

No. 1-12-3507

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LARYSA MYKYTIUK,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 11 CH 22877
)	
JULIE HAMOS, Director, the Illinois Department of)	Honorable
Healthcare and Family Services,)	Mary Anne Mason,
)	Judge Presiding.
Defendant-Appellee.)	

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Administrative law judge of the Illinois Department of Healthcare and Family Services abused his discretion in denying plaintiff's motion to file a third-party complaint to join necessary parties; plaintiff's due process rights were violated; judgment reversed.

¶ 2 This appeal arises from the October 24, 2012 order entered by the circuit court of Cook County, which affirmed the administrative decision of defendant-appellee Director Julie Hamos (the Director) of the Illinois Department of Healthcare and Family Services (DHFS), to terminate plaintiff-appellant Dr. Larysa Mykytiuk (Dr. Mykytiuk)'s eligibility to participate in the Illinois

Medical Assistance Program and to recover the sum of \$533,828.38 in overpayments made by DHFS. On appeal, Dr. Mykytiuk argues that: (1) the Director erred in refusing to find that certain relevant patient "sign-in" sheets satisfied Dr. Mykytiuk's obligation to produce patient records during an audit conducted by DHFS; (2) requiring her to reimburse \$533,828.38 in overpayments by DHFS violated public policy; (3) the Director and the administrative law judge erred in denying her motion to join certain necessary third parties to the administrative action; and (4) the Director's decision to terminate her from the Illinois Medical Assistance Program violated the Illinois Administrative Code and her due process rights. For the following reasons, we reverse the judgment of the circuit court of Cook County and therefore the judgment of the administrative tribunal.

¶ 3

BACKGROUND

¶ 4 Dr. Mykytiuk is a public service physician who specializes in pediatrics and has received extra training in psychiatry. In August 2004, Dr. Mykytiuk entered into a provider agreement with DHFS by which she agreed to provide medical treatment to patients who were recipients of public aid in the Illinois Medical Assistance Program—also known as the Medicaid program. As a provider or "vendor" in the state's Medicaid program, covered medical services rendered to Medicaid patients by Dr. Mykytiuk were paid by DHFS. Pursuant to the provider agreement with DHFS, Dr. Mykytiuk agreed, "on a continuing basis, to comply with all current and future program policy and billing provisions" as set forth in the DHFS handbooks, and "to be fully liable for the truth, accuracy and completeness of all claims submitted *** to [DHFS] for payment." Dr. Mykytiuk also agreed "to furnish to [DHFS] or its designee upon demand all records associated with submitted claims necessary to disclose fully the nature and extent of services provided to individuals under the [Medicaid] program and maintain said records for not

less than three (3) years from the date of service ***." Dr. Mykytiuk further agreed to be "fully liable to [DHFS] for any overpayments."

¶ 5 Under separate agreements with DHFS in 2004 and 2005, Dr. Mykytiuk designated as "alternate payees" the following three medical facilities where she was employed: (1) 26th Street Medical, S.C. (26th Street Medical); (2) Hyssop Modification Services, Inc. (Hyssop); and (3) Solid Rock Care Center (Solid Rock). The alternate payee agreements stated that the medical practitioner "shall be responsible for the accuracy and truthfulness of all bills submitted on behalf of the practitioner" and that the practitioner "understands and acknowledges that it is his or her personal responsibility to review any and all billings before such billings are submitted to [DHFS] on practitioner's behalf and/or in his or her name." In conjunction with the execution of the alternate payee agreements with DHFS, Dr. Mykytiuk also granted powers of attorney to Hyssop and Solid Rock. Under the powers of attorney, Dr. Mykytiuk acknowledged that the granting of such powers "in no way limits [her] rights, liabilities or duties relating to the provision of services under [DHFS]'s [Medicaid] program," and that she retained "full responsibility for all claims submitted to [DHFS]" under her name. By executing the powers of attorney agreements, Dr. Mykytiuk also acknowledged that "the person appointed must be a trusted employee over whom [she] [has] direct supervision on a daily basis." During her tenure at Hyssop and Solid Rock, Dr. Mykytiuk led group therapy sessions primarily for mentally ill nursing home residents. She worked as a pediatrician for 26th Street Medical. In December 2007, Dr. Mykytiuk quit her job at Hyssop.

¶ 6 In a letter dated September 3, 2008, DHFS notified Dr. Mykytiuk that she had been selected for the auditing process with regard to payments made by DHFS for medical services provided by Dr. Mykytiuk as a vendor of the Medicaid program. The stated purpose of the audit

was to determine whether Dr. Mykytiuk complied with DHFS policies with regard to billings made to DHFS between September 1, 2005 and August 31, 2007—during which DHFS paid bills under Dr. Mykytiuk's provider number for 613 Medicaid recipients.

¶ 7 In 2009, an audit was performed by DHFS' Bureau of Medicaid Integrity (the Bureau), which examined bills totaling \$304,098.47 from a sample size of 241 out of 613 Medicaid recipients. Results of the audit revealed that, within the audit sample, DHFS overpaid¹ \$209,873.80 on claims submitted under Dr. Mykytiuk's provider number for medical services provided to Medicaid patients between September 1, 2005 and August 31, 2007. Specifically, 945 cases of overpayment pertained to "missing patient records"; 4,958 cases of overpayment pertained to "missing records of specific services"; 55 cases of overpayment related to "improper procedure code billing"; 283 cases of overpayment related to "non-covered services"; and 8 cases of overpayment "due to billing for services performed by another provider." Subsequently, Dr. Mykytiuk requested a re-audit by DHFS. A re-audit was performed and the results of the re-audit again revealed that DHFS overpaid \$209,873.80 on claims submitted under Dr. Mykytiuk's provider number. Specifically, the re-audit found 22 cases of overpayment "due to missing patient records"; 5,881 cases of overpayment "due to missing records of specific services"; 55 cases of overpayment "due to improper procedure code billing"; 283 cases of overpayment "due to billing for non-covered services"; and 8 cases of overpayment "due to billing for services

¹Payments made by DHFS involved the use of public funds to cover medical services provided to Medicaid patients, which were paid directly to the three medical facilities designated by Dr. Mykytiuk as alternate payees. It was considered an "overpayment" if certain specific criteria set by DHFS were not met. For example, individual patient records containing information, such as diagnosis and treatment codes, were required to be maintained for each patient. Any discrepancy or failure to demonstrate that the criteria had been followed could result in DHFS finding an overpayment for the patient.

performed by another provider." DHFS then extrapolated the \$209,873.80 of overpayments beyond the sample size and projected a total recoupment amount of \$533,828.38.

¶ 8 On May 5, 2010, the Office of Inspector General of DHFS issued a "notice of right to hearing" to Dr. Mykytiuk, which stated the agency's intent to terminate her participation in the Medicaid program and to recover the \$533,828.38 in overpayments made by DHFS to the alternate payees under her provider number. A "statement of grounds" attached to the notice detailed DHFS' charges against Dr. Mykytiuk, including instances where she "billed for, and was erroneously or improperly paid for, services." Thereafter, Dr. Mykytiuk requested a hearing on the matter and administrative proceedings commenced.

¶ 9 On August 5, 2010, Dr. Mykytiuk, who was represented by counsel, filed a "motion to file third-party complaint," seeking to join as parties Hyssop and Andrew Griffin, Sr. (Griffin), individually and as owner and operator of Hyssop, in the administrative proceedings against her. Dr. Mykytiuk alleged that Hyssop and Griffin were necessary parties because they were solely responsible for billing DHFS and had received payments from DHFS as an alternate payee under her provider number; and that they refused to produce patient records or cooperate with Dr. Mykytiuk during the auditing process. On September 15, 2010, DHFS filed an objection opposing Dr. Mykytiuk's motion to join Hyssop and Griffin as necessary third parties, arguing that Hyssop and Griffin were not necessary to the administrative proceedings because Dr. Mykytiuk was liable to DHFS for the overpayments regardless of Hyssop and Griffin's conduct. DHFS' objection further noted that the proper venue for any action by Dr. Mykytiuk against Hyssop and Griffin would be in the circuit court, presumably in a separate proceeding, rather than in the then current administrative hearing.

¶ 10 On October 14, 2010, at a hearing on Dr. Mykytiuk's motion to file the third-party complaint against Hyssop and Griffin, the administrative law judge (ALJ) denied the motion. The ALJ noted that DHFS' rules provide for the issuance of subpoenas to compel the production of documents and to compel the appearance of individuals and entities. The ALJ found that the addition of Hyssop and Griffin as third parties in the case would have no material impact on the ultimate underlying issue in the case—that is, whether Dr. Mykytiuk's participation in the Medicaid program should be terminated and whether funds should be recovered from her by DHFS.

¶ 11 On November 3, 2010, an evidentiary hearing commenced during which DHFS presented the testimony of DHFS auditor Hope Little (Little). Little testified that she worked as an auditor for the Bureau within DHFS. She testified to the audit and re-audit of Dr. Mykytiuk's records in the instant case, which she had personally conducted. Little stated that the purpose of an audit is to determine compliance with DHFS rules. Little explained DHFS' audit procedures, the procedures she used with Dr. Mykytiuk's records, and the discrepancies she found in the records and bills during the audit. Little stated that designating alternate payees and granting powers of attorney to another entity are not requirements imposed on medical providers for participating in the Medicaid program. In describing the auditing process used in this case, she explained that the audit sample of 241 Medicaid recipients was drawn from a "universe" of 613 Medicaid recipients for whom DHFS issued payments under Dr. Mykytiuk's provider number between September 1, 2005 and August 31, 2007. Little testified that she had no control over the sample selection process, and that DHFS computer-selected the sample of 241 Medicaid recipients for auditing. Little stated that during auditing, she reviewed the records for the payments issued by DHFS for services rendered to the 241 Medicaid recipients. During auditing, a bill found to be

noncompliant with DHFS' policies or requirements was identified as a "discrepancy." She noted that a "Type A discrepancy" occurs when the patient record is missing and not produced for the audit. Little found 22 instances of Type A discrepancies in this case, which amounted to \$741.40 in overpayments by DHFS. A "Type B discrepancy" occurs when the patient record is tendered for audit, but a specific service date is missing from the patient's chart so that there is no documentation to substantiate that service date. Little found 5,881 instances of Type B discrepancies, which amounted to \$199,001.75 in overpayments by DHFS. A "Type C discrepancy" occurs where an improper procedure code was used to bill for a particular service. Little testified that she found 55 instances of Type C discrepancies in this case, which, after recoding to reflect the correct procedure code, totaled \$268.25 in overpayments by DHFS. Little also found 283 instances of overpayment totaling \$9,599.35 for "Type D discrepancies," which occur when the documentation in the patient's chart shows that the service is not covered by Medicaid. Little further found eight instances of overpayment totaling \$263.05 for "Type E discrepancies," which occur when a service is documented in the patient's record as having been performed by another provider.

¶ 12 Little described Dr. Mykytiuk as cooperative during the auditing process, and acknowledged that Dr. Mykytiuk had informed her that Dr. Mykytiuk had no control over the records or the billing process at the medical facilities where she worked. Little testified that during the audit, Dr. Mykytiuk tendered certain "sign-in sheets" for patients at the facility being audited, but that those sheets were not considered documentation for medical services. Little further explained that, because she was auditing Dr. Mykytiuk as the provider, rather than the clinics where she worked, it was not relevant as to which of the three medical facilities (26th Street Medical, Hyssop, or Solid Rock) maintained the medical records.

¶ 13 DHFS Audit Manager Thomas Harlson (Harlson), who only played a minimal role in Dr. Mykytiuk's case, testified that he had overseen approximately 1,500 total audits, which consisted of about 400 to 500 physician audits. DHFS typically conducts "post-payment compliance," the purpose of which is to ensure that the provider's records substantiate the payments that were made by DHFS. According to Harlson, DHFS does not audit alternate payees, but rather, audits the enrolled providers. When asked what a provider should do about keeping patient records if the provider's employment at a facility has been terminated, Harlson testified that the provider "is responsible for maintaining at least an abstract of the record" that is "[n]ot at the alternate payee's office."

¶ 14 Dr. Mykytiuk testified that she had been a licensed physician since 1982 and that she specializes in pediatrics. She had also received extra training in psychiatry. Her practice consisted of treating low-income and "underserved" patients. As a condition of employment at the medical facilities where she was employed, she was required to execute alternate payee agreements and power of attorney agreements. These agreements allowed the facilities to bill DHFS and to receive payment for services performed for patients by Dr. Mykytiuk under the Medicaid program. Dr. Mykytiuk stated that she completed thorough records of the medical services she provided at 26th Street Medical, Hyssop, and Solid Rock. At all three facilities, the medical records were stored on the premises and she was not permitted to remove them. She further testified that removing patient records from the facilities where she worked would violate the Health Insurance Portability and Accountability Act of 1996 (HIPPA). According to Dr. Mykytiuk, all three facilities kept patient billing records under lock and key, and she was not afforded the opportunity to examine the bills before they were sent to DHFS for payment. However, she trusted the billing staff to correctly bill for the services that were rendered to the

patients. Dr. Mykytiuk testified that, in December 2007, she terminated her employment with Hyssop because she learned from the Illinois State Police that Hyssop had falsely listed her as a 70% owner of the facility even though she had no ownership interest whatsoever and was in fact an employee of the facility. With regard to the audit and re-audit, Dr. Mykytiuk understood that she was responsible for providing all of the records that were requested by DHFS. When Dr. Mykytiuk requested patient records from the three medical facilities where she was employed, both 26th Street Medical and Solid Rock cooperated with her request by producing the records. However, Hyssop did not cooperate with the audit process or with Dr. Mykytiuk's requests to produce records for the auditor. Dr. Mykytiuk noted that Griffin, the owner of Hyssop, forbade his staff at Hyssop to assist her during the auditing process. Dr. Mykytiuk requested a re-audit because the results of the original audit showed that Hyssop had failed to produce the requested patient records. Dr. Mykytiuk then hired an attorney,² who wrote multiple request letters to Hyssop in an effort to obtain the patient records. However, Hyssop did not produce the records or give Dr. Mykytiuk access to the records for purposes of the audit. Dr. Mykytiuk testified that she never subpoenaed the records from Hyssop because she was not aware that she had the option to do so. Eventually, Hyssop permitted Dr. Mykytiuk to look for the records herself at the Hyssop facility, but she was only able to obtain patient "sign-in sheets" of group therapy sessions that she had led while employed at Hyssop. She then submitted the sign-in sheets to DHFS. Dr. Mykytiuk acknowledged that the sign-in sheets were not medical records.

¶ 15 Dr. Stella Paterakos (Dr. Paterakos) testified on Dr. Mykytiuk's behalf. Dr. Paterakos is a pediatrician who had known Dr. Mykytiuk since they both worked at the Chicago Department of

²This attorney was not the same counsel who represented Dr. Mykytiuk in the administrative hearing and proceedings.

Public Health in the 1990s. She described Dr. Mykytiuk as a "very conscientious" and "very good" pediatrician who was thorough in recording treatment to her patients. Dr. Paterakos testified that as a public service physician, she also had to sign an alternate payee agreement and a power of attorney agreement with her employer, the City of Chicago, in order for the City to bill DHFS for services she provided to patients in her care. She further testified that signing an alternate payee agreement and a power of attorney agreement was a condition of her employment. Additionally, she was not permitted to review the billing on public aid patients prior to its submission to DHFS. Dr. Paterakos also stated that she was not permitted to take patient records home, and could only access the records when she was at work. She had no control over how the patient records were stored or purged. Dr. Paterakos testified that she believed the process described in her testimony was standard practice in the public health medical community. Dr. Paterakos also testified that on one occasion, she accompanied Dr. Mykytiuk to Hyssop to search for the necessary records for the DHFS auditing process. She observed that the documents at Hyssop were in "terrible" condition, that they were "thrown into boxes" and disorganized, and that they had water damage and smelled of mildew.

¶ 16 Aline Strong (Strong) testified that she was employed by Hyssop as a cook and an office worker during the time Dr. Mykytiuk worked at the facility. The office work she performed involved working with "the files," particularly to make sure that records were completed correctly. She also made sure that each patient signed in for a therapy session in order to have documented verification that the patient had been present for that specific session. However, she was not involved with billing in any way at Hyssop. She testified that after Dr. Mykytiuk terminated her employment at Hyssop, Griffin did not want Dr. Mykytiuk to have access to any of the medical records and prohibited personnel at the Hyssop facility from providing any

assistance to Dr. Mykytiuk in her efforts to obtain records for the audit. Eventually, an office manager of the facility intervened and Dr. Mykytiuk was allowed to come to the facility to examine and obtain the records for short periods of time. However, based on Strong's observation, even on those occasions, Griffin did not give Dr. Mykytiuk access to all of the records.

¶ 17 The parties entered into an agreed stipulation stating that the "hard dollar amount of discrepancies" in this case was \$209,873.80, and that DHFS' extrapolation of that amount to \$533,828.38 was statistically valid.

¶ 18 Following the evidentiary hearing, on March 30, 2011, the ALJ issued a written "report and recommended decision" concluding that DHFS proved its case by a preponderance of the evidence, and upholding DHFS' decision to recover \$533,828.38 from Dr. Mykytiuk personally and to terminate her eligibility to participate as a vendor in the Medicaid program. The ALJ found that the re-audit revealed discrepancies in the amount of \$209,873.80, and the extrapolated value of the overpayments was \$533,828.38. The ALJ found that the majority of the discrepancies identified by DHFS, which were due to missing records and missing service dates, involved payments made by DHFS for services billed by Hyssop under Dr. Mykytiuk's name and provider identification number. The ALJ determined that DHFS was authorized to recover the \$533,828.38 in overpayments from Dr. Mykytiuk. The ALJ also summarized the applicable rules and DHFS handbook provisions stating that it is the physician's responsibility to maintain records, approve billing, and provide documentation of services rendered to patients. The ALJ found Little's testimony regarding the audit and re-audit findings to be credible, stating that it was supported by documentary evidence presented during the hearing. The documentary evidence included Little's notations of her audit and re-audit findings in a computer-generated

record of the bills submitted under Dr. Mykytiuk's name and the payments made by DHFS on those bills; the audit schedules that Little created reflecting the findings; documented examples of discrepancies found by her during the audit; an "introductory audit letter"; the "exit interview report"; the summary of audit and re-audit findings; Dr. Mykytiuk's provider agreement for the Medicaid program; and Dr. Mykytiuk's alternate payee agreements and power of attorney agreements, which gave the Hyssop the right to bill DHFS and collect payment for treatment rendered by Dr. Mykytiuk. The ALJ found that nothing was elicited from Little or "any other evidentiary source" to establish that Little had made any errors in her audit and re-audit findings. Further, the ALJ noted that because the "statement of grounds" attached to DHFS' May 5, 2010 "notice of right to hearing" revealed that DHFS sought Dr. Mykytiuk's termination from the program on the sole basis that she violated DHFS policies, rules and the terms of the provider agreement, as set forth under section 140.16(a)(1) of the Illinois Administrative Code, DHFS has forfeited any right to seek termination on any basis other than those set forth in section 140.16(a)(1). The ALJ further concluded that Dr. Mykytiuk had breached the 2004 provider agreement with DHFS by failing to maintain and furnish the requested records to the agency, by failing to use correct procedure codes, and by failing to only bill the agency for covered services. The ALJ also considered Dr. Mykytiuk's defenses—including her testimony that she had no control over records or billing as an employee of the medical facilities; that she could not review bills before they were submitted to DHFS for payment; that she was a victim of Hyssop's misconduct; and that she made repeated and ongoing efforts to obtain all the records that DHFS had requested for the auditing process. However, the ALJ concluded that participating in the Medicaid program was a "voluntary choice and endeavor"; that Dr. Mykytiuk understood the terms of her 2004 provider agreement, alternate payee agreements, and power of attorney

agreements; and that she understood the consequences of failing to comply with the rules and policies governing Medicaid providers. The ALJ further concluded that, even though Dr. Mykytiuk may have been a victim of misconduct by Hyssop, the law was "clearly and completely on [DHFS'] side in this case" and DHFS was entitled to the enforcement of the rules and policies which govern providers' participation in the Medicaid program. The ALJ further reasoned that it was within DHFS' right to elect to bring an action solely against Dr. Mykytiuk, rather than against Hyssop the alternate payee. The ALJ recommended that Dr. Mykytiuk be terminated from participation in the Medicaid program and that \$533,828.38 be recovered from her personally.

¶ 19 On May 27, 2011, the Director of DHFS adopted the ALJ's recommendation as the agency's final and binding administrative decision. On October 24, 2012, on administrative review, the circuit court affirmed the Director's decision to terminate Dr. Mykytiuk from participation in the Medicaid program and entered judgment in favor of DHFS in the amount of \$533,828.38.

¶ 20 On November 20, 2012, Dr. Mykytiuk filed a timely notice of appeal. Accordingly, we have jurisdiction to resolve the appeal.

¶ 21 ANALYSIS

¶ 22 Dr. Mykytiuk raises the following issues on appeal: (1) whether the Director erred in refusing to find that certain patient "sign-in" sheets submitted by Dr. Mykytiuk satisfied her obligation to produce patient records during the auditing process; (2) whether requiring Dr. Mykytiuk to reimburse \$533,828.38 in overpayments by DHFS violated public policy; (3) whether the ALJ erred in denying her motion to file a third-party complaint, which sought to join Hyssop and Griffin as third parties to the administrative action; and (4) whether the Director

erred in terminating her from participation as a provider in the Medicaid program. When a party appeals the circuit court's decision on a complaint for administrative review, the appellate court's role is to review the administrative decision rather than the circuit court's decision. *Siwek v. Retirement Board of the Policemen's Annuity & Benefit Fund*, 324 Ill. App. 3d 820, 824 (2001).

¶ 23 The Illinois Public Aid Code (the Public Aid Code) and DHFS regulations under the Illinois Administrative Code (the Administrative Code) authorize DHFS "to recover money improperly or erroneously paid, or overpayments, *** by requiring direct payment to [DHFS]." 305 ILCS 5/12-4.25(E) (West 2012); see 89 Ill. Adm. Code 140.15(a) (2007); see *Department of Public Aid ex rel. Hartigan v. Hokin*, 175 Ill. App. 3d 646, 654 (1988) (section 12-4.25 of the Public Aid Code "authorizes the Department to conclusively determine the amount of overpayments to a Medicaid provider and to enter an administrative order in the nature of a money judgment"). Section 140.25(a) of DHFS regulations under the Administrative Code provides that when an overpayment has been made, "the provider or the alternate payee shall reimburse [DHFS] for the overpayment. [DHFS] shall recover overpayments made to or on behalf of a provider that result from improper billing practices. Such recovery may occur by *** requiring direct repayment to [DHFS]." 89 Ill. Adm. Code 140.25(a) (2007). Moreover, where a practitioner designates an alternate payee, the practitioner and the alternate payee shall be "jointly and severally liable" to DHFS for payments made to the alternate payee, and recoveries by DHFS "may be made against either party or both, at [DHFS]' option." 89 Ill. Adm. Code 140.15(b) (2007).

¶ 24 DHFS' *Handbook for Providers of Medical Services* (Chapter 100, Topic 110.1), *Handbook for Physicians* (Section A-202.41), and *Handbook for Healthy Kids Services* (Section HK-205) require providers to maintain detailed and complete records documenting their services

to Medicaid patients. The handbooks also specify that payments made by DHFS may be recouped in the absence of proper and complete records required to be kept by the provider. Similarly, DHFS regulations require providers to maintain records pertaining to the medical care of patients for which payment is claimed. See 89 Ill. Adm. Code 140.28 (a) (2007) (providers shall maintain in the regular course of business any professional records, including medical records, "that relate to the quality of care given by the provider or that document the care for which payment is claimed"); see 89 Ill. Adm. Code 140.30(a) (2007) ("should an audit reveal that incorrect payments were made, or that the provider's records do not support the payments that were made, or should the provider or designated alternate payee fail to furnish records to support payments that were made, the provider or designated alternate payee shall make restitution").

¶ 25 In the case at bar, Dr. Mykytiuk entered into the 2004 provider agreement with DHFS in which she agreed to be a "vendor" of the Medicaid program. Under the provider agreement, Dr. Mykytiuk agreed, "on a continuing basis, to comply with all current and future program policy and billing provisions" as set forth in DHFS handbooks, and "to be fully liable for the truth, accuracy and completeness of all claims submitted *** to [DHFS] for payment." Dr. Mykytiuk also agreed to "furnish to [DHFS] or its designee upon demand all records associated with submitted claims necessary to disclose fully the nature and extent of services provided to individuals under the [Medicaid] program and maintain said records for not less than three (3) years from the date of service ***." Dr. Mykytiuk further agreed to be "fully liable to [DHFS] for any overpayments." In 2004 and 2005, Dr. Mykytiuk also executed agreements designating Hyssop, 26th Street Medical, and Solid Rock as alternate payees. The alternate payee agreements stated that Dr. Mykytiuk "shall be responsible for the accuracy and truthfulness of all

bills submitted on behalf of [her]" and that she "understands and acknowledges that it is her personal responsibility to review any and all billings before such billings are submitted to [DHFS] on [her] behalf and/or in her name." Power of attorney agreements executed by Dr. Mykytiuk in favor of Hyssop and Solid Rock stated that the granting of such powers "in no way limits [her] rights, liabilities or duties relating to the provision of services under [DHFS's] [Medicaid] program," and that she retained "full responsibility for all claims submitted to [DHFS]" under her name. By executing the powers of attorney, Dr. Mykytiuk also acknowledged that "the person appointed must be a trusted employee over whom [she] [has] direct supervision on a daily basis."

¶ 26 The ALJ's findings, which were adopted by the Director, stated that Dr. Mykytiuk was liable for failing to comply with her obligations under the 2004 provider agreement, DHFS handbooks, and DHFS regulations under the Administrative Code.

¶ 27 The facts of this case, as well as the applicable regulatory provisions are not in dispute. Notwithstanding the order in which Dr. Mykytiuk presents the issues on appeal, we choose to first determine whether the ALJ erred in denying Dr. Mykytiuk's motion which sought to join Hyssop and Griffin as necessary third parties to the administrative action. We review this issue under an abuse of discretion standard. See *Winter v. Henry Service Co.*, 143 Ill. 2d 289, 293-94 (1991).

¶ 28 On August 5, 2010, Dr. Mykytiuk, who was represented by counsel, filed a "motion to file a third-party complaint," seeking to join as necessary third parties, Hyssop and Griffin (individually and as owner and operator of Hyssop) in the administrative proceedings instituted by DHFS against her. In response, on September 15, 2010, DHFS opposed the motion by arguing that Hyssop and Griffin were not necessary to the administrative proceedings because

Dr. Mykytiuk was liable to DHFS for the overpayments regardless of Hyssop and Griffin's conduct. On October 14, 2010, at a hearing on Dr. Mykytiuk's motion to add Hyssop and Griffin, the ALJ denied the motion, finding that the addition of those parties to the case would have no material impact on the ultimate underlying issue of the case—that is, whether Dr. Mykytiuk's participation in the Medicaid program should be terminated and whether funds should be recovered from her by DHFS. Specifically, the ALJ noted that section 104.241 of the Administrative Code governed the addition of other parties to the instant hearing, but nonetheless found that the addition of Hyssop and Griffin as requested by Dr. Mykytiuk was not necessary and was immaterial to an adjudication of the underlying issues in the case.

¶ 29 Dr. Mykytiuk argues on appeal that Hyssop and Griffin were necessary parties to the administrative action pursuant to section 104.241 of the Administrative Code, and the ALJ erred in preventing joinder of those parties—thus, depriving her of a full, meaningful, opportunity to mount a defense to DHFS' allegations. She contends that by joining Hyssop and Griffin in the administrative action, the records could have been produced or "their absence could [have been] resolved." She further argues that because Hyssop, as the alternate payee, was responsible for maintaining the patient records, the ALJ's refusal to join Hyssop and Griffin as necessary parties was troubling where they were much more liable than she as they had responsibility for and control over the records which gave rise to the finding of noncompliance by the auditor. Dr. Mykytiuk argues that the failure to join Hyssop and Griffin as parties violated her due process rights.

¶ 30 DHFS argues that Dr. Mykytiuk's due process claim on this issue is forfeited, where she only mentions it in the "section heading" of her brief but fails to develop further arguments on the point. DHFS further contends that Hyssop and Griffin were not necessary parties to the

proceedings because Dr. Mykytiuk was individually liable to the agency regardless of the roles Hyssop and Griffin may have played in the billing. DHFS maintains that section 104.241 of the Administrative Code does not create a right to compel joinder of third parties to the administrative action. DHFS points out that Dr. Mykytiuk and her witnesses were permitted to testify at the hearing about Hyssop and Griffin's refusal to cooperate with her efforts to obtain the patient records for the audit, and that she could have subpoenaed Griffin to testify at the hearing. DHFS also argues that Dr. Mykytiuk could have filed an action against Hyssop and Griffin in a separate proceeding in the circuit court seeking indemnity for her liability to DHFS.

¶ 31 "A party is necessary where its presence in a lawsuit is required in order to: (1) protect an interest which the absentee has in the subject matter which would be materially affected by a judgment entered in his absence; (2) reach a decision which will protect the interests of those who are before the court; or (3) enable the court to make a complete determination of the controversy." *State Farm Fire & Casualty Co. v. John J. Rickhoff Sheet Metal Co.*, 394 Ill. App. 3d 548, 563 (2009).

¶ 32 Section 104.241 of the Administrative Code provides:

"At any time before completion of the hearing, amendments may be allowed on just and reasonable terms to introduce any party who ought to have been joined, to dismiss any party, or to delete, modify or add allegations and defenses." 89 Ill. Adm. Code 104.241 (2012).

¶ 33 Based on our examination of the record and the parties' written and oral arguments, we find that the ALJ erred in denying Dr. Mykytiuk's motion to join Hyssop and Griffin as necessary third parties. The principles of justice and reasonableness inherently underlie section

104.241 of the Administrative Code. See 89 Ill. Adm. Code 104.241 (2012). Here, it was both unjust and unreasonable for the ALJ to prohibit Dr. Mykytiuk from joining Hyssop and Griffin in the administrative action in order to allow her the opportunity to provide a complete defense to these serious charges. It is undisputed that although she had agreed under the provider agreement and DHFS rules and regulations to maintain and produce complete patient records substantiating claims for which DHFS was billed by Hyssop, she was prevented from carrying out her responsibilities as a result of Griffin's egregious conduct. In other words, Hyssop and Griffin's behavior made it impossible for Dr. Mykytiuk to perform her obligation under the provider agreement with DHFS. It is interesting to note, as confirmed by counsel for the Director during oral argument, that Hyssop, as an approved site at which Medicaid patients received treatment and services, also had an obligation to cooperate with DHFS if requested to do so. Counsel did not know whether any such request was made to Hyssop by DHFS during the audit of Dr. Mykytiuk. By making Hyssop and Griffin parties to the administrative action, a full and fair hearing as to all of the patient record issues could have been had. We find the argument by the Director that Dr. Mykytiuk could have subpoenaed Griffin to testify at the evidentiary hearing, to be disingenuous. At the time the ALJ denied the motion to join Hyssop and Griffin, the ALJ's stated reason for doing so was that joinder of the parties "would have no material impact" on the underlying issue in the case. Such a finding, in essence, strongly suggests that the ALJ had *predetermined* the outcome of the case. In essence, the clear inference to be drawn is that the ALJ had already determined that Dr. Mykytiuk was *solely and completely* liable—akin to strict liability—before hearing *any* evidence. Moreover, while DHFS had the regulatory option to seek recovery against *either* the provider directly, *or* the alternate payees, DHFS inexplicably sought to recover solely from Dr. Mykytiuk. When asked during oral argument

about the criteria that were used to make the decision as to which party will bear the responsibility for repayment, the Director's counsel's reply was enlightening and troubling. In summary, counsel stated that DHFS sought recoupment solely against Dr. Mykytiuk for the reason that by doing so it would reduce its own reimbursement obligation to the federal government for the overpayments under the Medicaid program. See 42 C.F.R. § 433.300(a), (b) (2012) (federal payments to states under the Medicaid program must be reduced to adjust for overpayments made; states have one year from discovery of an overpayment for Medicaid services to recover or attempt to recover the overpayment from the provider; federal adjustments will be made at the end of the one-year mark whether or not recovery is made by the state, "unless the [s]tate is unable to recover from a provider because the overpayment is a debt that has been discharged in bankruptcy or is otherwise uncollectable"). It is significant to note that, at the time of the ALJ's ruling denying joinder of Hyssop and Griffin as parties, Hyssop was still in operation and Griffin was its owner and agent. There was no finding made by the ALJ that Hyssop or Griffin would have been unable to reimburse DHFS for the overpayments—funds that counsel for DHFS acknowledged during oral argument had specifically been pocketed by Hyssop and not Dr. Mykytiuk. Thus, because Hyssop and Griffin's absence from the administrative proceedings affected the interests of Dr. Mykytiuk and DHFS, as well as prevented the ALJ from making a complete determination of the controversy before him, we find that they were necessary parties to the proceedings and their presence was required to conduct a full and fair hearing. When asked during oral argument, whether the ALJ had predetermined the outcome of the case before hearing the evidence, counsel for the Director stated that he had not. Accepting that response as true, then a full and fair hearing of the evidence would have required the joinder of Hyssop and Griffin. Therefore, the ALJ erred in finding that joinder of Hyssop

and Griffin would have no material impact on the underlying issues in the case. Accordingly, we hold that the ALJ abused his discretion in denying Dr. Mykytiuk's motion to join Hyssop and Griffin as necessary third parties. This abuse of discretion prevented Dr. Mykytiuk from putting on a full and fair defense to the serious charges leveled against her by DHFS. The resulting consequences brought about by the ALJ's abuse of discretion are likely devastating for Dr. Mykytiuk. As noted during oral argument by counsel for both sides, Hyssop has since been dissolved and is no longer in business; the patient records at issue are either no longer available or not in existence; and counsel suggested that Griffin cannot be located. Since we find that Hyssop and Griffin are necessary parties under the record before us, it is clear that the ALJ's ruling has deprived Dr. Mykytiuk of the opportunity to have a full and fair hearing at a time when it was possible to do so.

¶ 34 Further, we find that Dr. Mykytiuk's due process claim was violated by the failure to join Hyssop and Griffin as necessary third parties. DHFS contends that Dr. Mykytiuk's due process claim is forfeited on appeal on the basis that she only mentions it in the "section heading" of her brief but fails to develop further arguments on the point. We agree that Dr. Mykytiuk's brief does not develop her arguments on her claim of due process. Notwithstanding that alleged forfeiture of the due process claim, nevertheless, we choose to address the issue. See *Carroll v. Department of Employment Security*, 389 Ill. App. 3d 404, 407 (2009) (forfeiture of an argument operates as a limitation on the parties and not as a limitation upon the jurisdiction of this court).

¶ 35 It is well established that concepts of due process apply to both courts and administrative proceedings that perform adjudicatory functions. *SMRJ, Inc. v. Russell*, 378 Ill. App. 3d 563, 570 (2007). The requirements of due process in judicial proceedings differ from those in administrative proceedings, which are simpler and less formal and technical. *Id.* Due process in

an administrative hearing is satisfied by a "procedure that is suitable and proper to the nature of the determination to be made and conforms to fundamental principles of justice." (Internal quotation marks omitted.) *Id.* (quoting *Comito v. Police Board*, 317 Ill. App. 3d 677, 687 (2000) (quoting *Telcser v. Holzman*, 31 Ill. 2d 332, 339 (1964))). "That procedure must include the opportunity to be heard, the right to cross-examine adverse witnesses, and impartial rulings on the evidence." *Russell*, 378 Ill. App. 3d at 570-71. Also, as in judicial proceedings, due process requires that administrative proceedings be adjudicated by an impartial tribunal. *Girot v. Keith*, 212 Ill. 2d 372, 380 (2004); *Collura v. Board of Police Commissioners*, 113 Ill. 2d 361, 369 (1986).

¶ 36 We find that Dr. Mykytiuk was deprived of her due process rights by the ALJ's decision to deny joinder of Hyssop and Griffin as necessary third parties. As discussed, the ALJ's stated reason for denying Dr. Mykytiuk's motion to join Hyssop and Griffin was such that it strongly suggests that he had predetermined the outcome of the case—that is, there was an inference that the ALJ had already determined that Dr. Mykytiuk was solely and completely liable before hearing *any* evidence. Thus, we cannot conclude that Dr. Mykytiuk received impartial rulings on the evidence during the administrative proceedings. Likewise, because Hyssop and Griffin's absence from the administrative proceedings affected Dr. Mykytiuk's interests and prevented the ALJ from making a complete determination of the controversy before him, we cannot conclude that the procedure by which Dr. Mykytiuk was found to be liable to DHFS for the overpayments, were "suitable and proper" or conformed to "fundamental principles of justice." Accordingly, we hold that the ALJ's refusal to join Hyssop and Griffin as necessary third parties in the administrative proceedings violated Dr. Mykytiuk's due process rights and was clearly erroneous. See *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 211

(2008) ("an examination of the legal effect of a given state of facts involves a mixed question of fact and law with a standard of review of 'clearly erroneous'"; an administrative agency's decision is deemed "clearly erroneous" when the reviewing court is left with the "definite and firm conviction that a mistake has been committed").

¶ 37 In light of our holding, we need not address the remaining issues regarding whether the patient "sign-in" sheets satisfied Dr. Mykytiuk's duty to produce records to substantiate payments made by DHFS; whether requiring Dr. Mykytiuk to pay the entirety of the overpayments violated public policy; and whether the Director erred in terminating Dr. Mykytiuk from the Medicaid program.

¶ 38 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County.

¶ 39 Reversed.