The Devereux Foundation,
Petitioner,

v.

New Jersey Department of Labor and Workforce Development,
Respondent.

STATE OF NEW JERSEY
DEPARTMENT OF LABOR
AND WORKFORCE DEVELOPMENT

FINAL ADMINISTRATIVE
ACTION OF THE COMMISSIONER

OAL DKT. NO LID 14264-13
AGENCY DKT. NO. DOL 13-053

Issued: September 26, 2019

I. BACKGROUND

Pursuant to N.J.S.A. 43:21-14(c), on March 14, 2007 the New Jersey Department of Labor and Workforce Development ("Department" or "Respondent") assessed The Devereux Foundation ("Devereux" or "Petitioner") for unpaid contributions to the Department's unemployment and disability benefit funds for the period from 2002 to 2005 (the "audit period"), in the total amount of $77,561.95. While paying this amount under protest, Petitioner filed a timely appeal and the matter was transferred to the Office of Administrative Law ("OAL") for a hearing as a contested

case. A hearing was held before Administrative Law Judge ("ALJ") Jeffrey R. Wilson on November 29, 2018.

The issue before the ALJ was whether the therapeutic foster care providers, mental health personnel, and individuals making repairs[1] engaged by Devereux during the audit period were employees of the firm, and consequently whether Devereux was responsible under N.J.S.A. 43:21-7 for making contributions to the unemployment and disability benefits funds for those individuals. Under N.J.S.A. 43:21-1 *et seq.* (the Unemployment Compensation Law, or "UCL"), the term "employment" is defined broadly to include any service performed for remuneration or under any contract of hire, written or oral, express or implied. N.J.S.A. 43:21-19(i)(1)(A). Once it is established that a service has been performed for remuneration, that service is deemed to be employment subject to the UCL, unless and until it is shown to the satisfaction of the Department that:

> (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and,
>
> (B) Such service is either outside the usual course of business for which such service is performed, or that such services is performed outside of all the places of business of the enterprise for which such service is performed; and,
>
> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

N.J.S.A. 43:21-19(i)(6).

This statutory criteria, commonly referred to as the "ABC test," is written in the conjunctive. Therefore, where a putative employer fails to meet any one of the three criteria listed above with regard to an individual who has performed a service for remuneration, that individual

[1] These individuals are described as "repairmen" in the decision and in the record, and for convenience I will continue that description here.

is considered to be an employee and the service performed is considered to be employment subject to the requirements of the UCL; in particular, subject to N.J.S.A. 43:21-7, which requires an employer to make contributions to the unemployment compensation fund and the State disability benefits fund with respect to its employees.

A. ALJ'S INITIAL DECISION

In a decision delivered on May 13, 2019, the ALJ reversed the Department's assessment, finding that Devereux had no liability for the alleged unpaid contributions, and ordered that Devereux be reimbursed the $77,561.95 it had previously paid under protest. The ALJ disagreed with several of the Department's contentions and its presentation against the Petitioner.

To begin, the ALJ found that the Department had not established that Devereux provided remuneration for services to therapeutic foster care providers, mental health personnel, and repairmen, which is the necessary precursor to determining that such services constitute employment under the UCL. (Initial Decision, p. 7). The ALJ based this on a determination that the audits relied upon by the Department had no evidentiary weight and their findings could not be used to establish remuneration. Id. at 6. Additionally, he placed emphasis on the testimony of the Department's redetermination auditor, Alan Handler, who testified that while auditing employers to see if they are "following the rules concerning the ABC test," he "never" looks to see if a service has been performed for remuneration. Id. at 2-3. The ALJ concluded from this that the Department, as a whole, "never looks in detail to determine if remunerations were paid." Id. at 6. Finally, even though it was not mentioned in the ALJ's findings with respect to remuneration and instead came in his findings with respect to the ABC test, it seems clear that the ALJ was persuaded that the method of payment to the foster parents (reimbursement of expenses incurred in the course of foster care) did not constitute remuneration for services under the UCL

(the ALJ wrote that reimbursement of expenses "mitigates against a finding that the therapeutic foster parents are employees...[because] these funds are not considered 'income' for purposes of taxation"). Id. at 9.

Second, the ALJ criticized the Department for principally relying on two audit reports from 2006, without presenting the reports' authors, or the authors' supervisors, or any of the subjects interviewed by the auditors, as witnesses. Id. at 3. These audits concluded that a foster parent, Evangeline Edwards, who had entered into a foster parent agreement with Devereux and had then issued a 1099 form to a purported independent contractor, was a subject employer under the UCL. Ibid. This action then triggered a larger investigation, which concluded that Devereux was a subject employer because Edwards was acting as an agent for Devereux under N.J.S.A. 43:21-19(g). Id. at 3-4. The ALJ also found that these audits contained spreadsheets that were "not a standard form" used by the Department. Id. at 4. Essentially, the ALJ expressed concern with the Department's reliance on the audits, since the Department's sole witness, redetermination auditor Alan Handler, was not the author of the audits, did not oversee the audits, and only "reviewed the documents included...in preparation of the fair hearing." Ibid.

Based upon his concerns with the veracity of the audits, the ALJ admitted them as hearsay evidence but assigned them no probative value. That is, the ALJ found that there was not sufficient legally competent evidence to "provide assurances of reliability and to avoid the fact or appearance of arbitrariness" because, according to the ALJ, the Department had not provided adequate testimony to explain the audits apart from the hearsay evidence. Id. at 5, *citing* N.J.A.C. 1:1-15.5(b) (the so-called "residuum rule").

Finally, the ALJ found, even assuming *arguendo* that Devereux had provided remuneration for services, Devereux had met its burden under each prong of the ABC test. Id. at 7. With respect

to Part A of the test, the ALJ found that Devereux had the authority to direct the result to be accomplished, but it did not retain control over the means by which that result was achieved. Id. at 8. Therapeutic foster care providers, asserted the ALJ, "enjoy[ed] considerable autonomy regarding the details of day-to-day supervision of foster children in their home," and "decide all the things otherwise expected of biological parents, *e.g.* when to have dinner, what to do on weekends, where to go for recreation, when to do homework and how much TV to watch." Id. at 8, 10, *citing* New Jersey Prop.-Liab. Ins. Guar. Ass'n v. State, 195 N.J. Super. 4 (App. Div. 1984). In support of this, the ALJ cited Devereux's independent contractor agreements, which specified that the firm does not "exercise control or direction over the manner or method by which Contractor performs the services which are the subject matter of this Agreement." Id. at 8.

With respect to Part B of the test, the ALJ found that therapeutic foster care providers "operate in homes that they own over which Devereux has no ownership," and operate outside of Devereux's New Jersey offices, and consequently Devereux had met the statutory requirement that the therapeutic foster parents had performed services "outside of all of the places of business of the enterprise for which such service is performed." Id. at 10. With respect to Part C of the test, the ALJ found that because most therapeutic foster care providers include a spouse who works outside of the home, and must demonstrate another source of income (apart from reimbursements) as part of the licensure process, they have an "enterprise that exists and can continue to exist independently of and apart from the particular service relationship." Id. at 10.

B. EXCEPTIONS AND REPLY

The Department filed exceptions to the ALJ's initial decision, and Devereux filed a reply in opposition.

The Department raises a number of points in its brief. It argues first that the payments to the therapeutic foster parents constituted remuneration under the UCL. The Department asserts that the contracts and other documents presented to the auditor show "the full requirements of both the contractor and Devereux from the required licensing, training, and numerous other restrictions for a prescribed amount of money" paid to the therapeutic foster parents (and documented via a 1099). (Exceptions, p. 10). These payments would meet the definition of "remuneration" in N.J.S.A. 43:21-19(p), defined broadly as "all compensation for personal services, including commission and bonuses and the cash value of all compensation in any medium other than cash." (Exceptions, p. 10). According to the Department, by issuing 1099s "Devereux has acknowledged to the IRS that it compensated the therapeutic foster parents for their services." Id. at 12.

Second, the Department states that the relationship between the therapeutic foster care providers and the children should be considered "corrective training" rather than "true fostering," and that there is "no adoptive nature to the relationship." Id. at 6. According to the Department, this accords with the relationship in Lester A. Drenk Behavioral Health Center v. NJ Department of Labor and Workforce Development, 2007 N.J. AGEN LEXIS 592 (2007), a 2007 case on similar terms in which an employment relationship was found. Id. at 6, 18.

Third, the Department states that the ALJ misinterpreted evidentiary rules by first, considering the 2006 audits to be hearsay, and second, by according them no evidentiary weight. Id. at 6. The Department argues that as the audits were "gathered as part of the audit process by [the auditor] during his position as a field auditor," they are public records and should not be

considered hearsay under N.J. R. Evid. 803(c)(8). Id. at 8; Tr. 56:11-13. Additionally, the Department notes that the audits should be considered reliable because all of the information contained therein was "either provided by Devereux or the individuals in question from [the] audit," and that the audits were thoroughly reviewed by Alan Handler before testifying. Id. at 8-9. If the ALJ's refusal to give evidentiary weight to the audits were to stand, it would essentially "require all Department proceedings in the OAL to either issue a subpoena to the retired, sick or dead former workers to testify to the validity of their work post-employment," an untenable requirement. Id. at 9.

Fourth, the Department notes that the ALJ did not do a separate ABC analysis for each of the classes of workers involved in the Department's assessment – therapeutic foster care providers, mental health personnel, and repairmen. Id. at 13. Instead, the ALJ performed this analysis only for the therapeutic foster care providers, and "treated all contractors the same whether they performed services for the fixed Devereux locations as repairmen and psychiatrists or if they were treatment families." Ibid.

Finally, the Department asserts that the ALJ erred in his ABC analysis. As to Part A, Devereux retained significant control over the therapeutic foster care providers, including recruitment, vetting, training, assisting providers with licensure, setting rates of pay, and monitoring the providers' activities through an "intensive supervision plan" along with regular inspections. Id. at 14. As to Part B, 2 out of the 3 classes of workers involved in the Department's assessment (mental health personnel and repairmen) actually did perform services at Devereux-owned offices in New Jersey, and consequently Devereux clearly did not meet Part B with respect to these workers. As to the therapeutic foster care providers, the Department states that the provider's home should be considered "an extension of Devereux's business location," and that

the providers are performing services related to Devereux's business of "providing therapeutic services to adolescents for the State of New Jersey." Id. at 15-16. Therefore, Devereux would not meet Part B with respect to these workers either. As to Part C, the ALJ did not analyze whether the repairmen and mental health professionals engaged in an independently established trade or profession, but only considered whether the therapeutic foster care providers did so. Id. at 17. For the therapeutic foster care providers, if their contract with Devereux was terminated "they would be unemployed" and "their only flow of income would have dried up upon the separation." Ibid. This would not meet Part C of the ABC test.

Devereux raises numerous arguments in its reply. First, it asserts that the ALJ correctly determined that therapeutic foster care providers did not provide services for remuneration. According to Devereux, it merely acted as a "conduit" through which it "provided these parents with funds appropriated by the Legislature to reimburse parents" for the costs associated with the children. (Reply, p. 12). In support of this position, Devereux notes that until 1999 the State (which then administered the program) did not consider its payments to foster care payments as remuneration for personal services. Ibid. According to Devereux, "it would be the height of hypocrisy for the State to treat therapeutic foster parents as non-employees when the State ran the program, but then have its own agency – the Department – argue that they became employees when Devereux took over the State's identical role." Id. at 13-14. Furthermore, argues Devereux, even though the independent contractor agreement distinguishes between reimbursements and additional monies, it does not follow that the additional monies should be considered remuneration or wages. Id. at 17. Rather, according to Devereux, the non-reimbursement monies should be seen as flat payments (or a "per diem stipend account") to reimburse "parents" for all the other associated costs with being a "parent." Ibid. The fact that the agreement does not specify a dollar-

for-dollar reimbursement, according to Devereux, "merely reflects the highly impractical exercise that would have been required to do so." Ibid. Devereux also asserts that the Department's reliance on the issuance of 1099s as proof of remuneration belies its customary position giving "minimal weight...as to how companies or individuals classify their payments." Id. at 19.

Devereux defends the ALJ's findings with respect to the ABC test as well. With respect to Part A of the test, Devereux asserts that the firm's independent contractor agreement disclaims any control over therapeutic foster care providers, the providers own the house in which the children live, and exercise control over "all the things otherwise expected of biological parents." Id. at 12. Additionally, according to Devereux, nearly all of the firm's imposed requirements on the therapeutic foster care providers are regulated or required by the State, including requirements that children have the opportunity to receive allowance; receive appropriate toiletries; are given time for recreation; and are fed and clothed appropriately. Id. at 13. With respect to Part B, Devereux argues that the providers clearly operated outside of Devereux's New Jersey offices, and their homes could not be considered "extensions" of Devereux. Id. at 21. With respect to Part C, Devereux indicates that the fact that one parent usually worked outside the home demonstrated independence. Id. at 23. Devereux also raises conceptual questions related to whether therapeutic foster care providers' parenting obligations can be considered a "business" at all. Ibid.

Third, Devereux defends the ALJ's interpretation of hearsay and evidentiary rules. Devereux states that the ALJ correctly determined that the 2006 audits should be given no weight in "the absence of any competent evidence, such as testimony of the auditor or anyone else with knowledge of the audit." Id. at 18.

Fourth, Devereux argues that the Lester Drenk decision is not binding precedent that must be followed, and criticizes the case for its "circular reasoning" and lack of analysis into whether

the payments in that case constituted remuneration under the UCL. Id. at 24. Instead, Devereux suggests that a relevant precedent would be Koza v. NJ Dept. of Labor, 307 N.J. Super. 439 (App. Div. 1998) ("Koza II"). In that case, the Appellate Division held that a band leader who received payment for performances, and then distributed monies in equal amounts to band members whose services he had engaged, was not providing remuneration for services. Id. at 25. Devereux asserts that, like the band leader in Koza II, it is merely a "conduit" for monies appropriated by the Legislature. Ibid.

Finally, Devereux asserts that finding that therapeutic foster care providers were paid remuneration for personal services would "wreak havoc to the existing regulatory scheme." Id. at 26. Such a decision, argues Devereux, would "be but the tip of the iceberg that would almost assuredly sink the privatized foster care system." Id. at 27.

II. DISCUSSION

Upon *de novo* review of the record, and after consideration of the ALJ's Initial Decision as well as the exceptions and replies filed by the parties, I hereby REVERSE the ALJ's Initial Decision.

A. THE ALJ'S EVIDENTIARY FINDINGS

Much of the ALJ's Initial Decision follows from his conclusion that no weight should be assigned to the audit reports relating to Edwards and Devereux "because they were not supported by any testimony from their author Bartholomew, his supervising auditor or either of the referring agencies," and because of the inclusion of spreadsheets in these reports that were not standard Departmental forms. (Initial Decision, p. 6). I reject the ALJ's conclusions in this regard and find that the reports should be given significant evidentiary weight.

The ALJ correctly recognized that administrative proceedings do not follow the stricter evidentiary rules of Superior Court. N.J.A.C. 1:1-15.5; Weston v. State, 60 N.J. 36 (1972). Despite this, in giving the audits no evidentiary weight he ignored several important indicia of reliability. First, the audits and their underlying documents were gathered as part of the regular audit process by the Department's auditor, Michael Bartholomew, while Bartholomew was employed as a field auditor, and were presented by the Department in good faith at the hearing. (Exceptions, p. 8). Second, all of the information Bartholomew reviewed was either provided by Devereux or the individuals in question from his audit. Ibid. Indeed, Devereux did not dispute the compensation amounts presented by Bartholomew, instead questioning only where he had obtained the amounts:

> DOL: So if Michael [Bartholomew] had them in there, Michael had to get them from Devereux or a legal representative, we don't have an outside agency or any access to those directly. Correct?
>
> Alan Handler: Correct.
>
> DOL: All right. So if they're disputing it they're saying that the 1099s Michael reviewed are fraudulent...
>
> Devereux: We're not making that...We simply don't know where he may have gotten that information from. (Tr. 88:15-89:5).

Third, the ALJ fails to recognize the fact that while Handler did not gather the materials reviewed by Bartholomew, Handler **did** gather and review additional documentation provided by Devereux after Bartholomew had retired from the Department. (Tr. 74:5-9). Handler then reviewed the audits from beginning to end, performed his own substantive analysis, and affirmed Bartholomew's assessment, even though he had the authority to overturn Bartholomew's assessment if he had found it to be deficient. The below exchange illustrates the significant extent of Handler's involvement:

DOL: Your Honor, I'm going to the point where he's an Auditor and reviewed additional documentation that may have changed the actual audit based on what they provided after Mr. Bartholomew left the State's service. So his impression of the documents they provided is relevant because if he overturns it then we can cut this thing real short because he's going to do an analysis of what he reviewed from direction and control, place and course, he's basically going to do the ABC analysis on the documents that are here.

The Court: So he's here as a fact witness or expert.

DOL: Well, I guess a fact witness...

The Court: So you're representing that at some point Mr. Handler reviewed all of this and could have overturned Mr. Bartholomew.

DOL: Yes. That's what the Redetermination job is – the Redetermination Auditor's job is...

DOL: Alan, did you review anything in these documents that were provided after Mr. Bartholomew left or conducted his audit that would change the outcome of the decision of the Department?

Alan Handler: Nothing I saw would change the decision, no. (Tr. 74:5-76:2).

Fourth, the ALJ's contention that counsel for Devereux could not effectively cross-examine Handler, since he was reviewing conclusions "that were made by somebody else," was unfounded. (Tr. 56:2-10). As described immediately above, Handler performed a substantive review of the entire audit and was responsible for defending its findings as the Department's chief witness.

Fifth, the ALJ placed far too much emphasis on the allegedly suspect nature of the spreadsheets included in the audits. There is no mysticism about these spreadsheets. They are clearly a record of payments made to various individuals engaged by Devereux and prepared as part of a standard Departmental audit. Bartholomew obtained this information either through 1099s (see R-1, p. 85, which states that "examination was limited to the 1099s") or through Schedule C forms (which are indicated in certain places on the spreadsheets, *see e.g.* entries for

"Susan Generoso" and "Michael De Gasperis" in R-1, p. 89). The below exchange on cross-examination shows this:

> Devereux: All right. Now we've seen, however, in the documentation a reference to a number of 1099s. Have you seen all the 1099s that were referenced in the Devereux Audit Report that we just reviewed?
>
> Alan Handler: Not the physical 1099s, just what's summarized here in this – in the work papers.
>
> Devereux: Okay. So he [Bartholomew] would have reviewed the 1099s and prepared that sheet. Correct?
>
> Alan Handler: Yes. (Tr. 77:3-11).

The spreadsheets convey information in a straightforward fashion. They contain the names of the individuals engaged by Devereux; their Social Security numbers (redacted); a description of the services provided (for example, "Repairs," "Foster Care Payments," "Child Consult," and so forth); the amount of money the auditor believes was paid under a bona fide independent contractor arrangement; and the individual's excess and taxable wages (the maximum amount that the Department can assess for unpaid contributions to unemployment and disability insurance). (R-1, pp. 89-122). These spreadsheets are not the equivalent of scrawled comments in the margin of a page – they are easy to read and understand. The mere assertion that they are not standard Department forms should not rob them of their obvious probative value.

Indeed, the information contained in these spreadsheets is a critical part of every single audit the Department undertakes. As Handler testified at the hearing, "all audits are basically the same," in that their goal is to "verify a reported payroll...and to look for misclassified wages [and] subcontractors." (Tr. 30:16-19). As part of the Department's "basic audit principles," an auditor requests numerous records from the employer (including payroll records, quarterly reports, 1099s, tax returns, and disbursement records), and uses those records to determine if misclassification is

suspected. (Tr. 33:4-5; 33:20-21). If payments to purported independent contractors are reported, the auditor records this information and "send[s] out letters to these individuals...[that] we need to verify if they meet the ABC test." (Tr. 34:17-24). The auditor will also review whether the purported independent contractors have reported earnings or wages in the Department's internal systems. (Tr. 34:25-35:5). Thus, the information contained on the spreadsheets in this case is the same information that the Department uses in every audit it undertakes.

Finally, I find it relevant that Devereux did not object to the entry of these documents into evidence, and even conceded that they would probably qualify as a hearsay exception under the business record or public record exceptions. (Tr. 56:11-15; 56:23-57:4). This indicates to me that Devereux recognizes on some level that the audits have probative value.

For these reasons, I REVERSE the ALJ's determination and FIND that the audits should have been given significant evidentiary weight, and that as a matter of law legally competent evidence has been presented to support the conclusions contained in the audits.

B. THE ALJ'S FINDINGS WITH RESPECT TO REMUNERATION FOR THERAPEUTIC FOSTER CARE PROVIDERS

The ALJ based his finding that the Department had not established that Devereux provided remuneration for services to therapeutic foster care providers, mental health personnel, and repairmen upon 3 factors. First, he found that the audits proffered by the Department had no evidentiary weight and consequently could not be used to establish remuneration. (Initial Decision, p. 6). Second, he placed great importance on Alan Handler's testimony that, while auditing employers to see if they are "following the rules concerning the ABC test," he "never" looks to see if a service has been performed for remuneration. Ibid. Third, although not directly stated in his opinion, it appears to me that he was persuaded that the method of payment to the

therapeutic foster care providers (which included some reimbursement of expenses incurred in the course of foster care) did not constitute remuneration for services under the UCL. Id. at 9.

As to the first factor, as described in Section II.A I believe the ALJ erred and find that the audits should be given significant evidentiary weight. As to the second factor, the ALJ placed far too much emphasis on a single stray comment from Handler. It is obviously not true that the Department "never" looks to see if a service has been performed for remuneration – that is a necessary precursor before performing the ABC analysis. Rather, it would probably be more accurate to state that given the broad definition of "remuneration" in the UCL and the presumption of employment contained in the statute, Handler was acknowledging that the majority of the Department's contested cases involve disputes over the application of the ABC test, rather than whether services have been provided for remuneration. The ALJ lacked justification to make such a sweeping generalized conclusion from the single stray remark of one auditor. Furthermore, earlier in his testimony Handler specifically stated that auditors first determine whether there was remuneration for services before applying the ABC test:

> DOL: Okay. All right. The ABC Test, do you mean section N.J.S.A. 43:21-19 (A), (B), and (C)?
>
> Alan Handler: Yes.
>
> DOL: Okay. You said you determine remuneration before you can apply that test and why would that be?
>
> Alan Handler: Well, that's part of our process, we have to determine what payments were made, we can't tax anybody unless we know the amount that was paid to them. (Tr. 35:12-19).

As to the third factor, in the nearest case on point, Lester A. Drenk Behavioral Health Center v. NJDOL, 2007 N.J. AGEN LEXIS 592 (2007), an ALJ found that individuals providing therapeutic foster care services to children, and who were paid a per diem amount for such services

(documented via a 1099), received remuneration for services under the UCL. The circumstances in Drenk are not materially different than the circumstances under consideration here. As here, the program in Drenk was through a contract with the State, with the company then entering into a subcontract with families, "who are the providers and who are expected to provide a safe, nurturing environment to the child or children placed with them." Id. at 2. This subcontract "passe[d] State requirements on to the providers." Id. at 3. The therapeutic foster care providers in Drenk were considered "primary caregivers," with intensive supervision plans established by a care management team. Ibid. In that case, although recognizing that the therapeutic foster care providers "utilize some independent judgment" and "must exercise independent judgment as a parent," nevertheless they "were not free of direction and control by Drenk," because of an agreement which "requires that the providers accept juveniles into their home, obtain home and auto insurance and comply with numerous other specific requirements set forth in the agreement." Id. at 2.

The ALJ in Drenk found that it was "clear" that the therapeutic foster care providers "were paid by Drenk for services rendered in performing therapeutic foster parenting services to children in need." Id. at 6. Although these providers did not directly contract with the State (they were essentially subcontractors), Drenk "provided to the State" the individuals who performed the contracted services, "and paid these individuals for the services they rendered." Ibid. That is to say, the stipends paid by Drenk were more than just reimbursing therapeutic foster care providers for their expenses in raising a child.

At the hearing, the Department clarified that traditional foster parenting involves a "transitional period" during which time a child is temporarily placed in the custody of a foster family, who provide care and support, while a permanent living arrangement (whether it be

reunification with the birth parents, adoption, or permanent legal custodianship) is worked out. (Tr. 25:22-26:1). According to the Department, this is in contrast with being a therapeutic foster care provider, where usually the birth parents are "not really relinquishing custody of the children, they're just giving them over to help correct their behaviors. It's more of a therapy" than a transfer of custody. (Tr. 26:2-8). The requirements of the care provider under each system are "totally different." (Tr. 27:13-14).

In the instant case, these therapeutic foster care services are described in detail in the record. For example, an item from the Devereux website explains that therapeutic foster care providers "actually serve as primary treatment facilitators, teaching directly and by example" and "incorporate individual, group and milieu therapies, as well as psychiatric services, speech therapy, medical and nutritional interventions, and pre-vocational training" to "help these youth modify their behavior so they can return to their own communities or independent living." (R-1, p. 67). In the therapeutic foster care provider agreement between Devereux and the Edwards family, it is specified that the family "provide a therapeutic family environment for child/adolescent clients placed by Devereux to help the clients to achieve their individualized treatment goals." (R-1, p. 72). The key concept here is "therapeutic" family environment – the therapeutic foster care providers are doing more than just ensuring that the children are fed and clothed properly, they are teaching the children "directly and by example…to modify their behavior." (R-1, p. 67). To this end, the Edwards family was required to "document observations of the client's behavior and the therapeutic responses to the behavior on a daily basis." (R-1, p. 72). The family was also required to "implement the home-based treatment strategies of the client's ISP [Individualized Service Plan] and/or JCR [Joint Care Review]." (R-1, p. 73).

As another example, in the 2006-2007 Devereux treatment home contract, it states that therapeutic foster care providers function as a team "to provide services for individuals in the home," including "elements from a variety of different positive behavioral health based treatment models." (R-1, p. 174). The contract further states that therapeutic foster care providers, acting as teachers, "will implement a broad curriculum of skill training that will enable the individuals to develop in many areas so they may achieve their maximum potential and become productive members of society." (R-1, p. 174). These skills include "self-care, family living, independent living, academic skills, social skills, pre-vocational and vocational skills, self-control, [and] recreation." (R-1, p. 177).

As a third example, in an addendum to the 2003 independent contractor agreement between Devereux and Joan Perry, it states that therapeutic foster care providers "provide services utilizing the treatment methods of the Devereux Family Care Program" and "will teach the children a broad curriculum of skills that will enable the children to achieve their maximum potential and be reunited with their families in as short a time as possible." (R-1, p. 214). Pursuant to an individualized service plan, Perry was required to "teach the child social, academic, and daily living skills," "improve the child's ability to cope with problems in socially acceptable ways," and "improve the child's ability to develop positive relationships with adults and peers." (R-1, p. 215). Perry was further required to "implement a broad curriculum designed to teach the child new skills" in the areas of self-care, pre-vocational and vocational skills, academic skills, social skills, independent living, recreation and leisure, family living, self-control, and problem solving skills. (R-1, p. 215). Substantially similar requirements are included in Perry's 2004 and 2005 independent contractor agreement as well. (R-1, pp. 237-249, 252-264).

As a fourth example, in Devereux's handbook for its treatment home program, it instructs therapeutic foster care providers to "provide a family style living environment and teach the youth a broad curriculum of skills that will enable the youth to achieve their maximum potential." (R-1, p. 303). These skills include "concepts of personal space and appropriate boundaries;" social, academic, vocational, and self-care skills; and "alternatives to inappropriate behaviors and how to manage challenging behaviors." (R-1, p. 301). Therapeutic foster care providers become a member of the care team for each child, and must develop a treatment plan which "identifies strengths and needs and goals and objectives" as well as "delineating each service the youth will receive in order to help them achieve their goals." (R-1, p. 303).

As a fifth example, in an undated advertisement for its Family Care program, Devereux indicated that it was "seeking caring adults to provide specialized services to children in the adults' own homes." (R-1, p. 189). As a sixth example, an undated press release announcing the opening of Devereux's Family Care program stated that "the emphasis of the program is on teaching children the skills necessary for them to function effectively in their home and community." (R-1, p. 190).

Taken together, these documents show that therapeutic foster care providers were doing far more than just providing children with a safe and nurturing environment (as is the case in "traditional" foster parenting). Rather, they actively provided critical therapeutic services to children and adolescents with medical, psychological, social, and emotional needs (R-1, p. 410). These services included helping to create a care plan; implementing a broad training curriculum to help the children develop skills related to "self-care, family living, independent living, academic skills, social skills, pre-vocational and vocational skills, self-control, [and] recreation;" and

teaching the children these skills directly and by example, "so they may achieve their maximum potential and become productive members of society." (R-1, p. 67, 174, 177).

It is apparent to me that the ALJ did not adequately consider the therapeutic services provided by therapeutic foster care providers to the children. The payments received from Devereux were clearly for both these therapeutic services as well as to cover the costs of housing the children. Given the facts in the record, the broad definition of "remuneration" under the UCL, and the similarity to the situation in Drenk[2], I am persuaded that the payments to the therapeutic foster care providers constituted remuneration under the UCL.

Therefore, I REVERSE the ALJ's determination and FIND that the payments to therapeutic foster care providers documented in the audits constitute remuneration under the UCL.

C. THE ALJ'S FINDINGS WITH RESPECT TO REMUNERATION FOR REPAIRMEN AND MENTAL HEALTH PROFESSIONALS

Although there was extensive material in the record with respect to therapeutic foster care providers, and the ALJ's Initial Decision thoroughly considered the questions of remuneration and employment with respect to the therapeutic foster care providers, the ALJ gave little attention to the repairmen and mental health professionals who were also implicated in the audits.

With respect to repairmen, these individuals worked at Devereux's wholly owned or rented facilities throughout the State. (Devereux's Post-Hearing Brief, p. 5; Tr. 174:11-175:11). The firm hired approximately 46 contractors or service vendors to perform maintenance and repairs on these facilities during the audit period, and paid each of them via a 1099. Ibid. On the Department's audit spreadsheets, payments to these individuals were described as "Repairs,"

[2] Counsel for Devereux conceded on the record that there were not "a whole litany of facts that distinguish us in some way from Drenk, I acknowledge that it's a very similar set of circumstances." (Tr. 19:7-11).

"Maintenance," or similar. (Tr. 174:11-13; R-1, pp. 89-122). With respect to mental health professionals, Devereux hired approximately 14 mental health professionals during the audit period to perform psychological counseling and consulting services, and paid each of them via a 1099. Id. at 6; Tr. 177:1-179:24). On the audit spreadsheets, payments to these individuals were described as, *inter alia*, "Child Consult," "Psychologist," "Psychological Svc," "Behavior Svc," and so forth. (R-1, pp. 89-122).

The Department found that based upon the evidence in the audit reports, the repairmen and mental health professionals hired by Devereux were paid remuneration for services and were deemed to be in covered employment. (R-1, p. 85). For the same reasons as his finding with respect to therapeutic foster care providers, the ALJ concluded that no remuneration had been paid to the repairmen and mental health professionals. As described above in Section II.A, I believe the ALJ erred in so holding, and FIND that the audits should be given significant evidentiary weight.

Furthermore, although not discussed by the ALJ in his Initial Decision, the question of whether these repairmen and mental health professionals performed services for remuneration is far more straightforward. The ALJ clearly thought that the model of payment for therapeutic foster care providers, along with the fact that they were taking children into their homes, was sufficiently distinct from traditional forms of payment for services to warrant different treatment under the UCL. However, the model of payment to repairmen and mental health professionals implicates none of these concerns. The repairmen and mental health professionals were not taken into anyone's homes, nor were they reimbursed for their services. They were paid money to perform services and they performed them; they were issued 1099s to document the payments. There is nothing to distinguish or complicate their payment for services.

Consequently, I REVERSE the ALJ's determination and FIND that the payments to repairmen and mental health professionals documented in the audits constitute remuneration under the UCL.

D. THE ALJ'S FINDINGS WITH RESPECT TO THE ABC TEST FOR THERAPEUTIC FOSTER CARE PARENTS

In addition to finding that Devereux did not provide remuneration for services to its therapeutic foster care providers, the ALJ found that Devereux satisfied its burden under each prong of the ABC test. (Initial Decision, p. 7). With respect to Part A, the ALJ found that even though Devereux had the authority to direct the result to be accomplished, it did not retain control over the means by which that result was achieved. Id. at 8. According to the ALJ, therapeutic foster care providers "enjoy[ed] considerable autonomy regarding the details of day-to-day supervision of foster children in their home," and "decide all the things otherwise expected of biological parents, *e.g.* when to have dinner, what to do on weekends, where to go for recreation, when to do homework and how much TV to watch." Id. at 8, 10. The ALJ also found that the method of payment to foster parents mitigated against a finding of employment status, as they are not taxable for federal income tax purposes. Id. at 9.

I cannot agree with the ALJ's determination. As described in Part II.B, the ALJ did not adequately consider the therapeutic services provided by therapeutic foster care providers to the children. The payments received from Devereux were clearly for both these therapeutic services as well as to cover the costs of housing the children. Thus, while it is clear that the parents had some autonomy to "decide all the things otherwise expected of biological parents" (like when to eat dinner and so forth), they had no autonomy to disregard a child's care management plan, nor could they fail to "teach the child social, academic, and daily living skills," "improve the child's

ability to cope with problems in socially acceptable ways," and "improve the child's ability to develop positive relationships with adults and peers." (R-1, p. 215). This is in addition to Devereux's regular inspections of the homes and checks on the children. I am persuaded that the analysis in Drenk is applicable here, given the substantial similarities.

In Drenk, with respect to Part A, the ALJ found that the therapeutic foster care providers were not free from direction or control from the company. Drenk required that its therapeutic foster care providers followed applicable State guidelines; provided children with a safe and nurturing environment; fed, housed, and clothed the children appropriately; and provided therapeutic services as needed in accordance with the goals and objectives set forth in the care management plan. Drenk at 7. The company regularly inspected the homes and checked on the children. Ibid. These set of facts are not readily distinguishable from the facts in this case, a point conceded by Devereux's counsel. Consequently, I FIND that Devereux has failed to meet Part A of the ABC test.

In this case, with respect to Part B, the ALJ did not reach the question of whether the therapeutic foster care providers performed services that were outside the usual course of Devereux's business, and also found that therapeutic foster care providers "operate in homes that they own over which Devereux has no ownership," and consequently met the statutory requirement that they perform services "outside of all of the places of business of the enterprise for which such service is performed." Id. at 10. By contrast, in Drenk the ALJ found both that the therapeutic services of the providers were not outside Drenk's usual course of business and that although the therapeutic services were not provided on premises owned by Drenk, the in-home placement of foster children should be considered "extensions of Drenk's place of business." Ibid. As in Drenk, it is clear to me that the services provided by Devereux's therapeutic foster care providers are not

outside of Devereux's usual course of business. For example, in advertising its Family Care program, Devereux indicated that it was "seeking caring adults to provide specialized services to children in the adults' own homes." (R-1, p. 189). And its Treatment Home Program handbook stated the purpose of the program was to "provide safe, nurturing therapeutic home environments for youth...who are in need of treatment in community and family based settings." (R-1, p. 300). The therapeutic foster care providers delivered the services that Devereux was in the business of providing.

With respect to whether the therapeutic foster care providers perform services outside of Devereux's places of business, I am persuaded by the Drenk ALJ's interpretation that their private homes should be considered "extensions of Drenk's place of business." While it is true that the therapeutic services were delivered in private homes not owned by Devereux, the essence of Devereux's business is to deliver therapeutic services in this way. A more appropriate way to view this question is as the ALJ did in Trans World Systems, Inc. v. NJ Department of Labor, 1998 N.J. AGEN LEXIS 661 (1998), *aff'd* Trans World Systems, Inc. v. N.J. Department of Labor, Final Administrative Action of the Commissioner, dated January 5, 1999, *aff'd* Trans World Systems, Inc. v. N.J. Department of Labor, Docket No. A-3002-98T5 (App. Div. 2001) (unpublished). In that case, which involved whether agents of a debt collection company were employees, the ALJ explained that analysis of the B prong must consider not only "locations where the enterprise has a physical plant," but also where the employer "conducts an integral part of the business." Id. at 6. Since agents of the company attempted to sell their services outside of the company's main headquarters, the ALJ found that such activity was "clearly an integral part of the service" provided by the employer, and therefore the main headquarters as well as more informal offices constituted "a place of business of the enterprise." Ibid.

Similarly, Devereux's therapeutic foster care providers contract with the firm to provide services at their homes under tightly controlled circumstances. These services are an integral part of Devereux's business. Delivery of services in the home is not a random occurrence; rather, it is specifically determined at the time of acceptance of the contract with Devereux. The providers' private homes should therefore be considered "a place of business of the enterprise" and extensions of Devereux's places of business. Ibid. To hold otherwise would be to take an unduly restrictive view of the realities of the relationship between Devereux and its therapeutic foster care providers. Consequently, I FIND that Devereux has failed to meet Part B of the ABC test.

With respect to Part C of the test, the ALJ found that because most therapeutic foster care providers include a spouse who works outside of the home, and must demonstrate another source of income (apart from reimbursements) as part of the licensure process, they have an "enterprise that exists and can continue to exist independently of and apart from the particular service relationship." Id. at 10. This is an erroneous reading of the C prong of the ABC test.

In Drenk, the ALJ rejected a similar argument, holding that the key element of the C prong was whether "the person providing services is dependent on a single employer, and on termination of that relationship would join the ranks of the unemployed." Ibid., *citing* Carpet Remnant Warehouse v. N.J. Dept. of Labor, 125 N.J. 567, 585-86 (1991). Even if the therapeutic foster care providers here have outside sources of income, that is not relevant to the C prong analysis. What would be relevant would be a showing that they have outside sources of income from providing therapeutic services. As described above in Part II.B, I disagree with Devereux's argument that the providers' true business here is "parenting" or "running a home." (Devereux's Reply Brief, p. 23). Rather, their business is providing therapeutic services, and I have no evidence in the record to demonstrate that the providers "have an outside relationship with other entities to provide

therapeutic foster-parenting services," or were "conducting their own independently established enterprises as providers." Drenk at 9. Therefore, I FIND that Devereux has not met Part C of the ABC test.

For these reasons, I REVERSE the ALJ's determination and FIND that the therapeutic foster care providers were employees of the company during the audit period.

E. THE ALJ'S FINDINGS WITH RESPECT TO THE ABC TEST FOR REPAIRMEN AND MENTAL HEALTH PROFESSIONALS

Despite performing a full ABC analysis with respect to therapeutic foster care providers, the ALJ did not do so for the repairmen and mental health professionals. Since I have determined that these workers received remuneration for services under the UCL, the burden shifts to Devereux to prove that its relationship with these workers did not meet all 3 elements of the ABC test.

As to repairmen, at the hearing Devereux indicated that it hired these individuals because it did not have a "maintenance crew" to perform repairs on their group homes. (Tr. 174:20-25). According to the company, it did not control what tools the repairmen would use, nor what other individuals they would hire to assist in their work. (Tr. 175:12-21). The company verified whether the repairmen had insurance, but did not sign subcontracting agreements with them "because we had gotten burned several years ago with a litigation case on that." (Tr. 175:19-25). The company did not advance business expenses to the repairmen, and did not withhold any taxes or unemployment/disability contributions. (Tr. 176:7-13).

With respect to Part A of the ABC test, although Devereux has indicated that it gave repairmen some independence to conduct their work (permitting them to choose their tools and hire assistants), such a limited showing does not meet the requirement that the repairmen were

"free from control or direction." Devereux did not show, for example, that the repairmen were "free to choose where and when to work, including working for other brokers or independently;" that they were "not obligated to comply with any rules, practices, or procedures" set by Devereux; that the firm exercised no supervision over them; that the firm provided no training; that the firm provided no supplies, equipment, or uniforms; or that the firm provided no fringe benefits. Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Labor, 125 N.J. 567, 583-584 (1991), *citing* Trauma Nurses, Inc. v. Board of Review, 242 N.J. Super. 135, 141, 144-145 (App. Div. 1990). Therefore, I FIND that Devereux has failed to meet Part A of the test with respect to repairmen.

With respect to Part B, it is clear that the repairmen were not performing services in the usual course of Devereux's business, as the firm's business is not construction, maintenance, or repair. Therefore, I FIND that Devereux has met Part B of the test with respect to repairmen.

With respect to Part C, Devereux has not shown that its repairmen were customarily engaged in an independently established business enterprise. The firm verified that its repairmen had insurance, but that is not enough to meet the Part C test. Furthermore, a key element of the Part C analysis under Carpet Remnant Warehouse is whether the person providing services "is dependent on the employer, and on termination of that relationship would join the ranks of the unemployed." Id. at 585-586. Apart from the testimony described above, the record only contains Schedule Cs for a handful of the approximately 46 individuals engaged as repairmen during the audit period. These Schedule Cs show that the repairmen received the vast majority of their income from Devereux, which strongly indicates that they were not truly independent contractors.

For example, in 2005 Harry M. Findley received a 1099 showing that Devereux paid him $15,150 for "maintenance," and Findley's Schedule C from that year indicates that this amount was the entirety of his business's gross receipts and sales. (R-1, pp. 117, 123-124). In 2005,

Michael D. Nimchuk received a 1099 showing that Devereux paid him $2,135 for "cabinet making," and Nimchuk's Schedule C for that year indicates that this amount was the entirety of his business's gross receipts and sales. (R-1, pp. 117, 125-126). In 2004, Kevin Wallace received a 1099 showing that Devereux paid him $6,627.03 for "maintenance," and Wallace's Schedule C for that year indicates that this amount was the entirety of his business's gross receipts and sales. (R-1, pp. 107, 128-129).

The Schedule Cs show that these purportedly independent contractors were in reality wholly dependent upon Devereux. And the record only contains Schedule Cs for a small number of repairmen – for the vast majority of repairmen, there is no evidence in the record to establish that they were customarily engaged in an independently established business, occupation or trade. Therefore, I FIND that Devereux has failed to meet Part C of the test with respect to repairmen.

As to mental health professionals, at the hearing Devereux indicated that these individuals signed independent contractor agreements with the company, and were required to maintain professional liability insurance. (Devereux's Reply Brief, p. 10). The company also believed that these individuals had other business interests outside of Devereux. Ibid.

Apart from the independent contractor agreements (which state that the firm "shall have no right to control or direct the details, manner or means by which Contractor accomplishes" the contracted services), there is little evidence in the record to show that these mental health professionals were free from control. The mere presence of a signed independent contractor agreement does not end the ABC analysis. Devereux did not show, for example, that these professionals were "free to choose where and when to work, including working for other brokers or independently;" that they were "not obligated to comply with any rules, practices, or procedures" set by Devereux; that the firm exercised no supervision over them; that the firm

provided no training; that the firm provided no supplies, equipment, or uniforms; or that the firm provided no fringe benefits. Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Labor, 125 N.J. 567, 583-584 (1991), *citing* Trauma Nurses, Inc. v. Board of Review, 242 N.J. Super. 135, 141, 144-145 (App. Div. 1990). Therefore, I FIND that Devereux has failed to meet Part A of the test with respect to mental health professionals.

With respect to Part B, the testimony in the record indicates that the mental health professionals provided psychological evaluations of "mostly folks in the group homes," which were directly owned by Devereux, rather than in the private homes of foster parents. (Tr. 177:3-9). This indicates that these evaluations were performed at Devereux's business locations, which would not meet the requirements of Part B. Unlike a private home, a Devereux group home is a "residence that is either leased or owned by Devereux that is staffed by Devereux employees around the clock." (Tr. 101:16-20). Because of Devereux's greater responsibilities in its group homes, including the need to provide relevant medical services, the services provided by these professionals would not be outside the usual course of business. Therefore, I FIND that Devereux has failed to meet Part B of the test with respect to mental health professionals

With respect to Part C, Devereux has not shown that its mental health professionals were customarily engaged in an independently established business, occupation or trade. The fact that these professionals had professional liability insurance, and may have had other business interests, is not enough to meet the Part C test. As with the repairmen, the record only contains Schedule Cs for a handful of the approximately 14 individuals engaged as mental health professionals during the audit period. These Schedule Cs show that these professionals received the vast majority of their income from Devereux, which strongly indicates that they were not truly independent contractors.

For example, in 2002 Michael L. De Gasperis received a 1099 showing that Devereux paid him $11,028 for "psychologist," and De Gasperis's Schedule C from that year indicates that this amount was the entirety of his business's gross receipts and sales. (R-1, pp. 89, 134-135). In the years 2003-2005, De Gasperis also received 100% of his business's gross receipts and sales from Devereux. (R-1, pp. 98, 136-137; 107, 138-139; 118, 140-141. Another mental health professional, Loren B. Amsell, had Schedule Cs showing that in 2003, she received 83% of her gross receipts and sales from Devereux; in 2004, 100%; and in 2005, 100%. (R-1, pp. 99, 108, 119, 142-147). Another mental health professional, Susan J. Generoso, had Schedule Cs showing that in 2002 and 2003 she received 100% of her gross receipts and sales from Devereux. (R-1, pp. 89, 98, 150-153). Finally, in 2005 another mental health professional, Gregory E. Lebed, had Schedule Cs showing he received 100% of his gross receipts and sales from Devereux. (R-1, pp. 117, 126-127)

The Schedule Cs show that these purportedly independent contractors were in reality wholly dependent upon Devereux. And the record contains Schedule Cs for only these mental health professionals – for the remainder, there is no evidence in the record to establish that they were customarily engaged in an independently established business, occupation or trade. Therefore, I FIND that Devereux has failed to meet Part C of the test with respect to mental health professionals.

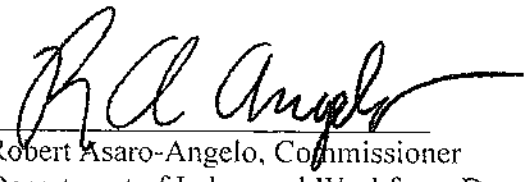
As Devereux has not met all elements of the ABC test, I therefore REVERSE the ALJ's determination and FIND that the repairmen and mental health professionals engaged by Devereux during the audit period were employees of the company.

ORDER

For the foregoing reasons, it is ordered that the Department retain the $77,561.95 previously remitted by petitioner to the Department under protest for unpaid contributions to the unemployment compensation and State disability benefits funds for services performed during the audit period (2002 through 2005) by therapeutic foster care providers, repairmen, and mental health professionals. It is further ordered that Petitioner remit to the Department any appropriate interest[3] and penalties.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY
THE COMMISSIONER, DEPARTMENT
OF LABOR AND WORKFORCE DEVELOPMENT



Robert Asaro-Angelo, Commissioner
Department of Labor and Workforce Development

[3] Payment of the contribution liability under protest at the outset of these proceedings should limit (and may eliminate) Petitioner's liability for interest. However, I do not wish to foreclose the possibility that there is some period prior to Petitioner having remitted the $77,561.95 for which the Department is due interest payments. I have no basis in the record to conclude one way or the other and, so, will defer to the Department's Division of Employer Accounts to determine whether any such interest is due.

Inquiries & Correspondence:

David Bander, Executive Director
Office of Policy
Department of Labor and Workforce Development
PO Box 110 – 13th Floor
Trenton, New Jersey 08625-0110