ venue questions;

(i) Venue- the hearing can be heard either in the county of residence of the recipient, Wake County or in a county where the OAH has an office at the Administrative Law Judge (ALJ')s discretion;

(j) The hearing before the ALJ can be conducted with witnesses in person, available by telephone or upon deposition;

(k) Burden of proof- the burden of proof in these hearings is always on the petitioner to show that the recipient is entitled by law to the Medicaid services;

(l) The issue—Legally, the issue before the ALJ was whether the decision substantially prejudiced the rights of the petitioner and in making it the Department/ or its agent:

(1) exceeded its authority or jurisdiction;

(2) acted erroneously;

(3) failed to use the proper procedure;

(4) acted arbitrarily or capriciously;

(5) failed to act as required by rule or law.

BUT IN ACTUALITY THE ISSUE IS USUALLY WHETHER THE REQUESTED SERVICE IS MEDICALLY NECESSARY. MEDICAID WILL ONLY PAY FOR MEDICALLY NECESSARY SERVICES. (To determine medical necessity, DHHS has protocols or written criteria for every service and the controversy centers on whether the recipient fits those criteria. (I found the applicable ones on the DHHS website and in the administrative code)

Since this becomes a battle of the medical experts use your advantage if you have the treating physician/ psychiatrist / psychologist . Normally in managed care situations, the other side's expert will not have seen the recipient but just reviewed the records prior to making the decision. Case law indicates that the court should give greater weight to the trading physician. Humanize the recipient.

TRIAL TIP- Go the OAH and pull up relevant decisions and study what the particular ALJ or

others have found convincing. It creates a great template for your case;

(m) After the hearing, the ALJ will render a written opinion and serve it on the participants. Until recently, this opinion would go back to the Department of Medical Assistance for a final agency opinion but now the ALJ decision is the final decision that must be appealed to Superior Court.

III. Judicial Review—A party adversely affected by the final decision in a contested OAH case can petition the superior court (in either the County where the recipient resides or in Wake County) for a judicial review in Superior Court.

(a) Timely filing- A petition seeking judicial review must be filed at the Clerk of Superior Court within 30 days after the service of the final decision. it must be served on all parties within 10 day so f the filing. NOTE: SERVE PARTIES NOT ATTORNEYS. SERVICEE ON AN ATTORNEY GENERAL IS NOT SERVICE ON A STATE AGENCY.

(b) Contents of Petition- Petition should explicitly except to the provisions of the final order in dispute.

(c) Scope of Review- The Court reviewing the final decision may affirm, or remand the ALJ for further proceeding or may reverse or modify the decision if the rights of the Petitioner has been prejudiced because of the original decision , or the findings, conclusions or inferences contained within it are:

(1) In violation of constitutional law;

(2) Exceed the statutory authority of jurisdiction of the ALJ;

(2) Made upon unlawful procedure;

(3) Affected by other error of law;

(4) Unsupported by substantial evidence as derived from the record; or

(5) Arbitrary, capricious or an abuse of discretion.

YOUR PETITION SHOULD ADDRESS YOUR OBJECTION TO THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION ON THESE GROUNDS.;

(d) Standard of Review—The trial court will use 1 of 2 standards in reviewing the case either a whole record analysis or de novo review. For # 1-4 above it will be a de- novo review which allows the Court to review the evidence and make its own decision based upon that evidence. For # 5 and # 6 there is a whole record review in which the Court reviews the record to determine it there is evidence to substantiate the ALJ's decision. also the court may

where appropriate enter a judgment on the pleadings or a summary judgment based on a review of the record under a de-novo review.

THE TRIAL COURT'S ORDER SHOULD REFLECT THE STANDARD APPLIED BY THE COURT IS IMPORTANT BECUASE USE OF THE WRONG ONE IS ONE GROUND FOR A REVERSAL BY THE APPELLATE COURTS;

(e) Hearing before a judge without a jury. It is based upon the official record as complied with by the OAH and submitted to the court prior to the hearings;

(Trial taps- When submitting briefs always include portions of the record you want the Judge to consider since the Official Record as submitted to the Court from the OAH is not numbered.)

(f) Conducting the hearing—You will be arguing from the official record why the ALJ's decision was wrong. TRIAL TIP—Humanize the case and be intentional in not over educating the judge on Medicaid law give him or her just enough to reach your desired result;

(g) Rendering a decision- Once the court gives a decision either resolving the matter or remanding it to the OAH for further hearing you have your normal 30 days to appeal to the Court of Appeals.

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(2) December 1 through the last day of February in and east of Hertford, Bertie, Martin, Pitt, Greene, Lenoir, Duplin, Pender and New Hanover counties.

(3) Trapping coyotes is allowed during times and with methods described by local laws in counties where local laws have established fox trapping seasons even when those seasons fall outside the regular trapping seasons described above.

(4) Nutria may be trapped east of I-77 at any time.

(b) Feral Swine. There is no closed season for trapping feral swine subject to the following restrictions:

(1) In addition to a hunting or trapping license, a permit issued by the Wildlife Resources Commission is required to trap feral swine. Individuals exempted from license requirements under the provisions specified in G.S. 113-276 may trap feral swine without a hunting or trapping license, but must acquire the permit.

(2) Feral swine may be live-trapped using only corral or box traps. Corral and box traps must be constructed in a manner such that a non-target animal can be easily released or can escape without harm. The permit number must be displayed on all traps.

(3) Feral swine must be euthanized while in the trap and may not be removed alive from any trap.

Note: See 15A NCAC 10D .0102(f) for other trapping restrictions on game lands.

History Note: Authority G.S. 113-134; 113-291.1; 113-291.2;
Eff. February 1, 1976;
Amended Eff. July 1, 1996; July 1, 1984; July 1, 1983; August 1, 1982; August 1, 1981;
Temporary Amendment Eff. July 1, 1999;
Amended Eff. July 1, 2000;
Temporary Amendment Eff. June 1, 2003;
Amended Eff. August 1, 2010; May 1, 2009; November 1, 2008; May 1, 2008; May 1, 2007; May 1, 2006; June 1, 2005; August 1, 2004;
Recodified from Rule 10B .0302 Eff. January 1, 2011;
Temporary Amendment Eff. December 29, 2011.

15A NCAC 10B .0304 BAG LIMITS

There are ~~shall be~~ no restrictions on bag limits of furbearers, coyotes, ~~or groundhogs.~~ groundhogs, and feral swine.

Note: Where local laws govern trapping, or are in conflict with these regulations, the local law shall prevail.

History Note: Authority G.S. 113-134; 113-291.2;
Eff. August 1, 1977;
Amended Eff. May 1, 2009; May 1, 2008; June 1, 2005; July 1, 1996; July 1, 1984;
Recodified from Rule 10B .0303 Eff. January 1, 2011;
Temporary Amendment Eff. December 29, 2011.

TITLE 26 – OFFICE OF ADMINISTRATIVE HEARINGS

Rule-making Agency: *Office of Administrative Hearings*

Rule Citation: *26 NCAC 03 .0101-.0102, .0105, .0127, .0131*

Effective Date: *January 1, 2012*

Date Approved by the Rules Review Commission: *December 15, 2011*

Reason for Action:
26 NCAC 03 .0101, .0105, .0127, .0131 *- The General Assembly enacted S.L. 2011-398 which gives OAH Administrative Law Judges final decision making in contested cases commenced on or after January 1, 2012 under Article 3 of G.S. 150B. OAH is amending rules that are affected by this legislative change.*
26 NCA 03 .0102 *– The General Assembly enacted S.L. 2011-398 which gives OAH Administrative Law Judges final decision making in contested cases commenced on or after January 1, 2012 under Article 3 of G.S. 150B. OAH intends to serve final decisions issued on and after January 1, 2012 by electronic mail. OAH will no longer forward the entire record to the agency therefore OAH will utilize electronic mail for cost savings and expedited service.*

CHAPTER 03 - HEARINGS DIVISION

SECTION .0100 - HEARING PROCEDURES

26 NCAC 03 .0101 GENERAL

(a) The rules in this Chapter in effect on January 1, 2012 shall apply to contested cases commenced on or after January 1, 2012. The rules in this Chapter in effect on December 31, 2011 shall apply to contested cases commenced on or before December 31, 2011.

~~(a)~~(b) The Rules of Civil Procedure as contained in G.S. 1A-1 and the General Rules of Practice for the Superior and District Courts as authorized by G.S. 7A-34 and found in the Rules Volume of the North Carolina General Statutes shall apply in contested cases in the Office of Administrative Hearings (OAH) unless another specific statute or rule of the Office of Administrative Hearings provides otherwise.

~~(b)~~(c) The Office of Administrative Hearings shall supply forms for use in contested cases. These forms shall conform to the format of the Administrative Office of the Courts' Judicial Department Forms Manual.

~~(c)~~(d) The Office of Administrative Hearings shall permit the filing of contested case documents and other pleadings by facsimile (fax) or electronic mail by an attached file either in PDF format or a document compatible with Microsoft Word 2007. Electronic mail with attachment shall be sent by electronic transmission to: oah.clerks@oah.nc.gov. The faxed or electronic documents shall be deemed a "filing" within the

meaning of 26 NCAC 03 .0102(a)(2) provided the original signed document, one copy and the appropriate filing fee (if a fee is required by G.S. 150B-23.2) is received by OAH within seven business days following the faxed or electronic transmission. Other electronic transmissions, for example, electronic mail without attached file as specified in this Paragraph, shall not constitute a valid filing with the Office of Administrative Hearings.

~~(d)~~(e) Every pleading and other documents filed with OAH shall be signed by the attorney who prepared the document, if it was prepared by an attorney, and shall contain his name, address, telephone number, and North Carolina State Bar number. An original and one copy of each document shall be filed.

~~(e)~~(f) Except as otherwise provided by statutes or by rules adopted under G.S. 150B-38(h), the rules contained in this Chapter shall govern the conduct of contested case hearings under G.S. 150B-40 when an Administrative Law Judge has been assigned to preside in the contested case.

History Note: Authority G.S. 7A-750; 7A-751(a); 150B-23.2; 150B-40(c);
Eff. August 1, 1986;
Amended Eff. May 1, 2009; January 1, 2006; April 1, 2004; April 1, 2001; August 1, 2000; February 1, 1994; July 1, 1992; May 1, 1989; January 1, 1989;
Emergency Amendment Eff. October 1, 2009;
Temporary Amendment Eff. December 1, 2009;
Amended Eff. October 1, 2010;
Temporary Amendment Eff. January 1, 2012.

26 NCAC 03 .0102 DEFINITIONS AND CONSTRUCTION

(a) The definitions contained in G.S. 150B-2 are incorporated herein by reference. In addition, the following definitions apply:

(1) "Chief Administrative Law Judge" means the person appointed according to G.S. 7A-752.

(2) "File or Filing" means to place the paper or item to be filed into the care and custody of the chief hearings clerk of the Office of Administrative Hearings, and acceptance thereof by him, except that the administrative law judge may permit the papers to be filed with him in which event the administrative law judge shall note thereon the filing date. All documents filed with the Office of Administrative Hearings, except exhibits, shall be in duplicate in letter size 8 1/2" by 11".

(3) ~~"Service or Serve" means personal delivery or, unless otherwise provided by law or rule, delivery by first class United States Postal Service mail or a licensed overnight express mail service, postage prepaid and addressed to the person to be served at his or her last known address. A Certificate of Service by the person making the service shall be appended to every document requiring service under these Rules. Service by mail or licensed overnight express mail is complete upon placing the item to be served, enclosed in a wrapper addressed to the person to be served, in an official depository of the United States Postal Service or upon delivery, postage prepaid and wrapped in a wrapper addressed to the person to be served, to an agent of the overnight express mail service.~~
"Service or Serve" [~~unless otherwise provided by law or rule~~] means:

(A) delivery by electronic mail with an attached file [~~either in PDF format or a document compatible with Microsoft Word 2007;~~] in a format that is readily accessible to the recipient;

(B) facsimile (fax);

(C) personal delivery;

(D) delivery by first class United States Postal Service mail; or

(E) delivery by overnight express mail service.

(b) A Certificate of Service by the person making the service shall be appended to every document requiring service under these Rules.

(c) Service by mail is complete upon placing the item to be served, enclosed in a wrapper addressed to the person to be served, in an official depository of the United States Postal Service.

(d) Service by overnight express mail is complete upon placing the item to be served, enclosed in a wrapper addressed to the person to be served, in the custody of an overnight express mail service.

[~~(b)~~](e) Service by electronic mail or fax is deemed to occur one hour after it is sent, provided that:

(1) documents sent after 5pm are deemed sent at 8am the following day; and

(2) documents sent by electronic mail that are not in a format in which the content is readily accessible to the recipient are not deemed served until actually received in a form in which the content is readily accessible to the receiving party.

Service by electronic mail or fax is treated the same as service by mail for the purpose of adding three days to the prescribed period to respond under N.C.R. Civ.P.6(e).

~~(b)~~(f) The rules of statutory construction contained in Chapter 12 of the General Statutes shall be applied in the construction of these Rules.

History Note: Authority G.S. 7A-752; 150B-23;
Eff. August 1, 1986;
Amended Eff. October 1, 1991; January 1, 1989; November 1, 1987; September 1, 1986;
Temporary Amendment Eff. January 1, 2012.

26 NCAC 03 .0105 DUTIES OF THE ADMINISTRATIVE LAW JUDGE

In conjunction with the powers of administrative law judges prescribed by G.S. 150B-33 and ~~G.S. 150B-36,~~ G.S. 150B-

34.the administrative law judge shall perform the following duties, consistent with law:

(1) Hear and rule on motions;
(2) Grant or deny continuances;
(3) Issue orders regarding prehearing matters, including directing the appearance of the parties at a prehearing conference;
(4) Examine witnesses when deemed necessary to make a complete record and to aid in the full development of material facts in the case;
(5) Make preliminary, interlocutory, or other orders as deemed appropriate;
(6) Grant dismissal when the case or any part thereof has become moot or for other reasons;
(7) Order the State of North Carolina, when it is the losing party as determined by the presiding Administrative Law Judge, to reimburse the filing fee to the petitioner; and
(8) Apply sanctions in accordance with Rule .0114 of this Section.

History Note: Authority G.S. 7A-751(a); 8C-1, Rule 614; 150B-23.2; 150B-33; 150B-34;
Eff. August 1, 1986;
Amended Eff. April 1, 2001; February 1, 1994; November 1, 1987;
Emergency Amendment Eff. October 1, 2009;
Temporary Amendment Eff. December 1, 2009;
Amended Eff. October 1, 2010;
Temporary Amendment Eff. January 1, 2012.

26 NCAC 03 .0127 ADMINISTRATIVE LAW JUDGE'S DECISION

(a) An administrative law judge shall issue a final decision or order in a contested case within 45 days after the later of the date the administrative law judge receives any proposed findings of fact and written arguments submitted by the parties and the date the contested case hearing ends. ~~The administrative law judge shall serve a copy of the decision on each party. When an administrative law judge issues a decision, the Office of Administrative Hearings shall promptly serve a copy of the official record on the agency making the final decision by hand delivery or certified mail.~~

(b) An administrative law judge's final decision shall be based exclusively on:

(1) competent evidence and arguments presented during the hearing and made a part of the official record;
(2) stipulations of fact;
(3) matters officially noticed;
(4) any proposed findings of fact and written arguments submitted by the parties under Paragraph (g) of Rule .0119 of this Section; and
(5) other items in the official record that are not excluded by G.S. 150B-29(b).

(c) An administrative law judge's final decision shall fully dispose of all issues required to resolve the case and shall contain:

(1) a caption;
(2) the appearances of the parties;
(3) a statement of the issues;
(4) references to specific statutes or rules at issue;
(5) findings of fact;
(6) conclusions of law based on the findings of fact and applicable constitutional principles, statutes, rules, or federal regulations;
(7) in the discretion of the administrative law judge, a memorandum giving reasons for his findings of fact and conclusions of law; and
~~(8) a statement identifying the agency that will make the final decision; and~~
~~(9)~~(8) a statement that each party has the right to file ~~exceptions to the administrative law judge's decision with the agency making the final decision and has the right to present written arguments on the decision to the agency making the final decision.~~ an appeal of the administrative law judge's final decision by filing a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides.

(d) The chief administrative law judge may extend the 45-day time limit for issuing a decision. An administrative law judge who needs an extension must submit a request for extension to the chief administrative law judge before the 45-day period has expired.

History Note: Authority G.S. 7A-751(a); 150B-34; 150B-47;
Eff. August 1, 1986;
Temporary Amendment Eff. August 26, 1987 For a Period of 120 Days to Expire on December 24, 1987;
Temporary Amendment Eff. December 24, 1987 For a Period of 8 Days to Expire on January 1, 1988;
Amended Eff. February 1, 1994; October 1, 1991; April 1, 1990; January 1, 1989;
Recodified from Rule .0126 Eff. August 1, 2000;
Amended Eff. April 1, 2001;
Temporary Amendment Eff. January 1, 2012.

26 NCAC 03 .0131 FINAL DECISIONS IN CONTESTED CASES

A copy of a final decision issued by an administrative law judge shall be served on each party in accordance ~~with G.S. 150B-36.~~ with Rule ~~[.0102(a)(3),]~~ .0102(a)(3) and (b) through (f) of this Section.

History Note: Authority G.S. 150B-45;
ARRC Objection Lodged November 17, 1988;
Eff. April 1, 1989;
ARRC Objection Removed Eff. April 1, 1990;
Amended Eff. October 1, 1991; April 1, 1990;
Recodified from Rule .0130 Eff. August 1, 2000;
Temporary Amendment Eff. January 1, 2012.

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA10-1552
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

In the Matter of:

A.C.G.

Davidson County
No. 05 JA 199

Appeal by Piedmont Behavioral Health from Order entered 28 July 2010 by Judge April C. Wood in Davidson County District Court. Heard in the Court of Appeals 11 May 2011.

Michael K. Newby, for Davidson County Department of Social Services.

Laura Bodenheimer, for Guardian ad Litem program.

Nelson, Mullins, Riley & Scarborough, LLP, by Stephen D. Martin, for Piedmont Behavioral Health.

HUNTER, JR., Robert N., Judge.

Piedmont Behavioral Health ("PBH") appeals from a civil contempt order, arguing the Order is punitive and not supported by findings of fact sufficient to conclude PBH is in willful contempt of court. PBH also contends it is entitled to sovereign immunity as a contractor for the North Carolina

Department of Health and Human Services. We affirm in part, and vacate in part.

I. Factual & Procedural History

On 20 March 2006, Oliver,[1] a minor child, was found to be an abused and neglected juvenile. On 4 December 2006, Oliver's biological father signed a relinquishment of his parental rights and consented to Oliver being adopted. On 22 March 2007, the trial court entered an Order terminating the parental rights of Oliver's biological mother due to her abandonment of Oliver. Davidson County Department of Social Services ("DSS") was appointed as Oliver's guardian. DSS subsequently determined that Oliver, an indigent child, needed state mental health services and sought appropriate treatment for Oliver with PBH.

PBH facilitates multi-county mental health services, developmental disabilities services, and substance abuse services pursuant to N.C. Gen. Stat. § 122C-115(c) and was established by the Boards of Commissioners of Cabarrus, Davidson, Rowan, Stanly, and Union Counties. PBH acts as a "local management entity" ("LME"), a local political subdivision that provides oversight of mental health care providers by planning and coordinating certain behavioral health services in

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[1] A pseudonym conceals the minor child's identity.

a defined geographic area. *See* N.C. Gen. Stat. § 122C-115.4 (2009). PBH does not provide these services, but connects those who require such services with service providers.

Pursuant to an agreement between PBH, the federal Center for Medicare and Medicaid Services ("CMS"), and the North Carolina Department of Health and Human Services, Division of Medical Assistance ("DMA"), PBH operates as a Prepaid Inpatient Health Plan ("PIHP"). A PIHP is a federally-recognized managed care organization pursuant to 42 C.F.R. § 438.2, and operates under federal Medicaid waivers pursuant to §§ 1915(b) and 1915(c) of the Social Security Act (42 U.S.C. §§ 1396n(b) and (c)). As a PIHP, PBH may only use Medicaid funds to pay for Medicaid services that are deemed "medically necessary" pursuant to 42 U.S.C. § 1396n(b). To qualify for services, an enrollee must meet certain criteria defined by Medicaid. Pursuant to PBH's contract with DMA, PBH is authorized to review requests by consumers to determine whether the requested services are "medically necessary," that is, whether they meet all of the established criteria.

In August, September, and October of 2009, DSS, as Oliver's guardian, requested that PBH approve certain Medicaid behavioral healthcare services on behalf of Oliver, including approval to

place Oliver in a psychiatric residential treatment facility ("PRTF"). PBH denied these requests, finding that Oliver did not meet the "medically necessary" admission criteria required for PRTF placement. On 9 November 2009, DSS initiated an appeal from this denial in the North Carolina Office of Administrative Hearings ("OAH"). On 18 August 2011, Chief Administrative Law Judge Julian Mann, III, of the OAH granted summary judgment in favor of DSS.[2]

On 26 March 2010, the Davidson County District Court entered a Post Termination Review Order in which it directed PBH to provide an appropriate PRTF placement for Oliver and "provide the other services necessary to meet his mental health needs or in the alternative to appear and explain to the Court why the [requested facility] or other PTRF [sic] placement is not part of an appropriate treatment plan." The Order further directed Dr. Hummel, Dr. Baker, or the current clinical director of PBH to appear at a 7 April 2010 hearing to explain PBH's denial, along with any other treating psychiatrist having the ability to describe in detail how PBH proposes to meet Oliver's "considerable needs."

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[2] As the order granting summary judgment was filed after the record on appeal in this case, we take judicial notice of the order.

PBH received the Order on 31 March 2010 and acknowledged receipt of the Order in a 5 April 2010 Notice. On 5 April 2010, PBH filed an objection to the Order, asserting the court lacked jurisdiction, since the matters were already pending before the OAH in a Medicaid appeal. Without waiving these objections, PBH advised the court that Dr. Hummel was out of the country, Dr. Baker was no longer employed by PBH, there was currently no clinical director of PBH, and there were no treating psychiatrists on staff at PBH familiar with Oliver's case.

On 7 April 2010, the trial court conducted a post termination of parental rights review. PBH did not attend the hearing. On 5 May 2010, the trial court entered a Show Cause Order, directing the Area Director/CEO of PBH, Dan Coughlin, to appear and show cause why PBH should not be held in civil contempt for failing to comply with the 26 March 2010 Order.

On 2 June 2010, the trial court conducted a hearing on the Show Cause Order. Coughlin testified to the factual basis of PBH's prior objection, that none of the requested parties were available to attend the 7 April 2010 hearing. Coughlin testified that he made no attempt to contact Dr. Baker or otherwise obtain her attendance at the hearing.

On cross-examination, Coughlin stated that although Dr. Baker was no longer employed by PBH, she was still a consultant for PBH. Coughlin responded to cross-examination as follows:

> Q. Well, could you not retain [Dr. Baker] to come to court to assist PBH in, uh, uh, explaining to the Court the appropriate treatment, uh, protocols for [Oliver]?
>
> A. Yeah. Uh, could I? Theoretically, I could; whether she'd accept such an assignment or not, I don't know.
>
> Q. Did you *try*?
>
> A. I did not.
>
> Q. Okay. What other efforts did you make to - in order to comply with the Court's order?
>
> A. Other than?
>
> Q. Other than just say, "Well, Dr. Hummel's not in the country." What else did you do in order to comply with the Court's order?
>
> A. We didn't do anything else.

In a 28 July 2010 Order, the trial court held PBH in civil contempt. The trial court's Order stated, in part:

> 5. PBH, through its counsel of record, filed a pleading in this cause relating to the April 7th hearing alleging its inability to comply with the Court's order and asking the Court to continue the hearing on April 7th; however, no one from PBH or representing PBH was present at the call of the case on April 7th to explain to the Court whether or not

> PBH was able to comply with the Court's order. . . .
>
> . . . .
>
> 7. At today's hearing, Mr. Coughlin testified concerning PBH's efforts to comply with the Court's March 26 order. He testified that when he received a copy of the order, he inquired about the availability of Dr. Hummel and was informed he was out of the county. He further testified that said inquiry was the extent of his efforts to comply with the Court's order.
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> 8. Neither Mr. Coughlin nor any representative of PBH attempted to obtain the appearance of Dr. Baker. . . . Mr. Coughlin testified that Dr. Baker continued to consult on [Oliver's] case and that his case was the only case for which she is currently a consultant.
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> . . . .
>
> 11. By its lack of effort in complying with the Court's March 26 order without legal justification, despite its ongoing ability to do so, PBH is in willful civil contempt of court.

The Order stated that PBH could purge itself of contempt by producing Dr. Hummel "or the current medical director along with any other treating psychiatrist who has the ability to describe in detail how PBH proposes to meet [Oliver]'s considerable needs" for testimony at a hearing on 17 June 2010, and by paying a fine of $10,000.00.

On 17 June 2010, Dr. Hummel appeared before Judge April C. Wood in Davidson County Juvenile Court. PBH filed its Notice of Appeal from the order of contempt on 3 August 2010. PBH appeals and argues that the trial court erred in holding PBH in contempt of the 26 March 2010 Order and fining PBH $10,000.00 to ensure compliance with its Order.

II. Jurisdiction & Standard of Review

This Court exercises jurisdiction over the matter pursuant to General Statutes section 5A-24. *See* N.C. Gen. Stat. § 5A-24 (2009) ("A person found in civil contempt may appeal in the manner provided for appeals in civil actions."). Further, "review of contempt proceedings is confined to whether there is competent evidence to support the [trial court's] findings of fact and whether those findings support the judgment." *McKillop v. Onslow Cnty.*, 139 N.C. App. 53, 58, 532 S.E.2d 594, 598 (2000) (quotation marks omitted) (citation omitted) (alteration in original).

III. Analysis

A. Sovereign Immunity

PBH contends the trial court erred in holding PBH in civil contempt, on the grounds that as a contractor for the State of North Carolina, PBH enjoys sovereign immunity. We disagree.

Under North Carolina law, an agent of the State of North Carolina is not subject to contempt. *See N.C. Dep't of Transp. v. Davenport*, 334 N.C. 428, 430, 432 S.E.2d 303, 304 (1993) ("Since the superior court's order was directed to an administrative agency . . . the threshold question is whether the court had authority to hold the sovereign in contempt. We conclude the court could not do so."). However, there is "no authority in this State which recognizes a contractor's right to assert governmental immunity in a . . . claim which arises out of the performance of a contract with the State." *Knighten v. Barnhill Contr. Co.*, 122 N.C. App. 109, 113, 468 S.E.2d 564, 566 (1996).

In the instant case, PBH contracted with DMA, a state agency. PBH contends that this contractual relationship extended sovereign immunity to PBH. PBH further argues that it is governed by federal Medicaid waivers in the five-county catchment area, and also operates a PIHP. Because PBH operates a federally-recognized managed care organization pursuant to 42 C.F.R. § 438.2, PBH argues the Medicaid waivers under which it operates supersede Chapter 122C of our General Statutes.

A PIHP "[p]rovides medical services to enrollees under contract with the State agency, and on the basis of prepaid

capitation payments, or other payment arrangements that do not use State plan payment rates." 42 C.F.R. § 438.2. While PBH acts as a PIHP, a federally recognized managed care organization, PBH does so under contract with the State. The two Medicaid waivers under which PBH operates are combination waivers that allow states to provide non-traditional long-term care services or to use a limited pool of providers to provide these services. 2005 Health L. Handbook § 12:7. As these waivers are employed by the State to select providers of services, they reinforce the contractual nature of PBH's provision of services.

The contract between PBH and DMA expressly provides that

> [t]he Contractor [(PBH)] is and *shall be deemed to be an independent contractor* in the performance of this contract and as such shall be wholly responsible for the work to be performed and for the supervision of its employees. (Emphasis added.)

Since PBH was acting as an independent contractor and not as an agent of the State, it is not entitled to the protection of the State's sovereign immunity. *See Knighten*, 122 N.C. App. at 113, 468 S.E.2d at 566. Therefore, PBH's argument is without merit and we find PBH was not entitled to the defense of sovereign immunity.

B. Willful Contempt

PBH argues the trial court erred in concluding that PBH was in willful contempt of court. We disagree.

Failure to comply with a court order creates a continuing civil contempt so long as four elements are satisfied: (1) the original court order must remain in force, (2) its purpose may still be satisfied by compliance, (3) non-compliance must be willful, and (4) the non-compliant party must be able to comply or take reasonable measures that would enable the party to comply. N.C. Gen. Stat. § 5A-21(a) (2009).

PBH does not contest the findings of fact of the trial court's 28 July Order. PBH argues the findings do not support the conclusion that PBH was in willful contempt because the findings show it was impossible for PBH to comply with the court's Order as it could not compel Dr. Baker to appear at the 7 April 2010 hearing.

Although PBH argues it could not compel Dr. Baker to testify, Dr. Baker continued to act as a consultant on Oliver's case. Coughlin's testimony that PBH could have retained Dr. Baker is evidence of their ability to comply with the Order. Given PBH's ability to retain Dr. Baker as a consultant, the complete lack of effort to comply with the Order supports the

trial court's contempt Order. For this reason, we affirm the trial court's finding of civil contempt.

C. Fine for Contempt

PBH contends the trial court erred in ordering it to pay a $10,000 fine in its contempt Order arguing that the fine was punitive rather than coercive in nature. We agree.

In *Jolly v. Wright*, our Supreme Court identified the purpose of issuance of civil contempt fines, namely to coerce compliance with a court order. 300 N.C. 83, 92, 265 S.E.2d 135, 142 (1980) ("The purpose of civil contempt is not to punish; rather, its purpose is to use the court's power to impose fines or imprisonment as a method of coercing the defendant to comply with an order of the court."), *overruled on other grounds*, *McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993); *see also Hicks ex. Rel Feiock v. Feiock*, 485 U.S. 624, 99 L.E.2d 721 (1988) (civil contempt non-remittable fines are acceptable forms of coercion for compliance with court orders); *Bishop v. Bishop*, 90 N.C. App. 499, 505, 369 S.E.2d 106, 109 (1988) (adopting *Hicks*). If the court imposes a fine as part of civil contempt, the fine "is lifted as soon as [the contemnor] decides to comply with the order of the court, or when it becomes apparent that compliance with the order is no longer feasible." *Jolly*, 300

N.C. at 92, 265 S.E.2d at 142. The $10,000 fine should have been lifted, in accordance with *Jolly*, on 17 June 2010, after Dr. Hummel testified in the trial court and complied with the dictates of the 26 March 2010 Order. Accordingly, we vacate the trial court's imposition of the fine against PBH.

IV. Conclusion

The trial court did not err by holding PBH in contempt, as there was competent evidence supporting a finding of contempt. Further, PBH was not protected by sovereign immunity. However, the trial court did err in imposing a fine against PBH after PBH complied with its Order. Therefore, the Order of the trial court is

Affirmed in part, and vacated in part.

Judges STEELMAN and STEPHENS concur.

Report per Rule 30(e).

(b) of this section may not disclose the identity of any patient.

§ 438.370 Federal financial participation.

(a) FFP at the 75 percent rate is available in expenditures for EQR (including the production of EQR results) and EQR-related activities set forth in § 438.358 conducted by EQROs and their subcontractors.

(b) FFP at the 50 percent rate is available in expenditures for EQR-related activities conducted by any entity that does not qualify as an EQRO.

Subpart F—Grievance System

§ 438.400 Statutory basis and definitions.

(a) *Statutory basis.* This subpart is based on sections 1902(a)(3), 1902(a)(4), and 1932(b)(4) of the Act.

(1) Section 1902(a)(3) requires that a State plan provide an opportunity for a fair hearing to any person whose claim for assistance is denied or not acted upon promptly.

(2) Section 1902(a)(4) requires that the State plan provide for methods of administration that the Secretary finds necessary for the proper and efficient operation of the plan.

(3) Section 1932(b)(4) requires Medicaid managed care organizations to establish internal grievance procedures under which Medicaid enrollees, or providers acting on their behalf, may challenge the denial of coverage of, or payment for, medical assistance.

(b) *Definitions.* As used in this subpart, the following terms have the indicated meanings:

Action means—

In the case of an MCO or PIHP—

(1) The denial or limited authorization of a requested service, including the type or level of service;

(2) The reduction, suspension, or termination of a previously authorized service;

(3) The denial, in whole or in part, of payment for a service;

(4) The failure to provide services in a timely manner, as defined by the State;

(5) The failure of an MCO or PIHP to act within the timeframes provided in § 438.408(b); or

(6) For a resident of a rural area with only one MCO, the denial of a Medicaid enrollee's request to exercise his or her right, under § 438.52(b)(2)(ii), to obtain services outside the network.

Appeal means a request for review of an action, as "action" is defined in this section.

Grievance means an expression of dissatisfaction about any matter other than an action, as "action" is defined in this section. The term is also used to refer to the overall system that includes grievances and appeals handled at the MCO or PIHP level and access to the State fair hearing process. (Possible subjects for grievances include, but are not limited to, the quality of care or services provided, and aspects of interpersonal relationships such as rudeness of a provider or employee, or failure to respect the enrollee's rights.)

§ 438.402 General requirements.

(a) *The grievance system.* Each MCO and PIHP must have a system in place for enrollees that includes a grievance process, an appeal process, and access to the State's fair hearing system.

(b) *Filing requirements*—(1) *Authority to file.* (i) An enrollee may file a grievance and an MCO or PIHP level appeal, and may request a State fair hearing.

(ii) A provider, acting on behalf of the enrollee and with the enrollee's written consent, may file an appeal. A provider may file a grievance or request a State fair hearing on behalf of an enrollee, if the State permits the provider to act as the enrollee's authorized representative in doing so.

(2) *Timing.* The State specifies a reasonable timeframe that may be no less than 20 days and not to exceed 90 days from the date on the MCO's or PIHP's notice of action. Within that timeframe—

(i) The enrollee or the provider may file an appeal; and

(ii) In a State that does not require exhaustion of MCO and PIHP level appeals, the enrollee may request a State fair hearing.

(3) *Procedures.* (i) The enrollee may file a grievance either orally or in writing and, as determined by the State, either with the State or with the MCO or the PIHP.

(ii) The enrollee or the provider may file an appeal either orally or in writing, and unless he or she requests expedited resolution, must follow an oral filing with a written, signed, appeal.

§ 438.404 Notice of action.

(a) *Language and format requirements.* The notice must be in writing and must meet the language and format requirements of § 438.10(c) and (d) to ensure ease of understanding.

(b) *Content of notice.* The notice must explain the following:

(1) The action the MCO or PIHP or its contractor has taken or intends to take.

(2) The reasons for the action.

(3) The enrollee's or the provider's right to file an MCO or PIHP appeal.

(4) If the State does not require the enrollee to exhaust the MCO or PIHP level appeal procedures, the enrollee's right to request a State fair hearing.

(5) The procedures for exercising the rights specified in this paragraph.

(6) The circumstances under which expedited resolution is available and how to request it.

(7) The enrollee's right to have benefits continue pending resolution of the appeal, how to request that benefits be continued, and the circumstances under which the enrollee may be required to pay the costs of these services.

(c) *Timing of notice.* The MCO or PIHP must mail the notice within the following timeframes:

(1) For termination, suspension, or reduction of previously authorized Medicaid-covered services, within the timeframes specified in §§ 431.211, 431.213, and 431.214 of this chapter.

(2) For denial of payment, at the time of any action affecting the claim.

(3) For standard service authorization decisions that deny or limit services, within the timeframe specified in § 438.210(d)(1).

(4) If the MCO or PIHP extends the timeframe in accordance with § 438.210(d)(1), it must—

(i) Give the enrollee written notice of the reason for the decision to extend the timeframe and inform the enrollee of the right to file a grievance if he or she disagrees with that decision; and

(ii) Issue and carry out its determination as expeditiously as the enrollee's health condition requires and no later than the date the extension expires.

(5) For service authorization decisions not reached within the timeframes specified in § 438.210(d) (which constitutes a denial and is thus an adverse action), on the date that the timeframes expire.

(6) For expedited service authorization decisions, within the timeframes specified in § 438.210(d).

§ 438.406 Handling of grievances and appeals.

(a) *General requirements.* In handling grievances and appeals, each MCO and each PIHP must meet the following requirements:

(1) Give enrollees any reasonable assistance in completing forms and taking other procedural steps. This includes, but is not limited to, providing interpreter services and toll-free numbers that have adequate TTY/TTD and interpreter capability.

(2) Acknowledge receipt of each grievance and appeal.

(3) Ensure that the individuals who make decisions on grievances and appeals are individuals—

(i) Who were not involved in any previous level of review or decision-making; and

(ii) Who, if deciding any of the following, are health care professionals who have the appropriate clinical expertise, as determined by the State, in treating the enrollee's condition or disease.

(A) An appeal of a denial that is based on lack of medical necessity.

(B) A grievance regarding denial of expedited resolution of an appeal.

(C) A grievance or appeal that involves clinical issues.

(b) *Special requirements for appeals.* The process for appeals must:

(1) Provide that oral inquiries seeking to appeal an action are treated as appeals (to establish the earliest possible filing date for the appeal) and must be confirmed in writing, unless the enrollee or the provider requests expedited resolution.

(2) Provide the enrollee a reasonable opportunity to present evidence, and allegations of fact or law, in person as

well as in writing. (The MCO or PIHP must inform the enrollee of the limited time available for this in the case of expedited resolution.)

(3) Provide the enrollee and his or her representative opportunity, before and during the appeals process, to examine the enrollee's case file, including medical records, and any other documents and records considered during the appeals process.

(4) Include, as parties to the appeal—

(i) The enrollee and his or her representative; or

(ii) The legal representative of a deceased enrollee's estate.

§ 438.408 Resolution and notification: Grievances and appeals.

(a) *Basic rule.* The MCO or PIHP must dispose of each grievance and resolve each appeal, and provide notice, as expeditiously as the enrollee's health condition requires, within State-established timeframes that may not exceed the timeframes specified in this section.

(b) *Specific timeframes*—(1) *Standard disposition of grievances.* For standard disposition of a grievance and notice to the affected parties, the timeframe is established by the State but may not exceed 90 days from the day the MCO or PIHP receives the grievance.

(2) *Standard resolution of appeals.* For standard resolution of an appeal and notice to the affected parties, the State must establish a timeframe that is no longer than 45 days from the day the MCO or PIHP receives the appeal. This timeframe may be extended under paragraph (c) of this section.

(3) *Expedited resolution of appeals.* For expedited resolution of an appeal and notice to affected parties, the State must establish a timeframe that is no longer than 3 working days after the MCO or PIHP receives the appeal. This timeframe may be extended under paragraph (c) of this section.

(c) *Extension of timeframes*—(1) The MCO or PIHP may extend the timeframes from paragraph (b) of this section by up to 14 calendar days if—

(i) The enrollee requests the extension; or

(ii) The MCO or PIHP shows (to the satisfaction of the State agency, upon its request) that there is need for additional information and how the delay is in the enrollee's interest.

(2) *Requirements following extension.* If the MCO or PIHP extends the timeframes, it must—for any extension not requested by the enrollee, give the enrollee written notice of the reason for the delay.

(d) *Format of notice*—(1) *Grievances.* The State must establish the method MCOs and PIHPs will use to notify an enrollee of the disposition of a grievance.

(2) *Appeals.* (i) For all appeals, the MCO or PIHP must provide written notice of disposition.

(ii) For notice of an expedited resolution, the MCO or PIHP must also make reasonable efforts to provide oral notice.

(e) *Content of notice of appeal resolution.* The written notice of the resolution must include the following:

(1) The results of the resolution process and the date it was completed.

(2) For appeals not resolved wholly in favor of the enrollees—

(i) The right to request a State fair hearing, and how to do so;

(ii) The right to request to receive benefits while the hearing is pending, and how to make the request; and

(iii) That the enrollee may be held liable for the cost of those benefits if the hearing decision upholds the MCO's or PIHP's action.

(f) *Requirements for State fair hearings*—(1) *Availability.* The State must permit the enrollee to request a State fair hearing within a reasonable time period specified by the State, but not less than 20 or in excess of 90 days from whichever of the following dates applies—

(i) If the State requires exhaustion of the MCO or PIHP level appeal procedures, from the date of the MCO's or PIHP's notice of resolution; or

(ii) If the State does not require exhaustion of the MCO or PIHP level appeal procedures and the enrollee appeals directly to the State for a fair hearing, from the date on the MCO's or PIHP's notice of action.

(2) *Parties.* The parties to the State fair hearing include the MCO or PIHP as well as the enrollee and his or her representative or the representative of a deceased enrollee's estate.

§ 438.410 Expedited resolution of appeals.

(a) *General rule.* Each MCO and PIHP must establish and maintain an expedited review process for appeals, when the MCO or PIHP determines (for a request from the enrollee) or the provider indicates (in making the request on the enrollee's behalf or supporting the enrollee's request) that taking the time for a standard resolution could seriously jeopardize the enrollee's life or health or ability to attain, maintain, or regain maximum function.

(b) *Punitive action.* The MCO or PIHP must ensure that punitive action is neither taken against a provider who requests an expedited resolution or supports an enrollee's appeal.

(c) *Action following denial of a request for expedited resolution.* If the MCO or PIHP denies a request for expedited resolution of an appeal, it must—

(1) Transfer the appeal to the timeframe for standard resolution in accordance with § 438.408(b)(2);

(2) Make reasonable efforts to give the enrollee prompt oral notice of the denial, and follow up within two calendar days with a written notice.

§ 438.414 Information about the grievance system to providers and subcontractors.

The MCO or PIHP must provide the information specified at § 438.10(g)(1) about the grievance system to all providers and subcontractors at the time they enter into a contract.

§ 438.416 Recordkeeping and reporting requirements.

The State must require MCOs and PIHPs to maintain records of grievances and appeals and must review the information as part of the State quality strategy.

§ 438.420 Continuation of benefits while the MCO or PIHP appeal and the State fair hearing are pending.

(a) *Terminology.* As used in this section, "timely" filing means filing on or before the later of the following:

(1) Within ten days of the MCO or PIHP mailing the notice of action.

(2) The intended effective date of the MCO's or PIHP's proposed action.

(b) *Continuation of benefits.* The MCO or PIHP must continue the enrollee's benefits if—

(1) The enrollee or the provider files the appeal timely;

(2) The appeal involves the termination, suspension, or reduction of a previously authorized course of treatment;

(3) The services were ordered by an authorized provider;

(4) The original period covered by the original authorization has not expired; and

(5) The enrollee requests extension of benefits.

(c) *Duration of continued or reinstated benefits.* If, at the enrollee's request, the MCO or PIHP continues or reinstates the enrollee's benefits while the appeal is pending, the benefits must be continued until one of following occurs:

(1) The enrollee withdraws the appeal.

(2) Ten days pass after the MCO or PIHP mails the notice, providing the resolution of the appeal against the enrollee, unless the enrollee, within the 10-day timeframe, has requested a State fair hearing with continuation of benefits until a State fair hearing decision is reached.

(3) A State fair hearing Office issues a hearing decision adverse to the enrollee.

(4) The time period or service limits of a previously authorized service has been met.

(d) *Enrollee responsibility for services furnished while the appeal is pending.* If the final resolution of the appeal is adverse to the enrollee, that is, upholds the MCO's or PIHP's action, the MCO or PIHP may recover the cost of the services furnished to the enrollee while the appeal is pending, to the extent that they were furnished solely because of the requirements of this section, and in accordance with the policy set forth in § 431.230(b) of this chapter.

§ 438.424 Effectuation of reversed appeal resolutions.

(a) *Services not furnished while the appeal is pending.* If the MCO or PIHP, or the State fair hearing officer reverses a decision to deny, limit, or delay services that were not furnished while the

appeal was pending, the MCO or PIHP must authorize or provide the disputed services promptly, and as expeditiously as the enrollee's health condition requires.

(b) *Services furnished while the appeal is pending.* If the MCO or PIHP, or the State fair hearing officer reverses a decision to deny authorization of services, and the enrollee received the disputed services while the appeal was pending, the MCO or the PIHP or the State must pay for those services, in accordance with State policy and regulations.

Subpart G [Reserved]

Subpart H—Certifications and Program Integrity

§438.600 Statutory basis.

This subpart is based on sections 1902(a)(4), 1902(a)(19), 1903(m), and 1932(d)(1) of the Act.

(a) Section 1902(a)(4) requires that the State plan provide for methods of administration that the Secretary finds necessary for the proper and efficient operation of the plan.

(b) Section 1902(a)(19) requires that the State plan provide the safeguards necessary to ensure that eligibility is determined and services are provided in a manner consistent with simplicity of administration and the best interests of the recipients.

(c) Section 1903(m) establishes conditions for payments to the State with respect to contracts with MCOs.

(d) Section 1932(d)(1) prohibits MCOs and PCCMs from knowingly having certain types of relationships with individuals excluded under Federal regulations from participating in specified activities, or with affiliates of those individuals.

§438.602 Basic rule.

As a condition for receiving payment under the Medicaid managed care program, an MCO, PCCM, PIHP, or PAHP must comply with the applicable certification, program integrity and prohibited affiliation requirements of this subpart.

§438.604 Data that must be certified.

(a) *Data certifications.* When State payments to an MCO or PIHP are based on data submitted by the MCO or PIHP, the State must require certification of the data as provided in §438.606. The data that must be certified include, but are not limited to, enrollment information, encounter data, and other information required by the State and contained in contracts, proposals, and related documents.

(b) *Additional certifications.* Certification is required, as provided in §438.606, for all documents specified by the State.

§438.606 Source, content, and timing of certification.

(a) *Source of certification.* For the data specified in §438.604, the data the MCO or PIHP submits to the State must be certified by one of the following:

(1) The MCO's or PIHP's Chief Executive Officer.

(2) The MCO's or PIHP's Chief Financial Officer.

(3) An individual who has delegated authority to sign for, and who reports directly to, the MCO's or PIHP's Chief Executive Officer or Chief Financial Officer.

(b) *Content of certification.* The certification must attest, based on best knowledge, information, and belief, as follows:

(1) To the accuracy, completeness and truthfulness of the data.

(2) To the accuracy, completeness and truthfulness of the documents specified by the State.

(c) *Timing of certification.* The MCO or PIHP must submit the certification concurrently with the certified data.

§438.608 Program integrity requirements.

(a) *General requirement.* The MCO or PIHP must have administrative and management arrangements or procedures, including a mandatory compliance plan, that are designed to guard against fraud and abuse.

(b) *Specific requirements.* The arrangements or procedures must include the following:

(1) Written policies, procedures, and standards of conduct that articulate

7. Information About the Grievance System to Providers and Subcontractors (Proposed § 438.414)

Proposed § 438.414 required that the MCO or PIHP must provide the information specified at § 438.10(g)(1) about the grievance system to all providers and subcontractors at the time they enter into a contract.

Comment: One commenter requested that CMS require that information about the grievance system be provided to subcontractors as well as to contracting providers.

Response: Proposed § 438.414, which is unchanged in this final rule, already provided that this information must be provided to providers "and subcontractors."

8. Recordkeeping and Reporting Requirements (Proposed § 438.416)

Proposed § 438.416 required the State to require MCOs and PIHPs to maintain records of grievances and appeals and review the information as part of the State quality strategy.

Comment: Commenters urged that the regulation require States to provide members of the public, upon request, with MCO and PHP summaries of grievance and appeal logs.

Response: States have the authority to require that MCOs and PIHPs make available to the State, or at the State's option, to members of the public, grievance and appeal logs or other MCO and PIHP grievance system documents. We do not agree that we should mandate this, however. In some cases, raw appeals data may be confusing to the public, or potentially misleading. We believe States are in the best position to decide how such information should be presented to the public. In designing their quality strategies, States should consider what information they and the public will need to support those strategies.

9. Continuation of Benefits When an MCO or PIHP Appeal of a Termination, Suspension, or Reduction, and State Fair Hearing on Such an Action, are Pending (Proposed § 438.420)

Proposed § 438.420 required that when the dispute involves the termination, suspension, or reduction of a previously authorized course of treatment, the MCO or PIHP must continue the enrollee's benefits until issuance of the final appeal decision or State fair hearing decision, if all of the following occur:

- The enrollee or the provider files the appeal timely.
- The services were ordered by an authorized provider.
- The period covered by the authorization has not expired.
- The enrollee requests such an extension of benefits.

We specified that timely filing means filing on or before the later of either the expiration of the timeframe specified by the State (in accordance with § 438.404(c)(2)) and communicated in the notice of action or the intended effective date of the MCO's or PIHP's proposed action.

This provision would apply only when the MCO or PIHP physician initially authorized the services (that is, it would not apply to pre-service authorization requests that were denied) and when the beneficiary requests the services be continued (that is, the mere action of filing for an appeal or State fair hearing in a timely manner is not sufficient for benefits to be continued). The continuation of benefits provision would not require a further statement of authorization from the MCO or PIHP physician or affect benefits not originally authorized.

If the MCO or PIHP continues or reinstates the enrollee's benefits while the appeal is pending, under proposed § 438.420(c), the benefits must be continued until one of the following occurs:

- The enrollee withdraws the appeal.
- The MCO or PIHP resolves the appeal against the enrollee, unless the enrollee has requested a State fair hearing with continuation of benefits until a State fair hearing decision is reached.
- A State fair hearing officer issues a hearing decision adverse to the enrollee.

Beneficiaries who have received continuation of benefits while they appeal to the MCO or PIHP are not obligated to pursue their appeal further, through the State fair hearing process, if the MCO or PIHP denies their appeal. It remains the beneficiaries' choice. It is important to note, however, that enrollees who lose their appeal at either the MCO, PIHP or State fair hearing levels will be liable for the costs of all appealed services from the later of the effective date of the notice of intended action or the date of the timely-filed appeal, through the date of the denial of the appeal. As a result, in § 438.420(d), we proposed that if the final resolution of the appeal is adverse to the enrollee (that is, it upholds the MCO's or PIHP's action) the MCO or PIHP may recover the cost of the services furnished to the enrollee while the appeal was pending, to the extent that they were furnished solely because of the requirements of this section, and in accordance with § 431.230(b).

Comment: Many commenters pointed out that the proposed rule does not specify all the same circumstances set forth in §§ 431.230 and 430.231 as situations in which benefits must be continued or reinstated. These commenters specifically cited advanced notice requirements, and argued that this rewards MCOs and PIHPs that do not provide advanced notice.

Response: We disagree with the commenters. MCOs, PIHPs, and States have a strong incentive to notify enrollees timely of any reduction, limitation, or suspension of existing services. While enrollees have to actively request continuation of benefits while filing an appeal, they must be given the opportunity to do so before the benefits are reduced, limited, or suspended. And since enrollees have this right until an adverse State fair hearing decision (assuming of course that he or she follows the applicable rules), a delay in notice only gives enrollees benefits for a longer period of time. However, in response to this comment, we now state in the regulation text that the enrollee has 10 days after the MCO or PIHP mails the notice of action to request continuation of benefits. Therefore, even if the effective date of action has passed, an MCO or PIHP may not discontinue those benefits until 10 days after the notice is mailed. We believe that this sufficiently addresses the commenters' concern.

Comment: We received many comments regarding enrollees' rights to continuation of benefits during the MCO and PIHP appeal process. Several commenters thought that the regulations mandate that MCOs and PIHPs continue benefits in all cases in which the appeal involves services that are being terminated or reduced. Several commenters felt that continuation of benefits pending resolution of an appeal or State fair hearing, without financial risk, is one of the most important protections needed for managed care enrollees.

In contrast, several other commenters were opposed to extending continuation of benefits requirements to the MCO and PIHP appeal process. One commenter contended that this requirement would have significant cost implications for MCOs and PIHPs. Another commenter felt that benefits should be continued only at the point when an enrollee requests a State fair hearing.

One commenter thought that requiring MCOs and PHPs to continue benefits would place them in an untenable position with their providers, compromising their ability to manage care and cost. This commenter expressed concern that this provision

may damage managed care programs, and believed it was unnecessary, given the requirement of expedited review of appeals in cases in which a delay could jeopardize health.

Response: Because we allow States to require exhaustion of the MCO and PIHP appeal before receiving a State fair hearing, we believe that, in order for the right to continued benefits during a State fair hearing to be meaningful, continuation of benefits must begin with the filing of an MCO or PIHP appeal, and continue until the State fair hearing decision. Given that, with few exceptions, the overall 90-day timeframe for a final fair hearing decision applies even when exhaustion is required, the amount of time benefits must be continued is the same under this final rule as under the longstanding fair hearing system. Continuation of benefits at the MCO and PIHP level thus is part of the same longstanding right to continuation of benefits that has existed for Medicaid beneficiaries when services are reduced or terminated.

As in fee-for-service, under managed care, the right to continuation of benefits is not exercised without financial risk to the beneficiary of payment for services provided should he or she lose the appeal. Otherwise, MCOs, PIHPs, or States would be unfairly liable for treatment in which they were correct in limiting, reducing, or suspending. It is because of this potential risk for enrollees that we require that the enrollee specifically request continuation of benefits. Under § 438.404(b)(7), the notice of adverse action must include an explanation of this choice.

While expedited appeals will decrease the amount of time MCOs and PIHPs are liable to continue benefits for enrollees with pending appeals, the expedited appeal process does not substitute for the protection provided to Medicaid beneficiaries of the right to continuation of previously authorized benefits pending the outcome of a State fair hearing decision.

If the benefit is a Medicaid covered service, but not an MCO or PIHP covered service, the State, not the MCO or PIHP is responsible for providing those services pending the outcome of the State fair hearing.

Comment: Several commenters requested that § 438.420 should clearly state that re-authorization of a service at a lower level than previously received, or a denial of re-authorization, is a termination or reduction of the service requiring the continuation of benefits pending appeal. Other commenters requested that we make clear in the regulation text that continuation of benefits does not include the expiration of an approved number of visits through an authorized course of treatment.

Response: As noted above, we agree that the expiration of an approved number of visits does not constitute a termination for purposes of notice and continuation of benefits. If an enrollee requests re-authorization for services and the MCO or PIHP denies the request or re-authorizes the services at a lower level than requested, the MCO or PIHP must treat this request as a new service authorization request and provide notice of the denial. We have explained above that the language in the proposed rule already limited the right to continued benefits to services that were authorized. In response to this comment, in order to make clear that the continuation of benefits itself is not what we mean by "authorized," we have revised § 438.420(b)(4) by adding the word "original" to make clear that benefits are only continued to the extent they were originally authorized. As noted above, we also have added a new § 438.420(c)(4) in this final rule to make clear that when benefits are continued under § 438.420(b), they may be discontinued when the original authorization expires.

Comment: One commenter was concerned about the status of enrollees who received authorization for a course of treatment from a non-network physician but then had those benefits limited by a new MCO once the course of treatment had begun. They believe that these enrollees need protection for their benefits.

Response: An enrollee who has his or her existing benefits reduced, limited, or suspended by an MCO, PIHP, or State has the right to request a continuation of benefits regardless of the source as long as it originated from a Medicaid participating provider. It is the State's decision as to what entity is liable for those benefits during the appeals process.

Comment: One commenter argued that discontinuing services being provided by an MCO without a State fair hearing was unconstitutional.

Response: We do not believe that we need reach constitutional issues (such as, regarding whether a property interest or State action exist) because Medicaid beneficiary rights are directly addressed in section 1902(a)(3) and 1932(b)(4), and it is these statutory rights that are implemented in this final rule. As noted above, we believe that if services are discontinued on the date the authorization expires, this is not a "termination" of services that the enrollee had any right to expect to receive, and thus is not a termination within the meaning of section 1902(a)(3) and the implementing regulations. In the case of a termination of authorized services prior to the expiration date of the authorization, we agree with the commenter that a beneficiary should have the right to have these benefits continue pending a hearing on the termination. We provide the enrollee with 10 days to request to have benefits continue under these circumstances, pending an appeal and State fair hearing. We believe that this process is fully consistent with the Medicaid statute and constitutional requirements, to the extent applicable.

Comment: Several commenters requested that we delete the requirement that the beneficiary must request continued benefits. They contended that this requirement was constitutionally defective in that they believed continued benefits, without pre-requisites to obtaining them, to be required under due process.

The commenters noted that while the existing regulation at § 431.230(b) provides for the possibility of recoupment, benefits are continued when an appeal is filed timely. The commenters found no reason to change this long-standing rule for beneficiaries who are receiving services through an MCO or PIHP. Also, several commenters believed that proposed § 438.420(c)(2) made it impossible for benefits to continue through a State fair hearing, because a beneficiary would have had to file for a State fair hearing before the MCO or PIHP had even made its internal appeal decision in order for benefits to continue.

Response: Again, we do not believe we need reach constitutional issues here, but that the final rule as proposed is fully consistent with any applicable constitutional requirements. It is not true that benefits continue under fee-for-service Medicaid "without pre-requisites to obtaining them." Benefits only continue under fee-for-service if the beneficiary timely files an appeal. We do not see the difference between requiring the filing of an appeal for benefits to continue and requiring that as part of such an appeal, the beneficiary request that benefits continue. Indeed, given the possibility of beneficiary liability in both cases, we believe that the approach in this final rule is more protective of beneficiary rights. Under this rule, after an action, the beneficiary will be notified both of this right to continuation of benefits and the possible liability for services if the final decision is not in his or her favor. Thus, we believe the general concern about continued benefits not being automatic with an appeal is unfounded.

However, we agree with the concerns expressed by several commenters' that proposed § 438.420(c)(2) could make it impossible for benefits to continue through a State fair hearing as proposed. Therefore, in response to these comments, we have revised § 438.420(c)(2) by requiring beneficiaries to re-request continuation of benefits within 10 days after the mailing of the internal appeal decision against the enrollee, in order to preserve continuation of benefits during a State fair hearing.

10. Effectuation of Reversed Appeal Resolutions (Proposed § 438.424)

Proposed § 438.424 required that if the MCO, PIHP, or the State fair hearing officer reverses a decision to deny, limit, or delay services that were not furnished while the appeal was pending, the MCO or PIHP must authorize or provide the disputed services promptly, and as expeditiously as the enrollee's health condition requires. Furthermore, if the MCO, PIHP, or the State fair hearing officer reverses a decision to deny authorization of services, and the enrollee received the disputed services while the appeal was pending, the MCO, PIHP, or the State would be required to pay for those services, in accordance with State policy and regulations.

Comment: Many commenters supported a time frame of no more than 10 days for an MCO or PIHP to provide or pay for services subsequent to a State fair hearing because enrollees with successful appeals should not have to adjudicate over the word "promptly."

Response: We disagree that MCOs and PIHPs should be held to a Federal timeframe to provide or pay for services, because such a timeframe may not be reasonable in the case of the circumstances of all States. Consistent with the State fair hearing policy in § 431.246, we are requiring that the services are provided promptly, or as expeditiously as the enrollee's health condition requires. We believe that the States are in the best position to decide whether to require specific time limits if they choose.

F. Certifications and Program Integrity (Subpart H)

Fraud and abuse can negatively affect both the quality of health care services rendered to Medicaid beneficiaries, and an MCO's, PIHP's, PAHP's, or PCCM's financial viability. Promoting program integrity within Medicaid managed care programs can protect against misspent Medicaid program funds, and promote quality health care services. Proposed subpart H of part 438 contains safeguards against fraud and abuse and requires that organizations with Medicaid contracts make a commitment to a formal and effective fraud and abuse program.

In proposed § 438.600 we stated that the statutory basis for this subpart is under sections 1902(a)(4) and 1902(a)(19) of the Act. These sections require that methods be provided in the State plan for the proper and efficient operation of the plan and that safeguards are provided consistent with the best interests of the recipients.

In proposed § 438.602 we provided that the certification and program integrity requirements contained in subpart H apply to MCOs and PIHPs as a condition for contracting and for receiving payment under the Medicaid managed care program.

In proposed § 438.604 we provided that data, including enrollment and encounter data, must be certified and submitted to the State, if State payments are based on the data. We also specified that other information required by the State and information included in contracts, proposals, and other related documents must be certified. We also required in § 438.604(b) that the MCO or PIHP certify that they are in substantial compliance with the terms of the contract.

In proposed § 438.606 we required that certifications be provided concurrently with the data they relate to, and required that certifications be signed by the MCO's or PIHP's Chief Executive Officer, Chief Financial Officer, or an individual delegated authority to sign for one of these individuals. We proposed that the certifications must include attestations to the truthfulness, accuracy, and completeness of the data based on best knowledge, information, and belief.

In proposed § 438.608 we required that each MCO or PIHP have administrative and management arrangements or procedures, including a mandatory compliance plan, designed to guard against fraud and abuse. This section also outlined the required elements to be included in the arrangements and procedures.

In this final rule we are making a technical correction to add two additional sources of authority. First, we are adding a citation to section 1903(m), which establishes conditions for payments to the State with respect to contracts with MCOs. Second, we are adding a new § 438.610 to incorporate the requirements of section 1932(d)(1) of the Act. That provision of the statute is self-implementing, and therefore we did not include it in the proposed regulation. However, we are including the substance of the requirement in this final regulation to make it easier for the public to find all the relevant provisions in one place. Under the authority of section 1902(a)(4) of the Act, we are also applying these provisions to PIHPs and PAHPs.

We believe it is in the best interests of State Agencies, MCOs, PCCMs, PIHPs, PAHPs, and CMS to significantly aid in the fight against fraud and abuse and the requirements of this subpart work to achieve that goal.

Comment: One commenter proposed that we develop a standard form for certifications since we are requiring certifications by the Chief Executive Officer or the Chief Financial Officer or other person who is delegated the authority of the MCO or PIHP to certify data submitted.

Response: We disagree with the commenter as we wish to maintain State flexibility in this area. In §§ 438.604 and 438.606 respectively, we provide that data certifications are required if data are being used to set payments. We have described the source, content, and timing required for certifications. We do not, however, wish to be overly prescriptive and therefore, we are not prescribing the format of the certifications. If the commenter is requesting a sample format that could be used as a model certification form, one can be found on the CMS website at *http://www.hcfa.gov/medicaid/letters/smd80700.htm* in the document entitled, "Guidelines for Addressing Fraud and Abuse in Medicaid Managed Care" at appendix 2.

Comment: One commenter suggested that it is unclear as to when certifications are required and if the certifications of data to set payments is meant to reference payments under the current contract year or for proposed contract years. The commenter also believes that the requirements for certifications for substantial compliance with the terms of the contract are unclear.

Response: In § 438.604(a) we require that MCOs and PIHPs provide certification of data requested by the State if payments to the MCOs and PIHPs are based on the data submitted, and in § 438.606(c) we require that MCOs and PIHPs submit the certification concurrently with the data. This applies regardless of whether the data are used for setting payments for current contract years, or for other contract years. If data are not being used to set payments, then certifications would not be required.

We agree with the commenter that clarification is necessary regarding

CHAPTER 3 - HEARINGS DIVISION

SECTION .0100 - HEARING PROCEDURES

26 NCAC 03 .0101 GENERAL

(a) The Rules of Civil Procedure as contained in G.S. 1A-1, the General Rules of Practice for the Superior and District Courts as authorized by G.S. 7A-34 and found in the Rules Volume of the North Carolina General Statutes shall apply in contested cases in the Office of Administrative Hearings (OAH) unless another specific statute or rule of the Office of Administrative Hearings provides otherwise.
(b) The Office of Administrative Hearings shall supply forms for use in contested cases. These forms shall conform to the format of the Administrative Office of the Courts' Judicial Department Forms Manual.
(c) The Office of Administrative Hearings shall permit the filing of contested case documents and other pleadings by facsimile (fax) or electronic mail by an attached file either in PDF format or a document that is compatible with or convertible to the most recent version of Microsoft Word. Electronic mail with attachment shall be sent by electronic transmission to: oah.clerks@ncmail.net. The faxed or electronic documents shall be deemed a "filing" within the meaning of 26 NCAC 03 .0102(a)(2) provided the original signed document and one copy is received by OAH within seven business days following the faxed or electronic transmission. Other electronic transmissions, for example, electronic mail without attached file as specified in this Paragraph, shall not constitute a valid filing with the Office of Administrative Hearings.
(d) Every pleading and other documents filed with OAH shall be signed by the attorney who prepared the document, if it was prepared by an attorney, and shall contain his name, address, telephone number, and North Carolina State Bar number. An original and one copy of each document shall be filed.
(e) Except as otherwise provided by statutes or by rules adopted under G.S. 150B-38(h), the rules contained in this Chapter shall govern the conduct of contested case hearings under G.S. 150B-40 when an Administrative Law Judge has been assigned to preside in the contested case.

History Note: *Authority G.S. 7A-750; 7A-751(a); 150B-40(c);*
Eff. August 1, 1986;
Amended Eff. January 1, 2006; April 1, 2004; April 1, 2001; August 1, 2000; February 1, 1994; July 1, 1992; May 1, 1989; January 1, 1989.

26 NCAC 03 .0102 DEFINITIONS AND CONSTRUCTION

(a) The definitions contained in G.S. 150B-2 are incorporated herein by reference. In addition, the following definitions apply:

(1) "Chief Administrative Law Judge" means the person appointed according to G.S. 7A-752.

(2) "File or Filing" means to place the paper or item to be filed into the care and custody of the chief hearings clerk of the Office of Administrative Hearings, and acceptance thereof by him, except that the administrative law judge may permit the papers to be filed with him in which event the administrative law judge shall note thereon the filing date. All documents filed with the Office of Administrative Hearings, except exhibits, shall be in duplicate in letter size 8 1/2" by 11".

(3) "Service or Serve" means personal delivery or, unless otherwise provided by law or rule, delivery by first class United States Postal Service mail or a licensed overnight express mail service, postage prepaid and addressed to the person to be served at his or her last known address. A Certificate of Service by the person making the service shall be appended to every document requiring service under these Rules. Service by mail or licensed overnight express mail is complete upon placing the item to be served, enclosed in a wrapper addressed to the person to be served, in an official depository of the United States Postal Service or upon delivery, postage prepaid and wrapped in a wrapper addressed to the person to be served, to an agent of the overnight express mail service.

(b) The rules of statutory construction contained in Chapter 12 of the General Statutes shall be applied in the construction of these Rules.

History Note: *Authority G.S. 7A-752; 150B-11; 150B-23;*
Eff. August 1, 1986;
Amended Eff. October 1, 1991; January 1, 1989; November 1, 1987; September 1, 1986.

26 NCAC 03 .0103 COMMENCEMENT OF CONTESTED CASE: NOTICE

(a) A contested case in the Office of Administrative Hearings is commenced by the filing of a petition as required by G.S. 150B-23.

(b) Within five days of filing a petition to commence a contested case, the Chief Administrative Law Judge shall assign an administrative law judge to the case. Within ten days of the filing of a petition commencing a contested case, the chief hearings clerk of the Office of Administrative Hearings shall serve a Notice of Contested Case Filing and Assignment upon all who are parties to the dispute. The notice shall contain the following:

(1) Name of case and date of filing;
(2) Name, address, and telephone number of the administrative law judge; and
(3) A request that the party send within 30 days a copy of the document constituting the agency action that caused the filing of the petition.

History Note: *Authority G.S. 150B-11; 150B-23; 150B-33;*
Eff. August 1, 1986;
Amended Eff. October 1, 1991; November 1, 1987; September 1, 1986.

26 NCAC 03 .0104 ORDER FOR PREHEARING STATEMENTS

The administrative law judge may serve all parties with an Order for Prehearing Statements together with, or after service of, the Notice of Contested Case Filing and Assignment. The parties thus served shall, within 30 days of service, file the requested statements setting out the party's present position on the following:

(1) The nature of the proceeding and the issues to be resolved;
(2) A brief statement of the facts and reasons supporting the party's position on each matter in dispute;
(3) A list of proposed witnesses with a brief description of his or her proposed testimony;
(4) A description of what discovery, if any, the party will seek to conduct prior to the contested case hearing and an estimate of the time needed to complete discovery;
(5) Venue considerations;
(6) Estimation of length of the hearing;
(7) The name, address, and telephone number of the party's attorney, if any; and
(8) Other special matters.

History Note: *Authority G.S. 150B-33;*
Eff. August 1, 1986;
Amended Eff. October 1, 1991; November 1, 1987.

26 NCAC 03 .0105 DUTIES OF THE ADMINISTRATIVE LAW JUDGE

In conjunction with the powers of administrative law judges prescribed by G.S. 150B-33 and G.S. 150B-36, the administrative law judge shall perform the following duties, consistent with law:

(1) Hear and rule on motions;
(2) Grant or deny continuances;
(3) Issue orders regarding prehearing matters, including directing the appearance of the parties at a prehearing conference;
(4) Examine witnesses when deemed necessary to make a complete record and to aid in the full development of material facts in the case;
(5) Make preliminary, interlocutory, or other orders as deemed appropriate;
(6) Grant dismissal when the case or any part thereof has become moot or for other reasons; and
(7) Apply sanctions in accordance with Rule .0114 of this Section.

History Note: *Authority G.S. 7A-751(a); 8C-1, Rule 614; 150B-33; 150B-36;*
Eff. August 1, 1986;
Amended Eff. April 1, 2001; February 1, 1994; November 1, 1987.

26 NCAC 03 .0106 CONSENT ORDER: SETTLEMENT: STIPULATION

Informal disposition may be made of a contested case or an issue in a contested case by stipulation, agreement, or consent order at any time during the proceedings. Parties may enter into such agreements on their own or may ask for a settlement conference with an administrative law judge to promote consensual disposition of the case.

History Note: *Authority G.S. 150B-31(b);*
Eff. August 1, 1986;
Amended Eff. November 1, 1987.

26 NCAC 03 .0107 SETTLEMENT CONFERENCE

(a) A settlement conference is for the primary purpose of assisting the parties in resolving disputes and for the secondary purpose of narrowing the issues and preparing for hearing.

(b) A settlement conference shall be held at the request of any party, the administrative law judge, or the Chief Administrative Law Judge. Upon receipt of the request, the Chief Administrative Law Judge shall assign the case to another administrative law judge for the purpose of conducting a settlement conference. Unless both parties and the administrative law judge agree, a unilateral request for a settlement conference shall not constitute good cause for a continuance. The conference shall be conducted at a time and place agreeable to all parties and the administrative law judge. It shall be conducted by telephone if any party would be required to travel more than 50 miles to attend, unless that party agrees to travel to the location set for the conference. If a telephone conference is scheduled, the parties must be available by telephone at the time of the conference.

(c) All parties shall attend or be represented at a settlement conference under the same requirements as provided for in a mediation settlement conference under Rule .0204(a) of this Chapter. Parties or their representatives shall be prepared to participate in settlement discussions.

(d) The parties shall discuss the possibility of settlement before a settlement conference if they believe that a reasonable basis for settlement exists.

(e) At the settlement conference, the parties shall be prepared to provide information and to discuss all matters required in Rule .0104 of this Section.

(f) If, following a settlement conference, a settlement has not been reached but the parties have reached an agreement on any facts or other issues, the administrative law judge presiding over the settlement conference shall issue an order confirming and approving, if necessary, those matters agreed upon. The order is binding on the administrative law judge who is assigned to hear the case.

History Note: *Authority G.S. 7A-751(a); 150B-22; 150B-31(b);*
Eff. August 1, 1986;
Amended Eff. April 1, 2001; February 1, 1994; November 1, 1987; September 1, 1986.

26 NCAC 03 .0108 PREHEARING CONFERENCE

(a) The purpose of the prehearing conference is to simplify the issues to be determined, to obtain stipulations in regard to foundations for testimony or exhibits, to obtain stipulations of agreement on nondisputed facts or the application of particular laws, to consider the proposed witnesses for each party, to identify and exchange documentary evidence intended to be introduced at the hearing, to determine deadlines for the completion of any discovery, to establish hearing dates and locations if not previously set, to consider such other matters that may be necessary or advisable and, if possible, to reach a settlement without the necessity for further hearing. Any final settlement shall be set forth in a settlement agreement or consent order and made a part of the record.

(b) Upon the request of any party or upon the administrative law judge's own motion, the administrative law judge may hold a prehearing conference prior to a contested case hearing. The administrative law judge may require the parties to file prehearing statements in accordance with Rule .0104 of this Section.

A prehearing conference shall be an informal proceeding conducted expeditiously by the administrative law judge. Agreements on the simplification of issues, amendments, stipulations, or other matters may be entered on the record or may be made the subject of an order by the administrative law judge. Venue for purposes of a prehearing conference shall be determined in accordance with G.S. 150B-24.

History Note: *Authority G.S. 150B-33(b)(4),(5);*
Eff. August 1, 1986;
Amended Eff. February 1, 1994; April 1, 1990; November 1, 1987.

26 NCAC 03 .0109 NOTICE OF HEARING

The content and the manner of service of the Notice of Hearing shall be as specified in G.S. 150B-23 (b) and (c).

History Note: *Authority G.S. 150B-23;*
Eff. August 1, 1986;
Amended Eff. October 1, 1991; November 1, 1987.

26 NCAC 03 .0110 DISQUALIFICATION OF ADMINISTRATIVE LAW JUDGE

Any party may file an affidavit of personal bias or disqualification pursuant to G.S. 150B-32(b). An administrative law judge shall withdraw from participation in a contested case if at any time he deems himself disqualified for any reason.

History Note: *Authority G.S. 150B-32(b);*
Eff. August 1, 1986;
Amended Eff. November 1, 1987.

26 NCAC 03 .0111 CONSOLIDATION OF CASES

(a) The Chief Administrative Law Judge of the Office of Administrative Hearings may order a joint hearing of any matters at issue in contested cases involving common questions of law or fact or multiple proceedings involving the same or related parties, or may order the cases consolidated or make other orders to reduce costs or delay in the proceedings.
(b) A party requesting consolidation shall serve a petition for consolidation on all parties to the cases to be consolidated and shall file the original with the Office of Administrative Hearings, together with a Certificate of Service showing service on all parties as herein required. Any party objecting to the petition shall serve and file his objections within 10 days after service of the petition for consolidation.
(c) Upon determining whether cases should be consolidated, the Chief Administrative Law Judge shall serve a written order on all parties which contains a description of the cases for consolidation and the reasons for the decision.
(d) Nothing contained in this Rule shall be deemed to prohibit the parties from stipulating and agreeing to a consolidation which shall be granted upon submission of a written stipulation signed by all the parties to the Chief Administrative Law Judge.
(e) Following receipt of a notice of or order for consolidation, any party may petition for severance by serving it on all other parties and filing it with the Office of Administrative Hearings at least seven days prior to the first scheduled hearing date. If the Chief Administrative Law Judge finds that the consolidation will prejudice any party, he shall order the severance or other relief which will prevent the prejudice from occurring.

History Note: *Authority G.S. 150B-23; 150B-31;*
Eff. August 1, 1986;
Amended Eff. January 1, 1987; September 1, 1986.

26 NCAC 03 .0112 DISCOVERY

(a) Discovery methods are means designed to assist parties in preparing to meet their responsibilities and protect their rights during hearings without unduly delaying, burdening or complicating the hearings process and with due regard to the rights and responsibilities of other parties and persons affected. Accordingly, parties are obliged to exhaust all less formal opportunities to obtain discoverable material before utilizing this Rule.

(b) Any means of discovery available pursuant to the North Carolina Rules of Civil Procedure, G.S. 1A-1, is allowed. If the party from whom discovery is sought objects to the discovery, the party seeking the discovery may file a motion with the administrative law judge to obtain an order compelling discovery. In the disposition of the motion, the party seeking discovery shall have the burden of showing that the discovery is needed for the proper presentation of the party's case, is not for purposes of delay, and that the issues in controversy are significant enough to warrant the discovery. In ruling on a motion for discovery, the administrative law judge shall recognize all privileges recognized at law.

(c) When a party serves another party with a Request for Discovery, that request need not be filed with the Office of Administrative Hearings but shall be served upon all parties.

(d) The parties in any contested case shall immediately commence to exchange information voluntarily, to seek access as provided by law to public documents and to exhaust other informal means of obtaining discoverable material.

(e) All discovery shall be completed no later than the first day of the contested case hearing. An administrative law judge may shorten or lengthen the period for discovery and adjust hearing dates accordingly and, when necessary, allow discovery during the pendency of the contested case hearing.

(f) No later than 15 days from receipt of a notice requesting discovery, the receiving party shall:

(1) move for relief from the request;

(2) provide the requested information, material or access; or

(3) offer a schedule for reasonable compliance with the request.

(g) Sanctions for failure of a party to comply with an order of the administrative law judge made pursuant to the discovery rules of this Chapter shall be as provided for by G.S. 1A-1, Rule 37, to the extent that an administrative law judge may impose such sanctions, and Rule .0114 of this Section.

History Note: *Authority G.S. 1A-1, Rule 5; 150B-28; 150B-33(b)(3)(4);*
Eff. August 1, 1986;
Amended Eff. February 1, 1994; November 1, 1987.

26 NCAC 03 .0113 SUBPOENAS

(a) Subpoenas for the attendance and testimony of witnesses or for the production of documents, either at a hearing or for the purposes of discovery, shall be issued in accordance with G.S. 150B-27 and G.S. 1A-1, Rule 45.

(b) A subpoena shall be served in the manner provided by G.S. 150B-27 and G.S. 1A-1, Rule 45. The cost of service, fees, and expenses of any witnesses subpoenaed shall be paid by the party at whose request the witness appears. A party seeking an order imposing sanctions for failure to comply with any subpoena issued under this Rule must prove proper service of the subpoena.

(c) Objections to subpoenas shall be heard in accordance with G.S. 150B-27 and G.S. 1A-1, Rule 45.

History Note: *Authority G.S. 150B-27; 150B-33;*
Eff. August 1, 1986;
Amended Eff. October 1, 1991; November 1, 1987.

26 NCAC 03 .0114 SANCTIONS

(a) If a party fails to appear at a hearing or fails to comply with an interlocutory order of an administrative law judge, the administrative law judge may:

(1) Find that the allegations of or the issues set out in the notice of hearing or other pleading may be taken as true or deemed proved without further evidence;

(2) Dismiss or grant the motion or petition;

(3) Suppress a claim or defense; or

(4) Exclude evidence.

(b) In the event that any party or attorney at law or other representative of a party engages in behavior that obstructs the orderly conduct of proceedings or would constitute contempt if done in the General Court of Justice, the administrative law judge presiding may enter a show cause order returnable in Superior Court for contempt proceedings in accordance with G.S. 150B-33(b)(8).

History Note: *Authority G.S. 150B-25(a); 150B-33(b)(8),(10);*
Eff. August 1, 1986;
Amended Eff. January 1, 1989; November 1, 1987; March 1, 1987.

26 NCAC 03 .0115 MOTIONS

(a) Any application to the administrative law judge for an order shall be by motion, which shall be in writing unless made during a hearing, and must be filed and served upon all parties not less than ten days before the hearing, if any, is to be held either on the motion or the merits of the case. The nonmoving party shall have ten days from the date of service of the motion to file a response. A response must be in writing. Motions practice in contested cases before the Office of Administrative Hearings shall be governed by Rule 6 of the General Rules of Practice for the Superior and District Courts.

(b) If any party desires a hearing on the motion, he shall make a request for a hearing at the time of the filing of his motion or response. A response shall set forth the nonmoving party's objections. All motions in writing shall be decided without oral argument unless an oral argument is directed by the administrative law judge. When oral argument is directed by the administrative law judge, a motion shall be considered submitted for disposition at the close of the argument. A hearing on a motion will be directed by the administrative law judge only if it is determined that a hearing is necessary to the development of a full and complete record on which a proper decision can be made. All orders on such motions, other than those made during the course of a hearing, shall be in writing and shall be served upon all parties of record not less than five days before a hearing, if any, is held.

History Note: *Authority G.S. 150B-33(b);*
Eff. August 1, 1986;
Amended Eff. November 1, 1987.

26 NCAC 03 .0116 TIME

Unless otherwise provided in the rules of the Office of Administrative Hearings or in a specific statute, time computations in contested cases before the Office of Administrative Hearings shall be governed by G.S. 1A-1, Rule 6.

History Note: *Authority G.S. 150B-33(b)(4);*
Eff. August 1, 1986.

26 NCAC 03 .0117 INTERVENTION

(a) Any person not named in the notice of hearing who desires to intervene in a contested case as a party shall file a timely motion to intervene and shall serve the motion upon all existing parties. Timeliness will be determined by the administrative law judge in each case based on circumstances at the time of filing. The motion shall show how the movant's rights, duties, or privileges may be determined or affected by the

contested case; shall show how the movant may be directly affected by the outcome or that movant's participation is authorized by statute, rule, or court decision; shall set forth the grounds and purposes for which intervention is sought; and shall indicate movant's statutory right to intervene if one should exist.
(b) Any party may object to the motion for intervention by filing a written notice of objection with the administrative law judge within five days of service of the motion if there is sufficient time before the hearing. The notice of objection shall state the party's reasons for objection and shall be served upon all parties. If there is insufficient time before the hearing for a written objection, the objection may be made at the hearing.
(c) When determined to be necessary to develop a full record on the question of intervention, the administrative law judge may conduct a hearing on the motion to determine specific standards that will apply to each intervenor and to define the extent of allowed intervention.
(d) The administrative law judge shall allow intervention upon a proper showing under this Rule, unless the administrative law judge finds that the movant's interest is adequately represented by one or more parties participating in the case or unless intervention is mandated by statute, rule, or court decision. An order allowing intervention shall specify the extent of participation permitted the intervenor and shall state the administrative law judge's reasons. An intervenor may be allowed to:

(1) File a written brief without acquiring the status of a party;
(2) Intervene as a party with all the rights of a party; or
(3) Intervene as a party with all the rights of a party but limited to specific issues and to the means necessary to present and develop those issues.

History Note: *Authority G.S. 150B-23(d);*
Eff. August 1, 1986;
Amended Eff. November 1, 1987.

26 NCAC 03 .0118 CONTINUANCES

(a) Requests for a continuance of a hearing shall be granted upon a showing of good cause. Unless time does not permit, a request for a continuance of a hearing shall be made in writing to the administrative law judge and shall be served upon all parties of record. In determining whether good cause exists, due regard shall be given to the ability of the party requesting a continuance to proceed effectively without a continuance. A request for a continuance filed within five days of a hearing shall be denied unless the reason for the request could not have been ascertained earlier.

(1) "Good cause" includes death or incapacitating illness of a party, representative, or attorney of a party; a court order requiring a continuance; lack of proper notice of the hearing; a substitution of the representative or attorney of a party if the substitution is shown to be required; a change in the parties or pleadings requiring postponement; and agreement for a continuance by all parties if either more time is clearly necessary to complete mandatory preparation for the case, such as authorized discovery, and the parties and the administrative law judge have agreed to a new hearing date or the parties have agreed to a settlement of the case that has been or is likely to be approved by the final decision maker.
(2) "Good cause" shall not include: intentional delay; unavailability of counsel or other representative because of engagement in another judicial or administrative proceeding unless all other members of the attorney's or representative's firm familiar with the case are similarly engaged, or if the notice of the other proceeding was received subsequent to the notice of the hearing for which the continuance is sought; unavailability of a witness if the witness testimony can be taken by deposition, and failure of the attorney or representative to properly utilize the statutory notice period to prepare for the hearing.

(b) During a hearing, if it appears in the interest of justice that further testimony should be received and sufficient time does not remain to conclude the testimony, the administrative law judge shall either order the additional testimony taken by deposition or continue the hearing to a future date for which oral notice on the record is sufficient.
(c) A continuance shall not be granted when to do so would prevent the case from being concluded within any statutory or regulatory deadline.

History Note: *Authority G.S. 150B-33(b)(4); 150B-28;*
Eff. August 1, 1986;
Amended Eff. November 1, 1987.

26 NCAC 03 .0119 SECURE LEAVE PERIODS FOR ATTORNEYS

(a) Any attorney may designate one or more secure leave periods each year as provided in this Rule.

(b) Length, Number. A secure leave period shall consist of one or more complete calendar weeks. During any calendar year, an attorney's secure leave periods pursuant to this Rule shall not exceed, in the aggregate, three calendar weeks.

(c) Designation, Effect. To designate a secure leave period an attorney shall file a written designation containing the information required by Paragraph (d) with the Chief Hearings Clerk. The designation shall be filed:

(1) no later than 90 days before the beginning of the secure leave period; and

(2) before any argument or other proceeding before an administrative law judge has been scheduled for a time during the designated secure leave period.

Upon such filing, the secure leave period so designated shall be deemed allowed without further action by the presiding administrative law judge, and the attorney shall not be required to appear at any argument or other administrative proceeding during that secure leave period.

(d) Content of Designation. The designation shall contain the following information:

(1) the attorney's name, address, telephone number and state bar number;

(2) the date of the Monday on which the secure leave period is to begin and of the Friday on which it is to end;

(3) the dates of all other secure leave periods during the current calendar year that have previously been designated by the attorney pursuant to this Rule;

(4) a statement that the secure leave period is not being designated for the purpose of delaying, hindering or interfering with the timely disposition of any matter in any pending action or proceeding; and

(5) a statement that no argument or other proceeding has been scheduled during the designated secure leave period in any matter pending before an administrative law judge in which the attorney has entered an appearance.

History Note: *Authority G.S. 7A-750; 150B-40(c);*
Eff. August 1, 2000.

26 NCAC 03 .0120 RIGHTS AND RESPONSIBILITIES OF PARTIES

(a) All parties shall have the right to present evidence, rebuttal testimony, and argument with respect to the issues of law and policy, and to cross-examine witnesses, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence.

(b) A party shall have all evidence to be presented, both oral and written, available on the date for hearing. Requests for subpoenas, depositions, or continuances shall be made within a reasonable time after their need becomes evident to the requesting party. In cases when the hearing time is expected to exceed one day, the parties shall be prepared to present their evidence at the date and time ordered by the administrative law judge or agreed upon at a prehearing conference.

(c) The administrative law judge shall send copies of all orders or decisions to all parties simultaneously. Any party sending a letter, exhibit, brief, memorandum, or other document to the administrative law judge shall simultaneously send a copy to all other parties.

(d) All parties have the continuing responsibility to notify the Office of Administrative Hearings of their current address and telephone number.

(e) A party need not be represented by an attorney. If a party has notified other parties of that party's representation by an attorney, all communications shall be directed to that attorney.

(f) With prior notice to the administrative law judge, any person may offer testimony or other evidence relevant to the case. Any nonparty offering testimony or other evidence may be questioned by parties to the case and by the administrative law judge.

(g) Prior to issuing a decision, the administrative law judge may order any party to submit proposed findings of fact and written arguments.

History Note: *Authority G.S. 7A-751(a); 150B-25; 150B-33; 150B-34;*
Eff. August 1, 1986;
Amended Eff. October 1, 1991; April 1, 1990; November 1, 1987;
Recodified from Rule .0119 Eff. August 1, 2000;
Amended Eff. April 1, 2001.

26 NCAC 03 .0121 WITNESSES

Any party may be a witness and may present witnesses on the party's behalf at the hearing. All oral testimony at the hearing shall be under oath or affirmation and shall be recorded. At the request of a party or upon the administrative law judge's own motion, the administrative law judge may exclude witnesses from the hearing room so that they cannot hear the testimony of other witnesses.

History Note: *Authority G.S. 150B-25(c)(d); 150B-33(4); 150B-37(b);*
Eff. August 1, 1986;
Amended Eff. November 1, 1987;
Recodified from Rule .0120 Eff. August 1, 2000.

26 NCAC 03 .0122 EVIDENCE

The North Carolina Rules of Evidence as found in Chapter 8C of the General Statutes shall govern in all contested case proceedings, except as provided otherwise in these Rules and G.S. 150B-29.

(1) The administrative law judge may admit all evidence that has probative value. Irrelevant, incompetent, and immaterial or unduly repetitious evidence shall be excluded. An administrative law judge may, in his discretion, exclude any evidence if its probative value is substantially outweighed by the risk that its admission will:
   (a) necessitate undue consumption of time; or
   (b) create substantial danger of undue prejudice or confusion.

(2) Contemporaneous objections by a party or a party's attorney are not required in the course of a hearing to preserve the right to object to the consideration of evidence by the administrative law judge in reaching a decision or by the court upon judicial review.

(3) All evidence to be considered in the case, including all records and documents or a true and accurate photocopy, shall be offered and made a part of the record in the case. No other factual information or evidence shall be considered in the determination of the case. Documentary evidence incorporated by reference may be admitted only if the materials so incorporated are available for examination by the parties.

(4) Documentary evidence in the form of copies or excerpts may be received in the discretion of the administrative law judge or upon agreement of the parties. Copies of a document shall be received to the same extent as the original document unless a genuine question is raised about the accuracy or authenticity of the copy or, under the circumstances, it would be unfair to admit the copy instead of the original.

(5) The administrative law judge may take notice of judicially cognizable facts by entering a statement of the noticed fact and its source into the record. Upon timely request, any party shall be given the opportunity to contest the facts so noticed through submission of evidence and argument.

(6) A party may call an adverse party or an officer, director, managing agent, or employee of the state or any political subdivision thereof or of a public or private corporation or of a partnership or association or body politic which is an adverse party, and interrogate that party by leading questions and contradict and impeach that party on material matters in all respects as if that party had been called by the adverse party. The adverse party may be examined by that party's counsel upon the subject matter of that party's examination in chief under the rules applicable to direct examination, and may be cross-examined, contradicted, and impeached by any other party adversely affected by the testimony.

History Note: *Authority G.S. 150B-33(b)(4); 150B-29;*

Eff. August 1, 1986;
Amended Eff. November 1, 1987; March 1, 1987;
Recodified from Rule .0121 Eff. August 1, 2000.

26 NCAC 03 .0123 OFFICIAL RECORD

(a) The official record of a contested case shall be available for public inspection upon request. An administrative law judge may, consistent with law, order part or all of an official record sealed.
(b) The official record shall be prepared in accordance with G.S. 150B-37(a).
(c) Contested case hearings shall be recorded either by a four-track recording system or a professional court reporter using stenomask or stenotype.
(d) Transcript costs incurred shall be divided equally among the party(ies) requesting a transcript.
(e) Any other costs incurred when using a professional court reporter shall be divided equally among the requesting party(ies).
(f) A 24 hour cancellation notice shall be required in all cases. The party(ies) responsible for the cancellation shall be liable for any cancellation fees.
(g) Transcripts of proceedings during which oral evidence is presented will be made only upon request of a party. OAH shall contract with an independent contractor to provide transcript services. Transcript requests must be made to the independent contractor. The name and phone number of the independent contractor may be obtained by calling the Office of Administrative Hearings. Transcript costs shall be provided to the requesting party by the independent contractor. An attorney requesting a transcript on behalf of a party shall be a guarantor of payment of the cost. The independent contractor may require an advance security deposit to cover the prospective cost.
(h) Copies of tapes are available upon written request at a cost of three dollars ($3.00) plus tax per tape.
(i) Copies of OAH Hearings tapes or Non-OAH Certified transcripts therefrom are not part of the official record.
Note: Rule 5.3(B) of the Rules of Professional Conduct permits an attorney to advance or guarantee expenses of litigation provided the client remains ultimately liable for such expenses.

History Note: *Authority G.S. 150B-37;*
Eff. August 1, 1986;
Amended Eff. August 1, 1998; April 1, 1990; February 1, 1989; November 1, 1987; September 1, 1986;
Recodified from Rule .0122 Eff. August 1, 2000.

26 NCAC 03 .0124 VENUE

Venue in a contested case shall be determined in accordance with G.S. 150B-24.

History Note: *Authority G.S. 150B-24;*
Eff. August 1, 1986;
Recodified from Rule .0123 Eff. August 1, 2000.

26 NCAC 03 .0125 CONDUCT OF HEARING

Hearings shall be conducted, as nearly as practical, in accordance with the practice in the Trial Division of the General Court of Justice.

History Note: *Authority G.S. 150B-11; 150B-25; 150B-33;*
Eff. August 1, 1986;
Recodified from Rule .0124 Eff. August 1, 2000.

26 NCAC 03 .0126 HEARING OFFICER'S PROPOSAL FOR DECISION: EXCEPTIONS

History Note: *Filed as a Temporary Repeal Eff. December 24, 1987 For a Period of 8 Days to Expire on January 1, 1988;*
Filed as a Temporary Repeal Eff. August 26, 1987 For a Period of 120 Days to Expire

on December 24, 1987;
Authority G.S. 150B-34;
Eff. August 1, 1986;
Repealed Eff. January 1, 1988;
Recodified from Rule .0125 Eff. August 1, 2000.

26 NCAC 03 .0127 ADMINISTRATIVE LAW JUDGE'S DECISION

(a) An administrative law judge shall issue a decision or order in a contested case within 45 days after the later of the date the administrative law judge receives any proposed findings of fact and written arguments submitted by the parties and the date the contested case hearing ends. The administrative law judge shall serve a copy of the decision on each party. When an administrative law judge issues a decision, the Office of Administrative Hearings shall promptly serve a copy of the official record on the agency making the final decision by hand delivery or certified mail.

(b) An administrative law judge's decision shall be based exclusively on:

(1) competent evidence and arguments presented during the hearing and made a part of the official record;
(2) stipulations of fact;
(3) matters officially noticed;
(4) any proposed findings of fact and written arguments submitted by the parties under Paragraph (g) of Rule .0119 of this Section; and
(5) other items in the official record that are not excluded by G.S. 150B-29(b).

(c) An administrative law judge's decision shall fully dispose of all issues required to resolve the case and shall contain:

(1) a caption;
(2) the appearances of the parties;
(3) a statement of the issues;
(4) references to specific statutes or rules at issue;
(5) findings of fact;
(6) conclusions of law based on the findings of fact and applicable constitutional principles, statutes, rules, or federal regulations;
(7) in the discretion of the administrative law judge, a memorandum giving reasons for his findings of fact and conclusions of law;
(8) a statement identifying the agency that will make the final decision; and
(9) a statement that each party has the right to file exceptions to the administrative law judge's decision with the agency making the final decision and has the right to present written arguments on the decision to the agency making the final decision.

(d) The chief administrative law judge may extend the 45-day time limit for issuing a decision. An administrative law judge who needs an extension must submit a request for extension to the chief administrative law judge before the 45-day period has expired.

History Note: *Filed as a Temporary Amendment Eff. December 24, 1987 For a Period of 8 Days to Expire on January 1, 1988;*
Filed as a Temporary Amendment Eff. August 26, 1987 For a Period of 120 Days to Expire on December 24, 1987;
Authority G.S. 7A-751(a); 150B-34;
Eff. August 1, 1986;
Amended Eff. February 1, 1994; October 1, 1991; April 1, 1990; January 1, 1989;
Recodified from Rule .0126 Eff. August 1, 2000;
Amended Eff. April 1, 2001.

26 NCAC 03 .0128 EX PARTE COMMUNICATIONS

Ex parte communications in a contested case are governed by G.S. 150B-35.

History Note: *Authority G.S. 150B-35;*
Eff. August 1, 1986;
Recodified from Rule .0127 Eff. August 1, 2000.

26 NCAC 03 .0129 RECONSIDERATION OR REHEARING

After an administrative law judge issues a decision in a contested case, the administrative law judge loses jurisdiction to amend the decision except to correct clerical or mathematical errors.

History Note: *Authority G.S. 7A-750; 7A-751(a); 150B-34;*
Eff. August 1, 1986;
Amended Eff. November 1, 1987; January 1, 1987;
Recodified from Rule .0128 Eff. August 1, 2000;
Amended Eff. April 1, 2001.

26 NCAC 03 .0130 AVAILABILITY OF COPIES

These Rules and copies of all matters adopted by reference herein are available from the Office of Administrative Hearings at the cost established in 26 NCAC 1 .0103.

History Note: *Authority G.S. 150B-14; 150B-62(b); 150B-63(f);*
Eff. August 1, 1986;
Amended Eff. January 1, 1991;
Recodified from Rule .0129 Eff. August 1, 2000.

26 NCAC 03 .0131 FINAL DECISIONS IN CONTESTED CASES

A copy of a final decision issued by an administrative law judge shall be served on each party in accordance with G.S. 150B-36.

History Note: *Authority G.S. 150B-36;*
ARRC Objection Lodged November 17, 1988;
Eff. April 1, 1989;
ARRC Objection Removed Eff. April 1, 1990;
Amended Eff. October 1, 1991; April 1, 1990;
Recodified from Rule .0130 Eff. August 1, 2000.

SECTION .0200 - MEDIATION SETTLEMENT CONFERENCE

26 NCAC 03 .0201 ORDER FOR MEDIATED SETTLEMENT CONFERENCE

(a) Order by Chief Administrative Law Judge. The Chief Administrative Law Judge may, by written order, require parties and their representatives to attend a pre-hearing mediated settlement conference in any contested case.

(b) Timing of the Order. The Chief Administrative Law Judge may issue the order within 10 days of the filing of the contested case petition. Paragraph (c) of this Rule and Paragraph (b) of Rule .0203 of this Section shall govern the content of the order and the date of completion of the conference.

(c) Content of Order. The Chief Administrative Law Judge's order shall:

(1) require the mediated settlement conference be held in the contested case;

(2) establish a deadline for the completion of the conference;

(3) state clearly that the parties have the right to select their own mediator as provided in Paragraphs (a) and (b) of Rule .0202 of this Section;

(4) state the rate of compensation of the mediator appointed by the presiding Administrative Law Judge pursuant to Paragraph (c) of Rule .0202 of this Section in the event that the parties do not exercise their right to select a mediator; and

(5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise apportioned by the presiding Administrative Law Judge.

(d) Motion to Dispense with Mediated Settlement Conference. A party may move the presiding Administrative Law Judge, within 10 days after the date of the Chief Administrative Law Judge's order, to dispense with the conference. Such motion shall state the reasons the relief is sought. For good cause shown, the presiding Administrative Law Judge may grant the motion.

(e) Motion for Mediated Settlement Conference. In contested cases not ordered to mediated settlement conference, any party may move the presiding Administrative Law Judge to order such a conference. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections may be filed in writing with the presiding Administrative Law Judge within 10 days after the date of the service of the motion. Thereafter, the presiding Administrative Law Judge shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling. In the event that mediation is ordered, the parties may select a mediator by agreement as provided in Paragraphs (a) and (b) of Rule .0202 of this Section within 21 days of the date of the presiding Administrative Law Judge's order. If the parties cannot agree or have failed to select a mediator within the 21 days, the presiding Administrative Law Judge shall appoint a certified mediator pursuant to Paragraph (c) of Rule .0202 of this Section.

History Note: *Authority G.S. 150B-23.1;*
Eff. February 1, 1994.

26 NCAC 03 .0202 SELECTION OF MEDIATOR

(a) Selection of Certified Mediator by Agreement of Parties. The parties may select a certified mediator by agreement within 21 days of the Chief Administrative Law Judge's order. The petitioner's attorney shall file with the Office of Administrative Hearings a Notice of Selection of Mediator by Agreement within 21 days of the Chief Administrative Law Judge's order. Such notice shall include: the name, address and telephone number of the mediator selected; the rate of compensation of the mediator; the agreement of the parties as to the selection of the mediator and rate of compensation; and whether or not the mediator is certified.

(b) Nomination and the Office of Administrative Hearings Approval of a Non-Certified Mediator. The parties may select a mediator who is not certified but who, in the opinion of the parties and the presiding Administrative Law Judge, is otherwise qualified by training or experience to mediate all or some of the issues in the action and who agrees to mediate indigent cases without pay. If the parties select a non-certified mediator, the petitioner's attorney shall file with the presiding Administrative Law Judge a Nomination of Non-Certified Mediator within 21 days of the Chief Administrative Law Judge's order. Such nomination shall include: the name, address and telephone number of the mediator; the training, experience or other qualifications of the mediator; the rate of compensation of the mediator; and the agreement of the parties as to the selection of the mediator and rate of compensation. The presiding Administrative Law Judge shall rule on the nomination without a hearing, shall approve or disapprove of the parties' nomination and shall notify the parties of the presiding Administrative Law Judge's decision.

(c) Appointment of Mediator by the presiding Administrative Law Judge. If the parties cannot agree upon the selection of a mediator, the petitioner's attorney shall so notify the presiding Administrative Law Judge and request, on behalf of all parties, that the presiding Administrative Law Judge appoint a mediator. The motion must be filed within 21 days of the date of the Chief Administrative Law Judge's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The motion shall state whether any party prefers a certified attorney mediator, and if so, the presiding Administrative Law Judge shall appoint a certified attorney mediator. The motion may state that all parties prefer a certified non-attorney mediator, and if so, the presiding Administrative Law Judge shall appoint a certified non-attorney mediator. If no preference is expressed, the presiding Administrative Law Judge may appoint a certified attorney mediator or a certified non-attorney mediator. Upon receipt of a motion to appoint a mediator, or in the event the petitioner's attorney has not filed a Notice of Selection or Nomination of Non-Certified Mediator with the presiding Administrative Law Judge within 21 days of the Chief Administrative Law Judge's order, the presiding Administrative Law Judge shall appoint a certified mediator. Only mediators who agree to mediate indigent cases without pay shall be appointed.

(d) Mediator Information Directory. To assist the parties in the selection of a mediator by agreement, the Office of Administrative Hearings shall prepare and keep current a list of certified mediators who wish to mediate contested cases. The list shall be kept in the Office of Administrative Hearings and made available to the parties upon request.

(e) Disqualification of Mediator. Any party may move for an order disqualifying the mediator. If the mediator is disqualified, a replacement mediator shall be selected by the parties or appointed by the

presiding Administrative Law Judge pursuant to this Rule. Nothing in this Paragraph shall preclude mediators from disqualifying themselves.

History Note: *Authority G.S. 7A-751(a); 150B-23.1;*
Eff. February 1, 1994;
Amended Eff. April 1, 2001.

26 NCAC 03 .0203 MEDIATION SETTLEMENT CONFERENCE

(a) Where Conference is to be Held. Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the courthouse or other public building in the county where the contested case is pending. The mediator shall reserve a place and make arrangements for the conference and give timely notice to all attorneys and unrepresented parties of the time and location of the conference.

(b) When Conference is to be Held. The Chief Administrative Law Judge's order issued pursuant to Paragraph (b) of Rule .0201 of this Section shall clearly state a date of completion for the conference. Such date shall not be less than 90 days or more than 120 days after the issuance of the Chief Administrative Law Judge's order. The Chief Administrative Law Judge may shorten these time limits in order to meet statutorily imposed deadlines for the hearing of certain types of contested cases.

(c) Request to Extend Date of Completion. A party, or the mediator, may request the presiding Administrative Law Judge to extend the deadline for completion of the conference. Such request shall state the reasons the continuance is sought and shall be served by the moving party upon the other parties and the mediator. The presiding Administrative Law Judge may grant the request and enter an order setting a new date for the completion of the conference, which date may be set at any time prior to hearing. Such order shall be served upon the parties and the mediator.

(d) Recesses. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set before the conference is recessed, no further notification is required for persons present at the recessed conference.

(e) The Mediated Settlement Conference Is Not To Delay Other Proceedings. The mediated settlement conference shall not be cause for the delay of other proceedings in the contested case, including the completion of discovery, the filing or hearing of motions, or the hearing of the contested case, except by order of the presiding Administrative Law Judge.

History Note: *Authority G.S. 7A-751(a); 150B-23.1;*
Eff. February 1, 1994;
Amended Eff. April 1, 2001.

26 NCAC 03 .0204 DUTIES OF PARTIES, REPRESENTATIVES, AND ATTORNEYS

(a) Attendance. The following persons shall physically attend a mediated settlement conference:

(1) All individual parties; or an officer, employee of a party who is not a natural person or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and or what terms to settle the contested case; or in the case of a governmental entity, an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and what terms to settle the contested case; provided if under law proposed settlement terms can be approved only by a Board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that Board;

(2) At least one counsel of record for each party or other participant whose counsel has appeared in the contested case; and

(3) For any insured party against whom a claim is made, a representative of the insurance carrier who is not such carrier's outside counsel and who has authority to make a decision on behalf of such carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have such decision-making authority.

(b) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Paragraph (c) of this Rule or an impasse has been declared. Such party or person may have the attendance requirement excused or modified including the allowance of that party's or person's participation without physical attendance by order of the presiding

Administrative Law Judge, upon motion of a party and notice to all parties and persons required to attend and the mediator.
(c) Finalizing Agreement. If an agreement is reached in the conference parties shall reduce its terms to writing and sign it along with their counsel. By stipulation of one or more of the parties and at their expense, the agreement may be electronically or stenographically recorded. A consent judgment, voluntary dismissals, or withdrawal of petition shall be filed with the Office of Administrative Hearings by such persons as the parties shall designate.
(d) Payment of Mediator's Fee. The parties shall pay the mediator's fee as provided by Rule .0207 of this Section.

History Note: *Authority G.S.7A-751(a); 150B-23.1;*
Eff. February 1, 1994;
Amended Eff. April 1, 2001.

26 NCAC 03 .0205 SANCTIONS FOR FAILURE TO ATTEND

If a party or other person required to attend a mediated settlement conference fails to attend, the presiding Administrative Law Judge may impose upon the party or person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference as authorized by G.S. 150B-33(b)(8) or (10). A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. The motion shall be served upon all parties and on any person against whom sanctions are being sought. If the presiding Administrative Law Judge imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

History Note: *Authority G.S. 7A-751(a); 150B-23.1;*
Eff. February 1, 1994;
Amended Eff. April 1, 2001.

26 NCAC 03 .0206 AUTHORITY AND DUTIES OF MEDIATORS

(a) Authority of Mediator.
- (1) Control of Conference. The mediator shall at all times be in control of the conference and the procedures to be followed.
- (2) Private Consultation. The mediator may communicate privately with any participant or counsel prior to and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.
- (3) Scheduling the Conference. The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

(b) Duties of Mediator.
- (1) The mediator shall define and describe the following at the beginning of the conference:
  - (A) The process of mediation;
  - (B) The differences between mediation and other forms of conflict resolution;
  - (C) The costs of the mediated settlement conference;
  - (D) The fact that the mediated settlement conference is not a hearing, the mediator is not a judge, and the parties retain their right to a hearing if they do not reach settlement;
  - (E) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;
  - (F) Whether and under what conditions communications with the mediator will be held in confidence during the conference;
  - (G) The inadmissibility of conduct and statements as provided by Rule 408 of the North Carolina Rules of Evidence;
  - (H) The duties and responsibilities of the mediator and the participants; and
  - (I) The fact that any agreement reached will be reached by mutual consent.

(2) Disclosure. The mediator shall be impartial and advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) Declaring Impasse. It is the duty of the mediator to determine that an impasse exists, and that the conference should end.

(4) Reporting Results of Conference. The mediator shall file a written report with the parties and presiding Administrative Law Judge within 10 days as to whether or not agreement was reached by the parties. If an agreement was reached, the report shall state whether the action will be concluded by consent judgment, voluntary dismissal, or withdrawal of petition and shall identify the persons designated to file such pleadings. The mediator's report shall inform the presiding Administrative Law Judge of the absence of any party, attorney, or insurance representative known to the mediator to have been absent from the mediated settlement conference without permission. A copy of the Mediator's report shall also be provided to the Attorney General of North Carolina or his designee responsible for evaluating the mediation program pursuant to the 1993 N.C. Session Laws, c. 363, s. 2.

(5) Scheduling and Holding the Conference. The mediator shall schedule the conference and conduct it prior to the conference completion deadline set out in the Chief Administrative Law Judge's order. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the presiding Administrative Law Judge.

History Note: *Authority G.S. 7A-751(a); 150B-23.1;*
Eff. February 1, 1994;
Amended Eff. April 1, 2001.

26 NCAC 03 .0207 COMPENSATION OF THE MEDIATOR

(a) By Agreement. When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.

(b) By Order. When the mediator is appointed by the Office of Administrative Hearings, the mediator shall be compensated by the parties at the uniform hourly rate and a one-time, per contested case, administrative fee, due upon appointment, as set by the Chief Administrative Law Judge. The Chief Administrative Law Judge shall set the rate at the same rate set by Rule 7 of the Rules of the North Carolina Supreme Court Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions.

(c) Change of Appointed Mediator. Pursuant to Rule .0202 of this Section, the parties have 21 days to select a mediator. Parties who fail to select a mediator within that time frame and then desire a substitution after the presiding Administrative Law Judge has appointed a mediator, shall obtain approval from the presiding Administrative Law Judge for the substitution. If the presiding Administrative Law Judge approves the substitution, the parties shall pay the presiding Administrative Law Judge's original appointee the one time, per case administrative fee provided for in Paragraph (b) of this Rule.

(d) Indigent Cases. No party found to be indigent by the presiding Administrative Law Judge shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these Rules shall waive the payment of fees from parties found by the presiding Administrative Law Judge to be indigent. Any party may move the presiding Administrative Law Judge for a finding of indigence and to be relieved of the obligation to pay that party's share of the mediator's fee. Such motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their contested case, subsequent to the conclusion of the contested case hearing but prior to the issuance of the Administrative Law Judge's decision. The presiding Administrative Law Judge may take into consideration the outcome of the contested case. The presiding Administrative Law Judge shall enter an order granting or denying a party's request.

(e) Postponement Fees. As used in this Paragraph, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for the settlement conference has been agreed upon and scheduled by the parties and the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference. A conference may be postponed only after notice to all parties of the reason for the postponement, payment of a postponement fee to the mediator, and consent of the mediator and the opposing attorney. If a mediation is postponed within seven business days of the scheduled date, the fee shall be set at a rate established by the Chief Administrative Law Judge.

Postponement fees shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Paragraph (b) of this Rule. The Chief Administrative Law Judge will set the rate at the same rate set by Rule 7 of the Rules of the North Carolina Supreme Court Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions.

(f) Payment of Compensation by Parties. Unless otherwise agreed to by the parties or ordered by the presiding Administrative Law Judge, mediator's fee shall be paid in equal shares by the parties. For purposes of this Rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the costs shall pay them equally. Payment shall be due upon completion of the conference unless there is a pending motion for determination of indigency. In such case, payment shall be due upon a ruling on the motion.

History Note: *Authority G.S. 7A-751(a); 150B-23.1;*
Eff. February 1, 1994;
Amended Eff. April 1, 2001.

26 NCAC 03 .0208 MEDIATOR

For purposes of this Section the term "certified mediator" shall mean a person who is currently certified as a mediator by the Administrative Office of the Courts pursuant to Rule 8 of Rules of the North Carolina Supreme Court Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions, 329 N.C. 795, effective December 1, 1993 and as may be subsequently amended.

History Note: *Authority G.S. 7A-751(a); 150B-23.1;*
Eff. February 1, 1994;
Amended Eff. April 1, 2001.

SECTION .0300 - EXPEDITED HEARING PROCEDURES FOR COMPLEX CONTESTED CASES

26 NCAC 03 .0301 ORDER DESIGNATING COMPLEX CONTESTED CASES

Upon the joint motion, stipulation, or consent of all parties, the Chief Administrative Law Judge (ALJ) may order any contested case to be designated as complex and eligible for expedited hearing procedures. The Chief ALJ shall issue this order, after reviewing the recommendation of the presiding ALJ, without hearing, within 30 days after the assignment of the contested case. If the Chief ALJ denies the order, the contested case shall remain on the presiding ALJ's regular docket.

History Note: *Authority G.S. 150B-31(b);*
Eff. April 1, 1997.

26 NCAC 03 .0302 FACTORS TO BE CONSIDERED

The Chief ALJ shall designate a contested case as complex and eligible for expedited procedures based upon any factors the Chief ALJ deems appropriate, including the following:

(1) the need for special expertise by the presiding ALJ;
(2) the number and diverse interests of the parties;
(3) the amount and nature of anticipated prehearing discovery and motions;
(4) the complexity of evidentiary matters and legal issues involved;
(5) the efficient administration of justice; and
(6) the economic value of the claims to be litigated.

History Note: *Authority G.S. 150B-31(b);*
Eff. April 1, 1997.

26 NCAC 03 .0303 VENUE

In order to comply with the time requirements of the expedited hearing procedures, venue for all contested cases designated as complex shall be Wake County, North Carolina, unless otherwise ordered by the presiding ALJ.

History Note: *Authority G.S. 150B-31(b);*
Eff. April 1, 1997.

26 NCAC 03 .0304 EXPEDITED HEARING PROCEDURES FOR COMPLEX CONTESTED CASES

(a) Scheduling Order By Consent. Within 15 days after the Chief ALJ has designated a contested case as complex, the parties shall submit to the presiding ALJ a scheduling order by consent. If the parties are unable to agree upon a consent scheduling order during this time period, the presiding ALJ shall remove the case from the expedited docket and return it to the regular docket.

(b) Content of the Scheduling Order. The Scheduling Order shall include the following:

(1) dates and time limits for filing motions, responses to motions, and disposition of prehearing motions;

(2) dates and time limits for completion of discovery;

(3) dates for prehearing conference and orders on final prehearing conference; and

(4) any other stipulation controlling the disposition of the contested case, including any agreement regarding abbreviated hearing procedures.

(c) Hearing and Decision. The hearing for a complex contested case shall commence within 90 days of the filing of the petition. Absent a contrary agreement between the parties, the maximum length allowed for a hearing shall be five days, and the time shall be allocated equitably between the parties. The presiding ALJ shall issue a decision within 30 days of the close of the hearing. The Office of Administrative Hearings shall deliver the official record to the agency making the final decision within 15 days after the presiding ALJ has filed a recommended decision.

History Note: *Authority G.S. 150B-31(b);*
Eff. April 1, 1997.

26 NCAC 03 .0305 RULES AND PROCEDURES

The rules contained in 26 NCAC 3 .0100 shall govern the hearing of complex contested cases except as modified by this Section.

History Note: *Authority G.S. 150B-31(b);*
Eff. April 1, 1997.

j. The appeal request form described in subdivision (4) of this subsection that the applicant or recipient may use to request a hearing.

(3) Appeals. – Except as provided by this subsection and subsection 10.15A(h2) of this act, a request for a hearing to appeal an adverse determination of the Department under this section is a contested case subject to the provisions of Article 3 of Chapter 150B of the General Statutes. The applicant or recipient must request a hearing within 30 days of the mailing of the notice required by subdivision (2) of this subsection by sending an appeal request form to the Office of Administrative Hearings and the Department. Where a request for hearing concerns the reduction, modification, or termination of Medicaid services, upon the receipt of a timely appeal, the Department shall reinstate the services to the level or manner prior to action by the Department as permitted by federal law or regulation. The Department shall immediately forward a copy of the notice to the Office of Administrative Hearings electronically. The information contained in the notice is confidential unless the recipient appeals. The Office of Administrative Hearings may dispose of the records after one year. The Department may not influence, limit, or interfere with the applicant's or recipient's decision to request a hearing."

SECTION 1.1.(b) Section 10.15A(h2) of S.L. 2008-107, as amended by Section 3.13(b) of S.L. 2008-118, reads as rewritten:

"**SECTION 10.15A.(h2)**

(1) Application. – This subsection applies only to contested Medicaid cases commenced by Medicaid applicants or recipients under subsection 10.15A(h1) of this act. Except as otherwise provided by subsection 10.15A(h1) and this subsection governing time lines and procedural steps, a contested Medicaid case commenced by a Medicaid applicant or recipient is subject to the provisions of Article 3 of Chapter 150B. To the extent any provision in this subsection or subsection 10.15A(h1) of this act conflicts with another provision in Article 3 of Chapter 150B, this subsection and subsection 10.15A(h1) controls.

(2) Simple Procedures. – Notwithstanding any other provision of Article 3 of Chapter 150B of the General Statutes, the chief administrative law judge may limit and simplify the procedures that apply to a contested Medicaid case involving a Medicaid applicant or recipient in order to complete the case as quickly as possible. To the extent possible, the ~~Hearings Division~~Office of Administrative Hearings shall schedule and hear all contested Medicaid cases within ~~45~~55 days of submission of a request for appeal. Hearings shall be conducted telephonically or by video technology, however the recipient or applicant, or the recipient's or applicant's representative may request that the hearing be conducted before the administrative law judge in person. An in-person hearing shall be conducted in Wake County, however for good cause shown, the in-person hearing may be conducted in the county of residence of the recipient or applicant. Good cause shall include but is not limited to the applicant's or recipient's impairments limiting travel or the unavailability of the applicant's or recipient's treating professional witnesses. The Department shall provide written notice to the recipient or applicant of the use of telephonic hearings, hearings by video conference, and in-person hearings before the administrative law judge, and how to request a hearing in the recipient's or applicant's county of residence. The simplified procedure may include requiring that all prehearing motions be considered and ruled on by the administrative law judge in the course of the hearing of the case on the merits. An administrative law judge assigned to a contested Medicaid case shall make reasonable efforts in a case involving a Medicaid applicant or recipient who is not represented by an attorney to assure a fair hearing and to maintain a complete record of the hearing. The administrative law judge may allow brief extensions of the time limits contained in this section for good cause and to ensure that the record is complete. Good cause includes delays

resulting from untimely receipt of documentation needed to render a decision and other unavoidable and unforeseen circumstances. Continuances shall only be granted in accordance with rules adopted by the Office of Administrative Hearings, and shall not be granted on the day of the hearing, except for good cause shown. If a petitioner fails to make an appearance at a hearing that has been properly noticed via certified mail by the Office of Administrative Hearings, the Office of Administrative Hearings shall immediately dismiss the contested case provision.

(3) Mediation. – Upon receipt of an appeal request form as provided by subdivision 10.15A(h1)(4) of this act or other clear request for a hearing by a Medicaid applicant or recipient, the ~~chief administrative law judge~~ Office of Administrative Hearings shall immediately notify the Mediation Network of North Carolina which shall within five days contact the petitioner to offer mediation in an attempt to resolve the dispute. If mediation is accepted, the mediation must be completed within 25 days of submission of the request for appeal. ~~If mediation is successful, the mediator shall inform the Hearings Division, which shall confirm with the agency that a settlement has been achieved, and the case shall be dismissed. If the petitioner rejects the offer of mediation or the mediation is unsuccessful, the mediator shall notify the Hearings Division that the case will proceed to hearing.~~Upon completion of the mediation, the mediator shall inform the Office of Administrative Hearings and the Department within 24 hours of the resolution by facsimile or electronic messaging. If the parties have resolved matters in the mediation, the case shall be dismissed by the Office of Administrative Hearings. The Office of Administrative Hearings shall not conduct any contested Medicaid cases hearings until it has received notice from the mediator assigned that either: (i) the mediation was unsuccessful, or (ii) the petitioner has rejected the offer of mediation, or (iii) the petitioner has failed to appear at a scheduled mediation. Nothing in this subdivision shall restrict the right to a contested case hearing.

(4) Burden of Proof. – The petitioner has the burden of proof to show entitlement to a requested benefit or the propriety of requested agency action when the agency has denied the benefit or refused to take the particular action. The agency has the burden of proof when the appeal is from an agency determination to impose a penalty or reduce, terminate, or suspend a benefit previously granted. The party with the burden of proof on any issue has the burden of going forward, and the administrative law judge shall not make any ruling on the preponderance of evidence until the close of all evidence.

(4a) New Evidence. – The petitioner shall be permitted to submit evidence regardless of whether obtained prior to or subsequent to the Department's actions and regardless of whether the Department had an opportunity to consider the evidence in making its determination to deny, reduce, terminate or suspend a benefit. When such evidence is received, at the request of the Department, the administrative law judge shall continue the hearing for a minimum of 15 days and a maximum of 30 days to allow for the Department's review of the evidence. Subsequent to review of the evidence, if the Department reverses its original decision, it shall immediately inform the administrative law judge.

(4b) Issue for Hearing. – For each penalty imposed or benefit reduced, terminated, or suspended, the hearing shall determine whether the Department substantially prejudiced the rights of the petitioner and if the Department, based upon evidence at the hearing:

a. Exceeded its authority or jurisdiction;
b. Acted erroneously;
c. Failed to use proper procedure;
d. Acted arbitrarily or capriciously; or
e. Failed to act as required by law or rule.

(5) Decision. – The administrative law judge assigned to a contested Medicaid case shall hear and decide the case without unnecessary delay. The ~~Hearings Division~~Office of Administrative Hearings shall send a copy of the audiotape or diskette of the hearing to the agency within five days of completion of the hearing. The judge shall prepare a written decision and send it to the parties. The decision must be sent together with the record to the agency within 20 days of the conclusion of the hearing."

SECTION 1.1.(c) Section 10.15A(e2) of S.L. 2008-107 reads as rewritten:

"**SECTION 10.15A.(e2)** The community support provider appeals process shall be developed and implemented as follows:

(1) A hearing under this section shall be commenced by filing a petition with the chief hearings clerk of the Department within 30 days of the mailing of the notice by the Department of the action giving rise to the contested case. The petition shall identify the petitioner, be signed by the party or representative of the party, and shall describe the agency action giving rise to the contested case. As used in this section, "file or filing" means to place the paper or item to be filed into the care and custody of the chief hearings clerk of the Department and acceptance thereof by the chief hearings clerk, except that the hearing officer may permit the papers to be filed with the hearing officer, in which event the hearing officer shall note thereon the filing date. The Department shall supply forms for use in these contested cases.

(2) If there is a timely request for an appeal, the Department shall promptly designate a hearing officer who shall hold an evidentiary hearing. The hearing officer shall conduct the hearing according to applicable federal law and regulations and shall ensure that:

a. Notice of the hearing is given not less than 15 days before the hearing. The notice shall state the date, hour, and place of the hearing and shall be deemed to have been given on the date that a copy of the notice is mailed, via certified mail, to the address provided by the petitioner in the petition for hearing.

b. The hearing is held in Wake County, except that the hearing officer may, ~~after consideration of the numbers, locations, and convenience of witnesses and in order to promote the ends of justice, hold the hearing~~take testimony and receive evidence by telephone or other electronic ~~means or hold the hearing in a county in which the petitioner resides.~~means. The petitioner and the petitioner's legal representative may appear before the hearing officer in Wake County.

c. Discovery is no more extensive or formal than that required by federal law and regulations applicable to the hearings. Prior to and during the hearing, a provider representative shall have adequate opportunity to examine the provider's own case file. No later than five days before the date of the hearing, each party to a contested case shall ~~provide to each other party a copy of any documentary evidence that the party intends to introduce at the hearing and shall~~ identify each witness that the party intends to call.

(3) The hearing officer shall have the power to administer oaths and ~~affirmations, subpoena the attendance of witnesses, rule on prehearing motions,~~ affirmations and regulate the conduct of the hearing. The following shall apply to hearings held pursuant to this section:

a. At the hearing, the parties may present such sworn evidence, law, and regulations as are relevant to the issues in the case.

b. The petitioner and the respondent agency each have a right to be represented by a person of his choice, including an attorney obtained at the party's own expense.

c. The petitioner and the respondent agency shall each have the right to cross-examine witnesses as well as make a closing argument summarizing his view of the case and the law.

Medicare and Medicaid Services in its July 31, 2008, letter to State Medicaid Directors, to ensure that inpatient hospital reimbursement is not provided for Hospital-Acquired Conditions (HACs) that are identified as nonpayable by Medicare. The State Plan Amendment addressing this "Never Event" modification shall apply to all Medicaid reimbursement provisions in section 4.19A of the North Carolina Medicaid State Plan governing inpatient hospital reimbursement, including Medicaid supplemental or enhanced payments and Medicaid disproportionate share hospital payments.

AMEND MEDICAID RECIPIENT APPEALS PROCESS

SECTION 10.30.(a) Article 2 of Chapter 108A of the General Statutes is amended by adding a new Part to read:

"Part 6A. Medicaid Recipient Appeals Process.

"**§ 108A-70.9A. Appeals by Medicaid recipients.**

(a) Definitions. – The following definitions apply in this Part, unless the context clearly requires otherwise.

(1) Adverse determination. – A determination by the Department to deny, terminate, suspend, or reduce a Medicaid service or an authorization for a Medicaid service.

(2) Recipient. – A recipient and the recipient's parent, guardian, or legal representative, unless otherwise specified.

(3) OAH. – The Office of Administrative Hearings.

(b) General Rule. – Notwithstanding any provision of State law or rules to the contrary, this section shall govern the process used by a Medicaid recipient to appeal an adverse determination made by the Department.

(c) Notice. – Except as otherwise provided by federal law or regulation, at least 10 days before the effective date of an adverse determination, the Department shall notify the recipient, and the provider, if applicable, in writing of the adverse determination and of the recipient's right to appeal the adverse determination. The Department shall not be required to notify a recipient's parent, guardian, or legal representative unless the recipient's parent, guardian, or legal representative has requested in writing to receive the notice. The notice shall be mailed on the date indicated on the notice as the date of the determination. The notice shall include:

(1) An identification of the recipient whose services are being affected by the adverse determination, including the recipient's full name and Medicaid identification number.

(2) An explanation of what service is being denied, terminated, suspended, or reduced and the reason for the determination.

(3) The specific regulation, statute, or medical policy that supports or requires the adverse determination.

(4) The effective date of the adverse determination.

(5) An explanation of the recipient's right to appeal the Department's adverse determination in an evidentiary hearing before an administrative law judge.

(6) An explanation of how the recipient can request a hearing and a statement that the recipient may represent himself or herself or use legal counsel, a relative, or other spokesperson.

(7) A statement that the recipient will continue to receive Medicaid services at the level provided on the day immediately preceding the Department's adverse determination or the amount requested by the recipient, whichever is less, if the recipient requests a hearing before the effective date of the adverse determination. The services shall continue until the hearing is completed and a final decision is rendered.

(8) The name and telephone number of a contact person at the Department to respond in a timely fashion to the recipient's questions.

(9) The telephone number by which the recipient may contact a Legal Aid/Legal Services office.

(10) The appeal request form described in subsection (e) of this section that the recipient may use to request a hearing.

Petitioner's Supplemental Exhibit 1

(d) Appeals. – Except as provided by this section and G.S. 108A-70.9B, a request for a hearing to appeal an adverse determination of the Department under this section is a contested case subject to the provisions of Article 3 of Chapter 150B of the General Statutes. The

recipient shall request a hearing within 30 days of the mailing of the notice required by subsection (c) of this section by sending an appeal request form to OAH and the Department. Where a request for hearing concerns the reduction, modification, or termination of Medicaid services, including the failure to act upon a timely request for reauthorization with reasonable promptness, upon the receipt of a timely appeal, the Department shall reinstate the services to the level or manner prior to action by the Department as permitted by federal law or regulation. The Department shall immediately forward a copy of the notice to OAH electronically. The information contained in the notice is confidential unless the recipient appeals. OAH may dispose of the records after one year. The Department may not influence, limit, or interfere with the recipient's decision to request a hearing.

(e) Appeal Request Form. – Along with the notice required by subsection (c) of this section, the Department shall also provide the recipient with an appeal request form which shall be no more than one side of one page. The form shall include the following:

(1) A statement that in order to request an appeal, the recipient must send the form by mail or fax to the address or fax number listed on the form within 30 days of mailing of the notice.

(2) The recipient's name, address, telephone number, and Medicaid identification number.

(3) A preprinted statement that indicates that the recipient would like to appeal the specific adverse determination of which the recipient was notified in the notice.

(4) A statement informing the recipient that he or she may choose to be represented by a lawyer, a relative, a friend, or other spokesperson.

(5) A space for the recipient's signature and date.

(f) Final Decision. – After a hearing before an administrative law judge, the judge shall return the decision and record to the Department in accordance with G.S. 108A-70.9B. The Department shall make a final decision in the case within 20 days of receipt of the decision and record from the administrative law judge and promptly notify the recipient of the final decision and of the right to judicial review of the decision pursuant to Article 4 of Chapter 150B of the General Statutes.

"**§ 108A-70.9B. Contested Medicaid cases.**

(a) Application. – This section applies only to contested Medicaid cases commenced by Medicaid recipients under G.S. 108A-70.9A. Except as otherwise provided by G.S. 108A-70.9A and this section governing time lines and procedural steps, a contested Medicaid case commenced by a Medicaid recipient is subject to the provisions of Article 3 of Chapter 150B of the General Statutes. To the extent any provision in this section or G.S. 108A-70.9A conflicts with another provision in Article 3 of Chapter 150B of the General Statutes, this section and G.S. 108A-70.9A control.

(b) Simple Procedures. – Notwithstanding any other provision of Article 3 of Chapter 150B of the General Statutes, the chief administrative law judge may limit and simplify the procedures that apply to a contested Medicaid case involving a Medicaid recipient in order to complete the case as quickly as possible.

(1) To the extent possible, OAH shall schedule and hear contested Medicaid cases within 55 days of submission of a request for appeal.

(2) Hearings shall be conducted telephonically or by video technology with all parties, however the recipient may request that the hearing be conducted in person before the administrative law judge. An in-person hearing shall be conducted in Wake County, however, for good cause shown, the in-person hearing may be conducted in the county of residence of the recipient or a nearby county. Good cause shall include, but is not limited to, the recipient's impairments limiting travel or the unavailability of the recipient's treating professional witnesses. The Department shall provide written notice to the recipient of the use of telephonic hearings, hearings by video conference, and in-person hearings before the administrative law judge, and how to request a hearing in the recipient's county of residence.

(3) The simplified procedure may include requiring that all prehearing motions be considered and ruled on by the administrative law judge in the course of the hearing of the case on the merits. An administrative law judge assigned to a contested Medicaid case shall make reasonable efforts in a case

involving a Medicaid recipient who is not represented by an attorney to assure a fair hearing and to maintain a complete record of the hearing.

(4) The administrative law judge may allow brief extensions of the time limits contained in this section for good cause and to ensure that the record is complete. Good cause includes delays resulting from untimely receipt of documentation needed to render a decision and other unavoidable and unforeseen circumstances. Continuances shall only be granted in accordance with rules adopted by OAH and shall not be granted on the day of the hearing, except for good cause shown. If a petitioner fails to make an appearance at a hearing that has been properly noticed via certified mail by OAH, OAH shall immediately dismiss the contested case, unless the recipient moves to show good cause within three business days of the date of dismissal.

(5) The notice of hearing provided by OAH to the recipient shall include the following information:

a. The recipient's right to examine at a reasonable time before the hearing and during the hearing the contents of the recipient's case file and documents to be used by the Department in the hearing before the administrative law judge.

b. The recipient's right to an interpreter during the appeals process.

c. Circumstances in which a medical assessment may be obtained at agency expense and be made part of the record. Qualifying circumstances include those in which (i) a hearing involves medical issues, such as a diagnosis, an examining physician's report, or a medical review team's decision; and (ii) the administrative law judge considers it necessary to have a medical assessment other than that performed by the individual involved in making the original decision.

(c) Mediation. – Upon receipt of an appeal request form as provided by G.S. 108A-70.9A(e) or other clear request for a hearing by a Medicaid recipient, OAH shall immediately notify the Mediation Network of North Carolina, which shall contact the recipient within five days to offer mediation in an attempt to resolve the dispute. If mediation is accepted, the mediation must be completed within 25 days of submission of the request for appeal. Upon completion of the mediation, the mediator shall inform OAH and the Department within 24 hours of the resolution by facsimile or electronic messaging. If the parties have resolved matters in the mediation, OAH shall dismiss the case. OAH shall not conduct a hearing of any contested Medicaid case until it has received notice from the mediator assigned that either: (i) the mediation was unsuccessful, or (ii) the petitioner has rejected the offer of mediation, or (iii) the petitioner has failed to appear at a scheduled mediation. Nothing in this subsection shall restrict the right to a contested case hearing.

(d) Burden of Proof. – The recipient has the burden of proof to show entitlement to a requested benefit or the propriety of requested agency action when the agency has denied the benefit or refused to take the particular action. The agency has the burden of proof when the appeal is from an agency determination to impose a penalty or to reduce, terminate, or suspend a previously granted benefit. The party with the burden of proof on any issue has the burden of going forward, and the administrative law judge shall not make any ruling on the preponderance of evidence until the close of all evidence.

(e) New Evidence. – The recipient shall be permitted to submit evidence regardless of whether obtained prior to or subsequent to the Department's actions and regardless of whether the Department had an opportunity to consider the evidence in making its adverse determination. When the evidence is received, at the request of the Department, the administrative law judge shall continue the hearing for a minimum of 15 days and a maximum of 30 days to allow for the Department's review of the evidence. Subsequent to review of the evidence, if the Department reverses its original decision, it shall immediately inform the administrative law judge.

(f) Issue for Hearing. – For each adverse determination, the hearing shall determine whether the Department substantially prejudiced the rights of the recipient and if the Department, based upon evidence at the hearing:

(1) Exceeded its authority or jurisdiction.

(2) Acted erroneously.

(3) Failed to use proper procedure.
(4) Acted arbitrarily or capriciously.
(5) Failed to act as required by law or rule.

(g) Decision. – The administrative law judge assigned to a contested Medicaid case shall hear and decide the case without unnecessary delay. OAH shall send a copy of the audiotape or diskette of the hearing to the agency within five days of completion of the hearing. The judge shall prepare a written decision and send it to the parties. The decision shall be sent together with the record to the agency within 20 days of the conclusion of the hearing."

"**§ 108A-70.9C. Informal review permitted.**

Nothing in this Part shall prevent the Department from engaging in an informal review of a contested Medicaid case with a recipient prior to issuing a notice of adverse determination as provided by G.S. 108A-70.9A(c)."

SECTION 10.30.(b) Section 10.15A.(h3) of S.L. 2008-107, as amended by Section 3.13.(b) of S.L. 2008-118, reads as rewritten:

"**SECTION 10.15A.(h3)** From funds available to the Department of Health and Human Services (Department) for the ~~2008-2009~~2010-2011 fiscal year, the sum of ~~two~~ one million dollars ~~($2,000,000)~~ ($1,000,000) shall be transferred by the Department ~~of Health and Human Services~~ to the Office of Administrative Hearings (OAH). These funds shall be allocated by ~~the Office of Administrative Hearings~~ OAH for mediation services provided for Medicaid ~~applicant and~~ recipient appeals and to contract for other services necessary to conduct the appeals process. OAH shall continue the Memorandum of Agreement (MOA) with the Department for mediation services provided for Medicaid recipient appeals and contracted services necessary to conduct the appeals process. The MOA will facilitate the Department's ability to draw down federal Medicaid funds to support this administrative function. Upon receipt of invoices from OAH for covered services rendered in accordance with the MOA, the Department shall transfer the federal share of Medicaid funds drawn down for this purpose."

SECTION 10.30.(c) Not later than October 1, 2011, the Department of Health and Human Services and the Office of Administrative Hearings (OAH) shall submit a report to the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Subcommittee on Health and Human Services, the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services, and the Fiscal Research Division on the number, status, and outcome of contested Medicaid cases handled by OAH pursuant to the appeals process established in Part 6A of Article 2 of Chapter 108A of the General Statutes. The report shall include information on the number of contested Medicaid cases resolved through mediations and through formal hearings, the outcome of settled and withdrawn cases, and the number of incidences in which the Division of Medical Assistance (DMA) reverses the decision of an administrative law judge along with DMA's rationale for the reversal.

ACCOUNTING FOR MEDICAID RECEIVABLES AS NONTAX REVENUE

SECTION 10.31. Section 10.64.(b) of S.L. 2009-451 reads as rewritten:

"**SECTION 10.64.(b)** For the 2009-2010 fiscal year, the Department of Health and Human Services shall deposit from its revenues one hundred twenty-four million nine hundred ninety-four thousand nine hundred fifty-four dollars ($124,994,954) with the Department of State Treasurer to be accounted for as nontax revenue. For the 2010-2011 fiscal year, the Department of Health and Human Services shall deposit from its revenues ~~one hundred million dollars ($100,000,000)~~one hundred thirty-five million dollars ($135,000,000) with the Department of State Treasurer to be accounted for as nontax revenue. These deposits shall represent the return of General Fund appropriations provided to the Department of Health and Human Services to provide indigent care services at State-owned and operated mental hospitals. The treatment of any revenue derived from federal programs shall be in accordance with the requirements specified in the Code of Federal Regulations, Volume 2, Part 225."

MEDICAID PREFERRED DRUG LIST

SECTION 10.32. Section 10.66.(c) of S.L. 2009-451 reads as rewritten:

"**SECTION 10.66.(c)** The Department, in consultation with the PAG, shall adopt and publish policies and procedures relating to the preferred drug list, including:

(1) Guidelines for the presentation and review of drugs for inclusion on the preferred drug list,

JUDICIAL REVIEW IN MEDICAID APPEALS[1]

Judicial review of a final agency decision in a Medicaid appeal, like all administrative appeals, is within the jurisdiction of the Superior Courts of the state. Superior Court proceedings for administrative appeals, however, are *sui generis* and governed by procedures and standards that are very different from those most commonly seen in practice before the state courts. These materials will acquaint the attorney with the procedures commonly used in Judicial Review proceedings; the various standards of review that are set out in the Administrative Procedure Act which govern the Superior Court's disposition of the petition for review; and a few miscellaneous issues that the practitioner might typically encounter.

I. Procedure for Obtaining Judicial Review

A. Filing of Petition

Judicial review of final agency decisions is governed by Article 4 of the Administrative Procedure Act. G.S. § 150B-43 through 150B-52. The Act imposes five requirements to be met before a party is entitled to judicial review of an agency decision: "(1) the petitioner must be an aggrieved party; (2) there must be a final decision; (3) the decision must result from a contested case; (4) the petitioner must have exhausted all administrative remedies; and (5) there must be no other adequate procedure for judicial review." G.S. § 150B-43; *Charlotte Truck Drive Training School, Inc. v. North Carolina Div. of Motor Vehicles,* 95 N.C. App. 209, 211-12, 381 S.E.2d 861, 862 (1989).

If these requirements are met, a person may obtain judicial review of an agency decision by filing a petition in the Superior Court of Wake County or in the Superior Court of the county where the person resides. G.S. § 150B-45. The petition must be filed within thirty days after the person is served with a written copy of the agency decision. *Id.* Failure to file the petition within the thirty day period waives the right to judicial review. For good cause shown, however, the court may accept a petition filed after the thirty day period has expired. G.S. § 150B-45(b).

The petition must contain "what exceptions are taken to the decision or procedure and what relief the petitioner seeks." G.S. § 150B-46. The petitioner must serve by personal service or by certified mail copies of the petition on all parties of record within ten days of filing the petition with the court. For Medicaid appeals, a copy of the filed petition together with a summons should be served by certified mail to:

Ms. Emery Milliken, Esq.
Office of the Secretary, Department of Health and Human Services
Adams Building, 101 Blair Drive
2001 Mail Service Center
Raleigh, NC 27699-2001

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[1] This manuscript is based primarily upon the excellent work of Carson Carmichael, a partner with Bailey & Dixon, LLP, who practices principally in the area of administrative law, and to whom I am grateful.

Other parties to the proceeding may file a response to the petition within thirty days of service. In the response the parties, including agencies, may state exceptions to the decision or procedure and what relief is sought. Any person aggrieved may file a motion to intervene as provided in G.S. § IA-l, Rule 24.

B. Stay of Agency Decision

Any person aggrieved may, at any time before or during the review proceeding, apply to the reviewing court for an order staying the agency decision pending the outcome of the judicial review. G.S. § 150B-48. Such a stay may be granted or denied in the discretion of the court, subject to the provisions G.S. §IA-l, Rule 65. *Id.*

In Medicaid appeals, there is no entitlement to maintenance of services after the fair hearing process is concluded and the final agency decision is rendered. *Goldberg v. Kelly,* 397 U.S. 254, 261 (1970); *see* 42 C.F.R. § 431.230(a). Therefore, to prevent a termination or reduction of services while the petition for judicial review is pending, it is necessary to file a Motion for Preliminary Injunction under Rule 65, asking to court to order the Department of Health and Human Services to maintain the status quo while the court considers the appeal. In cases where the agency's action is upheld, federal regulations permit the Department to recoup the costs associated with services furnished to the recipient "to the extent they were furnished solely by reason of this section." Although the Department has rarely sought recoupment, the client should be informed of this possibility. In any case, it is doubtful that services provided by the Department in conformity with an injunction are services "furnished *solely* by reason of this section."

II. Record for Review

A. Time Period for Filing Record

Unlike civil cases in which it is the appellant's responsibility to prepare the record, after receiving a copy of the petition for review, the agency must transmit the original or certified copy of the official record to the reviewing court within thirty days. G.S. § 150B-47. Upon request by the agency, the court may allow additional time for the filing of the record. *Id.*

In Medicaid appeals, it is not the practice of the Attorney General's office to serve a copy of the Record on Appeal on counsel for the petitioner. Consequently, petitioner's counsel can expect to receive only a "Notice of Filing of Record of Appeal" and then obtain a copy of the Record on Appeal from the case file maintained by the Clerk of Court.

B. Contents of the Record

The official record typically consists of:

(1) Notices, pleadings, motions, and intermediate rulings;
(2) Questions and offers of proof, objections, and rulings thereon;
(3) Evidence presented;

(4) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose; and
(5) Any decision, opinion, order, or report by the officer presiding at the hearing and by the agency.

G.S. § 150B-37.

Generally, testimony at OAH is recorded but need not be transcribed unless requested by a party, who is responsible for the cost of transcription. G.S. §150B-37(b). If any of the items listed in the statute are not necessary for review of the agency's final decision, with permission of the court, the record may be shortened by stipulation of the parties. G.S. § 150B-47. In practice, a transcript of all of the testimony and arguments in Medicaid appeals is customarily included in the Record on Appeal.

III. Standards of Review

A. General Considerations

The scope of review of final agency decisions is set out in G.S. § 150B-51. Judicial review is conducted by the Superior Court without a jury. G.S. §150B-50. In reviewing a final agency decision, the court's authority is limited to affirming the decision, remanding the case to the agency for further proceedings, or reversing or modifying the agency's decision if the substantial rights of the petitioner may have be prejudiced because the agency's findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions;
(2) In excess of the statutory authority or jurisdiction of the agency;
(3) Made upon unlawful procedure;
(4) Affect by other error of law;
(5) Unsupported by substantial evidence in view of the entire record as submitted; or
(6) Arbitrary or capricious.

G.S. §150B-51(b).

The type of review conducted by the court under G.S. §150B-51depends upon the error which the petitioner alleges has occurred. *Brooks v. Ansco & Assoc., Inc.,* 114 N.C. App. 711, 716, 443 S.E.2d 89, 92 (1994).

B. De Novo Review

If it is alleged that the agency's decision was based upon error of law, *de novo* review is required. "An error of law, as that term is used in N.C. Gen. Stat. Sec. 150B-51 (b)(4), exists if a conclusion of law entered by the administrative agency is not supported by the findings of fact entered by the agency or if the conclusion of law does not support the decision of the agency." *Brooks*, 443 S.E.2d at 92. Agency error in interpreting a statute is also considered an error of law. *Best v. N. C. State Bd. of Dental Examiners,* 108 N.C. App. 158, 161, 423 S.E.2d 330, 332

(1992), *disc. review denied,* 333 N.C. 461, 428 S.E. 2d 184 (1993). Thus, "[w]hen the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review." *Id.* (quoting *Savings and Loan League v. Credit Union Comm.,* 302 N.C. 458, 465, 276 S.E. 2d 404, 410 (1981)). When it is alleged that the agency's decision is in violation of constitutional provisions, in excess of the agency's statutory authority, or made upon unlawful procedure, or affected by other error or law, the reviewing court also applies a *de novo* review. *In re Denial of NC Idea's Refund of Sales and Use Tax,* 196 N.C. App. 426, 675 S.E.2d 88 (2009).

In Medicaid appeals, *de novo* review is appropriate for claims alleging that the Department failed to follow the statutory provisions of the APA. For example, G.S. § 150B-36 mandates that the Department adopt the factual findings of the ALJ unless "the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the administrative law judge to evaluate the credibility of witnesses." G.S. § 150B-36(b). Still further, Section 36(b1) requires that the department explain the reasons for its failure to adopt a specific factual finding and the evidence in the record relied upon in not adopting the finding.

De novo review may also be invoked for violations of federal Medicaid regulations. For example, the Department frequently seeks to foreclose the introduction of relevant evidence at the OAH evidentiary hearing under the dubious authority of *Britthaven v. N.C. Dept. of Human Resources,* 118 N.C. App. 379, 455 S.E.2d 455 (1995). Final agency decisions often fault the ALJ for permitting "new" evidence to be admitted at the hearing, employing this "error" as a basis for rejecting a factual finding. However, the Medicaid regulations demand that a *de novo* hearing be afforded to a Medicaid recipient when challenging the reduction or termination of benefits, and that the recipient be given the opportunity to examine witnesses and "establish all pertinent facts and circumstances." 42 C.F.R. § 431.242.

C. Whole Record Test

When the petitioner alleges that the agency's decision is not supported by substantial competent evidence, in violation of G.S. § 150B-51(b)(5), review is to be conducted under the "whole record" test. *Best v. N.C. State Bd. of Dental Examiners,* 114, N.C. App. at 716, 443 S.E.2d at 92. The "whole record" test demands that "[i]f, after all of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand." In this context substantial evidence has been held to mean such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Therefore, in reaching its decision, the reviewing court is prohibited from replacing the agency's findings of fact with its own judgment of how credible, or incredible, the testimony appears to be, so long as substantial evidence of those findings exists in the whole record. *Cameron v. N.C. State Bd. of Dental Examiners,* 95 N.C. App. 332, 337, 382 S.E.2d 864, 867 (1989). The definition of "substantial evidence" stated in *Cameron* is codified at G.S. §150B-2(8b). Likewise, if the petitioner alleges that the agency's final decision is arbitrary or capricious, the standard of review is the whole record test. The arbitrary or capricious standard is difficult to meet. Agency action is considered arbitrary or capricious "only if it indicates a 'lack of fair and careful consideration' and fails 'to indicate any course of reasoning and the exercise of judgment.'" *Watson v. N.C. Real Estate*

Commission, 87 N.C. App. 637, 649, 362 S.E.2d 284, 301 (1987), *cert. denied,* 321 N.C. 746, 365 S.E.2d 296 (1988).

In Medicaid appeals, the whole record test is most frequently used to analyze the medical data supporting the requested service. It is also often employed to resolve the testimony of competing expert witnesses.

D. The Superior Court Order

Under the APA, a Superior Court is empowered to affirm, reverse or modify the final agency decision. G.S. § 150B-51(b). The court may remand the case to the agency or the ALJ for further proceedings. The Court may also adopt the decision of the ALJ if the Court determines that the petitioner's substantial rights were prejudiced by the agency's actions.

In most Medicaid appeals, a petition for judicial review is occasioned by the Department's rejection of an ALJ decision favorable to the Medicaid recipient. In such cases, the Superior court's review is governed by G.S. § 150B-51(c), which demands that the Superior Court review the official record, *de novo*, making its own findings of fact and conclusions of law. Importantly, this subsection states that the Superior Court "shall determine whether the petitioner is entitled to the relief sought in the petition, based upon its review of the official record." That is, the Superior Court must rule on the merits of the petitioner's application for services. In most cases, therefore, a Superior Court Order favorable to a petitioner must contain sufficient findings of fact and conclusions of law to support a judgment in the petitioner's favor. While the subsection permits the Superior Court to "adopt the administrative law judge's decision," the better practice is to provide the Superior Court Judge with a draft order that repeats the supporting evidence adduced at the OAH hearing and contained in the Record on Appeal.

E. Appellate Review

The scope of review of an appellate court reviewing a lower court's review of an agency decision is governed by G.S. 150B-52. "The scope of review in these instances is the same as it is for other civil cases," that is, whether the lower court committed an error of law. *Best v. N.C. State Bd. of Dental Examiners,* 108 N.C. App. at 161, 423 S.E.2d at 332. The appellate court employs the whole record test to "determine if the agency's findings and conclusions are support by substantial evidence, or, evidence that a reasonable mind could find adequate to support a conclusion." *Id.* at 162, 423 S.E.2d at 332 (citing *North Carolina Dept. of Correction v. Hodge,* 99 N.C. App. 602, 610, 394 S.E.2d 285, 289 (1990)). After taking into consideration evidence that supports and contradicts the agency decision, the appellate court must uphold the agency decision if the decision has a rational basis in the evidence. *Id.*

IV. Miscellaneous Considerations

A. Expertise of the Agency vs. Treating Physician

Acknowledging that many agencies and boards are comprised of members of a particular profession or industry who bring technical expertise to the hearing of a contested case, the APA

permits an agency to "use its experience, technical competence, and specialized knowledge in the evaluation of evidence presented to it." G.S. §150B-41(d). In addition, the administrative law judge is directed to "decide the case based upon the preponderance of the evidence, *giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency.*" G.S. § 150B-34(a).

In the context of Medicaid appeals, the Department will often tout its knowledge of the service definitions and overall operations of the Medicaid program in order to bolster the decisions made by its reviewers. Two responses are in order. First, "due regard" is not equivalent to deference. In order for the administrative law judge to grant due regard, the knowledge and expertise of the agency must be demonstrated. Stated otherwise, due regard must be earned. Recognizing that the demands of any administrative action implicates the expertise of the agency, the weight afforded to the agency's expertise in a particular case "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also Rainey v. North Carolina Dept. of Public Instruction*, 361 N.C. 679, 652 S.E.2d 251 (2007). Second, the specialized knowledge of the agency rarely extends to the determination of "medical necessity" made in an individual case because the treating physician is in the best position to make a judgment concerning a recipient's individual medical needs. In *Lackey v. N.C. Dept. of Human Resources*, 306 N.C. 231, 293 S.E.2d 171 (1982), the North Carolina Supreme Court ruled that a single report from a non-examining physician – particularly an opinion that is contrary to all the medical facts and the opinions from treating physicians – did not constitute substantial evidence to support a denial of Medicaid benefits.

> Although the reports of non-examining physicians may in some circumstances constitute substantial evidence to support an agency's determination, they deserve little weight in the overall evaluation of disability. Further, it has been held specifically that where the non-examining physician's opinion is the only evidence supporting a denial of disability benefits and is contrary to all the medical facts as well as the opinion of the treating physician, that opinion alone cannot constitute substantial evidence to support a conclusion relying solely on it.

Lackey, 293 S.E.2d at 240 (citations omitted).

In *Dean v. Cone Mills Corp.*, 350 S.E.2d 99, 83 N.C. App. 273 (1986), the North Carolina Court of Appeals (citing *Lackey*) found that the standard of review under the APA required the ALJ to consider the entire record, not just the opinion of a non-examining physician, when determining the denial of workers' compensation benefits. An ALJ is required to review all evidence in determining whether an agency's denial of benefits was lawful. 350 S.E.2d at 101. *See also Weaver v. Reagen,* 886 F.2d 194, 200 (8th Cir. 1989) (deference to treating physician required by Medicaid statute); *Pinneke v. Preisser,* 623 F.2d 546, 550 (8th Cir. 1980) ("The decision of whether or not certain treatment or a particular type of surgery is 'medically necessary' rests with the individual recipient's physician and not with clerical personnel or government officials.").

B. Attorney's Fees

A prevailing petitioner may seek payment of attorney's fees, filing a motion under the following statutory section:

> In any civil action ... contesting State action ..., unless the prevailing party is the State, the court may in its discretion allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency 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.

G.S. § 6-19.1.

The burden is on the state agency to prove its position was substantially justified. *Walker v. N.C. Coastal Resources Comm.,* 124 N.C. App. 1, 476 S.E.2d 138 (1996). "Substantial justification" means "justified in substance or in the main – that is, justified to a degree that could satisfy a reasonable person." *Crowell Constructors, Inc. v. State ex rel. Cobey*, 342 N.C. 838, 844, 467 S.E.2d 675, 679 (1996). The Court in *Crowell* explained:

> [T]his standard should not be so loosely interpreted as to require the agency to demonstrate only that the suit is not frivolous, for 'that is assuredly not the standard for Government litigation of which a reasonable person would approve.' Rather, we adopt a middle-ground objective standard to require the agency to demonstrate that its position, *at and from the time of its initial action,* was rational and legitimate to such a degree that a reasonable person could find it satisfactory or justifiable in light of the circumstances then known to the agency.

Id. (emphasis added) (quoting *Pierce v. Underwood*, 487 U.S. 552 (1988)).

The agency must establish that its position had a reasonable basis both in law *and* fact. *Pierce*, 487 U.S. at 565. An agency has been held liable for fees if it continues "pressing its claim throughout this action" despite contravening, clearly established law or facts, even in cases where the agency initially prevailed on the merits. *Walker v. N.C. Coastal Resources Comm.*, 124 N.C. App. 1, 476 S.E. 2d 138 (1996); *Tay v. Flaherty*, 100 N.C. App. 51, 294 S.E.2d 217 (1990). Thus, section 6-19.1 allows for attorney's fees in cases where the suit is *pressed* without substantial justification. In *Crowell Constructors, Inc. v. State ex rel. Cobey*, 342 N.C. 838, 467 S.E.2d 675 (1996), the North Carolina Supreme Court interpreted this statute as to "require the agency to demonstrate that its position, *at and from the time of its initial action*, was rational and legitimate to such degree that a reasonable person could find it satisfactory or justifiable in light of the circumstances then known to the agency." 342 N.C. at 841. Hence, in cases where the agency has unreasonably rejected the decision of the ALJ and continued to adhere to its own position, a petitioner could argue that fees incurred after the final agency decision resulted from a position that could not be substantially justified and seek payment of fees from that time forward.

LOCAL RULES GOVERNING ADMINISTRATIVE APPEALS TO SUPERIOR COURT

BUNCOMBE COUNTY (Dist. 28)

Rule 11. ADMINISTRATIVE APPEALS

11.1 Rules 11.1 through 11.15 shall govern judicial review of final administrative agency decisions pursuant North Carolina General Statues, 150B, and judicial review of all other administrative rulings other than those requiring evidence to be presented to the Superior Court.

11.2 With respect to administrative judicial review of matters not covered by G.S. 150B of the North Carolina General Statutes, reference in these rules to procedures in said statutes shall apply.

11.3 Pursuant to N.C.G.S. 150B-47, the agency which makes the final agency decision must submit the official record to the court within thirty (30) days after the receipt of the copy of the petition for review, or within such additional time as the court, or these rules, may allow. In cases brought to the Court by certiorari, the record shall be submitted within thirty (30) days from the issuance of the writ.

Prior to submitting the official record, the agency shall consider any proposed additions or deletion to the N.C.G.S.150B-37-42 record submitted by the petitioner or the respondent state agency, when it did not make for final agency decision, to the final decision agency within fifteen (15) days of the filing of the petition for judicial review. The petition shall request deletion of any items not required for an understanding of the basis for relief from the final agency decision asserted in the petition for judicial review. Requests for additions to the record shall be accompanied by a copy of the proposed addition, unless a copy was previously provided to the parties. The final decision agency shall notify the petitioner and the respondent state agency of any deletions it proposes to the official record within twenty (20) days of receipt of the petition for judicial review. If the parties are unable to settle the record, the final decision agency shall submit the official record acceptable to the agency with a report of the remaining differences.

In the cases where no record was prepared pursuant to N.C.G.S.150B-37, or -42, the final decision agency shall notify the petitioner and any intervenor, a proposed official record within twenty (20) days after receipt of a copy of the petition for review. Requests for additions or deletions shall be served on the agency within ten (10) days of receipt of the proposed official record. After consideration of such requests, the agency shall file the official record within ten (10) days of receipt of any requests for additions or deletions. If no such requests are served on the agency, the proposed official record shall be filed as the official record. If the parties are unable to settle the record, the agency shall accompany the official record with report of the remaining differences.

If the review is of a decision of a local government or agency, all relevant ordinances shall be included in the record.

A motion to make previously requested additions or deletions to the official record shall be filed within ten (10) days of the filing of the official record. Any party unreasonably refusing to stipulate to limit the record shall be taxed by the court for the additional costs occasioned by the refusal.

11.4 The petition for judicial review shall state explicitly the objections to the agency decision and the basis for the objections. Any objections to specific findings of fact and conclusion of law shall be identified in the petition. The petition shall be accompanied by a copy of the agency decision and a certificate of service showing service on the parties to any prior contested case hearing.

11.5 Applications to present additional evidence, pursuant to N.C.G.S. 150B-49. shall be filed within thirty (30) days of the submission of the official record, unless the court finds good cause for a late filed application. The application shall be accompanied by a copy of the additional evidence or a statement showing what the evidence will show. Responses to such applications shall be filed within twenty (20) days of service of the application.

11.6 Applications for stay of decision, pursuant to N.C.G.S. 150B-48, shall be accompanied by:

a. A copy of the final agency decision.
b. An affidavit demonstrating the harm to the applicant and an ability to post a bond adequate to compensate the agency or any other party to the contested case proceeding which will be adversely affected by the stay.
c. A memorandum of law, or other statement of law, demonstrating the applicant is entitled to a stay of decision; and
d. A certificate of service demonstrating notice to the agency before the hearing on the application is conducted.

11.7 A motion to remand to the agency pursuant to N.C.G.S. 150B-51(a) shall be filed within thirty (30) days of the filing of the contested case petition.

11.8 The brief of the petitioner shall be filed with this Court and served upon all other parties to the proceeding in accordance with N.C.G.S. 1A-1, Rule 5, within thirty (30) days after the original or a certified copy of the record of the proceedings under review has been filed with this Court, as provided in N.C.G.S. 150B-47, or settled by this Court, whichever is later.

11.9 The brief of the respondent, whether the agency or any person who was party to the agency proceeding and who became party to the review proceeding pursuant to N.C.G.S. 150B-46, shall be filed with this Court and served upon all other parties to the proceeding in accordance with N.C.G.S. 1A-1, Rule 5, within thirty (30) days after service of the brief of the petitioner.

11.10 The brief of an intervenor who may become a party to the review proceeding, pursuant to N.C.G.S. 150-46, shall be filed with this Court and served upon all other parties to the proceeding in accordance with N.C.G.S. 1A-1, Rule 5, within thirty (30) days of the date of the filing of the intervenor's motion to intervene; provided that where, because of the time of such motion for intervention, the intervenor's brief should be under thirty (30) days or less from the date the review is set for hearing, the intervenor's brief shall be filed concurrently with its motion to intervene.

11.11 Unless the Court in its discretion shall order to the contrary, there shall be no reply briefs filed by any party to the review proceedings.

11.12 Briefs pursuant to Rule 11.7 – 11.10 shall be in the format required by Appellate Rule 28 and in the cases of Rules 11-7 – 11.9 shall not exceed ten (10) pages, and in the case of 11.10, five (5) pages except as specifically upon motion ordered by the Court.

11.13 Judicial review proceedings shall be set for hearing at the first regular non-jury administrative session of Buncombe County Superior Court commencing on or after the thirtieth (30th) day following the filing in this Court of the brief of the respondent or such later regular session of the Superior Court as determined by the Trial Court Administrator under the supervision of the Senior Resident Superior Court Judge.

11.14 All parties to the judicial review proceedings may offer oral argument.

11.15 Nothing contained in the 28th District Local Rules 11.1 through 11.15 shall be deemed to prohibit the Court in its discretion for good cause shown, from enlarging the times herein provided for filing briefs for any party to the review proceeding, from permitting the filing of briefs after the expiration of the time previously allotted for such filings, or from continuing and rescheduling review hearings.

11.16 All time periods prescribed or allowed by the 28th District Local Rules 11.1 through 11.15 or by any order of this Court pursuant to such rules shall be computed in accordance with N.C.G.S. 1A-1, Rule 6(a).

BURKE COUNTY (Dist. 25)

15. Procedure Rules when the Superior Court acts as an Appellate Court.

In those cases in which the Superior court is called upon to act as an appellate court, the following rules of procedure shall be followed in District 25A:

(a) Upon filing of a Petition for Review, the Petitioner shall have thirty days in which to serve a proposed Record on Appeal upon opposing counsel.

(b) Opposing Counsel shall have twenty days from the date of service to serve Petitioner with an alternative Record on Appeal, or object to the form or content of the Petitioner's Proposed Record on Appeal.

(c) Counsel will undertake to resolve disputes as to the content of the Record on Appeal. The TCC will be kept informed of the status of the Record on Appeal.

(d) Upon settling of the Record on Appeal, all Counsel shall sign an attached certificate of settlement of the Record. It shall then be filed with the Clerk of Court of the County in which the action is filed, and a copy for the presiding judge delivered to the TCC by the Petitioner.

(e) Petitioner shall have twenty days from the filing of the Record on Appeal to file and serve any brief or memoranda. A copy for the presiding judge will be delivered to the TCC.

(f) Opposing party shall have twenty days from the service of the last Petitioner's brief or memoranda to file responsive brief or memoranda with a copy for the presiding judge to the TCC. If Petitioner does not file a brief within the time allowed in (e) above, opposing party shall file a brief at any time after twenty days from the filing of the Record on Appeal.

(g) Failure of Petitioner to file a brief within the time required will be deemed abandonment of the Petition, and the Senior Resident Judge shall dismiss the Petition.

(h) The Appeal shall be placed on the next Administrative Scheduling Session docket more than sixty days from the date of the filing of the Petition, for scheduling of the final hearing.

(i) All deadlines set by these rules may be modified by the Senior Resident Judge upon motion by any party, after opportunity has been given to opposing counsel to be heard.

ORANGE and CHATHAM COUNTIES (Dist. 15B)

Rule 19. Judicial Review of Administrative Action

The following rules shall govern judicial review of final administrative agency decisions pursuant to the Administrative Procedure Act (Chapter 150B):

19.1 Case Management Schedule: The Court, upon its own motion or by request of any party, may establish a schedule for a particular case. If no schedule is set then the following rules shall apply.

19.2 Briefs, Petitioner(s) / Appellant(s): The brief of the Petitioner/Appellate shall be filed with this Court and served upon all other parties to the proceedings within 20 days after the original or a certified copy of the record of the proceedings under review has been filed with this Court or as provided by Writ of Certiorari.

19.3 Brief, Respondent(s) / Appellee(s): All other parties shall file and serve briefs within twenty (20) days after service of the brief of the Petitioner(s)/Appellant(s).

19.4 Reply briefs: Unless the Court in its discretion shall order to the contrary, there shall be no reply briefs.

19.5 Calendaring: Judicial Review proceedings shall be set for hearing by the Judge or the JSS.

19.6 Exempt from MSC: Judicial Reviews of Administrative Actions are exempt from Mandatory Mediated Settlement Conferences.

WAKE COUNTY (Dist 10)

9.1 Rules 9.1 through 9.9 shall govern judicial review of final administrative agency decision pursuant to G.S. §150B-43, *et seq*, or of any other matter coming before this Court seeking review of an administrative agency ruling.

9.2 Briefs, Petitioner(s)/Appellant(s): The brief of the Petitioner(s)/Appellant(s) shall be filed with this Court and served upon all other parties to the proceeding in accordance with G.S. §1A-1, Rule 5, within twenty days after the original or a certified copy of the record of the proceedings under review has been filed with this Court, as provided in G.S. §150B-47, or as provided by a Writ of Certiorari, and notice of such filing has been served on Petitioner.

9.3 Briefs, Respondent(s)/Appellee(s): The brief of the Respondent(s) (for the purposes of this rule, being those persons who are parties to the agency proceeding and who have become parties to the review proceeding as set forth in G.S. §150B-46) shall be filed with this Court and served upon all other parties to the proceeding in accordance with G.S. §1A-1, Rule 5, within twenty days after service of the brief of the Petitioner(s)/Appellant(s).

9.4 Briefs, Intervenors: The brief of an Intervenor who may become a party to the review proceeding pursuant to the last sentence of G.S. §150B-46 shall be filed with this Court and served upon all other parties to the proceeding in accordance with G.S. §1A-1, Rule 5, within twenty days of the date of the filing of the Intervenor's motion to intervene; provided that where, because of the time of such motion for intervention, the Intervenor's brief would be due twenty days or less from the date the review is set for hearing, the Intervenor's brief shall be filed concurrently with its motion to intervene.

9.5 Reply Briefs: Unless the Court in its discretion shall order to the contrary, there shall be no reply briefs filed by any party to the review proceedings.

9.6 Calendaring: Judicial review proceedings shall be set for hearing at the first available regular non-jury session of Wake County Superior Court commencing on or after the thirtieth day following the filing in this Court of the brief of the Respondent(s)/Appellee(s). Hearings requiring in excess of one hour will ordinarily be set on a trial calendar.

9.7 Hearings: All parties to the judicial review proceedings may offer evidence and oral argument as provided in G.S. §150B-49 and §150B-50. The Court will strictly enforce the prohibition in G.S. §150B-49 against presentation of repetitive evidence or of evidence previously contained in the record.

9.8 Nothing contained in Tenth District Local Rules 9.1 through 9.9 shall be deemed to prohibit the Court, in its discretion for good cause shown, from enlarging the times herein provided for filing briefs for any party to the review proceeding, from permitting the filing of briefs after the expiration of the time previously allotted for such filing, or from continuing and rescheduling judicial review hearings.

9.9 All time periods prescribed or allowed by Tenth District Local Rules 9.1 through 9.9 or by any order of this Court pursuant to such rules shall be computed in accordance with G.S. §1A-1, Rule 6(a).

9.10 Special Provision for the Denial of a Special Use Permit for a Sexually Oriented Business. An applicant who has been denied a special use permit for a sexually oriented business by a municipality or county may request, in writing, expedited judicial review after filing a timely petition for certiorari. The applicant's brief required under Local Rule 9.2 shall accompany the request.

The matter shall be placed on the first available calendar after the applicant files the request and brief. The hearing will occur within 45 days after the applicant's filing. A judge reviewing the denial should issue a decision on the merits from the bench or should otherwise assure that the applicant receives a prompt judicial decision.

09CV007597

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 09-CVS-

2009 APR 15 PM 3:5
WAKE COUNTY, C.S.C.
BY

LANE [redacted] and JOANN [redacted]
Parents and Guardians of
JENNIFER [redacted]

Petitioners,

vs.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

PETITION FOR JUDICIAL REVIEW

Now come the petitioners, Lane and Joann [redacted] parents and natural guardians of their minor child Jennifer [redacted] through the undersigned attorneys, to petition the court for review of an adverse administrative decision by the respondent, as follows:

1. The petitioners and their 7 year-old daughter Jennifer [redacted] are citizens of the United States and residents of Craven County.

2. The petitioners bring this action pursuant to the Administrative Procedure Act, N.C.G.S. §150B-43, *et. seq.*, seeking reversal of the final agency decision made by North Carolina Department of Health and Human Services, dated March 16, 2009, in the above captioned contested case (08 DHR 3010). The final agency decision upheld an agency decision to reduce Medicaid coverage of medically necessary services used to treat Jennifer [redacted] diagnosed autism.

3. Jennifer [redacted] is eligible for services under the N.C. Medicaid program through a Medicaid home and community-based waiver program called the Community Alternative Program for Persons with Mental Retardation and other Developmental Disabilities. (CAP-

MR/DD). As required by this program, a Plan of Care was submitted to ValueOptions, Inc., a contracted agent of the respondent delegated responsibility for reviewing requests for mental health services under the N.C. Medicaid program. In the submitted Plan of Care, through Jennifer's treating clinicians, the petitioners requested that the respondent continue to provide coverage for a medically necessary service known as Home and Community Supports ("HCS") in the amount of forty-two (42) hours per week. In response, the respondent, through its agent ValueOptions, issued notice dated September 11, 2008 that Medicaid coverage of HCS services would be reduced to only thirty (30) hours per week.

4. Petitioner timely filed a petition for a contested case hearing in the Office of Administrative Hearings (OAH) to challenge respondent's failure to continue to provide coverage for the requested services. This contested case (case number 08 DHR 3010 in OAH) was tried on the merits before Administrative Law Judge (ALJ) Joe L. Webster on January 22, 2009. Judge Webster issued a decision on February 19, 2009, in which he made forty-one (41) findings of fact and ten (10) conclusions of law. Judge Webster reversed the agency's decision and ordered the respondent to continue to provide Medicaid coverage for the services requested in Jennifer Massey's Plan of Care and in the amounts requested by the petitioners.

5. On March 16, 2009, the respondent issued a final agency decision rejecting the ALJ decision and upholding the ValueOptions decision to reduce the HCS services from forty-two to thirty hours per week.

6. The petitioners are persons aggrieved by the final agency decision in this matter.

7. The petitioners have exhausted all administrative remedies available to them.

8. The petitioners file this petition within 30 days of service upon them of the final agency decision.

9. The petitioners take the following exceptions to the Findings of Fact and Conclusions of Law set out in the final agency decision:

A. The respondent erred as a matter of law in violation of N.C.G.S. §150B-36(b) by rejecting or altering, in whole or in part, the ALJ's findings of fact numbered 6, 8, 14, 17, 27, 38, 39, 40, and 41 because the ALJ's findings were not clearly contrary to the preponderance of the admissible evidence adduced at the hearing and because the agency failed to give due regard to the ALJ's evaluation of the credibility of the evidence.

B. The respondent erred as a matter of law in violation of N.C.G.S. §150B-36(b1) by rejecting or altering, in whole or in part, the ALJ's findings of fact numbered 6, 8, 14, 17, 27, 38, 39, 40, and 41, because the final agency decision failed to set forth separately and in detail the evidence in the record relied upon by the agency in not adopting each of the above findings of fact contained in the ALJ decision.

C. The respondent erred as a matter of law by failing to accord petitioner the right to a de *novo* hearing as required by the due process clause of the Fourteenth Amendment to the U.S. Constitution and by federal Medicaid regulations, 42 C.F.R. 431.200, et. seq.

D. The respondent erred as a matter of law in violation of N.C.G.S. §150B-36(b3) by failing to adopt the ALJ decision without demonstrating that the

ALJ decision is clearly contrary to the preponderance of the admissible evidence in the record.

E. The respondent's conclusions of law numbered 1, 2, 3, 4 and 5 contain findings of fact that fail to comply with N.C.G.S. §150B-36(b), (b1), and (b2), for the same reasons stated in paragraphs A, B, C, and D hereinabove.

F. The respondent's findings of fact, including but not limited to the findings numbered 3, 4, 6, 7, 8 and 9, and its conclusions of law, including but not limited to the conclusions numbered 1, 2, 3, 4, and 5, contain errors of law in violation of N.C.G.S. §150B-34 and 42 CFR 431.244, by failing to base its findings of fact and decision on the weight of the evidence presented at the hearing and thus failing to accord petitioner the right to a de *novo* hearing.

G. The respondent's final agency decision contains inadequate findings of fact to support its decision.

H. The respondent's decision, including conclusions of law numbered 1, 2, 3, 4 and 5, contains errors of law in that the decision fails to comply with 42 U.S.C. § 1396d(r)(5), 42 U.S.C § 1396a(a)(43), and 42 U.S.C. § 1396a(a)(8).

I. The respondent's decision, including conclusions of law numbered 1, 2, 3, 4 and 5, contains errors of law in that it conflicts with the terms of the N.C. CAP-MR/DD Waiver and federal Medicaid statutory provisions

governing the Waiver, including 42 U.S.C. 1396a(a)(10(B), 1396d(a), and 1396n.

J. The respondent's final agency decision is not adequately supported by its own findings of fact and conclusions of law.

K. The final agency decision, in failing to provide the relief ordered by the ALJ in the paragraph entitled "Decision," contains errors of law in violation of 42 U.S.C. §1396d(r)(5), 42 U.S.C. §1396a(a)(43), 42 U.S.C. §1396a(a)(8), N.C.G.S. §150B-36, N.C.G.S. §150B-34, 42 CFR 431.244, the terms of the N.C. CAP/MRDD Waiver, 42 U.S.C. 1396a(a)(10)(B), 1396d(a), and 1396n.

L. The final agency decision contains errors of law in violation of the due process clause of the Fourteenth Amendment to the U.S. Constitution and principles of administrative res judicata by reducing coverage for services at a level previously approved by the respondent with no evidence of medical improvement or other change in circumstances justifying the reduction in services.

M. The final agency decision, including Finding of Fact No. 3, contains errors of law in violation of the federal Medicaid statute, including 42 U.S.C. 1396a(a)(10(B), 1396d(a), and 1396n, by failing to accord any deference to the opinions of Jennifer's treating clinicians.

N. The final agency decision, including Finding of Fact No. 3, contains errors of law in violation of N.C. Session Law 2008-no. 3 N.C. Adv.

Legis. Serv. 369, 382, sec. 10.15A(h2)(4)in that the decision appears to assign the burden of proof to the petitioners instead of the Respondent.

O. The final agency decision, including Finding of Fact No. 9, contains errors of law in violation of N.C.G.S. 150B, Article 2A in that the CAP-MR/DD manual has not been promulgated as a rule and is not a medical coverage policy that was adopted under the procedures set out in N.C.G.S. 108A-54.2.

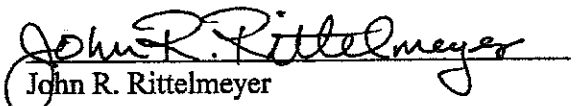
PRAYER FOR RELIEF

WHEREFORE, the petitioner prays for the following relief:

1. That the court review the administrative record *de novo* pursuant to N.C.G.S. §150B-51(c);
2. That the court adopt those findings of fact made by the ALJ as not clearly contrary to the evidence adduced at the hearing and because the agency did not follow the procedures required by N.C.G.S. 150B-36;
3. That the court reverse the final agency decision of the respondent and adopt the ALJ decision as the final decision in this matter;
4. That the court award the petitioner a reasonable attorney's fee pursuant to N.C.G.S. §6-19.1;
5. That the court tax all costs of this action to the respondent, including costs and expert witness fees incurred during the administrative proceedings;
6. That the court grant the petitioner such other relief as law and equity allow.

DATED this 15th day of April, 2009.

DISABILITY RIGHTS NORTH CAROLINA



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