STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

Protection and Advocacy for the People with Disabilities, Inc., et al.,)

Plaintiffs,)

v.)

South Carolina Department of Disabilities and Special Needs; et al.,)

Defendants.)

Civil Action No. 07-CP-40-2187

ORDER

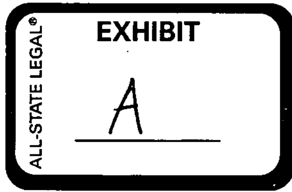
RICHLAND COUNTY FILED
2013 SEP 24 AM 9:07
JEANETTE W. McBRIDE C.C.P. & G.S.

This case was heard on August 6, 2013, by this Court on the parties' cross motions for summary judgment. For the reasons set forth herein, the Court grants the Motion for Summary Judgment filed by Defendants and denies Plaintiff's Motion for Summary Judgment. A review of both motions indicates that there is no genuine issue as to any material fact, and that the Defendants are entitled to judgment as a matter of law.

STATEMENT

This action was filed on April 5, 2007. Plaintiffs are a number of anonymous individuals and the eleemosynary corporation Protection and Advocacy for the People with Disabilities, Inc. ("P & A"). P & A was granted certain powers and duties by statute. S.C. Code Ann. § 43-33-310.

Plaintiffs have sought an order requiring DDSN to "promptly promulgate regulations governing the operation of the department and the employment of professional staff and personnel, and to obtain informed consent and to protect the dignity of the individual in research settings. . . ." Complaint, p. 18. The Defendants moved for summary judgment. Plaintiffs initially claimed in response that the case involves contested issues of fact and that it should not be



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resolved on summary judgment. However, Plaintiffs eventually filed their own motion for summary judgment, agreeing that the issues in the case were solely legal issues.

The Complaint in this matter alleges a number of situations in which Plaintiffs assert that DDSN should promulgate regulations. Plaintiffs' contentions pertain to several different subjects, ranging from alleged failure to recognize certain diagnosed conditions as eligible for DDSN services, to the methods for computing rents for DDSN facilities. Plaintiffs also complain about a number of decisions in individual cases, such as claims that an individual was not eligible for autism services, or that an individual was not waitlisted for residential placement. Plaintiffs do not ask this Court to order affirmative relief in any of their cases, other than requiring DDSN to promulgate regulations. Defendants have denied the material allegations of the Complaint, and have several affirmative defenses, including lack of standing in the Plaintiffs.

CONCLUSIONS OF LAW

1. Standing of the Plaintiffs.

Defendants have asserted that neither the individual Plaintiffs nor P & A have demonstrated the necessary standing in order to pursue their claims in this action. The Court agrees, for the reasons set forth below.

a. General principles of standing and justiciability.

As shown below, neither P & A nor the individual Plaintiffs have made a showing of injury in fact to themselves. Instead, they ask for this Court, in effect, to sit as a commission of review to determine in the abstract whether DDSN needs to promulgate regulations in certain contexts. However, Plaintiffs' concept of this Court's role in this matter disregards the normal principles of justiciability, standing, and actual injury in fact to the plaintiffs in litigation, which must be shown before relief will be granted by a court.

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The law in South Carolina on issues of justiciability and standing has been summarized by the Court of Appeals as follows:

> A threshold inquiry for any court is a determination of justiciability, *i.e.*, whether the litigation presents an active case or controversy." *Lennon v. S.C. Coastal Council,* 330 S.C. 414, 415, 498 S.E.2d 906, 906 (Ct.App.1998). "A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Byrd v. Irmo High Sch.,* 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996). "To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." *Graham v. State Farm Mut. Auto. Ins. Co.,* 319 S.C. 69, 71, 459 S.E.2d 844, 845-46 (1995) (holding that ruling was not advisory but was imperative to preserve rights and necessary to determine whether insurance coverage existed and carrier was required to be served); *see also Brown v. Wingard,* 285 S.C. 478, 330 S.E.2d 301 (1985). The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing. *Jackson v. State,* 331 S.C. 486, 490 n. 2, 489 S.E.2d 915, 917 n. 2 (1997).

Holden v. Cribb, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002)(emphasis added).

The core function of litigation seeking injunctive relief, regardless of the number of parties and of claims, is to determine whether there is a likelihood that one or more specific, named, plaintiffs will be injured by an action of one or more defendants. As the U.S. Supreme Court held in *Lewis v. Casey*, 518 U.S. 343 (1996):

> It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution. In the context of the present case: It is for the courts to remedy past or imminent official interference with individual inmates' presentation of claims to the courts; it is for the political branches of the State and Federal Governments to manage prisons in such fashion that official interference with the presentation of claims will not occur.

518 U.S. at 349 (emphases added).

The Supreme Court of South Carolina has cited *Lewis* with reference to standing and the need to show actual injury to the plaintiff. *Howard v. South Carolina Dept. of Corrections*, 399 S.C. 618, 633-634, 733 S.E.2d 211, 219-220 (2012)(Plaintiff's "claim is barred by the doctrine of standing as he has not demonstrated that the alleged inadequacy . . . caused *him* 'actual injury,' i.e., hindered him in pursuing his own legal claims")(emphasis in original); *Hendricks v. South Carolina Dept. of Corrections*, 385 S.C. 625, 629, 686 S.E.2d 191, 193 (2009)(same). Our Supreme Court further quoted *Lewis* to the effect that there was no "abstract, freestanding right to a law library or legal assistance" in absence of a showing of harm. *Howard, supra,* 399 S.C. at 634, 733 S.E.2d at 220. Nor is there an "abstract, freestanding right" to have regulations promoted. As the Court in *Lewis, supra,* continued:

> Standing is not dispensed in gross. If the right to complain of one administrative deficiency automatically conferred the right to complain of all administrative deficiencies, <u>any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law</u>. As we have said, "[n]or does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject

518 U.S. at 349 n. 6. (Emphasis added.) Plaintiffs' claims are very similar to those condemned in *Lewis*. They seek to "bring the whole structure of state administration before the courts for review" without any showing of harm to themselves at all.[1]

[1] Plaintiffs also place heavy reliance on the Declaratory Judgment Act, §15-53-30, but parties seeking declaratory relief still must "demonstrate a justiciable controversy," which exists when, among other things, "a concrete issue is present." *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995). *See also, e.g.,* 26 C.J.S. Declaratory Judgments § 134 ("A court will not render a declaratory judgment for a complaint who lacks standing to maintain the claim for relief.").

b. **Absence of a showing of injury in fact to the individual Plaintiffs.**

Plaintiffs have not cited even a single instance of how a specific individual Plaintiff has actually suffered any kind of injury in fact as a result of the claims set forth in the Complaint. There is not even a discussion of facts pertaining to any individual Plaintiff, much less an indication as to how any particular Plaintiff has been injured.

The 2007 Complaint made certain allegations about the anonymous individual Plaintiffs, but the Answer of the Defendants denied all of those allegations for lack of information, noting that the Defendants did not know the identities of the individual Plaintiffs. *See, e.g.*, Answer, Par. 17. Defendants in 2007 filed a Motion for More Definite Statement, seeking to learn the names of the anonymous Plaintiffs, but Plaintiffs successfully opposed that motion. The result was an Order of Judge Michelle Childs filed on December 14, 2007, denying the Motion for More Definite Statement. Plaintiffs have accordingly not only failed to supply the Court with facts pertaining to their particular situations, but have actually obtained an Order making it impossible for the Defendants to obtain any definite information about any of the individual Plaintiffs.

Nor have Plaintiffs subsequently provided any more information about their individual situations other than the allegations of the Complaint, which Defendants denied for lack of information. Because the Defendants have denied the factual allegations of the Complaint pertaining to the individual Plaintiffs, and because there has been no subsequent showing regarding the factual situations of the individual Plaintiffs, there is no evidence whatsoever before the Court as to the facts concerning the individual Plaintiffs. As a result of this absence of a factual showing, there is nothing before the Court that shows actual injury in fact to any of the individual Plaintiffs.

c. **Absence of a showing of injury in fact to P & A or to any of its constituents.**

There are two ways in which an organization such as P & A can establish standing. The first is by showing that one or more of its constituents "suffered a concrete injury." Thus, for instance, in *Doe v. Stincer*, 175 F.3d 879 (11th Cir. 1999), an advocacy group similar to P & A was held to have no standing to argue about an agency's procedures in the absence of

> any evidence that any of the Advocacy Center's constituents have been denied access to mental health records based on the Florida statute at issue here. Without such allegations, the Advocacy Center cannot show that any of its clients suffered a concrete injury that is traceable to the challenged statute and could be redressed by a favorable decision in this action-as it must to establish standing. . . .

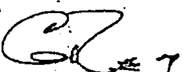
175 F.3d at 887. *See also, Tenn. Prot. & Advocacy, Inc. v. Bd. of Educ.*, 24 F.Supp.2d 808, 816 (M.D.Tenn.1998)(holding that the protection and advocacy group did not establish that it had standing to sue where it failed to name specific individuals who had suffered concrete harm); *Pa. Prot. & Advocacy, Inc. v. Houston*, 136 F.Supp.2d 353, 365-67 (E.D.Pa.2001)(denying standing to the protection and advocacy system because it had failed to "identify a specific constituent who is being harmed by the [d]efendant's actions"). 175 F.3d 879, 887 (11th Cir. 1999). In the present case, P & A has simply not even attempted to make such a showing. As already noted, there is nothing in the record which shows injury to any individual Plaintiff, so this method of establishing standing is unavailing to P & A..

The other way for P & A to establish standing is to show some harm to the entity itself. With respect to the standing of organizations or associations, the general rule in South Carolina is that "[a]n organization has standing only if it alleges that it or its members will suffer an individualized injury; a mere interest in a problem is not enough." *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 300-301, 551 S.E.2d 588, 589 (Ct. App. 2001)(emphasis added).

Plaintiffs' showing in this regard consists only of the Prevost Affidavit of May 11, 2010. However, the assertion in Paragraph 8 of that affidavit that "P&A has been injured by DDSN's failure to promulgate regulations" is completely conclusory. It obviously is no substitute for the factual showing that is necessary to establish both the existence of a claim, as well as standing to sue. Plaintiffs also have referred the Court to Paragraph 7 of the Prevost Affidavit, but the only claim in that paragraph is that it is allegedly time-consuming for P & A to search DDSN's extensive online policies and directives in order for P & A "to adequately represent its clients." Prevost Affidavit, Par. 7. This does not support Plaintiffs' claim that there is a legal duty to promulgate regulations. That duty turns on factors other than the issue of ease of use. To cite a familiar example, no one would argue that the Code of Federal Regulations is anything other than time-consuming to sift through. In contrast, the list of current DDSN Directives (Plaintiffs' Exhibit 34) clearly sets forth the content of those directives. P & A, which deals with DDSN regularly, cannot validly claim that the DDSN Directives are too difficult for P & A officials to understand. But even if that were the case, it still would not establish a valid claim for failure to promulgate regulations. P & A has simply not made the requisite showing of harm to itself.

d. "Public importance" standing.

Plaintiffs rely heavily on the "public importance" rule set forth in some South Carolina cases as a reason for permitting this case to go forward without a plaintiff who can show actual injury. The principal distinction between those cases and this one is that in most or all of them, the issue presented was primarily a legal issue, rather than one involving an intense, case-by-case, factual showing as to how specific plaintiffs are, or are not, affected by the absence of regulations in specific situations. *Cf., e.g., Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004) (whether Governor could hold a commission in the Air Force Reserve); *Davis v. Richland*



County Council, 372 S.C. 497, 642 S.E.2d 740 (2007) (method of appointment of the members of county recreation commission); *Sloan v. Department of Transp.*, 365 S.C. 299, 618 S.E.2d 876 (2005) (interpretation of highway construction bidding statutes); *Thompson v. South Carolina Commission on Alcohol and Drug Abuse*. 267 S.C. 463, 229 S.E.2d 718 (1976) (constitutionality of Uniform Alcohol and Intoxication Treatment Act); *Sloan v. School Dist. of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000)(applicability of emergency exception to its competitive sealed bid procedure). Clearly, none of these cases resemble this one, which would require the review of multiple, unproven factual situations, and the effect, or non-effect, of the absence of regulations in each situation. Such issues should be resolved only on a case-by-case basis, where the specific facts of each plaintiff's situation are fully presented.

2. Effect of the absence of a plaintiff with standing and an actual case or controversy.

Plaintiffs' lack of a showing of injury in fact, while fatal to their claims in and of itself, also has the practical effect of making it impossible to evaluate the effect of the absence of a regulation. In other words, if, for instance, it is claimed that eligibility requirements need to be spelled out in a regulation, the validity of such a claim can only be measured in terms of whether some specific person was harmed thereby. However, there is no such person and no such showing before the Court.

While no South Carolina case has yet had occasion to decide the point, it has been held elsewhere that a party who asserts a claim of failure to promulgate regulations must show prejudice as a result of the alleged failure. *See, e.g., Goldberg v. Insurance Dept. of State of Conn.* 207 Conn. 77, 83-84, 540 A.2d 365, 368 (1988), and cases cited therein ("where as here, a party challenges the failure of an administrative agency either to adopt or publish sufficient

procedural rules, that party [must] demonstrate some prejudice as a result of the agency's alleged failure").

This requirement of a showing of prejudice is simply an application of the rule that "injury in fact" must be shown. Thus, if one of the individual Plaintiffs had filed an administrative appeal based on a denial of eligibility for services, and had made a showing that there was no regulation setting forth eligibility rules, such an individual would still need to show some prejudice as a result of the alleged agency failure to promulgate regulations. Plaintiffs cite several cases in which such failures to promulgate regulations were found to have occurred. Pl. 7/31/13 Mem. at 12, 18-22. However, in those cases, the party who argued that regulations should have been promulgated was also able at least to allege some kind of specific and actual harm as a result of the agency's allegedly having adopted a binding rule without promulgating that rule in the form of a regulation. This element of some specific aspect of harm is entirely lacking in this case, which must accordingly be dismissed in its entirety.[2]

3. **Merits of Plaintiffs' claims.**

Even if some or all Plaintiffs are deemed to have standing, their claims lack substantive merit, for the reasons set forth below.

a. **Absence of a statutory requirement for the promulgation of regulations in the situations described in the Complaint.**

As a general rule, any duty to promulgate regulations must be found in some statutory directive. Absent such a directive, the duty to promulgate regulations simply does not exist. Essentially the same principles are followed in both state and federal cases dealing with this

[2] A further reason for there to be a plaintiff with standing is that the specific facts of each individual's situation would need to be examined in order to determine whether such individual's case has become moot at some point since 2007, when this case was filed.

subject. A good starting point for the inquiry, therefore, is *National Small Shipments Traffic Conference, Inc. v. I.C.C.*, 725 F.2d 1442, 1447 (D.C. Cir. 1984), which holds that

> It is hornbook administrative law that the choice of proceeding by individual adjudication or general rulemaking lies largely within the agency's discretion. *SEC v. Chenery,* 332 U.S. 194 (1947).

In all of the individual instances cited in the Complaint, the allegedly-aggrieved party is (or was) free to challenge the agency action of which the party complains, if other provisions of law require the agency to hold a hearing, or if other provisions of law permit judicial review of such actions. Such situations would present instances of "individual adjudication" as mentioned in the case above.[3] In the absence of provisions creating a right to a hearing or to judicial review, Plaintiffs would gain nothing by the addition of regulations, because those regulations could not create a right to any more review than already exists.

Another example of a statement of the general rule is found in *Pulido v. Heckler*, 758 F.2d 503, 506 (10th Cir. 1985):

> [A]s a general rule, an administrative agency is not required to promulgate detailed rules interpreting every statutory provision that may be relevant to its actions. *See American Power & Light Co. v. SEC*, 329 U.S. 90, 67 S.Ct. 133, 91 L.Ed. 103 (1946); *SEC v. Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947). A statute may, however, impose a duty to do so.

(Emphasis added.) Plaintiffs apparently do not allege otherwise. Instead, they allege that DDSN "has refused to adhere to its statutory duty to promulgate regulations." Complaint, Par. 45. The Complaint cites three statutes which Plaintiffs allege to confer a duty on DDSN to promulgate

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[3] It has long been held that there is no constitutional duty to promulgate regulations. *American Power & Light Co. v. Securities and Exchange Commission*, 329 U.S. 90, 106 (1946)("[n]or is there any constitutional requirement that the legislative standards be translated by the Commission into formal and detailed rules of thumb prior to their application to a particular case. If that agency wishes to proceed by the more flexible case-by-case method, the Constitution offers no obstacle").

regulations in the areas mentioned by Plaintiffs. Those three statutes are quoted in pertinent part below:

> **SECTION 44-20-220. Duties of Commission; per diem; appointment of Director of Disabilities and Special Needs; advisory committees.**
>
> The commission shall determine the policy and promulgate regulations governing the operation of the department and the employment of professional staff and personnel. The members of the commission shall receive subsistence, mileage, and per diem as may be provided by law for members of state boards, committees, and commissions. The commission shall appoint and in its discretion remove a South Carolina Director of Disabilities and Special Needs who is the chief executive officer of the department. The commission may appoint advisory committees it considers necessary to assist in the effective conduct of its responsibilities. The commission may educate the public and state and local officials as to the need for the funding, development, and coordination of services for persons with mental retardation, related disabilities, head injuries, and spinal cord injuries and promote the best interest of persons with mental retardation, related disabilities, head injuries, and spinal cord injuries. The commission is authorized to promulgate regulations to carry out the provisions of this chapter and other laws related to mental retardation, related disabilities, head injuries, or spinal cord injuries. In promulgating these regulations, the commission must consult with the advisory committee of the division for which the regulations shall apply.
>
> **SECTION 44-20-790. Promulgation of regulations governing hearings.**
>
> The procedures governing hearings authorized by "Notice of Deficiencies . . ." must be in accordance with regulations promulgated by the department. The director may appoint a review team, including consumers, to assist in the collection of information pertinent to the hearing.[4]

[4] The language "Notice of Deficiencies . . ." is set forth above exactly as it appears in the statutes. It pertains to written notices given by DDSN to governing boards of programs or operators or licensees of programs or facilities. § 44-20-780.

SECTION 44-26-180. Informed consent required for participation in research; promulgation of regulations.

> A client or his representative shall give informed consent in every case before participation in research conducted by, for, or in cooperation with the department. The department shall promulgate regulations to obtain informed consent and to protect the dignity of the individual.

An examination of each one of these statutes reveals that none of them require DDSN to promulgate regulations in the subject areas of this lawsuit, that is, eligibility for services, appeal procedures, standards for operation of residential programs, procedures for its Human Rights Committees, and standards for research on human subjects.[5] Complaint, Paragraphs 7, 38.

Starting with the last-mentioned statute, Section 44-26-180, which pertains to informed consent before research may be performed, there is nothing in the Complaint to indicate that any individual Plaintiff has ever been the subject of "research conducted by, for, or in cooperation with the department." § 44-26-180. Indeed, the Complaint alleges no facts at all with reference to research on human subjects. As a result, in addition to lacking standing generally, Plaintiffs clearly lack standing to complain with regard to § 44-26-180.

Another of the three statutes, § 44-20-790, pertains to regulations governing hearings that may be requested after notices of deficiencies in a program or operation. This section relates back to the preceding section, § 44-20-790, which establishes a right to written notice and a hearing before a program operator's license is suspended, denied or revoked. None of the Plaintiffs, including P & A, is a program operator or licensee, so there is obviously no standing in any of them to complain of alleged absence of regulations under § 44-20-790.[6] To put it

[5] There is nothing in the Complaint that would suggest that Plaintiffs, or any of them, have standing to complain about alleged lack of regulations pertaining to research on human subjects.

[6] Operators and licensees are not disabled or handicapped persons for whom P & A may advocate. *See* § 43-33-35.

differently, that section does not create a duty to promulgate regulations in any of the subject areas of this lawsuit listed in Paragraphs 7 and 38 of the Complaint.[7]

Finally, Plaintiffs cite § 44-20-220. That section contains two provisions for the promulgation of regulations. The first is of limited application. It provides that the DDSN Commission

> shall determine the policy and promulgate regulations governing the operation of the department and the employment of professional staff and personnel.

(Emphasis added). Plaintiffs allege that this paragraph imposes a mandatory duty because of the use of the word "shall." Complaint, Par. 39. Even assuming, however, that this provision is mandatory as to its subject area, Plaintiffs fail to highlight that subject area, which is limited to "the operation of the department and the employment of professional staff and personnel." In plain and ordinary parlance, a phrase such as "the operation of the department" refers to the internal functions of the agency, rather than its actions in the performance of its mission to the outside world. This meaning is confirmed by the next phrase in the statute, which is "and the employment of professional staff and personnel." This is likewise a phrase that refers to the internal operations of the agency. None of the Plaintiffs alleges that they are aggrieved by any internal operation of the agency, as would be the case, for instance, if one of the plaintiffs had been an employee complaining of wrongful discharge or other agency actions involving his employment.

On the other hand, the same code section also deals with the agency's mission to the outside world, that is, "carry[ing] out the provisions of this chapter and other laws related to

[7] Those areas, again, are eligibility for services, appeal procedures, standards for operation of residential programs (as opposed to procedures for denying or terminating program licenses), procedures for its Human Rights Committees, and standards for research on human subjects.

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mental retardation, related disabilities, head injuries, or spinal cord injuries. In promulgating these regulations. . . ." § 44-20-220. In that situation, the statute does not provide that the agency "shall" promulgate regulations, but instead it provides that the agency "is authorized to" promulgate regulations. The full sentence, which Plaintiffs do not quote in the Complaint, provides that

> The commission is authorized to promulgate regulations to carry out the provisions of this chapter and other laws related to mental retardation, related disabilities, head injuries, or spinal cord injuries.

This sentence of the statute undermines Plaintiff's allegation that the statute imposes mandatory duties on the agency to promulgate regulations with respect to most aspects of its mission, that is, the implementation of "[that] chapter and other laws related to mental retardation, related disabilities, head injuries, or spinal cord injuries."

Clearly, the term "is authorized to," as used in § 44-20-220, does not create a mandatory duty to promulgate regulations. In *Scalise v. Thornburgh*, 891 F.2d 640 (7th Cir. 1989), the court construed the words "[t]he Attorney General is authorized ... to make regulations for the proper implementation of such treaties in accordance with this chapter. . ." Rejecting a claim that this language created a duty to promulgate regulations, the court held:

> We find no merit in the argument that this language by itself imposes a mandatory duty to issue regulations. The language does not provide that the Attorney General "shall" issue regulations, it merely states that he is authorized to do so.

891 F.2d at 644. The court added in a footnote that "Congress unquestionably knows how to and is capable of imposing mandatory obligations on Executive branch officials to issue regulations." *Id.*, n.4. *Accord, Bagguley v. Bush*, 953 F.2d 660, 662 (D.C. Cir. 1991)(same); *Heckler v. Chaney*, 470 U.S. 821 (1985)(language "[t]he Secretary is authorized to conduct examinations and investigations" held permissive rather than mandatory). These cases, in addition to the plain

and ordinary meaning of the statute itself, leave no doubt that DDSN has been vested with discretion, rather than a mandatory duty, to promulgate regulations in furtherance of its mission to provide programs and services "related to mental retardation, related disabilities, head injuries, or spinal cord injuries."

The Supreme Court of South Carolina has likewise recognized the distinction between statutes mandating the promulgation of regulations and other statutes merely permitting regulations to be promulgated. In *Captain's Quarters Motor Inn, Inc., v. South Carolina Coastal Council*, 306 S.C. 488, 413 S.E.2d 13 (1991), the Court held that the Coastal Council's enabling statute, by providing that "[t]he Council shall . . . publish final rules and regulations," imposed a mandatory duty. 306 S.C. at 491, 413 S.E.2d 13, at 14 (emphasis added). On the other hand, the enabling act for the Department of Natural Resources provided only that that agency "may promulgate regulations to effectuate the provisions of this chapter." (Emphasis added). Accordingly, the Court in *Edisto Aquaculture Corp. v. South Carolina Wildlife and Marine Resources Dept.*, 311 S.C. 37, 426 S.E.2d 753 (1993), held that DNR was under no mandatory duty to promulgate regulations:

> The simple answer here is that the [DNR] Commission may promulgate regulations, since there is no mandatory language in § 50-16-50. This difference in underlying statutes allows the [DNR] Commission a level of discretion that the Coastal Council does not have.

311 S.C. at 40, 426 S.E.2d at 755. The DDSN statutes contain the same absence of mandatory language in connection with the subject areas of which Plaintiffs complain.

Finally, while the Complaint does not appear to assert that the Administrative Procedures Act, in of itself, creates a mandate to promulgate regulations, such an argument would be fruitless in any event. There is nothing at all in the APA that addresses whether a regulation should be promulgated. Instead, that Act's purpose is to provide for procedures and processes for

the promulgation of regulations that are required by some other provision of law, or of regulations that an agency elects, in its discretion, to promulgate. *South Carolina Ambulatory Surgery Center Ass'n v. South Carolina Workers' Compensation Com'n.,* 389 S.C. 380, 390, 699 S.E.2d 146, 152 (2010)(APA, § 1-23-110, "merely provides for the procedures that must be followed whenever a regulation is otherwise mandated"). *See also, Consolidated Aluminum Corp. v. Tennessee Valley Authority*, 462 F. Supp. 464, 475 (M.D. Tenn. 1978)(while the federal APA requires an agency to follow certain steps in the process of promulgating regulations; "[the APA] does not . . . require an agency to adopt such [regulations]; and a court cannot create duties in this regard which are not imposed by statute"). The reasoning of these cases, and the nature of the APA in general, preclude any argument by Plaintiffs that the APA imposes a mandatory duty on an agency to promulgate regulations.

b. Plaintiffs' contentions regarding alleged "binding norms."

The Complaint in this case was filed in April 2007, over six years ago. The legal claim asserted in the Complaint was that the Defendants had failed to perform statutory duties set forth in the statutes specific to DDSN. Complaint, Paragraphs 39-41 (citing §§ 44-20-220, 44-26-180, and 44-20-790).[8] Reference was made to the APA as well, but no specific section of the APA was cited.

Also absent from the Complaint was any suggestion that Plaintiffs were claiming that DDSN had improperly established "binding norms." That issue was first mentioned, in a very limited context, in Plaintiffs' May 13, 2010 Memorandum in Opposition to Defendants' Motion for Summary Judgment, pp. 19-21. However, the issue was mentioned only in connection with one fact situation, which turned out to be incorrect in fact. (Plaintiffs had argued that DDSN had

[8] The claim based on § 44-20-790 appears to have been abandoned.

determined that it would not provide services to persons with Asperger's Syndrome. *Id.* at 23. As Plaintiffs now recognize, Pl. July 31, 2013 Memorandum at 26, that statement is not factually correct: DDSN does in fact provide such services.)[9]

The response of the Defendants in 2010 was first, to mention that the claim relating to Asperger's Syndrome was factually incorrect, as noted above, second, to note that the "binding norm" theory had not been pled, and third, to note that Plaintiffs had not presented the Court with any specific facts indicating that a genuine issue of fact existed on this point. Defendants' Reply Memorandum, May 28, 2010, at 6-7.

At present, more than three years later, Plaintiffs have never sought to amend their Complaint to raise in proper fashion the "binding norm" issue. Instead, their July 31, 2013, Memorandum has expanded that unpled claim. Pl. 7/31/13 Mem. at 12-13, 18-22. As a result, this claim should not be considered at this late date.

Even if the "binding norm" argument is considered, however, Plaintiffs cannot prevail on it, because they have failed to show how they have been injured in fact by the absence of regulations, the point on which their claim is based. In order to determine whether any Plaintiff was injured by the alleged imposition of a binding norm without a regulation, it would be necessary for such an individual to show the specific agency action taken, the harm to that

[9] It is noteworthy that Plaintiffs did not argue in 2010, as they do now, that the "binding norm" theory should entitle them to summary judgment. Instead, they argued that "Whether the agency has established a binding norm with regard to some of its policies is a question of fact." *Id.* at 23. (That claim has subsequently been silently abandoned. Plaintiffs now argue that there is no issue of fact.)

individual as a result, and the extent, if any, to which binding effect was given to an unpromulgated statement by the agency. None of these are present.[10]

CONCLUSION

For the foregoing reasons, the Court concludes that Plaintiff's Motion for Summary Judgment should be denied, Defendants' Motion for Summary Judgment should be granted, and that this action should be, and hereby is, dismissed with prejudice in all respects.

AND IT IS SO ORDERED.

G. Thomas Cooper, Jr.
Circuit Court Judge
Fifth Judicial Circuit

Columbia, South Carolina

September 23, 2013

[10] Even if P & A had been held to have standing to raise some of its claims, P & A would not have standing to raise the "binding norm" claim, again, because of the lack of specific facts that would the nature or extent of any alleged injury.