

STATE OF NORTH CAROLINA  
COUNTY OF MECKLENBURG

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
11 DHR 15098

McWILLIAMS CENTER FOR COUNSELING, )  
INC., )  
Petitioner, )  
v. )  
NORTH CAROLINA DEPARTMENT OF )  
HEALTH AND HUMAN SERVICES, DIVISION )  
OF MENTAL HEALTH, DEVELOPMENTAL )  
DISABILITIES, SUBSTANCE ABUSE )  
SERVICES, an agency of the STATE OF NORTH )  
CAROLINA, )  
Respondent. )  
\_\_\_\_\_ )

**DECISION**

THIS MATTER came on for hearing before Administrative Law Judge, Selina M. Brooks, on August 27-28, 2012 in Charlotte, North Carolina.

**APPEARANCES**

For Respondent: Tracy J. Hayes  
Special Deputy Attorney General  
N.C. Department of Justice  
Raleigh, North Carolina

For Petitioner: Carlos D. Watson, Esq.  
Watson Law Firm  
Charlotte, North Carolina

**ISSUE**

Whether Respondent's decision to revoke Petitioner's authorization to receive funding to provide services utilizing state or federal mental health, developmental disabilities and substance abuse services funds was erroneous, contrary to law, rule or procedure, or arbitrary and capricious.

**EXHIBITS**

For Respondent: Exhibits 1 – 30 were admitted.  
For Petitioner: Exhibits 1-14 and 17-22 were admitted.

## **TESTIMONY**

Karen Williams testified on behalf of Petitioner, and DMH/DD/SAS Accountability Team Certified Investigators Stacey Lee and Marvin Sanders testified on behalf of Respondent.

## **APPLICABLE STATUTES, RULES, REGULATIONS AND POLICIES**

1. The Social Security Act, 42 U.S.C. 1396 *et seq.*
2. N.C.G.S. § 108A-25(b)
3. N.C.G.S. § 108A-54
4. 10A NCAC 26C .0502 and .0504
5. 10A NCAC Subchapter 22P (expired)
6. North Carolina State Plan for Medical Assistance
7. N.C. Session Law 2012-171
8. December 10, 2008 Policy and Procedures for the Review, Approval and Follow-Up of Plans of Correction

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, along with documents and exhibits received and admitted in evidence and the entire record in this proceeding, the Undersigned makes the following Findings of Fact. In making the Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which each witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

## **FINDINGS OF FACT**

1. Respondent, the Department of Health and Human Services (“DHHS”), is the single state agency responsible for administering the North Carolina Medicaid program in accordance with federal and state law pursuant to the Social Security Act, N.C.G.S. §108A-25(b), §108A-54 and the North Carolina State Plan for Medical Assistance.

2. The Division of Mental Health, Developmental Disabilities and Substance Abuse Services (“DMH/DD/SAS”) is a Division of DHHS and is responsible for investigating complaints about providers of MH/DD/SA services, overseeing plans of correction, and revoking authorization to receive state and federal funding for mental health services if necessary.

3. At all times relevant to this petition, McWilliams Center for Counseling, Inc. (“McWilliams” or “Petitioner”), was an enrolled Medicaid provider of mental health services. Respondent’s Exhibit 1.

4. Respondent was certified by DHHS as a Critical Access Behavioral Health Agency (“CABHA”) on or about January 28, 2011, with an effective date of January 1, 2011.

5. CABHA is a type of Medicaid provider certification for mental health and substance abuse services set forth in the North Carolina State Plan for Medical Assistance (“State Plan”). The State Plan requires that entities certified as CABHAs deliver a minimum of three core services, along with a specific continuum that includes at least two enhanced services. Respondent’s Exhibit 26.

6. McWilliams voluntarily designated Intensive In-Home (“IIH”) and Child and Adolescent Residential Family Treatment, Level II - Family Type, which is also known as Therapeutic Foster Care (“TFC”), as the two enhanced services IIH chose for its CABHA Child Mental Health continuum.

7. The Division of Medical Assistance (“DMA”) requires TFC providers to bill Medicaid for these services through a Local Management Entity (“LME”). Prior to obtaining CABHA certification, McWilliams submitted a request to the Gaston-Lincoln-Cleveland Mental Health, Developmental Disabilities and Substance Abuse Area Authority (“Pathways LME”) to execute a contract to submit pass-through billing for TFC services in Pathways’ geographic catchment area.

8. Petitioner and Pathways entered into a pass-through contract on October 12, 2010, and it was effective from October 3, 2010 through June 30, 2011, the end of the fiscal year. Respondent’s Exhibit 30.

9. After obtaining its CABHA status, Petitioner did not submit any claims for TFC to Pathways. Petitioner’s contract to bill for TFC expired June 30, 2011 due to the fact that McWilliams had not submitted any billing during the fiscal year of the contract. The contract was not renewed by July 1, 2011; therefore, Petitioner was unable to submit any pass-through billing via Pathways after June 30, 2011.

10. Pathways attempted to conduct an on-site review at the business address on file for McWilliams and discovered that there was no longer a business at that location. On March 11, 2011, Pathways notified Petitioner of its intent to involuntarily withdraw Petitioner’s business verification and endorsements for Community Support Team (“CST”) and IIH services effective the date of the notification. Respondent’s Exhibit 19.

11. On March 30, 2011, Petitioner requested a local reconsideration of the involuntary withdrawals. On April 14, 2011, Pathways notified Petitioner telephonically and attempted to serve a notice by certified mail of its decision to uphold the involuntary withdrawal endorsement of CST and IIH services and to overturn the involuntary withdrawal of endorsement for business verification. Respondent’s Exhibit 20.

12. On April 20, 2011, Petitioner’s business verification was reinstated. Petitioner never appealed Pathways’ involuntary withdrawal of CST and IIH to the DMH/DD/SAS Appeals Panel.

13. Beginning in March 2011, the DMH Accountability Team began receiving complaints about McWilliams and about Dr. Karen Williams, including allegations of fraudulent billing. Respondent's Exhibit 2. The Accountability Team began preparing for an on-site investigation and also referred the complaints to the DMA Program Integrity Behavioral Health Section. Subsequent to that referral, Dr. Karen Williams was referred to the Medicaid Fraud Investigations Unit and is currently under active investigation for criminal fraud, and DMA has suspended all Medicaid payments to Dr. Williams as required by 42 C.F.R. § 455.23.

14. On May 16, 2011, the Accountability Team received specific complaints that included allegations that McWilliams had failed to report core CABHA staff changes to the LME and DMH, that CABHA staff were not qualified for their positions, that the CABHA clinical director was not providing supervision as required, and that McWilliams was not delivering TFC Services as required by their continuum designation.

15. Accountability Specialist Stacey Lee led an unannounced site visit to the McWilliams Center in Charlotte, NC on May 25, 2011 at 8:45 a.m. for the purpose of investigating these complaints. Respondent's Exhibit 2.

16. The on-site review revealed that McWilliams had not followed requirements for notifying the LME and DMH of core CABHA staff vacancies, that the Quality Management/ Training Director did not meet CABHA requirements, that the agency had not provided TFC Services as required by their continuum designation, and that the signatures of the Medical Director, Dr. Patel, and the Clinical Director, Stacey Olden, had likely been forged. The on-site review also substantiated additional areas of concern, including a failure of the agency's Clinical Director to develop collaborative relationships as required by the CABHA Clinical Director job functions, and a finding that McWilliams had altered documentation to avoid sanctions.

17. The investigation was concluded on July 8, 2011. On July 12, 2011, DMH notified Petitioner about the results of the complaint investigation and offered McWilliams the opportunity to submit a Plan of Correction ("POC"). Respondent's Exhibit 3. Subsequent to the July 12 letter, DMH staff confirmed that the signatures of Dr. Patel and Ms. Coley had been forged. Respondent's Exhibits 4 and 5.

18. On July 22, 2011, DMH revoked McWilliams's authorization to receive funding to provide services utilizing state or federal mental health, developmental disabilities and substance abuse funds. DMH also advised Petitioner that a recommendation would be made to DMA to revoke Medicaid enrollment based on the provider agency creating documentation to avoid sanctions. Respondent's Exhibit 6.

19. Petitioner McWilliams submitted their first Plan of Correction to DMH on July 27, 2011. Respondent's Exhibit 7. The July 27 POC indicated that McWilliams would correct the deficiency regarding its lack of delivery of TFC Services by pursuing endorsement for a different continuum service, Day Treatment. McWilliams has not obtained endorsement for another service to add to their continuum in accordance with their Plan of Correction.

20. On July 28, 2011, DMH advised Petitioner that its POC would be pended due to the July 22, 2011 revocation action. Respondent's Exhibit 8.

21. On August 9, 2011, Petitioner sent a letter to DMH in efforts to set up an informal meeting with DMH to resolve the issues regarding the recent revocation without litigation. Respondent's Exhibit 9. Prior to the meeting, DMH upheld its action following an internal administrative review. Respondent's Exhibit 10.

22. On September 7, 2011, DMH staff met informally with McWilliams staff to discuss the alteration of documents and other issues. During the meeting, McWilliams indicated that the forged documentation was the result of an internal policy that individuals document "signatures" for other individuals, including licensed staff. Petitioner was given written notice to immediately cease and desist this internal practice, which is outside the scope of the DMH/DD/SAS Records Management and Documentation Manual and applicable state or federal laws governing signatures. Petitioner's Exhibit 7.

23. As a result of this meeting, DMH agreed to rescind the Accountability Team's July 22 revocation action and to allow McWilliams to proceed with the Plan of Correction process. Respondent's Exhibit 11.

24. Marvin Sanders testified that nothing in the POC Policy prevents Respondent from pending the POC process in response to subsequent agency action or to allow the parties to attempt to resolve the issues informally. He was the primary individual at DMH responsible for the creation of the POC Policy and his testimony is supported by the greater weight of the evidence. DMH specifically did not withdraw any of the findings that were the basis for the revocation or POC actions.

25. Stacey Lee reviewed the July 27 POC in accordance with the requirements of the POC Policy, which identifies eight evaluative criteria to be considered. Respondent's Exhibit 24, page 5 of 8. She determined that the POC did not substantially address the issues identified and forwarded her recommendation to Sandee Resnick, the Accountability Team Leader. Ms. Resnick agreed with Ms. Lee's determination.

26. On October 5, 2011, DMH notified Petitioner that their July 27, 2011 POC was not accepted and advised them to resubmit a revised POC within ten days. Respondent's Exhibit 13.

27. On October 13, 2011, McWilliams submitted a revised POC to DMH. Respondent's Exhibit 14. The second POC acknowledges that the CABHA rules in effect when McWilliams was certified require that there not be a lapse in a continuum service for more than 120 days, that McWilliams had violated those rules, and that TFC is a difficult service to pair with IHH. The POC further indicates that McWilliams would correct the deficiency regarding its lack of delivery of TFC Services by "adding another service to our continuum that can better facilitate the needs of our consumers." Petitioner never added another continuum service.

28. Stacey Lee reviewed the October 13 POC in accordance with the POC Policy's eight evaluative criteria. Respondent's Exhibit 24, page 5 of 8. She determined that the POC did not substantially address the TFC continuum issue and forwarded her recommendation to Sandee Resnick, the Accountability Team Leader. Ms. Resnick agreed with Ms. Lee's determination.

29. If Petitioner had taken steps to add another continuum service or had provided evidence that it was providing TFC, the POC could have been approved. Because the second POC was unacceptable, DMH notified McWilliams that it had again revoked authorization for Petitioner to receive funding to provide services utilizing state or federal mental health, developmental disabilities and substance abuse funds in accordance with 10A NCAC 26C .0504. Respondent's Exhibit 16. DMH also recommended that DMA terminate Petitioner's Medicaid provider number(s). Respondent's Exhibit 17.

30. DMA terminated Petitioner's Medicaid agreements for Provider numbers 3410188, 8703190, 8302359H, and 8302359V on November 11, 2011. Petitioner has never appealed this action. Respondent's Exhibit 18.

31. Petitioner is not currently endorsed to provide IHH or CST by either Pathways or Mecklenburg LME. Respondent's Exhibits 21-23.

### **CONCLUSIONS OF LAW**

Based on the foregoing facts, the Undersigned makes the following Conclusions of Law:

1. The North Carolina Office of Administrative Hearings has jurisdiction over the parties and subject matter of this contested case pursuant to N.C. Gen. Stat. §150B-23 *et seq.* All necessary parties have been joined. The parties received proper notice of the hearing in this matter.

2. To the extent that the findings of fact contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels. *Bonnie Ann F. v. Callahan Indep. Sch. Bd.*, 835 F. Supp. 340 (S. D. Tx. 1993).

3. Petitioner entered into a Provider Administrative Participation Agreement with the DHHS which required Petitioner to comply with the North Carolina State Plan for Medical Assistance and "state laws and regulations, medical coverage policies of the Department, and all guidelines, policies, provider manuals, implementation updates and bulletins published by CMS, the DHHS, its divisions and or its fiscal agent in effect at the time the service is rendered." Respondent's Exhibit 1.

4. The State Plan required Petitioner to deliver at least two continuum services in order to maintain their CABHA status. Regardless of the status of the temporary CABHA Rules (10A NCAC Subchapter 22P), Petitioner was required to comply with the State Plan as a condition of Medicaid participation.

5. Pursuant to 10A NCAC 26C .0504(a), Respondent DMH/DD/SAS “shall revoke authorization to receive funding to provide services utilizing state or federal mental health, developmental disabilities and substance abuse services funds and make a recommendation to DMA to revoke enrollment for Medicaid, when it finds that there has been substantial failure to comply with statutes or pursuant to Rule .0502(5) of this Section.”

6. Pursuant to 10A NCAC 26C .0502, “Substantial failure to comply” includes evidence that: (d) the provider has created or altered documents to avoid sanctions, or (e) the provider has not submitted, revised or implemented a plan of correction in the specified timeframes.

7. DMH’s determination that Petitioner failed to submit an acceptable POC and that Petitioner had created or altered documents in order to avoid sanctions was not erroneous, arbitrary or capricious, or contrary to law, rule or policy.

8. Respondent DMH is entitled to deference in its interpretation of its own policies and procedures, including its interpretation of the Plan of Correction Policy. “It is well established ‘that an agency’s construction of its own regulations is entitled to substantial deference.’” *Morrell v. Flaherty*, 338 N.C. 230, 237-238, 449 S.E.2d 175, 179-180 (1994), *citing Martin v. OSHRC*, 499 U.S. 144, 150-51, 113 L. Ed. 2d 117, 127, 111 S.Ct. 1171 (1991). Moreover, the “agency’s interpretation must be given ‘controlling weight unless it is plainly erroneous or inconsistent with the regulation.’” *Id.*, *citing Udall v. Tallman*, 380 U.S. 1, 16-17, 13 L. Ed. 2d 616, 625-26, 85 S. Ct. 792 (1965). Marvin Sanders’s interpretation that the Plan of Correction policy does not prevent the agency from pending a POC is not plainly erroneous or inconsistent, and his interpretation is entitled to substantial deference.

9. “In determining whether an agency decision is arbitrary or capricious, the reviewing court does not have authority to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law.” *Mann Media, Inc. v. Randolph County Planning Bd.*, 356 N.C. 1, 565 S.E.2d 9 (2002). “The ‘arbitrary or capricious standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are ‘patently in bad faith,’ [*Burton v. City of Reidsville*, 243 N.C. 405, 407, 90 S.E.2d 700, 702 (1956),] or ‘whimsical’ in the sense that ‘they indicate a lack of fair and careful consideration’ or ‘fail to indicate [] any course of reasoning and the exercise of judgment. []’ [*State ex rel. Comm’r of Ins. v. [N.C.] Rate Bureau*, 300 N.C. [381,] 420, 269 S.E.2d [547,] 573 [(1980)].” *Lewis v. N.C. Dep’t of Human Resources*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989).

10. Petitioner has not presented any evidence which demonstrates that Respondent’s decision was not exercised in good faith or in accordance with the law.

11. Petitioner has not presented any evidence that Respondent’s decision in this matter was erroneous, arbitrary or capricious, contrary to law or rule, or failed to use proper procedure.

12. Pursuant to N.C. Gen. Stat. § 150B-34, based upon the preponderance of the evidence and “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,” the Undersigned finds that Respondent DMH/DD/SAS did not act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule when it revoked Petitioner’s authorization to receive funding to provide services utilizing state or federal mental health, developmental disabilities and substance abuse services funds in accordance with 10A NCAC 26C .0504.

### **DECISION**

NOW, THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned determines that the Respondent’s decision to suspend payments to Petitioner was not erroneous, contrary to law, rule or policy, or arbitrary and capricious.

### **NOTICE**

The Agency that will make the final decision in this contested case is the North Carolina Department of Health and Human Services.

The Agency is required to give each party an opportunity to file exceptions to the decision and to present written arguments to those in the Agency who will make the final decision. N.C. Gen. Stat. § 150-36(a). The Agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorneys of record and to the Office of Administrative Hearings.

In accordance with N.C. Gen. Stat. § 150B-36 the Agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact.

This is the 8th day of November, 2012.

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Selina M. Brooks  
Administrative Law Judge