

REL: June 25, 2021

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2200138

Alabama Department of Mental Health

v.

Nobles Group Homes, Inc.

Appeal from Montgomery Circuit Court
(CV-20-900287)

FRIDY, Judge.

This case arises under the Alabama Administrative Procedure Act ("the AAPA"), § 41-22-1 et seq., Ala. Code 1975. The Alabama Department

2200138

of Mental Health ("the Department") appeals from a judgment of the Montgomery Circuit Court ("the circuit court") reversing the Department's order revoking the authority of Nobles Group Homes, Inc. ("Nobles"), to provide residential intellectual-disability services in Alabama. We affirm.

Background

The Department is an agency of the State of Alabama, § 22-50-2, Ala. Code 1975, tasked by statute with providing mental-health services to the people of Alabama. § 22-50-9, Ala. Code 1975. In addition, the Department is statutorily authorized to certify for licensure mental-health facilities, to create minimum standards for their operation, and to inspect such facilities and certify their compliance with those standards. § 22-50-11(11)-(13), Ala. Code 1975. No person or entity may operate a mental-health facility without being certified by the Department. § 22-50-17(a), Ala. Code 1975. Relevant to the present matter, the Department is "authorized and directed to provide hearings for anyone claiming to be damaged by decisions of its employees or agents, and it may delegate the holdings of such hearings to administrative hearing officers." 22-50-11(15).

2200138

Under the Department's certification program, the Department can issue a certificate for the operation of a mental-health facility for up to two years. Ala. Admin. Code (Dep't of Mental Health), r. 580-3-23-.07(2). If a facility does not meet the Department's certification standards, the Department can issue to the operator a provisional certification for no more than sixty days. Id. An operator receiving a provisional certificate is required to submit a plan of action to the Department for correcting the problems identified in the facility inspection. Ala. Admin. Code (Dep't of Mental Health), r. 580-3-23-.13. At the times relevant to this appeal, the Department utilized a point system for inspecting mental-health facilities when making certification determinations.

If an operator receives a provisional certification at least twice in a twelve-month period, a recommendation to decertify the provider is made to the Department's commissioner ("the commissioner"). Ala. Admin. Code (Dep't of Mental Health), r. 580-3-23-.16(1). The operator then can seek an administrative hearing regarding the recommendation, which hearing is to be conducted in accordance with the AAPA. Ala. Admin. Code (Dep't of Mental Health), rr. 580-3-23-.15, -.16. After the hearing, the commissioner

2200138

renders a final determination, which the operator can then appeal to a circuit court under the AAPA.

Nobles, which has been in business since the mid-1990s, operates mental-health facilities in the Mobile area. In May 2015, following an evaluation by the Department, Nobles was recommended for decertification, and it sought an administrative hearing of that recommendation. After that hearing was held in March 2016, but before the commissioner issued a final decision, the Department and Nobles entered into a settlement agreement under which the Department permitted Nobles to submit a certification application without taking into consideration the Department's past reviews of Nobles's facilities. Nobles thereafter continued to operate its facilities, and the Department did not enforce its 2015 decertification determination.

In August 2017, personnel from the Department made a site visit to inspect Nobles's facilities. Based on the scores Nobles received from that visit, the Department granted Nobles only a provisional certification and required it to submit a plan of action to address the issues raised by the inspection. The Department conducted a follow-up site visit in January

2200138

2018, and the result of that inspection was the issuance of another provisional certification to Nobles and the requirement that it prepare another plan of action to address the problems the Department had identified. The Department thereafter approved the plan of action Nobles submitted.

In June 2018, the Department conducted another site visit to Nobles's facilities. The result of that inspection was another score indicating that Nobles had not met the Department's standards. The commissioner notified Nobles that the Department intended to decertify Nobles and that it had the right to seek an administrative hearing as to that proposed action. Nobles requested a hearing, which was held by a hearing officer over two days in January and February 2019. After the hearing, the hearing officer issued a proposed order decertifying Nobles, containing findings of fact and conclusions of law. In January 2020, the commissioner adopted that proposed order and decertified Nobles.

Nobles appealed from the Department's final determination and filed a petition seeking judicial review in the circuit court. See § 41-22-20(b), Ala. Code 1975. The Department answered Nobles's petition, and both

2200138

Nobles and the Department presented oral and written arguments to the circuit court. On October 7, 2020, the circuit court entered a final judgment reversing the Department's decertification determination. The circuit court made a number of findings and, in its conclusions, gave multiple grounds for reversing the Department's determination. In pertinent part, the judgment provided:

"FINDINGS OF FACT

"....

"12. [Department] employees [Connie] Batiste and [Jimmy] Paulk both testified at the contested case hearing that follow-up site visits are properly intended to focus only upon the deficiencies cited in the site visit report resulting in the need for the follow-up. Despite this, the substantial evidence shows that follow-ups to Nobles went far beyond the deficiencies cited on the immediately earlier site visit report.

"13. Pursuant to Ala. Admin. Code § 580-3-23-.10(5), at the conclusion of a site visit, preliminary findings are given orally to the appropriate agency staff. Under § 580-3-23.10(6), '[a]n exit interview will be conducted upon the completion' of the site visit to provide the entity 'the opportunity to clarify or present evidence of compliance on issues being cited...' Paulk testified that all findings were not reported, and attempted to draw a distinction between whether exit interviews were 'mandated' or 'required'; he further made the assertion that he had been 'told' that exit reviews were only for new providers, despite the clear language of the regulation.

"14. It is without dispute that the calculations of the site visit scores were incorrectly performed by [Department] personnel. In fact, it is without dispute that [Department] witnesses could not agree as to by whom the scores were calculated, or by whom the scores are appropriately to be calculated.

"15. It was undisputed throughout the testimony of [Department] witnesses that there is a deficit in adequate training for staff charged with regulation of providers, including those who conduct site visits. Batiste, Paulk and Region III Director Kevin LaPorte all testified as to a lack of direct formal training. Despite the clear testimony regarding the lack of training for relevant [Department] employees, the Hearing Officer wrote that '[n]o evidence was submitted to substantiate [the] claim [of inadequate training].' (Recommended Order, p. 31.) This was clear error. Not only was there testimony as set forth above about there being no training regarding the conduct of site visits, but the inability of [Department] personnel to accurately and properly calculate scores, or even to know where responsibility for that action lies, clearly establish a claim of inadequate training.

"16. The score resulting from a site visit is properly calculated based upon the number of deficiencies cited, based upon certain Factors. It is without dispute that it is the pattern and practice of Paulk to write the same deficiency up under multiple Factors resulting in a drastic reduction of the score for the provider. It is also without dispute that Batiste testified that it is not a good practice to cite the same deficiency multiple times under different factors, and that such action would have the effect of double punishing the provider by taking away multiple points for the same infraction.

"17. Although after resolution of the earlier decertification hearing, Nobles had been denied the opportunity to add new residents, Batiste testified that Nobles had been treated by [the Department] as if it had a 'clean slate' rather than a provision[al] certification following the resolution of the 2016 decertification hearing. Nobles was never notified of this fact. As a result, Nobles was deprived of the right to compete for new residents during that two year period, in that it believed it was operating under a provisional certification, and providers holding provisional certifications are not eligible to compete for new residents.

"18. In January 2013, Paulk made his first site visit to Nobles. From that point forward, Paulk has been involved in every site visit but one regarding Nobles. During this period, Nobles has filed complaints of bias in Paulk's conduct and behavior, complaints of which he and his supervisor [were] aware. There has been no discipline regarding the complaints, and there is no evidence of any investigation. Batiste, Paulk's supervisor, testified that it is possible for another reviewer to conduct site visits at Nobles, but that such action had not been undertaken.

"19. It is without dispute that Nobles was treated in a disparate manner by [the Department] in connection with investigations of allegations by residents, with a complaining resident being removed from Nobles home, while other providers were allowed to maintain residents and operations in the face of more serious allegations, up to and including the death of a resident.

"CONCLUSIONS OF LAW

"....

"5. As set forth herein, and based upon the foregoing Findings of Fact, the Court concludes that there is substantial evidence that [the Department] has not complied with its own regulations in a variety of ways, including failing to provide notice of the results of site visit within the time mandated by regulation; failing to completely conduct exit interviews as a required portion of a site visit; failing to limit the scope of follow-up site visits; and failing to follow its own guidelines as to the method of calculation of the agency score at the conclusion of site visits.

"[6. There] is also substantial evidence that Nobles has filed multiple complaints against Paulk, alleging misconduct and bias, and that [the Department] has acknowledged a lack of a full and fair investigation of these allegations, and has instituted no disciplinary actions against Paulk. Further, it is without dispute that Paulk has been involved in all but one site visit to Nobles since the beginning of 2013, even after learning that Nobles has filed multiple complaints against him.

"7. As set forth herein, and based upon the foregoing Findings of Fact, the Court concludes that there is substantial evidence that [the Department] failed to adequately train the individuals assigned to conduct site visits, and those with supervisory responsibility in that area.

"8. As set forth herein, and based upon the foregoing Findings of Fact, the Court concludes that there is substantial evidence that [the Department] improperly reduced the agency scores assigned to Nobles through the 'double-counting' of citations for deficiencies.

"9. As set forth herein, and based upon the foregoing Findings of Fact, the Court concludes that there is substantial

evidence that [the Department] failed to notify Nobles that it was being treated with a 'clean slate' following resolution of the earlier dispute between the parties, resulting in damage to Nobles.

"10. As set forth herein, and based upon the foregoing Findings of Fact, the Court concludes that there is substantial evidence that [the Department] subjected Nobles to disparate treatment when compared to other providers in the Region III area.

"11. As a result of the foregoing, the Court concludes that the final agency action of [the Department] appealed from herein prejudiced the substantial rights of Nobles by being made in violation of constitutional and statutory provisions; being made in violation of pertinent agency rules; being made upon unlawful procedures; being affected by other error of law; by being clearly erroneous in view of the reliable, and substantial evidence on the whole record; and being unreasonable, arbitrary, or capricious and characterized by an abuse of discretion.

"12. Additionally, the Court concludes that the actions of Nobles have not led to an imminent danger to the care, safety, welfare and protection of its consumers.

"WHEREFORE, it is hereby ORDERED that the final agency action of [the Department] is hereby vacated and set aside, and that the determination to decertify Nobles from operations under the auspices of [the Department] is null and void; it is FURTHER ORDERED that [the Department] is to issue a full, non-provisional certification to Nobles, forthwith, and allow Nobles all the rights and opportunities appertaining thereto; and it is FURTHER ORDERED that [the Department]

2200138

is to take appropriate action to ensure that future site visits at Nobles'[s] facilities will not be performed by Jimmy Paulk."

(Capitalization and emphasis in original.) From that judgment, the Department timely appealed to this court.

Analysis

Section 41-22-20(k) of the AAPA governs a circuit court's review of agency decisions. That subsection reads:

"Except where judicial review is by trial de novo, the agency order shall be taken as prima facie just and reasonable and the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, except where otherwise authorized by statute. The court may affirm the agency action or remand the case to the agency for taking additional testimony and evidence or for further proceedings. The court may reverse or modify the decision or grant other appropriate relief from the agency action, equitable or legal, including declaratory relief, if the court finds that the agency action is due to be set aside or modified under standards set forth in appeal or review statutes applicable to that agency or if substantial rights of the petitioner have been prejudiced because the agency action is any one or more of the following:

"(1) In violation of constitutional or statutory provisions;

"(2) In excess of the statutory authority of the agency;

"(3) In violation of any pertinent agency rule;

"(4) Made upon unlawful procedure;

2200138

"(5) Affected by other error of law;

"(6) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

"(7) Unreasonable, arbitrary, or capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion."

Section 41-22-21 provides that the judgment of a circuit court reviewing an agency's action under the AAPA is subject to appeal to the appropriate court, which, in this case, is this court. This court reviews the circuit court's judgment without any presumption of correctness. See Colonial Mgmt. Grp., L.P. v. State Health Plan. & Dev. Agency, 853 So. 2d 972, 974 (Ala. Civ. App. 2002). Further, "[n]either this court nor the [circuit] court may substitute its judgment for that of the administrative agency." Id. at 975.

In its opening appellate brief, the Department challenges the circuit court's judgment only to the extent that it concluded that substantial evidence did not support the Department's decision to decertify Nobles. However, the circuit court reversed the Department's determination on many more grounds than just a lack of substantial evidence to support

2200138

that determination. As quoted above, the circuit court also found that the Department had not complied with its own regulations in a variety of ways; that it had failed to conduct a full and fair investigation of the Department employee who had conducted most of the site visits despite multiple complaints against that employee for alleged misconduct and bias; that the Department had failed to adequately train employees who were assigned to conduct site visits; and that the Department had subjected Nobles to disparate treatment when compared to other service providers in the region. Thus, the circuit court, applying § 41-22-20(k), set aside the Department's determination, concluding that Nobles's substantial rights had been prejudiced because the Department's determination, among other things, violated constitutional and statutory provisions, violated pertinent agency rules, was made upon unlawful procedures, was affected by other error of law, was clearly erroneous in view of the evidence, and was unreasonable, arbitrary, or capricious and characterized by an abuse of discretion. The Department did not address any of the other grounds on which the circuit court rested its judgment

2200138

until it filed its reply brief, and, even then, it addressed only a few of them.

When a trial court provides multiple reasons supporting its judgment, an appellant seeking reversal of that judgment is required to challenge all of those reasons in its opening brief, failing which the judgment is due to be affirmed. See Soutullo v. Mobile Cnty., 58 So. 3d 733, 738-39 (Ala. 2010). In Soutullo, the trial court, relying on two separate grounds, entered a judgment as a matter of law in favor of the defendant. On appeal, the plaintiffs challenged only one of those two grounds for the judgment. Our supreme court affirmed the judgment, writing:

"In order to secure a reversal, 'the appellant has an affirmative duty of showing error upon the record.' Tucker v. Nichols, 431 So. 2d 1263, 1264 (Ala.1983). It is a familiar principle of law:

" 'When an appellant confronts an issue below that the appellee contends warrants a judgment in its favor and the trial court's order does not specify a basis for its ruling, the omission of any argument on appeal as to that issue in the appellant's principal brief constitutes a waiver with respect to the issue.'

"Fogarty v. Southworth, 953 So. 2d 1225, 1232 (Ala. 2006) (footnote omitted) (emphasis added). This waiver, namely, the failure of the appellant to discuss in the opening brief an issue on which the trial court might have relied as a basis for its judgment, results in an affirmance of that judgment. Id. That is so, because 'this court will not presume such error on the part of the trial court.' Roberson v. C.P. Allen Constr. Co., 50 So. 3d 471, 478 (Ala. Civ. App. 2010) (emphasis added). See also Young v. Southern Life & Health Ins. Co., 495 So. 2d 601 (Ala. 1986). If an appellant defaults on his or her duty to show error by failing to argue in an opening brief an unstated ground that was placed in issue below, then, a fortiori, a challenge to the judgment is waived where, as here, the trial court actually states two grounds for its judgment, both grounds are championed by the appellee, and the appellant simply declines to mention one of the two grounds. Because the [plaintiffs] have pretermitted discussion of one of the two grounds forming the basis for the [judgment as a matter of law], we pretermitted discussion of the other ground, and we affirm the judgment."

Soutullo, 58 So. 3d at 738-39.

This court applied that principle from Soutullo more recently in a case arising under the AAPA. In State Department of Transportation v. Reid, 74 So. 3d 465 (Ala. Civ. App. 2011), this court reviewed a circuit court's judgment reversing a decision of the State Department of Transportation ("the DOT")--a state agency--regarding the denial of a permit to erect a billboard. Reid, 74 So. 3d at 466. The circuit court had

2200138

stated three bases for its reversal of the decision. Id. at 468-69. On appeal, the DOT did not challenge the third basis for the circuit court's judgment. Id. at 469. Relying on several cases, including Soutullo, this court held that the DOT had waived any argument on appeal as to the correctness of that basis, and we affirmed the judgment without addressing the DOT's arguments related to the other two grounds for the judgment. Id.

The fact that the circuit court's judgment in the present case comes to us without a presumption of correctness, and that our review of that judgment is de novo, does not alter the normal rules by which we review a circuit court's judgment and consider an appellant's contentions. It is, after all, the circuit court's judgment that we are reviewing, not the agency's determination in the first instance. See § 41-22-21, Ala. Code 1975 ("An aggrieved party may obtain a review of any final judgment of the circuit court under Section 41-22-20 by appeal" (emphasis added)). Indeed, our de novo review of a judgment regarding an agency determination is the same standard we apply in reviewing a judgment as a matter of law--the kind of judgment at issue in Soutullo. See Protective Life Ins. Co. v. Apex Parks Grp., LLC, [Ms. 1180508, Sept. 18, 2020] ____

2200138

So. 3d ___, ___ (Ala. 2020) (noting that a judgment as a matter of law is reviewed de novo); Nunnelley v. GE Cap. Info. Tech. Sols.-N. Am., 730 So. 2d 238, 241 (Ala. Civ. App. 1999) (noting that no presumption of correctness attaches to judgment as a matter of law). And this court has not hesitated to apply other familiar rules of appellate review in appeals involving agency determinations. See, e.g., Dawson v. Alabama Dep't of Env't Mgmt., 529 So. 2d 1012, 1013 (Ala. Civ. App. 1988), overruled on other grounds by Ex parte Fowl River Protective Ass'n, 572 So. 2d 446 (Ala. 1990) (contentions not raised in trial court cannot be raised for the first time on appeal). For these reasons, we respectfully reject the dissent's view that appeals to this court arising under the AAPA are different, and not subject to the same standards, as every other appeal within this court's jurisdiction.

In the present case, the Department, in its opening brief, failed to challenge almost all the grounds on which the circuit court based its judgment vacating the Department's decision and ordering it to fully certify Nobles. It therefore waived any argument regarding the

2200138

correctness of the grounds it failed to challenge. As a result, this court has no choice but to affirm the circuit court's judgment.

AFFIRMED.

Moore and Edwards, JJ., concur.

Hanson, J., dissents, with writing, which Thompson, P.J., joins.

2200138

HANSON, Judge, dissenting.

For the following reasons, I cannot concur in today's affirmance of the Montgomery Circuit Court's judgment reversing the administrative order of the Commissioner of the Alabama Department of Mental Health ("the Department") revoking the authority of Nobles Group Homes, Inc. ("Nobles"), to provide residential intellectual-disability services in Alabama.

The majority upholds the affirmance based upon a perceived procedural default on the Department's behalf, relying upon Soutullo v. Mobile County, 58 So. 3d 733, 738-39 (Ala. 2010), as primary authority. In Soutullo, our supreme court, in pertinent part, affirmed a judgment as a matter of law entered by a trial court as to tort claims asserted by owners of real property located outside of municipal limits against a county that had constructed drainage works that, the owners alleged, had caused flooding on the owners' property; the trial court in that case had cited two grounds for its judgment, i.e., a substantive ground -- the right of upper owners of land in unincorporated areas to concentrate water flow

2200138

upon lower land -- and a procedural ground -- the expiration of the period specified in the governing statute of limitations for bringing an action to abate the condition. 58 So. 2d at 736-37. In their opening brief on appeal from that judgment, the owners attacked the substantive ground cited by the trial court but did not address the procedural ground (see id. at 738); our supreme court, citing, among other cases, Fogarty v. Southworth, 953 So. 2d 1225 (Ala. 2006), concluded that that failure to address the procedural ground warranted "pretermi[ting] discussion of [the substantive ground] and ... affirm[ance of] the judgment" at issue. Id. at 739.

The waiver rule applied in Soutullo is based upon a specific procedural predicate: an appellate court " 'will not presume ... error on the part of the trial court.' " Soutullo, 58 So. 3d at 739 (quoting Roberson v. C.P. Allen Constr. Co., 50 So. 3d 471, 478 (Ala. Civ. App. 2010)) (emphasis added in Soutullo). This predicate raises the question: Why does an appellate court not "presume" that error exists in a particular trial-court judgment? The answer lies in the correlative conflicting presumption that the trial court "acted in accordance with the law," which governs "[i]n the

2200138

absence of a contrary showing" from the record. Alabama Pub. Serv. Comm'n v. AAA Motor Lines, Inc., 272 Ala. 362, 367, 131 So. 2d 172, 175 (1961).

However, in the context of appeals from administrative-agency decisions governed by the Alabama Administrative Procedure Act ("AAPA"), § 41-22-1 et seq., Ala. Code 1975, such as those of the Department,

"judicial review by circuit courts ... is (1) subject to the presumption that the agency [i.e., not the circuit court] has acted correctly and (2) limited to the record made before an administrative agency, see Ala. Code 1975, § 41-22-20(i), (j), and (k); moreover, subsequent appellate review under the AAPA likewise is subject to the same scope and standards."

Alabama Dep't of Transp. v. Lee Outdoor Advert., LLC, 275 So. 3d 542, 545 (Ala. Civ. App. 2018) (quoting Taylor v. Harvey, 257 So. 3d 869, 871-72 (Ala. Civ. App. 2017)) (emphasis added). In other words, as a commentator in this area has noted, "when an appellate court is reviewing the circuit court's review of an agency decision, the appellate court gives no credence to the decision of the circuit court"; rather, the appellate court "performs its own 'de novo' application of whatever deferential standards

2200138

apply to the agency's findings and interpretations." Marc J. Ayers, A Primer On Alabama Administrative Appeals and Judicial Deference, 79 Ala. Law. 406, 413-14 (Nov. 2018) (emphasis added and omitted).

In this case, rather than seeking to directly rebut the statements in the proposed judgment submitted to the circuit court by counsel for Nobles and adopted by the circuit court point by point, the Department elected to rely upon the prevailing presumption in favor of the hearing officer's findings and to demonstrate that substantial evidence supported the administrative decision so as to compel a conclusion that the circuit court's adoption of that proposed judgment necessarily constituted an impermissible reweighing of the evidence. That election, in my view, was proper, and I would reject the position taken by the main opinion that the Department failed to present a sufficient argument in this case to warrant reversal of the circuit court's judgment. Further, to the extent that the main opinion is correct that State Department of Transportation v. Reid, 74 So. 3d 465 (Ala. Civ. App. 2011), might instead compel a mechanistic application of Soutullo so as to mandate giving credence to a circuit court's judgment in review proceedings under the AAPA in a manner inconsistent

2200138

with our settled standard of judicial review in the administrative-law setting, I would recede from Reid. See also Pavilion Dev., L.L.C. v. JBJ P'ship, 979 So. 2d 24, 43 (Ala. 2007) (Murdock, J., joined by Cobb, C.J., concurring specially) (cautioning against overextension of principles of appellate review mandating affirmance based upon deficiencies in appellants' arguments that would "require[] appellate courts ... to affirm judgments even if they are wrong" (emphasis omitted)).

For the foregoing reasons, I would reach the merits of the Department's arguments. Further, in doing so, I would hold (a) that any violation by the Department of regulatory provisions requiring certified mailing to a service provider of any site-visit report within 30 days of the visit was harmless because Nobles was afforded a full 30 days after receipt of the site-visit report to submit a plan of action to the Department to cure the numerous deficiencies found; (b) that any reliance by the Department on matters first identified by Department personnel in follow-up site visits was not barred by any applicable statute or regulation; (c) that the inability of Nobles to rebut findings of Department employees at the exit-interview stage was not a denial of due process given that Nobles was

2200138

afforded "notice by certified mail ... of facts or conduct which warrant[ed]" the Department's proposed revocation of the operating authority of Nobles and "an opportunity to show compliance with all lawful requirements for the retention of [its] license" under Ala. Code 1975, § 41-22-19(c) (emphasis added);¹ and (d) that any "scoring errors" on the part of Department personnel were harmless in light of the repeated failure of Nobles to achieve, as required, 100% favorable findings on the mandatory criteria specified in Ala. Admin. Code (Dep't of Mental Health), rr. 580-5-33-.07, 580-5-33-.08, and 580-5-33-.09.

Under binding precedent, a reviewing court (such as the circuit court) "must affirm the [administrative agency]'s decision if that decision is supported by substantial evidence." Ex parte Williamson, 907 So. 2d 407, 411-12 (Ala. 2004). In this case, the Department's commissioner cited Nobles for its having consistently failed to meet required standards for

¹See also Opp Cotton Mills, Inc. v. Administrator of Wage & Hour Div. of Dep't of Lab., 312 U.S. 126, 152-53 (1941) ("The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective.").

2200138

residential providers of intellectual-disability services, and the evidence presented in the administrative hearing indicated that Nobles had, on the occasion of the Department's most recent evaluation, breached minimum standards in a number of respects. Those included, among other things, failing to equip a resident's bed with linens; repeatedly testing a resident's blood pressure on her forearm in an effort to obtain a reading considered sufficiently low to record; failing to meet numerical staffing requirements as to residents requiring heightened observation; staff members' filling out of residents' behavioral reports in advance of pertinent reporting periods; equipping residential units with "furniture made of raw lumber and unfinished plywood with exposed splinters and edges"; and failing to train staff members regarding prevention, detection, and reporting of alleged or observed abuse, neglect, mistreatment, and exploitation of residents. The hearing officer determined in her recommended order, which the Department's commissioner adopted, that those areas of concern, as well as the subsequent conduct of Nobles in failing to timely report allegations of abuse made by one of its residents regarding a Nobles employee, "demonstrate[d] a pattern on the part of Nobles of a consistent

2200138

failure to meet basic standards" expected of providers of services to persons with intellectual disabilities, a discrete group of Alabama citizens as to which the hearing officer aptly noted:

"The population of Alabama citizens served by the ... Department ... through its contracted and certified developmental disability community programs is unique in that they are reliant on the programs and their staff to provide nourishment, protection, education, treatment, and helpful guidance as they cannot adequately provide for themselves. As these citizens also cannot advocate on their own behalf, it is dependent upon the administration of the ... Department ... to provide oversight to community programs and advocate on behalf of those served. When providers do not adhere, and consistently fail to meet the standards established for the well-being of its clients, they put those individuals at risk, and they fail to meet the trusted obligations bestowed upon them."

Because I believe that the Department's order is amply supported by the evidence; that the circuit court's judgment reversing that order, to which judgment this court owes no fealty, is manifestly contrary to the applicable principles of appellate review of administrative-agency orders and is itself due to be reversed; and that the majority, rather than reaching that result, has applied Soutullo in a manner that demonstrates the prescience of Justice Murdock's concern, expressed in his special concurrence in Pavilion Development, supra, that appellate-waiver

2200138

principles not be extended so as to require appellate courts to affirm judgments even if they are wrong, I respectfully dissent from the main opinion.

Thompson, P.J., concurs.