THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Circuit Court Case No. 2007-CP-40-02187

Protection and Advocacy for the People with Disabilities, Inc.; M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as guardians of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M.; R.P. on behalf of and as Guardian of S.P.; R.R. and J.R. on behalf of and as guardians of K.D.R.; and J.K. on behalf of and guardian of S.S. . . . . **APPELLANTS**

v.

South Carolina Department of Disabilities and Special Needs; Dr. Beverly Buscemi, in her official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Nancy Banor, Deborah McPherson, Christine Sharp, Rick Huntress, Fred Lynn, Harvey Shiver and Kelly Hanson Floyd, as Commissioners of the South Carolina Department of Disabilities and Special Needs . . . . . **RESPONDENTS**

RECORD ON APPEAL

Volume I

[counsel listed on following page]

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SC Court of Appeals

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Volume I

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PROTECTION AND ADVOCACY FOR THE PEOPLE WITH DISABILITIES, INC., ET AL v. S.C. DEPT. OF DISABILITIES AND SPECIAL NEEDS
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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2007CP4002187

Protection and Advocacy for People with Disabilities Inc	South Carolina Dept of Disabilities and Special Needs
MJB	Stanley J Butkus
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

RICHLAND COUNTY FILED 2013 SEP 27 AM 9 39 JEANETTE W. McBRIDE C.C. & G.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ **day of** _____, **20** _____ and a copy mailed first class or placed in the appropriate attorney's box on this 27 September 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Kenya Carver Miller Jo Anne Wessinger Hill Kenneth P. Woodington

ATTORNEY(S) FOR THE PLAINTIFF(S) ATTORNEY(S) FOR THE DEFENDANT(S)

RECEIVED OCT - 7 2013

Court Reporter _____ **Clerk of Court** Jeanette W. McBride

SCRCP Form 4C (10/2011)

SCANNED

STATE OF SOUTH CAROLINA 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.	IN THE COURT OF COMMON PLEAS 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

SCANNED

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.

GR ✱ 2

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, 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. 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").

GC/xco

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.

GOE 13

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 25, 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.

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2007CP4002187

Protection and Advocacy for People with Disabilities Inc

MJB

PLAINTIFF(S)

South Carolina Dept of Disabilities and Special Needs

Stanley J Butkus

DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP; ☐ Vol. Nonsuit;
☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

RICHLAND COUNTY FILED 2013 DEC 30 PM 4:16 JEANETTE W. McBRIDE CLERK OF COURT

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ **day of** _____, **20** _____ and a copy mailed first class or placed in the appropriate attorney's box on this 30 December 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Kenya Carver Miller Jo Anne Wessinger Hill Kenneth P. Woodington

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

SCANNED

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Protection and Advocacy for People with Disabilities, Inc., et al., Plaintiffs, v. South Carolina Department of Disabilities and Special Needs, et al., Defendants.	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C/A No.: 2007-CP-40-2187 **ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION**

RICHLAND COUNTY FILED
2013 DEC 30 AM 9:38
JEANETTE W. McBRIDE C.C.P. & G.S.

This matter comes before the Court by way of Plaintiffs' Motion to Reconsider pursuant to Rule 59(e), SCRCP. Specifically, Plaintiff Protection and Advocacy for People with Disabilities, Inc., in its own capacity and on behalf of individual, unnamed Plaintiffs, asks this Court to reconsider its Order filed September 24, 2013 granting Defendants' Motion for Summary Judgment.

After careful consideration of the submissions of the parties, the Court herby **AMENDS** its September 24, 2013 Order for clarification purposes as follows:

The paragraph on page 18 which currently reads

> "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."

Is amended to read

> "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,

SCANNED

and hereby is, dismissed with prejudice with respect to the merits issues discussed in § 3(a) of the Order, pp. 9-16. This dismissal, however, shall not preclude P & A or any individual Plaintiff from raising, in subsequent administrative appeals involving specific individuals, the issues discussed in § 3(b) of the Order, pp. 16-18, so long as such subsequent appeals involve matters that could not have been raised in the present case."

In all other respects, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby **DENIES** Plaintiffs' Motion under to Rule 59(e), SCRCP to Reconsider this Court's Order filed September 24, 2013. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

IT IS SO ORDERED.

Columbia, South Carolina
December 27, 2013

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

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)
) CIVIL ACTION NO.:

Protection and Advocacy for People with Disabilities, Inc, MJB on behalf of and as next friend of J.B., CBB on behalf of and as guardian of P.B., GC and LC on behalf of and as guardian of F.C., DP on behalf of and as guardian of C.M.D., KF and SF on behalf of and as next friend of A.F., JH on behalf of and as next friend of A.J., GM on behalf of and as guardian of E.M., MM on behalf of and as guardian of E.J.M., RP on behalf of and as guardian of S.P., RR and JR on behalf of and as guardian of K.D.R., and JK on behalf of and as guardian of S.S.

PLAINTIFFS,

v.

South Carolina Department of Disabilities and Special Needs, Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs, and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs.

DEFENDANTS.

RICHLAND COUNTY
FILED
2007 APR 12 AM 9:16
BARBARA A. SCOTT
C.C.C. & S.S.

ORDER TO ALLOW INDIVIDUALLY NAMED PLAINITFFS TO PROCEED ANONYMOUSLY

This matter is before me upon *ex parte* Motion of Counsel for Plaintiffs (the "Petitioners") requesting that this civil action proceed anonymously. The Petitioners contend that it is important for this matter to proceed anonymously since the individually named Plaintiffs include minors and/or adults who have been diagnosed as having either a mental

disability or disorder thereby rendering them incompetent to make legal decisions and their affidavits necessarily reveal sensitive personal information. Additionally, Petitioners argue that identification of the individually named Plaintiffs potentially poses a risk of retaliatory denial of needed services which may result in physical or mental harm to the individually named Plaintiffs.

Based upon the foregoing, the court finds that this matter is one appropriate to proceed anonymously and not to publicly disclose the identity of the individually named Plaintiffs who are minors and/or incompetent adults potentially at risk of retaliatory conduct.

IT IS SO ORDERED.

s/G. Thomas Cooper, Jr.

Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina
4/9, 2007

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

JUDGMENT IN A CIVIL CASE

Case No.: 2007-CP-40-2187

Protection and Advocacy for People with Disabilities, Inc., et al. versus **South Carolina Department of Disabilities and Special Needs, et al.**

Plaintiff(s) Defendant(s)

RICHLAND COUNTY FILED
2007 DEC 14 AM 10:03
CLERK OF COURT

CHECK ONE

[ ] **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and the verdict has been rendered.

[ ] **DECISION BY COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[ ] **ACTION DISMISSED (CHECK REASON):** [ ] Rule 12(b), SCRCP; [ ] Rule 41(a), SCRCP (Vol. nonsuit) [ ] Rule 43(k), SCRCP(Settled); [ ] Other -

[ ] **ACTION STRICKEN (CHECK REASON):** [ ] Rule 40(j),SCRCP; [ ] Bankruptcy; [ ] Binding Arbitration, subject to right to restore to confirm, vacate or modify arbitration award; [ ] Other

IT IS ORDERED AND ADJUDGED: [ ] See attached order; [X] Statement of Judgment by Court

This matter came before the Court on October 29, 2007 pursuant to Defendants' Motion to Dismiss and Motion for a More Definite Statement (filed May 31, 2007). Present at the hearing were Steve Hamm, Esquire, and Jo Anne Wessinger Hill, Esquire, representing Plaintiffs, and Kenneth Woodington, Esquire, representing Defendants.

Defendants' Motion to Dismiss

Defendants assert this action should be dismissed as to all Defendants because the Complaint fails to state facts sufficient to constitute a case of action. Specifically, Defendants allege that the Complaint does not identify or allege any situation in which the statutes of South Carolina, or any source of law, require the Defendants to promulgate regulations. As to the individual Defendants, Defendants assert that the Complaint fails to state facts sufficient to constitute a cause of action against them because no personal involvement against them is alleged. In addition, Defendants assert that it is not necessary for the individual Defendants to be named because if any relief is ordered, the Defendant Department of Disabilities and Special Needs (the "Department") is the only appropriate party necessary in order to provide complete relief.

"Generally, in considering a Rule 12(b)(6) motion to dismiss, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. The motion may not be sustained if the facts alleged in the complaint and the inferences that can be drawn therefrom would entitle the plaintiff to any relief under any theory." Doe v. Greenville County School Dist., 375 S.C. 63, 66-67, 651 S.E.2d 305, 307 (2007) (citing) Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995).

Based on the arguments set forth in Plaintiffs' Memorandum in Opposition to Defendants' Motion, arguments made at the hearing, and the Court's determination that the interpretation of the statutes in question is outside the scope of a motion to dismiss, the Court finds that Defendants' Motion to Dismiss Plaintiff's Complaint as to the Department

individual Defendants is **DENIED**.

Defendants' Motion for a More Definite Statement

Defendants move, pursuant to SCRCP 12(e), for an order requiring a more definite statement for Plaintiffs because all of the individual Department clients/plaintiffs are named only by initials and it is impossible for Defendants to frame a responsive pleading without knowledge of the names of those individuals. Defendants also request the Court to order, or that Plaintiffs agree, that the Complaint should be amended to comply with SCRCP 10(b), which requires that "[a]ll averments of the facts of a cause of action or defense and demands for relief shall be made in consecutive numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances. . . ." Defendants assert that as presently stated, the Complaint contains a number of paragraphs that have multiple sentences dealing with multiple circumstances and that unless the Complaint is amended to comply with Rule 10(b), any Answer filed would be difficult for the Court and the parties to follow because each sentence of each paragraph could require a separate averment in the Answer.

Based on the arguments set forth in Plaintiffs' Memorandum in Opposition to Defendants' Motion, and arguments made at the hearing, the Court finds that Defendants' Motion for a More Definite Statement is **DENIED**.

IT IS SO ORDERED.

Dated at Columbia, South Carolina,

12-13-07 J. Michelle Childs

Date Judge

This judgment was entered on the _____ Day of _____, 20__, and a copy mailed first class this 17th Day of Dec., 2007 to attorneys of record or to parties (when appearing *pro se*) as follows:

Attorney(s) for Plaintiff
Steve Hamm
Jo Anne Wessinger Hill
Kenya Carver Miller
SCRP Form 4(Rev. 2/96)

Attorney(s) for Defendant(s)
Kenneth Woodington
William Davidson, II

Clerk of Court

s/BARBARA A. SCOTT

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
Protection and Advocacy for People with Disabilities, Inc, MJB on behalf of and as next friend of J.B., CBB on behalf of and as guardian of P.B., GC and LC on behalf of and as guardian of F.C., DP on behalf of and as guardian of C.M.D., KF and SF on behalf of and as next friend of A.F., JH on behalf of and as next friend of A.J., GM on behalf of and as next friend of E.M., MM on behalf of and as guardian of E.J.M., RP on behalf of and as guardian of S.P., RR and JR on behalf of and as guardian of K.D.R., and JK on behalf of and as guardian of S.S.)

Plaintiff(s))

vs.

South Carolina Department of Disabilities and Special Needs, Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs, and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs.)

Defendant(s))

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVER SHEET

2007CP4002187

RICH. CO. COUNTY FILED
2007 APR -5 PM 4:36
BARBARA A. SCOTT C.C.C. & G.S.

(Please Print)
Submitted By: Kenya Carver Miller
Address: 1900 Barnwell Street, Columbia, SC 29201
PO Drawer 7788, Columbia, SC 29202

SC Bar #: 72634
Telephone #: 803-771-4400
Fax #: 803-779-0016
Other:
E-mail: kmiller@rpcrlaw.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply)*

***If Action is Judgment/Settlement do not complete*

☐ **JURY TRIAL** demanded in complaint. ☒ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION *(Check One Box Below)*

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions

- ☐ PCR (500)
- ☐ Sexual Predator (510)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Judgments/Settlements

- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Other (799)

Administrative Law/Relief

- ☐ Reinstate Driver's License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture (840)
- ☒ Other (899)

Declaratory Judgment Action

Appeals

- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Administrative Law Judge (980)
- ☐ Public Service Commission (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other

- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)

Negligence: Damages to Under Ground Utilities

- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)

Submitting Party Signature: _____ **Date:** April 5, 2007

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	CIVIL ACTION NO.:
Protection and Advocacy for People with Disabilities, Inc, MJB on behalf of and as next friend of J.B., CBB on behalf of and as guardian of P.B., GC and LC on behalf of and as guardian of F.C., DP on behalf of and as guardian of C.M.D., KF and SF on behalf of and as next friend of A.F., JH on behalf of and as next friend of A.J., GM on behalf of and as next friend of E.M., MM on behalf of and as guardian of E.J.M., RP on behalf of and as guardian of S.P., RR and JR on behalf of and as guardian of K.D.R., and JK on behalf of and as guardian of S.S.	)	**SUMMONS (Non-Jury)**
PLAINTIFFS,	)	
v.	)	
South Carolina Department of Disabilities and Special Needs, Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs, and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs.	)	
DEFENDANTS.	)	

RICHLAND COUNTY
FILED
2007 APR -5 PM 4:40
BARBARA A. SCOTT
C.C.P. & G.S.

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Complaint on the Plaintiff at 1900 Barnwell Street, Columbia, South Carolina 29201, within thirty (30) days after the service hereof, exclusive of the day of such

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	CIVIL ACTION NO.:
Protection and Advocacy for People with Disabilities, Inc, MJB on behalf of and as next friend of J.B., CBB on behalf of and as guardian of P.B., GC and LC on behalf of and as guardian of F.C., DP on behalf of and as guardian of C.M.D., KF and SF on behalf of and as next friend of A.F., JH on behalf of and as next friend of A.J., GM on behalf of and as next friend of E.M., MM on behalf of and as guardian of E.J.M., RP on behalf of and as guardian of S.P., RR and JR on behalf of and as guardian of K.D.R., and JK on behalf of and as guardian of S.S.	)	**SUMMONS**
PLAINTIFFS,	)	**(Non-Jury)**
v.	)	
South Carolina Department of Disabilities and Special Needs, Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs, and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs.	)	
DEFENDANTS.	)	

RICHLAND COUNTY
FILED
2007 APR -5 PM 4:40
BARBARA A. SCOTT
C.C. & G.S.

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Complaint on the Plaintiff at 1900 Barnwell Street, Columbia, South Carolina 29201, within thirty (30) days after the service hereof, exclusive of the day of such

service, and if you fail to answer the Complaint within the time aforesaid, Plaintiff will apply to the Court for the relief demanded in the Complaint.

RICHARDSON, PLOWDEN,
CARPENTER & ROBINSON, PA

BY: _____

Steven W. Hamm
C. Jo Anne Wessinger Hill
Kenya Carver-Miller
1900 Barnwell Street
Columbia, South Carolina 29201
803-771-4400

ATTORNEYS FOR PLAINTIFFS

Columbia, South Carolina

April 5, 2007

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CIVIL ACTION NO.:
	)	
Protection and Advocacy for People with Disabilities, Inc, MJB on behalf of and as next friend of J.B., CBB on behalf of and as guardian of P.B., GC and LC on behalf of and as guardian of F.C., DP on behalf of and as guardian of C.M.D., KF and SF on behalf of and as next friend of A.F., JH on behalf of and as next friend of A.J., GM on behalf of and as next friend of E.M., MM on behalf of and as guardian of E.J.M., RP on behalf of and as guardian of S.P., RR and JR on behalf of and as guardian of K.D.R., and JK on behalf of and as guardian of S.S.	)	**COMPLAINT** (Non-Jury)
PLAINTIFFS,	)	
v.	)	
South Carolina Department of Disabilities and Special Needs, Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs, and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs.	)	
DEFENDANTS.	)	

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C.C.C. & G.S.

Plaintiffs would respectfully show unto the Court:

PARTIES AND JURISDICTION

1. That Plaintiff Protection and Advocacy for People with Disabilities, Inc. (hereinafter "P&A") is a private, non-profit corporation established pursuant to Federal and State law to protect and advocate for the rights of people with disabilities in the State of South

Carolina, including individuals eligible for or receiving services from SCDDSN. P&A represents individuals and their families who receive some services from or seek appropriate services from SCDDSN.

2. That individual Plaintiffs are citizens and residents of the State of South Carolina who have need for services from Defendant South Carolina Department of Disabilities and Special Needs (hereinafter "SCDDSN"). Due to the highly personal nature of the facts surrounding their claims and due to their fear of retaliation by Defendant, Plaintiffs will be identified in this Complaint by their initials only. Additionally, any reference to his or her, herein, is not an indication of any particular gender.

3. That Defendant SCDDSN is a state agency created by and operating through the authority of the South Carolina General Assembly, pursuant to S. C. Code Ann. §§ 44-20-10 *et seq.* with the stated purpose of "[having] authority over all of the state's services and programs for the treatment and training of persons with mental retardation, related disabilities, head injuries, and spinal cord injuries." S.C. Code Ann. § 44-20-240.

4. That Defendant Dr. Stanley Butkus is the duly appointed Director of defendant SCDDSN, and in such capacity has virtually unfettered and nonreviewable authority over decisions affecting thousands of citizens of this State.

5. The Defendants Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs, are charged with the statutory duty to determine the policy and promulgate regulations governing the operation of the department [SCDDSN] and the employment of professional staff and personnel.

6. That pursuant to the South Carolina Administrative Procedures Act (APA), S.C. Code Ann. 1-23-10 *et seq.* and SCDDSN's enabling statute (S.C. Code Ann. 44-20-10 *et seq.*) SCDDSN is statutorily required to promulgate regulations. Additionally, the APA was intended to provide a standardized process for all public agencies to formulate rules in order to obtain public comment and to provide access to agencies' operations as well as an avenue for appellate review of administrative decisions.

7. That SCDDSN has never promulgated regulations regarding issues of critical concern to applicants and recipients of its services, including but not limited to eligibility for its services; appeal procedures; standards for the operation of its residential programs; procedures for its Human Rights Committees; and standards for research on human subjects.

8. That SCDDSN's failure to comply with the requirements of the APA has resulted in South Carolina citizens and entities being unable to seek information about its policies in the South Carolina Administrative Code, unable to determine their rights to receive or dispute SCDDSN decisions, and participate in the rule-making process as intended by the APA.

9. That the individual Plaintiffs have been, are being and will continue to be harmed as the direct result of said deficiencies, through denial of services, inadequate services and unequal availability and quality of services, and lack of an appropriate grievance procedure; all of which affect their health, safety, well-being, their right to live and participate in their communities and their ability to enjoy typical lifestyles.

10. That Plaintiff P&A has been, and will continue to be, injured by Defendant's failure to promulgate regulations in that it has and will continue to repeatedly expend time and resources attempting to determine and enforce rights of developmentally disabled persons

without access to any meaningful or enforceable rules or regulations regarding eligibility and services, and with no access to judicial review of decisions affecting its clients.

11. That this Court has jurisdiction to declare, rights, status, and other legal relations and to grant injunctive and other relief pursuant to the South Carolina Uniform Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10, *et seq.*, by ordering Defendant to promulgate regulations concerning its operation and services, as more fully set forth in this complaint.

BACKGROUND FACTS

12. The allegations of all preceding paragraphs are incorporated as if repeated verbatim herein.

13. Plaintiff P&A has been, and will continue to be, injured by SCDDSN's failure to promulgate regulations in that it has and will continue to repeatedly expend time and resources attempting to determine and enforce rights of developmentally disabled persons without access to any meaningful or enforceable rules or regulations regarding eligibility and services, and with no access to judicial review of decisions affecting its clients.

14. J.B. is a resident of a facility for people with developmental disabilities and has been a SCDDSN client for many years. His disabilities include a tendency towards self-destructive and aggressive behaviors. The facility, defined as a Community Training Home II ("CTH II") by SCDDSN, included in his care plan that he would be provided with services of a psychologist to develop a "Behavior Support Plan (BSP)". BSPs are designed to provide the resident staff with specific target behavior identification along with effective prevention and interventions tailored to the needs of the individual client. They are an integral part of effective services and are required to enhance the individual's skills in order to increase independence and minimize self-injury and injuries to other clients and staff. However, for over a year while J.B.

lived in the supervised facility, SCDDSN failed to develop a BSP, despite repeated efforts by P&A and J.B.'s family.

15. BSPs are critically important to the recipients of services and to the service providers. However, SCDDSN has never promulgated regulations regarding their process or components nor has SCDDSN promulgated regulations for the operation of these CTH II homes. Instead, SCDDSN implements internal directives to serve as a guide in implementing BSPs. Pursuant to SCDDSN internal directives, BSPs must be approved by a Human Rights Committee (HRC). See S.C. Code of Laws § 44-26-70 (mandating the establishment of Human Rights Committees). The role of the HRCs is to safeguard and protect the rights of people receiving services and to ensure that individuals are treated with dignity and respect in the full recognition of their rights. However, HRCs do not have the authority to order that a BSP be developed within a certain time frame as SCDDSN has not promulgated any regulations regarding the membership, jurisdiction, or procedures of HRCs.

16. During the time that J.B. went without any BSP in place, J.B. suffered increased aggressiveness and self-destructive behavior. Not only did he pose a danger of harm to himself, but staff and other clients were at increased risk as well. Although J.B.'s family and P&A worked for over a year to get a BSP for J.B, their efforts were met with limited success as no regulation exists to provide a method to appeal the failure to develop or implement a BSP. J. B., and others like him, are and will continue to be subjected to this type of arbitrary failure and refusal to provide a proper level of services unless and until SCDDSN is forced to promulgate and adhere to regulations, with the availability of judicial review.

17. P.B. is a person who has mental retardation residing in a supervised apartment ("SLP II") funded by SCDDSN. Without prior notice to P.B.'s guardian or other persons

receiving similar services across the state, SCDDSN implemented a change in policy purportedly eliminating P.B.'s eligibility to receive the adult companion services which SCDDSN had provided for many years prior to this change of policy. In addition, without notice to guardians or family members, SCDDSN changed the standards for supervision of the program, so that 24 hours a day on-site supervision is not provided to P.B. and other persons living in SLP II settings as was required when P.B. was admitted to the program. P.B. was subsequently left unsupervised at a public fair. P.B.'s guardian reported this neglect to the South Carolina Department of Social Services after the SCDDSN private/contract provider refused to do so. SCDDSN has not promulgated any regulations with regard to operation of SLPs. Regulations are needed to establish standards for supervision, reporting procedures, an appeals process to challenge decisions of the SCDDSN and procedures for the operation of an independent HRC.

18. SCDDSN's failure to promulgate regulations has resulted in P.B. incurring significant legal expenses to protect his services. Promulgation of regulations by Defendant would provide P.B., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state.

19. F.C. is a minor child who lives with his parents. F.C. has a long history of hospitalizations and treatment, as his parents have tried desperately to find the right kind of help for him. Experts have concluded that F.C. has Asperger's Disorder, as well as Attention Deficit Hyperactivity Disorder (ADHD) and other diagnoses. Asperger's Disorder is a developmental disability (not a mental illness), classified in the Diagnostic and Statistical Manual (DSM-IV) under "Pervasive Developmental Disorders". It is characterized by symptoms such as

impairment in the use of nonverbal behaviors to regulate social interaction, apparently inflexible adherence to specific, nonfunctional routines or rituals, and severe and sustained impairment in social interaction. Likewise, F.C., who has severe developmental delays including emotional and social deficits, is unable to socialize effectively, has difficultly understanding nonverbal social and other cues, is unable to function effectively in many school and home situations, and requires specialized training and habilitation.

20. F.C.'s mother contacted SCDDSN and attempted to have F.C. evaluated for services. However, SCDDSN refused to evaluate F.C. stating that SCDDSN does not recognize the diagnosis of Asperger's as criteria for eligibility for services. SCDDSN denied services to F.C. despite the fact that Asperger's is very similar to Autism, a condition that SCDDSN does serve, and despite that South Carolina statutory law requires that Defendant SCDDSN treat individuals with mental retardation and "related disabilities". See S.C. Code Ann. § 44-20-240.

21. The Department of Mental Health and the Continuum of Care for Emotionally Disturbed Children have provided some services to assist F.C., but due to their lack of expertise in the treatment of developmental disorders such as Autism and Asperger's, these services have not and cannot adequately address the needs of F.C. As a result, F.C. remains in danger of institutionalization due to a lack of appropriate long-term services, which could and should be provided by SCDDSN as the agency charged by law with serving people of all ages who have developmental disorders.

22. Neither the standards for eligibility and receipt of SCDDSN services nor the grievance process have been subjected to review by the public or the General Assembly. SCDDSN has no regulation or clearly established procedures for appealing the denial of services to an internal or external hearing officer. Consequently, F.C. and his family have no meaningful

access to standards used to determine to which services he may be entitled. F.C. and his family have no avenue for appealing any SCDDSN determination regarding services provided, or not, by SCDDSN. Promulgation of regulations by Defendant would provide F.C., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state. Promulgation of regulations would also provide individuals such as F.C. and his family with a process for accessing the courts to obtain a decision by a neutral third party where SCDDSN's actions fail to conform to the regulation.

23. C.M.D. is an adult residing in a group home funded by SCDDSN which is classified as a CTH II home. Funds for the purchase of this residence were provided by SCDDSN and the South Carolina Housing Trust Fund. C.M.D. disputes the method used to calculate her rental payment to the CTH II home. SCDDSN has failed to promulgate regulations for the establishment of rent charged to residents of SCDDSN CTH II funded residences. In addition, SCDDSN has failed to promulgate regulations for the release of records and investigations to victims of abuse, neglect and exploitation and has denied C.M.D.'s brother and guardian access to records regarding abuse and neglect of C.M.D. Promulgation of regulations by Defendant would provide C.M..D., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state. Promulgation of regulations would also provide individuals such as C.M.D. and his family with a process for accessing the courts to

obtain a decision by a neutral third party where SCDDSN's actions fail to conform to the regulation.

24. Plaintiff A.F., age 19, lives with his parents and natural guardians, K.F. and S.F. A.F. has been diagnosed with and treated for many years for severe developmental disabilities, including Asperger's Syndrome and Pervasive Developmental Disorder. As the result of his developmental disorders, he has extreme difficulty with social interaction and adaptation, with independent living skills, and with learning. He has become increasingly aggressive and difficult for his parents to handle, to the point that it has become clear that, without appropriate support services, his parents will be forced to place him in a residential care facility. Despite A.F.'s critical and obvious need for services, Defendant SCDDSN steadfastly refused to provide services or participate in meetings with other service providers, including the local school district, local Department of Mental Health Center, and local Department of Juvenile Justice personnel.

25. Eventually, the Family Court in a juvenile justice proceeding ordered SCDDSN to provide services to A.F., who will need services for the rest of his life. However, once A.F. reached the age of eighteen, SCDDSN was no longer obligated under the Court Order to provide him with services. Recently, SCDDSN terminated A.F. from services. SCDDSN has not promulgated any regulations for A.F.'s family to refer to or for SCDDSN employees to follow, in making the decision to continue or discontinue services, or in determining what services A.F. would receive if any. There is also no avenue for appealing any SCDDSN determination with regard to denied services. Although SCDDSN has a "grievance process", this loosely defined process is subject to change at any time without notice. Neither the standards for eligibility and

receipt of services nor the grievance process have been subjected to review by the public or the General Assembly.

26. Promulgation of regulations by Defendant would provide A.F., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state. Promulgation would also provide individuals such as A.F. and his family with a process for accessing the courts to obtain a decision by a neutral third party where SCDDSN's actions fail to conform to the regulations.

27. A.J. is a person who has mental retardation and resides in an SLP II. SCDDSN has paid for his participation in a workshop program; however, A.J. has been assaulted twice at the workshop and is fearful of returning to the workshop. SCDDSN has denied A.J. and other residents of SLP II's eligibility for less expensive adult companion services by changing the eligibility criteria to require A.J. and others like him to attend institutional day programs. SCDDSN has not promulgated any regulations with regard to the standards for eligibility and receipt of services. SCDDSN has no regulation or clearly established procedures for appealing the denial of services to an internal or external hearing officer. Promulgation of regulations by Defendant would provide A.J., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state.

28. E.M. is a long-time client of Defendant SCDDSN. Over the years, E.M. has utilized day services obtained through the use of Medicaid funds administered by Defendant

SCDDSN. E.M. has participated in a job training program and is employable in the private sector, albeit in very limited areas. E.M.'s parents have always cared for him in the home, and though E.M. is well into adulthood, he is unable, and is unlikely to ever be able, to live on his own. Although E.M. and his parents are aware that there is a long waiting list for residential services through Defendant SCDDSN, they have, for many years, attempted to have E. M. placed on a waiting list. Despite the declining health of E.M.'s parents, Defendant SCDDSN for years refused to place E.M. on a waiting list for residential placement. In effect, Defendant SCDDSN informed E.M. and his family that unless E.M.'s needs were "critical" (i.e. he was facing immediate homelessness) or it he could be shown that he needed residential placement within twelve months, he could not be placed on any list. E.M.'s parents even offered to pay for the difference between E.M.'s current funding and the cost of a residential placement. SCDDSN, however, refused to allow such use of the funds, and failed to provide any explanation for such refusal or appeal options.

29. After years of requesting that E.M. be placed on the waiting list, just recently in late 2006, SCDDSN finally provided GM with a verbal offer of residential placement. Nevertheless, due to SCDDSN's failure to promulgate regulations as it is required to do so, E.M. and his family was not afforded access to any formal procedure for challenging Defendant's waiting list procedures or their decisions regarding the use of funds in which Plaintiff E.M. had already been approved. Neither the standards for eligibility and receipt of services, the standards governing choice of services needed/provided, the waiting list process, nor the grievance process are subjected to review by the public or the General Assembly. SCDDSN has no regulation or clearly established procedures for appealing the denial of services, denial of change in services, or admission to or priority on a waiting list to an internal or external hearing officer.

30. E.M. and his family were afforded no avenue for appealing any SCDDSN determination regarding services provided, or not, by SCDDSN as no such procedure exists. Promulgation of regulations by Defendant would have provided E.M., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state. Promulgation of regulations would also provide individuals such as E.M. and his family with a process for accessing the courts to obtain a decision by a neutral third party where SCDDSN's actions fail to conform to the regulations.

31. E.J.M. has profound mental retardation and was voluntarily admitted to SCDDSN services in 1999. For the next six years, E.J.M. was subjected to repeated physical and psychological abuse at a private facility (the "Private or Contract Provider") funded by SCDDSN. Violations of the human rights of residents of this facility are not reviewed by a Human Rights Committee operated by the county SCDDSN Board. Instead, SCDDSN allows the Private or Contract Provider to operate its own Human Rights Committee (HRC). SCDDSN has not promulgated any regulations with regard to operation of such a committee or with regard to the appeals process to challenge the decision of the Private or Contract Provider's HRC. Thus, E.J.M. has not had access to a HRC through promulgation.

32. E.J.M.'s mother attempted to move him to a safer facility but SCDDSN refused to do so, even to the point of refusing to permit his guardian to terminate SCDDSN services. As SCDDSN does not promulgate regulations with regard to eligibility of services or appeals rights/processes, E.J.M's mother was forced to employ the services of an attorney in order to acquire the needed services in which E.J.M was entitled. Only after E.J.M. incurred significant

legal expenses were these services finally provided. Promulgation of regulations by Defendant would provide E.J.M., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state. Promulgation of regulations would also provide individuals such as E.J.M and his family with a process for accessing the courts to obtain a decision by a neutral third party where SCDDSN's actions fail to conform to the regulations.

33. K.D.R. is a minor who lives with his parents. As a young child, K.D.R. had developmental delays and was a client of SCDDSN. At age seven, K.D.R. was diagnosed with Asperger's Disorder and continued to receive sporadic services from Defendant. At age nine, despite the fact that his symptoms and difficulties had worsened, SCDDSN cut off K.D.R.'s services, stating he was not qualified to receive them. K.D.R.'s parents were told by a local DSN Board employee that there was no appeal process. However, K.D.R.'s parents persisted and eventually received a determination that K.D.R. was ineligible for services because he did not meet diagnostic criteria for autism or Mental Retardation, and that neither PDD-NOS nor Asperger's were considered "related disabilities". If SCDDSN promulgated regulations as it is required to do, K.D.R., his family and others like him would be provided with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state. They would also have a process for accessing the courts to obtain a decision by a neutral third party where SCDDSN's actions fail to conform to the regulations.

34. S.P began receiving SCDDSN funded residential services in 2003 when he filed a lawsuit against SCDDSN and Defendant Butkus. In 2005 SCDDSN found S.P. to be ineligible for SCDDSN services based on eligibility criteria which are more restrictive than those contained in state and federal law. SCDDSN has failed to promulgate regulations establishing eligibility criteria which comply with state and federal law. In addition, SCDDSN has refused to follow the guardian's wishes in providing appropriate residential services to S.P. SCDDSN has released protected health records to other entities in violation of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and possibly other state and federal law. See 29 U.S.C.A. § 1181, Pub. L 104-191, August 21, 1996, 110 Stat. 1936. SCDDSN has not promulgated regulations for compliance with HIPAA. Promulgation of regulations by Defendant would provide S.P., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state.

35. Minor Plaintiff S.S. is currently in an out of home placement, but formerly lived with his mother, stepfather and siblings in their family home. S.S. has been treated for many years for a variety of diagnoses due to unusual and at times unmanageable behaviors, strange thought patterns and, as he has become older, episodes of severe aggression. In 2005, the Medical University of South Carolina evaluated S.S. and diagnosed him with Asperger's Disorder. This disorder, very similar to autism, is one of a group of diagnoses referred to in the DSM IV as "Pervasive Developmental Disorders." S.S. is unable to socialize effectively, has difficulty understanding nonverbal social and other cues, is unable to function effectively in many school and home situations, and requires specialized training and habilitation. Defendant

SCDDSN denied services to S.S., stating only that he did not meet requirements for a diagnosis of Autism. He was not evaluated for "related disabilities" and has never received SCDDSN services.

36. Despite S.S.'s mother's "appeal" to state-level SCDDSN, Defendant has consistently refused to provide services. S.S. has been repeatedly committed to treatment facilities and foster homes because services from the Department of Mental Health have been inadequate for his needs. S.S.'s mother has no access to any formal procedure for challenging Defendant's refusal to provide services. Neither the standards for eligibility and receipt of services nor the grievance process have been subjected to review by the public or the General Assembly. SCDDSN has no regulation or clearly established procedures for appealing the denial of services to an internal or external hearing officer. S.S. and his family have no meaningful access to standards used to determine to which services he may be entitled. Additionally, S.S. and his family have no avenue for appealing any SCDDSN determination regarding services provided, or not, by SCDDSN. Promulgation of regulations by Defendant would provide S.S., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state. They would also have a process for accessing the courts to obtain a decision by a neutral third party where SCDDSN's actions fail to conform to the regulations.

FOR A CAUSE OF ACTION

DECLARATORY JUDGMENT

37. The allegations of all preceding paragraphs are incorporated as if repeated verbatim herein.

38. That SCDDSN has promulgated only five regulations: R. 88-105, License Requirement for Facilities and Programs; R. 88-210-Definitions; R. 88-310, Recreational Camps for Mentally Retarded Persons; R. 88-405, Day Programs for Mentally Retarded Persons; and R-88-910, Unclassified Facilities and Programs. SCDDSN has never promulgated regulations defining for issues of critical concern to applicants and recipients of its services, including but not limited to eligibility for its services; appeal procedures; standards for the operation of its residential programs; procedures for its Human Rights Committees; and standards for research on human subjects.

39. That SCDDSN's enabling statute requires that the Commission of the SCDDSN promulgate regulations, stating "The commission **shall** determine the policy **and promulgate regulations** governing the operation of the department and the employment of professional staff and personnel." S.C. Code Ann. § 44-20-220 (emphasis added).

40. That SCDDSN is additionally required to promulgate regulations pursuant to S.C. Code Ann. § 44-26-180 ("...The department **shall promulgate regulations** to obtain informed consent and to protect the dignity of the individual.") (emphasis added).

41. Section 44-20-790 of the South Carolina Code of Laws dealing with promulgation of regulations governing hearings provides that "[t]he procedures governing hearings authorized by "Notice of Deficiencies . . ." must be in accordance with regulations promulgated by the department.

42. That the APA was intended to provide a standardized process for all public agencies to formulate rules in order to obtain public comment and to provide access to agencies' operations as well as an avenue for appellate review of administrative decisions.

43. That Defendant Dr. Stan Butkus is the duly appointed Director of defendant SCDDSN, and in such capacity has virtually unfettered and nonreviewable authority over decisions affecting thousands of citizens of this State.

44. That on or about October 24, 2005, Plaintiffs, by and through counsel, delivered to Defendant SCDDSN a letter demanding that regulations be promulgated pursuant to S.C. Code Ann. §§ 1-23-10 *et seq.*, commonly known as the Administrative Procedures Act or APA.

45. That SCDDSN has refused to adhere to its statutory duty to promulgate regulations.

46. That the failure to promulgate regulations under the APA results in Defendant SCDDSN having unfettered decision-making authority, with no opportunity for public participation in the rulemaking process, review by the General Assembly or opportunity for independent judicial review.

47. That such unfettered decision-making authority has marked potential for, and indeed has resulted in, numerous instances of inconsistency, misapplication of the law, failure to provide services, failure to provide adequate services, provision of unequal levels of service coordination and delivery, arbitrary and capricious eligibility decisions, and no avenue for judicial scrutiny of agency decisions.

48. That by failing to promulgate regulations, SCDDSN and the Commission have circumvented not only the requirements of its own enabling legislation, but the requirements of the APA, leaving the public, P&A, the individually named Plaintiffs, defendant's employees, the legislature and the courts with no meaningful access to generally applicable standards which can be judicially reviewed.

49. That Plaintiffs are informed and believe themselves entitled to a Declaratory Judgment requiring that SCDDSN 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.

50. That Defendants do not have substantial justification for refusal to promulgate regulations.

51. That attorney's fees and costs have continued to incur in this matter.

52. That upon information and belief, there are no special circumstances which would make an award of attorney's fees and costs unjust.

53. That Plaintiffs are informed and believe they are entitled to an order of this court requiring Defendants to pay Plaintiffs' attorney fees and costs pursuant to S.C. Code Ann. § 15-77-300.

WHEREFORE, Plaintiffs pray this Court for an Order:

1. Declaring that Defendant SCDDSN is required to, and that it shall 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; and
2. Awarding reasonable attorney's fees and costs to Plaintiffs.

Respectfully submitted,

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C. Jo Anne Wessinger Hill
Kenya Carver-Miller
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Columbia, South Carolina
April 5, 2007

ATTORNEYS FOR THE PLAINTIFFS

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)
COUNTY OF RICHLAND)
Protection and Advocacy for People with Disabilities, Inc.)
MJB on behalf of and as next friend of J.B., CBB on behalf)
of and as guardian of P.B., GC and LC on behalf)
and as guardian of F.C., DP on behalf of and as)
guardian of C.M.D., KF and SF on behalf of and as)
next friend of A.F., JH on behalf of and as next friend)
of A.J., GM on behalf of and as next friend of E.M.,)
MM on behalf of and as guardian of E.J.M., RP on)
Behalf of and as guardian of S.P., RR and JR on behalf)
Of and as guardian of K.D.R. and JK on behalf of and)
As guardian of S.S.)
)
Plaintiffs,)
)
v.)
South Carolina Department of Disabilities and Special)
Needs, Dr. Stanley J. Butkus, in his official capacity)
As Director of the South Carolina Department of)
Disabilities and Special Needs, and Edythe Dove,)
Mary Katherine Bagnal, Ronald Forrest, John Vaughn,)
Dr. Otis Speight, W. Robert Harrell as Commissioners)
Of the South Carolina Department of Disabilities and)
Special Needs,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
CASE NO.:

2007CP4202187

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

RICHLAND COUNTY FILED
2007 APR 12 AM 9:16
BARBARA A. SCOTT C.C.C.P.G.S.

Plaintiff's Attorney:	Defendant's Attorney:
Kenya Carver-Miller Richardson, Plowden, Carpenter & Robinson, PA Post Office Drawer 7788 Columbia, South Carolina 29202	
phone: 771-4400 fax: 779-0016	phone: fax:

MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: **PETITION (EX PARTE) TO PROCEED ANONYMOUSLY AND PROPOSED ORDER**

ESTIMATED TIME NEEDED: 30 MIN **COURT REPORTER NEEDED:** **YES**

SECTION II: Motion/Order Type

Written motion attached
Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for **Plaintiff** / Defendant Date submitted 4/5/07

SECTION III: Motion Fee

11 PAID - AMOUNT: $25.00

EXEMPT: Rule to Show Cause in Child or Spousal Support

(check reason) Domestic Abuse or Abuse and Neglect

Indigent Status State Agency v. Indigent Party

Sexually Violent Predator Act Post-Conviction Relief

Motion for Stay in Bankruptcy

Motion for Publication Motion for Execution (Rule 69, SCRCP)

Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

Other:

JUDGE'S SECTION

Motion Fee to be paid upon filing of the attached order.

Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by:

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CIVIL ACTION NO.:
	)	
IN RE:	)	
	)	
Protection and Advocacy for People with Disabilities, Inc, MJB on behalf of and as next friend of J.B., CBB on behalf of and as guardian of P.B., GC and LC on behalf of and as guardian of F.C., DP on behalf of and as guardian of C.M.D., KF and SF on behalf of and as next friend of A.F., JH on behalf of and as next friend of A.J., GM on behalf of and as next friend of E.M., MM on behalf of and as guardian of E.J.M., RP on behalf of and as guardian of S.P., RR and JR on behalf of and as guardian of K.D.R., and JK on behalf of and as guardian of S.S.	)	**PETITION (*EX PARTE*) TO PROCEED ANONYMOUSLY**
	)	
PLAINTIFFS,	)	
	)	
v.	)	
	)	
South Carolina Department of Disabilities and Special Needs, Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs, and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs.	)	
	)	
DEFENDANTS.	)	

RICHLAND COUNTY
FILED
2007 APR 12 AM 9:16
BARBARA A. SCOTT
C.C.C. & G.S.

The individually named Plaintiffs ("Petitioners"), through their undersigned Counsel, pursuant to Rules 6 and 17 of the South Carolina Rules of Civil Procedure hereby file this Petition *ex parte* respectfully requesting that this civil action proceed anonymously. In support of this Petition, the undersigned would show unto the Court:

1. that individually named Plaintiffs J.B., P.B., C.M.D., A.F., A.J., E.M., E.J.M., and S.P. are over the age of eighteen (18), but have been diagnosed as having either a mental disability or disorder, such that these individually named Plaintiffs are incompetent to make legal decisions;

2. that the individually named Plaintiffs F.C., K.D.R., and S.S. are minors who have also been diagnosed as having either a mental disability or disorder such that these individually named Plaintiffs are incompetent to make legal decisions;

3. that upon information and belief the identification of the Plaintiffs' identities potentially poses a substantial risk that they will be denied access to essential services or otherwise face retaliation for the exercise of their rights;

4. that it is critically important for the Court to protect the privacy interests of the individually named Plaintiffs because of the extremely personal nature of the facts set out in the Complaint;

5. that allowing this action to proceed anonymously would not be unfair to the Defendants or be to the Defendants' disadvantage.

The undersigned hereby requests that all of the individually named Plaintiffs in this matter be allowed to proceed anonymously pursuant to the South Carolina Rules of Civil Procedure and other applicable state law.

Respectfully Submitted,

Steven W. Hamm
C. Jo Anne Wessinger Hill
Kenya C. Miller
RICHARDSON, PLOWDEN, CARPENTER & ROBINSON, P.A.
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400

ATTORNEYS FOR THE PLAINTIFFS

Columbia, South Carolina
April 5, 2007

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS
Protection and Advocacy for the People with Disabilities, Inc., M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M.; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S., Plaintiffs, v. South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs, Defendants.	Civil Action No. 07-CP-40-2187 **MOTION TO DISMISS** **AND** **MOTION FOR MORE DEFINITE STATEMENT**

TO: Steven W. Hamm, C. Jo Anne Wessinger Hill, Kenya Carver-Miller
Attorneys for Plaintiff

YOU WILL PLEASE TAKE NOTICE that the undersigned attorneys for the Defendants, will move before the Presiding Judge of the Fifth Judicial Circuit at the Richland County

Courthouse, Columbia, South Carolina, at such time and place as may be set by the Court, for an order granting the Defendants' motion to dismiss this matter and/or the Defendants' motion for more definite statement based on the following grounds:

MOTION TO DISMISS

1. As to all Defendants, the Complaint fails to state facts sufficient to constitute a cause of action. Specifically, the Complaint does not identify or allege any situation in which the statutes of South Carolina, or any other source of law, requires the Defendants to promulgate regulations.

2. As to the individual Defendants, i.e., the Director of the Department of Disabilities and Special Needs and the Commissioners of the Department, the Complaint fails to state facts sufficient to constitute a cause of action against them because no personal involvement against them is alleged. In addition, it is not necessary for them to be named as Defendants, because if any relief is ordered (the entitlement to which is denied by Defendants), the Defendant Department of Disabilities and Special Needs is the only appropriate party necessary in order to provide complete relief.

MOTION FOR MORE DEFINITE STATEMENT

3. Defendants also move pursuant to Rule 12(e), SCRCP, for an order requiring a more definite statement from the Plaintiffs. The reason for this motion is that all of the individual DDSN clients/plaintiffs are named only by initials, and it is impossible for the Defendants to frame a responsive pleading without knowledge of the names of those individuals.

4. Defendants would also request that the Court order, or that the Plaintiffs agree, that the Complaint should be amended to comply with Rule 10(b), SCRCP, which requires that "[a]ll averments of the facts of a cause of action or defense and demands for relief shall be made

in consecutive numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances. . . ." As presently stated, the Complaint contains a number of paragraphs that have multiple sentences dealing with multiple circumstances. Unless the Complaint is amended to comply with Rule 10(b), any Answer filed would be difficult for the Court and the parties to follow, because each sentence of each paragraph could require a separate averment in the Answer.

These motions are based on the pleadings, South Carolina Rules of Civil Procedure, the laws of the State of South Carolina, the case law of the State of South Carolina, and such other matters as may be properly presented to the Court at the time of the hearing.

DAVIDSON, MORRISON & LINDEMANN, P.A.

By: _____

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ATTORNEYS FOR DEFENDANTS

Columbia, South Carolina

May 30, 2007

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Protection and Advocacy for the People with Disabilities, Inc., M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M.; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S., Plaintiffs, v. South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs, Defendants.	IN THE COURT OF COMMON PLEAS Civil Action No. 07-CP-40-2187 **CERTIFICATE OF SERVICE**

The undersigned employee of Davidson, Morrison & Lindemann, P.A., attorneys for the Defendants, does hereby certify that service of the attached **Motion to Dismiss and Motion for More Definite Statement** in the above-referenced action was made upon all counsel of record

by placing same in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 30th day of May, 2007, addressed as follows:

Steven W. Hamm, Esquire
C. Jo Anne Wessinger Hill, Esquire
Kenya Carver-Miller, Esquire
Richardson, Plowden, Carpenter & Robinson, P.A.
1900 Barnwell street
Columbia, South Carolina 29201

Shelley E Stafford

STATE OF SOUTH CAROLINA 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.	IN THE COURT OF COMMON PLEAS Civil Action No. 07-CP-40-2187 **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

STATEMENT

This action was filed on April 5, 2007. It is a result of the desire of Plaintiffs to have the Court order the Department of Disabilities and Special Needs ("DDSN") to promulgate regulations in areas where Plaintiffs would prefer state agency action to occur by regulation rather than by other means. The Defendants have moved to dismiss, on the ground that the Complaint does not identify or allege any situation in which the statutes of South Carolina, or any other source of law, requires the Defendants to promulgate regulations, and in fact no such requirements exist.[1] Defendants therefore submit that Plaintiffs' remedy, if one is to be found, should come from the General Assembly rather than from this Court.

[1] The individual Defendants, i.e., the Director of the Department of Disabilities and Special Needs and the Commissioners of the Department, have also moved to dismiss on the ground that no personal involvement against them is alleged. In addition, it is not necessary for them to be named as Defendants, because if any relief is ordered (the entitlement to which is denied by Defendants), the Defendant Department of Disabilities and Special Needs is the only party necessary in order to provide complete relief.

FACTS

The lengthy Complaint in this matter alleges a number of situations in which Plaintiffs are dissatisfied with alleged actions or inactions by DDSN. Plaintiffs' areas of dissatisfaction cover 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.

ARGUMENT

1. No statute requires 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 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 instances cited in the Complaint, the allegedly-aggrieved party is (or was) free to challenge the agency action of which it 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. [2] 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 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.

---

[2] 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").

> 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.[3]
>
> **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

[3] 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.

for its Human Rights Committees, and standards for research on human subjects.[4] 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, the Court need not consider this allegation.

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 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. To put it 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.[5]

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.

[4] 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.

[5] 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.

(Emphasis added). Plaintiffs allege that this paragraph imposes a mandatory duty because of the use of the word "shall." Complaint, Par.39. Even assuming without conceding, 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 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.

The reason for Plaintiffs' failure to quote this sentence of the statute in the Complaint is obvious—it completely undermines their 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 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. While cases addressing this subject appear to be rare, at least one,

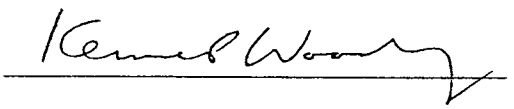
Consolidated Aluminum Corp. v. Tennessee Valley Authority, 462 F. Supp. 464, 475 (M.D. Tenn. 1978), specifically holds that while the federal APA requires an agency to follow certain steps in the process of promulgating regulations; "[the APA] does not . . . require an agency to adopt such [regulations]; and a court cannot create duties in this regard which are not imposed by statute." This reasoning, 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.

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that their motion to dismiss should be granted, and that this case should be dismissed with prejudice.

Respectfully submitted,

DAVIDSON, MORRISON & LINDEMANN, P.A.

By: 

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ATTORNEYS FOR DEFENDANTS

Columbia, South Carolina

September 18, 2007

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF RICHLAND)	Civil Action No.: 2007-CP-40-2187
Protection and Advocacy for the People with Disabilities, Inc.; M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as Guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S.,	**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND FOR MORE DEFINITE STATEMENT**
Plaintiffs,	
v.	
South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, and W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs,	
Defendants.	

RICHLAND COUNTY
2007 SEP 21 AM 10: 25
BARBARA A. SCOTT
C.C.C. & G.S.

TO: WILLIAM H. DAVIDSON, II, ESQUIRE AND KENNETH P. WOODINGTON, ESQUIRE, ATTORNEYS FOR DEFENDANTS

The Plaintiffs (hereinafter "Plaintiffs") respectfully submit this Memorandum of Law in Opposition to Defendants' Motion to Dismiss and Motion for a More Definite Statement. For the reasons set forth below, Defendants' Motions should be denied.

I. Defendants' Motion to Dismiss Should be Denied.

A. Plaintiffs Have Adequately Pled a Cause of Action.

Defendants moved, pursuant to Rule 12(b)(6), SCRCP, to dismiss Plaintiffs' Complaint, alleging that the Complaint fails to state facts sufficient to constitute a cause of action. More specifically, Defendants allege that "the Complaint does not identify or allege any situation in which the statutes of South Carolina, or any other source of law, require the Defendants to promulgate regulations." (*See* Defendants' Motion to Dismiss and Motion for More Definite Statement (hereinafter "Defendants' Motion") ¶ 1.)

"In deciding a motion to dismiss pursuant to [Rule] 12(b)(6), SCRCP, the trial court should consider only the allegations set forth on the case of the plaintiff's complaint. A 12(b)(6) motion should not be granted if 'facts alleged and inferences reasonably deductible therefrom would entitle the plaintiff to any relief on any theory of the case.' The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." Plyler v. Burns, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007) (citing Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995) and Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987)).

The Plaintiffs allege that Defendants have violated South Carolina Code §§ 1-23-10 (the South Carolina Administrative Procedures Act) and 44-20-220 (1976, as

amended). (Complaint ¶ 6.) Section 44-20-220 of the South Carolina Code of Laws states that "[t]he commission **shall determine the policy and promulgate regulations** governing the operation of the department and the employment of professional staff and personnel" (emphasis added).[1] This statutory language is mandatory and requires Defendants to promulgate regulations including those regarding issues of critical concern to Plaintiffs. (Complaint ¶¶ 6, 7.) The South Carolina courts has held that "[u]nder the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement." Bradley v. Doe, ___ S.C. ___, 649 S.E.2d 153, 160 (S.C. App. 2007). The Defendants have not established any regulations pursuant to the SC Administrative Procedures Act ("APA"), SC Code §§ 1-23-10 *et seq.* or in compliance with their statutory requirements. See, South Carolina Administrative Procedures Act (APA), S.C. Code Ann. 1-23-10 *et seq.* and Defendant's enabling statute (S.C. Code Ann. 44-20-10 *et seq.*). The Defendant is statutorily required to promulgate regulations, which they have not done. In fact, the Defendants have never promulgated regulations regarding issues of critical concern to applicants and recipients of its services, including but not limited to eligibility for its services; appeal procedures; standards for the operation of its residential programs; procedures for its Human Rights Committees; and standards for research on human subjects.

The APA was intended to provide a standardized process for all public agencies to formulate rules in order to obtain public comment and to provide access to agencies' operations as well as an avenue for appellate review of administrative decisions. The

[1] The Commission is defined in S.C. Code §44-20-30(3) to be Commission" means the South Carolina Commission on Disabilities and Special Needs, the policy-making and governing body of the Department of Disabilities and Special Needs.

Defendant's failure to comply with the requirements of the APA has resulted in South Carolina citizens and entities being unable to seek information about its policies in the South Carolina Administrative Code, unable to determine their rights to receive or dispute SCDDSN decisions, and participate in the rule-making process as intended by the APA. The Plaintiffs have been, are being and will continue to be harmed as the direct result of said deficiencies, through denial of services, inadequate services and unequal availability and quality of services, and lack of an appropriate grievance procedure; all of which affect their health, safety, well-being, their right to live and participate in their communities and their ability to enjoy typical lifestyles. The APA was intended to provide a standardized process for all public agencies to formulate rules in order to obtain public comment and to provide access to agencies' operations as well as an avenue for appellate review of administrative decisions.

Plaintiffs also further allege and assert that Defendants have violated South Carolina Code § 44-26-180 (1976, as amended), which states that "[t]he department **shall promulgate regulations** to obtain informed consent and to protect the dignity of the individual" (emphasis added). (Complaint ¶ 40.) Plaintiffs seek declaratory judgment requiring South Carolina Department of Disabilities and Special Needs to promulgate regulations as required by statute. (Complaint ¶ 49.)

The Complaint identifies each individual plaintiff by their respective circumstances and makes allegations as to the statute that has been violated, varying treatment or application of law, and the damages each plaintiff has suffered due to that violation. (Complaint ¶¶ 13-36.) Plaintiffs also identify the harm suffered by them collectively. (Complaint ¶¶ 46-48.) Viewing these allegations in the light most favorable

to Plaintiffs, there is certainly a valid claim for relief from which reasonable minds could find that Plaintiffs are entitled to relief. Although the court or the defendants may not believe that Plaintiffs will ultimately prevail in this action, that is not sufficient grounds for the dismissal of Plaintiffs' Complaint. Plyler, 373 S.C. at 645, 647 S.E.2d at 192. Therefore, Defendants' Motion to Dismiss on these grounds must be denied.

B. Plaintiffs Have Adequately Pled a Cause of Action Against the Individual Defendants.

Defendants have also moved, pursuant to Rule 12(b)(6), SCRCP, to dismiss Plaintiffs' Complaint against each of the individual Defendants. Defendants argue that "the Complaint fails to state facts sufficient to constitute a cause of action against them because no personal involvement against them is alleged." (Defendants' Motion ¶ 2.) Defendants further argue that naming the individual defendants as parties to this lawsuit is unnecessary, as any relief ordered must be provided by Defendant South Carolina Department of Disabilities and Special Needs. (Defendants' Motion ¶ 2.) Plaintiffs disagree.

Plaintiffs, in filing their Complaint, named as defendants Dr. Stanley J. Butkus, Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight and W. Robert Harrell. Dr. Butkus was named in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs, while the other individual defendants were names as Commissioners of SCDDSN. The Complaint, referring to these individual defendants collectively as "Commissioners" or "the Commission", contains specific allegations of wrongdoing by them. (Complaint ¶¶ 5, 39, 48, 50.)

The individual commissioner comprise the governing body of the Department of Disabilities and Special Needs and they individually and collectively as the Commission establish the policies and procedures, as well as to comply with the laws of South Carolina. They are correctly joined in this action. There is no prejudice.

II. Defendants' Motion for More Definite Statement Should be Denied.

A. Caption Identifying Plaintiffs Only by their Initials is Sufficient.

Defendants have also moved for a more definite statement pursuant to Rule 12(e), SCRCP. Plaintiffs, in their Complaint, are identified by their initials rather than their full names. They are further identified by the initials of their guardians, caretakers, or "next friends". Plaintiffs explain this choice, stating that this choice is "[d]ue to the highly personal nature of the facts surrounding their claims and due to their fear of retaliation by Defendant." (Plaintiffs' Complaint, ¶2.)

In their Motion, Defendants state that "all of the individual DDSN clients/plaintiffs are named only by initials" and argue that "it is impossible for the Defendants to frame a responsive pleading without knowledge of the names of those individuals." (Defendants' Motion ¶ 3.) Plaintiffs disagree.

The Court of Appeals addressed the anonymity of a plaintiff in Doe v. Howe, 362 S.C. 212, 607 S.E.2d 354 (Ct. App. 2004). In Doe, the court held that a former victim of a sexual abuse would be allowed to proceed anonymously where that victim had established the need to "preserve privacy in a matter of [a] sensitive and highly personal nature." Id. at 219, 607 S.E.2d at 357 (citing James v. Jacobson, 6 F.3d 233, 238 (4th Cir. 1993)).

In Doe, the plaintiff filed an action for breach of fiduciary duty and malpractice against his former attorney, who represented Doe in a civil action containing allegations of sexual abuse against Doe. Doe v. Howe, 362 S.C. at 214, 207 S.E.2d at 354-55. Doe's underlying civil action was resolved by settlement, but in his action against his former attorney, Doe filed a motion for confidentiality, asking that the court allow him to proceed anonymously. Id. The court, looking to the Fourth Circuit for guidance, stated that "there is no litmus test in South Carolina to determine whether a litigant in a civil proceeding should be allowed to proceed anonymously." Id. at 217, 607 S.E.2d at 356. The court also found that the best approach is one that allows some degree of flexibility, as these kinds of cases are often "fact-sensitive." Id.

The Doe court used the following factors in determining the issue of anonymity:

> "(1) whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is it to preserve privacy in a matter of sensitive and highly personal nature;
> (2) whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically, to innocent non-parties;
> (3) the ages of the persons whose privacy interests are sought to be protected;
> (4) whether the action is against a governmental or private party; and
> (5) the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously."
>
> Id. at 217-18, 607 S.E.2d at 356-57.

Using these factors for its analysis, the court held that revealing Doe's identity would cause harm and social stigmatization, and that Doe had established the need to preserve his privacy, as sexual abuse is a matter that is sensitive and highly personal. Id. at 219, 607 S.E.2d at 357. The court further held that the defendant in this matter would suffer no risk of unfairness and that the defendant had failed to demonstrate that his ability to

conduct discovery or prepare for trial would be hindered. Id. Therefore, Doe was allowed to proceed anonymously.

Applying the Doe analysis to the case at bar, we turn to the first of the enumerated factors – whether proceeding anonymously is designed to avoid the annoyance and criticism of litigation or to preserve privacy in a matter of sensitive and highly personal nature. Id. at 217, 607 S.E.2d at 356. Plaintiffs in this case are persons who suffer from physical and mental disabilities. Their claims regarding regulatory violations each stem from underlying circumstances in which their personal health or mental and physical wellbeing has not been protected. A person's medical history is a very personal subject and, particularly where disabilities or diseases are involved, is a highly sensitive subject. Allowing Plaintiffs to proceed anonymously in this action will serve to preserve their medical privacy and is not designed to avoid any potential annoyance or criticism.

In the second prong of the Doe analysis considers whether identification of the plaintiff poses a risk of retaliatory physical or mental harm to them. Id. at 218, 607 S.E.2d at 256. Plaintiffs in this case argue that retaliation may arise. (Complaint ¶ 2.) Plaintiffs, due to their conditions, are in some respects vulnerable people. Although it is merely the anticipation of retaliation, and retaliation cannot yet be proven, it is not unreasonable to believe for Plaintiffs to have such a fear or to believe that some substantial risk of retaliation exists.

Next, the Doe court considered the ages of the persons whose privacy interests are sought to be protected. Id. at 218, 607 S.E.2d at 357. Several of the plaintiffs in this case are minor children, and many others suffer from mental retardation – a condition giving them a lesser mental capacity. Although chronological age and mental age are different,

for purposes of this analysis, Plaintiffs believe that they should be similarly considered, and, for that reason, Plaintiffs should be allowed to remain anonymous.

Finally, the Doe court considered "the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously." Id. In Doe, the plaintiff requested that the court allow him to remain anonymous only in the pretrial phases. The court held doing so would not prejudice the defendant and would not hinder his ability to conduct discovery or otherwise prepare for trial. Id. at 219, 607 S.E.2d at 357. In our case, Plaintiffs are not completely anonymous. They are identified by their initials as well as the initials of their parents, guardians, or other responsible parties. Defendants are also given other identifying information about Plaintiffs, such as their respective ailments and their treatment or residential placement. As such, Defendants should be able to adequately discern Plaintiffs' identities and form responsive pleadings.

Allowing Plaintiffs to proceed through litigation using only their initials will preserve their privacy and save them from potential retaliation. Many of the plaintiffs are either chronologically or mentally minors. Additionally, anonymity will not prejudice Defendants in the course of litigation. Therefore, Defendants' Motion for More Definite Statement on these grounds should be denied.

B. Plaintiffs' Numbering of Paragraphs in the Complaint is Sufficient.

Defendants' Motion for More Definite Statement, pursuant to Rule 12(e), SCRCP, asks that the court order Plaintiffs amend their Complaint to "comply with Rule 10(b), SCRCP, which requires that '[a]ll averments of the facts of a cause of action or defense and demands for relief shall be made in consecutive numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single

set of circumstances...'" (Defendants' Motion ¶ 4.) Plaintiffs believe that the requirements of this rule have been satisfied.

Each of the paragraphs of the Complaint are numbered consecutively, which those numbers easily legible on the left side of the page. (See Complaint, generally.) Each of those numbered paragraphs contains a single allegation. While some paragraphs may contain more than one sentence, Plaintiffs argue that said paragraphs contain a single thought or idea. Each thought or idea is limited to a single set of circumstances. Plaintiffs argue that the style in which the Complaint is written is practical, given the subject matter. Each paragraph or collection of sentences, is not severable from the rest, as doing so would compromise the cohesiveness and clarity of each allegation. The paragraphs of Plaintiffs' complaint are "limited as far as practicable" to adequately explain the allegations contained therein. Therefore, Defendants' Motion for More Definite Statement on these grounds must be denied.

III. Conclusion

Plaintiffs have adequately pled causes of action against all defendants in this case and have done so in a style and manner from which Defendants can formulate responsive pleadings and conduct discovery. During the course of the lawsuit, it will be shown as alleged by the Plaintiffs that there has been varied action, implementation of the law, and/or results in the provision of services around state that a regulation, binding on the Department and Defendants, would require equal application. Our State Supreme Court has said that pronouncements not binding. See, Department of Corrections litigation (i.e,

when the SC Department of Corrections failed to adopt regulations for certain prisoner issues). The Plaintiffs are equally as worthy to the relief that they seek.

For those reasons, and the reasons set forth below, Defendants' Motion to Dismiss and Motion for More Definite Statement should be denied.

Respectfully submitted,

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Attorneys for Plaintiffs

September 17, 2007
Columbia, South Carolina.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF RICHLAND)	Civil Action No.: 2007-CP-40-2187
Protection and Advocacy for the People with Disabilities, Inc.; M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as Guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S.,)	
Plaintiffs,)	
v.)	
South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, and W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs,)	
Defendants.)	

2007 SEP 21 AM 10: 25
BARBARA A. SCOTT
C.C.C. & G.S.

CERTIFICATE OF SERVICE

I, the undersigned attorney of the firm of Richardson Plowden and Robinson, P. A., attorneys for the Plaintiffs, do hereby certify that I have served the foregoing Plaintiffs'

Memorandum in Opposition to Defendants' Motion to Dismiss and for More Definite Statement on Defendants by hand delivery to Defendants' counsel at the hearing at the Richland County Courthouse on September 18, 2007:

William H. Davidson, II
Kenneth P. Woodington, Esq.
1611 Devonshire Drive, Second Floor
PO Box 8568
Columbia, SC 29202

C. Jo Anne Wessinger Hill

September 18, 2007

Columbia, South Carolina

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

Protection and Advocacy for the People with Disabilities, Inc., M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M.; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S.,

Plaintiffs,

v.

South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs,

Defendants.

Civil Action No. 07-CP-40-2187

ANSWER OF ALL DEFENDANTS

All Defendants, and each of them, answering the Complaint herein, allege and show the following:

FOR A FIRST DEFENSE

1. Defendants deny each and every allegation of the Complaint not hereinafter specifically admitted, qualified, or explained.

2. Answering Paragraph 1, Defendants admit that Plaintiff P&A is a private, non-profit corporation established pursuant to federal and state law. The remaining allegations of the first sentence of Paragraph 1 set forth legal conclusions which can neither be admitted or denied. Insofar as such allegations attempt to establish liability on the part of Defendants, Defendants would deny same and demand strict proof thereof. The second sentence of Paragraph 1 is denied for lack of information.

3. The first sentence of Paragraph 2 is denied for lack of information. The remainder of Paragraph 2 is merely descriptive, and requires neither admission nor denial. Insofar as such allegations attempt to establish liability on the part of Defendants, Defendants would deny same and demand strict proof thereof.

4. Paragraph 3 sets forth legal conclusions which can neither be admitted or denied. Insofar as such allegations attempt to establish liability on the part of Defendants, Defendants would deny same and demand strict proof thereof.

5. Answering Paragraph 4, it is admitted only that Dr. Stanley Butkus is the duly appointed Director of Defendant SCDDSN. The remainder of Paragraph 4 is denied.

6. Answering Paragraph 5, it is admitted that all of the individuals therein listed except Ronald Forrest are presently DDSN Commissioners. Mr. Forrest was once a Commissioner, but is no longer on the Commission. The remainder of Paragraph 5 sets forth legal conclusions which can neither be admitted or denied. Insofar as such allegations attempt to establish liability on the part of Defendants, Defendants would deny same and demand strict proof thereof.

7. Paragraph 6 sets forth legal conclusions which can neither be admitted or denied. Insofar as such allegations attempt to establish liability on the part of Defendants, Defendants would deny same and demand strict proof thereof.

8. Answering Paragraph 7, Defendants would refer the Court to the South Carolina Code of Regulations for a precise list of regulations promulgated by DDSN. To the extent that any subject area mentioned by Plaintiffs in this or any other paragraph of the Complaint is not covered by a DSSN regulation, Defendants would show that there is no legal duty to promulgate regulations in those subject areas.

9. Paragraph 8 is denied.

10. Paragraph 9 is denied for lack of information. The Defendants do not know the identities of the individual Plaintiffs.

11. Paragraph 10 is denied.

12. Paragraph 11 sets forth legal conclusions which can neither be admitted or denied. Insofar as such allegations attempt to establish liability on the part of Defendants, Defendants would deny same and demand strict proof thereof.

13. Answering Paragraph 12, Defendants reiterate and reallege each and every paragraph and affirmative defense of this Answer as if set forth herein.

14. Paragraph 13 is denied.

15. The allegations of Paragraph 14 that pertain specifically to Plaintiff J.B. are denied for lack of information. The Defendants do not know the identities of the individual Plaintiffs. The fourth and fifth sentences of Paragraph 14, beginning with "BSP's are," and "They are an integral," respectively, are admitted.

16. The first sentence of Paragraph 15 is denied for lack of information about the meaning of the subjective phrase "critically important." Answering the second sentence of Paragraph 15, Defendants would refer the Court to the South Carolina Code of Regulations for a precise list of regulations promulgated by DDSN. To the extent that any subject area mentioned by Plaintiffs in this or any other paragraph of the Complaint is not covered by a DSSN regulation, Defendants would show that there is no legal duty to promulgate regulations in those subject areas. Answering the third sentence of Paragraph 15, it is admitted that agency policies exist as guides for implementing BSP's. To the extent that policies, directives or standards are referenced in Paragraph 15, Defendants would refer the Court to the terms of those policies, directives or standards for their proper interpretation. The remainder of Paragraph 15 sets forth legal conclusions which can neither be admitted or denied. Insofar as such allegations attempt to establish liability on the part of Defendants, Defendants would deny same and demand strict proof thereof.

17. Paragraph 16 is denied for lack of information. The Defendants do not know the identities of the individual Plaintiffs. In addition, without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them."

18. The allegations of Paragraph 17 that pertain specifically to Plaintiff P.B. are denied for lack of information. The Defendants do not know the identities of the individual Plaintiffs. To the extent that policies or standards are referenced in Paragraph 17, Defendants would refer the Court to the terms of those policies or standards for their proper interpretation. Answering the sixth sentence of Paragraph 17, beginning with "SCDDSN has not promulgated," Defendants would refer the Court to the South Carolina Code of Regulations for a precise list of regulations

promulgated by DDSN. To the extent that any subject area mentioned by Plaintiffs in this or any other paragraph of the Complaint is not covered by a DSSN regulation, Defendants would show that there is no legal duty to promulgate regulations in those subject areas. The seventh and last sentence of Paragraph 17 is denied.

19. Paragraph 18 is denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them."

20. The allegations of Paragraph 19 that pertain specifically to Plaintiff F.C. are denied for lack of information. The Defendants do not know the identities of the individual Plaintiffs. Answering the fourth and fifth sentences of Paragraph 19, which reference the DSM-IV or a condition described therein, Defendants would refer the Court to that manual for the best evidence of its contents.

21. The allegations of Paragraph 20 that pertain specifically to Plaintiff F.C. are denied for lack of information. The Defendants do not know the identities of the individual Plaintiffs. With respect to the allegations of Paragraph 20 relating to Asperger's syndrome in general, Defendants would allege in 2007, DDSN and the South Carolina Department of Health and Human Services began to implement a program to serve children aged 3 through 11 with pervasive developmental disorder. The remainder of Paragraph 20 sets forth legal conclusions which can neither be admitted or denied. Insofar as such allegations attempt to establish liability on the part of Defendants, Defendants would deny same and demand strict proof thereof.

22. The allegations of Paragraph 21 are denied for lack of information. The Defendants do not know the identities of the individual Plaintiffs.

23. The first sentence of Paragraph 22 is denied, insofar as it refers to review by the general public. In addition, Defendants deny that General Assembly review is required for standards governing eligibility and receipt of DDSN services. Answering the second sentence of Paragraph 22, Defendants would refer the Court to the South Carolina Code of Regulations for a precise list of regulations promulgated by DDSN. To the extent that any subject area mentioned by Plaintiffs in this or any other paragraph of the Complaint is not covered by a DSSN regulation, Defendants would show that there is no legal duty to promulgate regulations in those subject areas. In addition, Paragraph 22 sets forth legal conclusions which can neither be admitted or denied. Insofar as such allegations attempt to establish liability on the part of Defendants, Defendants would deny same and demand strict proof thereof. The allegations of Paragraph 22 that pertain specifically to Plaintiff F.C. are denied for lack of information. The Defendants do not know the identities of the individual Plaintiffs. In addition, the thirds and fourth sentences of Paragraph 22 are denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them." Any remaining allegations of Paragraph 22 are denied.

24. The allegations of Paragraph 23 that pertain specifically to Plaintiff C.M.D. or that individual's residence are denied for lack of information. The Defendants do not know the identities of the individual Plaintiffs. Answering the fourth and fifth sentences of Paragraph 23, Defendants would refer the Court to the South Carolina Code of Regulations for a precise list of regulations promulgated by DDSN. To the extent that any subject area mentioned by Plaintiffs in this or any other paragraph of the Complaint is not covered by a DSSN regulation, Defendants would show that there is no legal duty to promulgate regulations in those subject areas. The sixth

and seventh sentences of Paragraph 23, both beginning with "Promulgation," are denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them." Any remaining allegations of Paragraph 23 are denied.

25. Paragraph 24 is denied for lack of information. The Defendants do not know the identities of the individual Plaintiffs.

26. The allegations of Paragraph 25 that pertain specifically to Plaintiff A.F. are denied for lack of information. The Defendants do not know the identities of the individual Plaintiffs. The fourth sentence of Paragraph 25, beginning with "DDSN has not promulgated," is denied for lack of information as to what the subject matter of such regulations would be. The fifth sentence of Paragraph 25 sets forth legal conclusions which can neither be admitted or denied. Insofar as such allegations attempt to establish liability on the part of Defendants, Defendants would deny same and demand strict proof thereof. The sixth and seventh sentences of Paragraph 25 are denied for lack of information about the subject matter of the allegations. In addition, the seventh sentence of Paragraph 22 is denied, insofar as it refers to review by the general public. Defendants also deny that General Assembly review is required for standards governing eligibility and receipt of DDSN services. Any remaining allegations of Paragraph 25 are denied.

27. Paragraph 26 is denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them."

28. The allegations of Paragraph 27 that pertain specifically to Plaintiff A.J. are denied for lack of information. Answering the third and fourth sentences of Paragraph 27, Defendants would refer the Court to the South Carolina Code of Regulations for a precise list of regulations

promulgated by DDSN. To the extent that any subject area mentioned by Plaintiffs in this or any other paragraph of the Complaint is not covered by a DSSN regulation, Defendants would show that there is no legal duty to promulgate regulations in those subject areas. In addition, the fourth sentence of Paragraph 27 is denied. Answering the fifth and last sentence of Paragraph 27, those allegations are denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them." Any remaining allegations of Paragraph 27 are denied.

29. Paragraph 28 is denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them."

30. The allegations of Paragraph 29 that pertain specifically to Plaintiff E.M. (or GM) are denied for lack of information. The Defendants do not know the identities of the individual Plaintiffs. The third sentence of Paragraph 29 is denied, insofar as it refers to review by the general public. In addition, Defendants deny that General Assembly review is required for standards governing eligibility and receipt of DDSN services, or the other matters referenced in that sentence. Answering the fourth and last sentence of Paragraph 29, Defendants would refer the Court to the South Carolina Code of Regulations for a precise list of regulations promulgated by DDSN. To the extent that any subject area mentioned by Plaintiffs in this or any other paragraph of the Complaint is not covered by a DSSN regulation, Defendants would show that there is no legal duty to promulgate regulations in those subject areas. All remaining allegations of Paragraph 29 are denied.

31. Paragraph 30 is denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them."

32. Paragraph 31, except for the next to last sentence thereof, is denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them." With respect to the next to last sentence of Paragraph 31, Defendants would refer the Court to the South Carolina Code of Regulations for a precise list of regulations promulgated by DDSN. To the extent that any subject area mentioned by Plaintiffs in this or any other paragraph of the Complaint is not covered by a DSSN regulation, Defendants would show that there is no legal duty to promulgate regulations in those subject areas.

33. The allegations of Paragraph 32 pertaining specifically to Plaintiff E.J.M. are denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them." With respect to the first part of the second sentence of Paragraph 32, Defendants would refer the Court to the South Carolina Code of Regulations for a precise list of regulations promulgated by DDSN. To the extent that any subject area mentioned by Plaintiffs in this or any other paragraph of the Complaint is not covered by a DSSN regulation, Defendants would show that there is no legal duty to promulgate regulations in those subject areas.

34. Paragraph 33 is denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them."

35. The allegations of Paragraph 34 pertaining to Plaintiff S.P. are denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them." With respect to the third and sixth sentences of Paragraph 34, Defendants would refer the Court to the South Carolina Code of Regulations for a precise list of regulations promulgated by DDSN. To the extent that any subject area mentioned by Plaintiffs in this or any other paragraph of the Complaint is not covered by a DSSN regulation, Defendants would show that there is no legal duty to promulgate regulations in those subject areas.

36. The allegations of Paragraph 35 pertaining to Plaintiff S.S. are denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them." With respect to the fourth sentence of Paragraph 35, which references the DSM-IV or mental conditions described therein, Defendants would refer the Court to that manual for the best evidence of its contents.

37. The allegations of Paragraph 36 pertaining to Plaintiff S.S. are denied for lack of information. Without knowledge of the identities of the individual Plaintiffs, Defendants can only deny those allegations pertaining to those individuals, their families, and/or others said to be "others like them." Answering the fourth sentence of Paragraph 36, that sentence is denied, insofar as it refers to review by the general public. In addition, Defendants deny that General Assembly review is required for standards governing eligibility and receipt of DDSN services, or the other matters referenced in that sentence. Answering the fifth sentence of Paragraph 36, Defendants would refer the Court to the South Carolina Code of Regulations for a precise list of regulations promulgated by DDSN. To the extent that any subject area mentioned by Plaintiffs in

this or any other paragraph of the Complaint is not covered by a DSSN regulation, Defendants would show that there is no legal duty to promulgate regulations in those subject areas. The remaining allegations of Paragraph 36 are denied.

38. Answering Paragraph 37, Defendants reiterate and reallege each and every paragraph and affirmative defense of this Answer as if set forth herein.

39. Answering Paragraph 38, Defendants would refer the Court to the South Carolina Code of Regulations for a precise list of regulations promulgated by DDSN. To the extent that any subject area mentioned by Plaintiffs in this or any other paragraph of the Complaint is not covered by a DSSN regulation, Defendants would show that there is no legal duty to promulgate regulations in those subject areas.

40. Paragraphs 39 through 42 set forth legal conclusions which can neither be admitted or denied. Insofar as such allegations attempt to establish liability on the part of Defendants, Defendants would deny same and demand strict proof thereof.

41. Answering Paragraph 43, it is admitted only that Dr. Stanley Butkus is the duly appointed Director of Defendant SCDDSN. The remainder of Paragraph 43 is denied.

42. Paragraph 44 is admitted.

43. Paragraphs 45 through 48 are denied.

44. Paragraph 49 is merely descriptive of Plaintiffs' beliefs about this action, and as such requires neither admission nor denial. Insofar as such allegations attempt to establish liability on the part of Defendants, Defendants would deny same and demand strict proof thereof.

45. Paragraphs 50 through 53, and the remainder of the Complaint, including the prayer for relief, are denied.

FOR A SECOND DEFENSE

46. The Complaint fails to state facts sufficient to constitute a cause of action.

FOR A THIRD DEFENSE

47. The individual Defendants should be dismissed, because their presence in this action is not necessary to obtain complete relief.

FOR A FOURTH DFENSE

48. On information and belief, some or all Plaintiffs lack standing to bring some or all of the claims set forth in the Complaint.

FOR A FIFTH DEFENSE

49. There is no provision of statute requiring the Defendants, or any of them, to promulgate regulations in the subject areas in which Plaintiffs claim that regulations should be promulgated.

FOR A SIXTH DEFENSE

50. All or part of this action is barred by the doctrine of sovereign immunity.

FOR A SEVENTH DEFENSE

51. On information and belief, some or all Plaintiffs are not real parties in interest to this litigation.

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WHEREFORE, having fully answered the Complaint, Defendants respectfully pray that this action be dismissed with prejudice in its entirety, for the costs of this action, and for such other and further relief as the Court may deem appropriate.

DAVIDSON, MORRISON & LINDEMANN, P.A.

By: /s/ Kenneth P. Woodington

WILLIAM H. DAVIDSON, II
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ATTORNEYS FOR DEFENDANTS

Columbia, South Carolina

December 21, 2007

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF RICHLAND	)	
	)	
Protection and Advocacy for the People with Disabilities, Inc., M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M.; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S.,	)	Civil Action No. 07-CP-40-2187
	)	**CERTIFICATE OF SERVICE**
Plaintiffs,	)	
v.	)	
South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs,	)	
Defendants.	)	

The undersigned employee of Davidson, Morrison & Lindemann, P.A., attorneys for the Defendants , does hereby certify that service of the attached **Answer** in the above-referenced action was made upon all counsel of record by placing same in the United States Mail, first class postage

prepaid, at the below listed address clearly indicated on said envelope this the 21st day of December,

2007, addressed as follows:

Steven W. Hamm, Esquire
C. Jo Anne Wessinger Hill, Esquire
Kenya Carver-Miller, Esquire
Richardson, Plowden & Robinson, P.A.
1900 Barnwell Street
Columbia, South Carolina 29201

STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND** Protection and Advocacy for the People with Disabilities, Inc., M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M.; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S., Plaintiffs, v. South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs, Defendants.	**IN THE COURT OF COMMON PLEAS** Civil Action No. 07-CP-40-2187 **MOTION FOR SUMMARY JUDGMENT**

TO: Steven W. Hamm, C. Jo Anne Wessinger Hill, Kenya Carver-Miller
Attorneys for Plaintiff

YOU WILL PLEASE TAKE NOTICE that the undersigned attorneys for the Defendants will move before the Presiding Judge of the Fifth Judicial Circuit at the Richland County

Courthouse, Columbia, South Carolina, at such time and place as may be set by the Court, for an Order, pursuant to Rule 56, SCRCP, granting summary judgment to the Defendants and dismissing the Plaintiffs' Complaint with prejudice.

This motion is based on the ground that there is no genuine issue as to any material fact and that Defendants are entitled to judgment as a matter of law because neither the statutes of South Carolina, nor any other source of law, requires the Defendants to promulgate regulations in the situations alleged in the Complaint.

This motion is based on the pleadings, South Carolina Rules of Civil Procedure, the laws of the State of South Carolina, the case law of the State of South Carolina, and such other matters as may be properly presented to the Court at the time of the hearing.[1]

DAVIDSON, MORRISON & LINDEMANN, P.A.

By: /s/ Kenneth P. Woodington

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ATTORNEYS FOR DEFENDANTS

Columbia, South Carolina

June 4, 2008

[1] Defendants reserve all rights to move, if necessary, for the disclosure of the names of the anonymous Plaintiffs, pursuant to the standards set forth in *Doe v. Howe*, 362 S.C. 212, 607 S.E.2d 354 (Ct. App. 2004).

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF RICHLAND	)	
	)	
Protection and Advocacy for the People with Disabilities, Inc., M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M.; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S.,	)	Civil Action No. 07-CP-40-2187
Plaintiffs,	)	**CERTIFICATE OF SERVICE**
v.	)	
South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs,	)	
Defendants.	)	

The undersigned employee of Davidson, Morrison & Lindemann, P.A., attorneys for the Defendants, does hereby certify that service of the attached **Notice of Motion and Motion for Summary Judgment** in the above-referenced action was made upon all counsel of record by

placing same in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 4th day of June, 2008, addressed as follows:

Steven W. Hamm, Esquire
Richardson, Plowden & Robinson, P.A.
1900 Barnwell Street
Columbia, South Carolina 29201

Shelley E. Stafford

STATE OF SOUTH CAROLINA)	
)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF RICHLAND)	
)	
Protection and Advocacy for the People with Disabilities, Inc., et al.,)	Civil Action No. 07-CP-40-2187
)	
Plaintiffs,)	**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**
)	
v.)	
)	
South Carolina Department of Disabilities and Special Needs; et al.,)	
)	
Defendants.)	
)	

STATEMENT

This action was filed on April 5, 2007. It is a result of the desire of Plaintiffs to have the Court order the Department of Disabilities and Special Needs ("DDSN") to promulgate regulations in areas where Plaintiffs would prefer state agency action to occur by regulation rather than by other means. The Defendants have moved for summary judgment, on the ground that Plaintiffs have not identified or alleged any situation in which the statutes of South Carolina, or any other source of law, requires the Defendants to promulgate regulations, and in fact no such requirements exist. Defendants therefore submit that Plaintiffs' remedy, if one is to be found, should come from the General Assembly rather than from this Court.[1]

Rec'd
OCT - 9 2008

[1] Defendants previously moved to dismiss this action, but Judge Childs denied that motion by Order dated December 13, 2007. Judge Childs held that "the interpretation of the statutes in question is outside the scope of a motion to dismiss. . . ." While the Defendants respectfully disagree that the purely legal questions raised by this case could not have been decided on a motion to dismiss, there is clearly no impediment to those issues being decided on motion for summary judgment.

FACTS

The lengthy Complaint in this matter alleges a number of situations in which Plaintiffs are dissatisfied with alleged actions or inactions by DDSN. Plaintiffs' areas of dissatisfaction cover 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.

ARGUMENT

1. No statute requires 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 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 instances cited in the Complaint, the allegedly-aggrieved party is (or was) free to challenge the agency action of which it 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.[2] 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 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.

---

[2] 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").

> 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.[3]
>
> **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

[3] 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.

for its Human Rights Committees, and standards for research on human subjects.[4] 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, the Court need not consider this allegation.

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 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. To put it 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.[5]

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.

[4] 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.

[5] 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.

(Emphasis added). Plaintiffs allege that this paragraph imposes a mandatory duty because of the use of the word "shall." Complaint, Par.39. Even assuming without conceding, 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 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.

The reason for Plaintiffs' failure to quote this sentence of the statute in the Complaint is obvious—it completely undermines their 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 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. While cases addressing this subject appear to be rare, at least one,

Consolidated Aluminum Corp. v. Tennessee Valley Authority, 462 F. Supp. 464, 475 (M.D. Tenn. 1978), specifically holds that 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." This reasoning, 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.

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that their motion for summary judgment should be granted, and that this case should be dismissed with prejudice.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

By: _____

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ATTORNEYS FOR DEFENDANTS

Columbia, South Carolina

October 8, 2008

STATE OF SOUTH CAROLINA)	
)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF RICHLAND)	
)	
Protection and Advocacy for the People with Disabilities, Inc., M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M.; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S.,)	Civil Action No. 07-CP-40-2187
)	**CERTIFICATE OF SERVICE**
Plaintiffs,)	
)	
v.)	
)	
South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs,)	
)	
Defendants.)	
)	

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Defendants, does hereby certify that service of the attached **Memorandum in Support of Defendants' Motion for Summary Judgment** in the above-referenced action was made upon all counsel of record by placing same in the United States Mail, first class postage prepaid, at the

below listed address clearly indicated on said envelope this the 8th day of October, 2008, addressed as follows:

Steven W. Hamm, Esquire
C. Jo Anne Wessinger Hill, Esquire
Richardson, Plowden & Robinson, P.A.
1900 Barnwell Street
Columbia, South Carolina 29201

Shelley E. Stafford

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS
Protection and Advocacy for the People with Disabilities, Inc., M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M.; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S., Plaintiffs, v. South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs, Defendants.	Civil Action No. 07-CP-40-2187 **DEFENDANTS' ANSWERS TO PLAINTIFFS' REQUESTS FOR ADMISSION**

The Defendants answer Plaintiffs' Requests for Admission as follows:

RESPONSES

1. That the South Carolina Commission on Disabilities and Special Needs is charged by the General Assembly with the responsibility of determining and establishing policy for the South Carolina Department of Disability and Special Needs.

RESPONSE: Admitted only to the extent that *S.C. Code Ann.* § 44-20-220 provides in part that "The commission shall determine the policy and promulgate regulations governing the operation of the department and the employment of professional staff and personnel." It is denied that this statute, or any other provision of law, creates the rights to which Plaintiffs claim they are entitled in their pleadings in this case.

2. That the South Carolina Department on Disabilities and Special Needs is a state agency subject to comply with and meet the requirements of all laws enacted by the General Assembly.

RESPONSE: Admitted, but it is denied that this broad legal proposition creates the rights to which Plaintiffs claim they are entitled in their pleadings in this case.

3. That the Commission pursuant to § 44-20-220 is the body responsible to promulgate regulations.

RESPONSE: Admitted, but it is denied that this broad legal proposition creates the rights to which Plaintiffs claim they are entitled in their pleadings in this case.

4. That any and all policies established or determined by the Department of Disabilities and Special Needs must be in accordance with its duties and responsibilities in accordance with the law enacted by the General Assembly.

RESPONSE: Admitted, but it is denied that this broad legal proposition creates the rights to which Plaintiffs claim they are entitled in their pleadings in this case.

5. That any and all operations of the Defendant are related to, or are for the purpose of, carrying out and providing services to certain citizens or people who have mental retardation, a related disability, head injury, or spinal cord injury and who are receiving services or who is an infant at risk of having a developmental disability and is receiving services.

RESPONSE: Denied as stated. Specifically, and as already argued by Defendants in connection with their pending Motion for Summary Judgment, the term "operations," as used in § 44-20-220, relates only to the internal operations of the Department, and not to its mission to the outside world.

6. That the South Carolina Department of Disabilities and Special Needs is required to treat and/or provide service to individuals with mental retardation, a related disability, head injury, or spinal cord injury as part of its operations in the State of South Carolina.

RESPONSE: Denied as stated. Specifically, and as already argued by Defendants in connection with their pending Motion for Summary Judgment, the term "operations," as used in § 44-20-220, relates only to the internal operations of the Department, and not to its mission to the outside world.

7. That the South Carolina Department of Disabilities and Special Needs is s tatutorily required to promulgate regulations related to the operations of the Department.

RESPONSE: Admitted, but it is denied that this broad legal proposition creates the rights to which Plaintiffs claim they are entitled in their pleadings in this case. Specifically, and as already argued by Defendants in connection with their pending Motion for Summary Judgment, the term "operations," as used in § 44-20-220, relates only to the internal operations of the Department, and not to its mission to the outside world.

8. That the South Carolina Department of Disabilities and Special Needs is subject to South Carolina Administrative Procedures Act, § 41-23-10 et. seq. (hereafter "Administrative Procedures Act" or "APA").

RESPONSE: Admitted, but it is denied that this broad legal proposition creates the rights to which Plaintiffs claim they are entitled in their pleadings in this case.

9. That the South Carolina Department of Disabilities and Special Needs has not promulgated regulations subject to review by the public or by the General Assembly in accordance with the Administrative Procedures Act which set forth or provide standards for the eligibility and/or receipt of services.

RESPONSE: It is admitted that the Department has not promulgated regulations of the kind described in this request, but it is denied that there is any provision of law that requires the promulgation of such regulations.

10. That the South Carolina Department of Disabilities and Special Needs has not promulgated regulations subject to review by the public or by the General Assembly in accordance with the Administrative Procedures Act which sets forth or provides the grievance process for individuals who may or may not have been denied services.

RESPONSE: It is admitted that the Department has not promulgated regulations of the kind described in this request, but it is denied that there is any provision of law that requires the promulgation of such regulations. In addition, other provisions of state law, and in some instances, federal law, provide for review of Department decisions when individuals claim that those decisions have denied services to them to which they claim to be entitled. Finally, Defendants are unaware of why a grievance process would even be necessary for a person who has not been denied services, which is a category of persons described in this request.

11. That the South Carolina Department of Disabilities and Special Needs has not promulgated regulations subject to review by the public or by the General Assembly in accordance with the Administrative Procedures Act which sets forth or provides a uniform grievance process for individuals who may or may not have been denied services.

RESPONSE: It is admitted that the Department has not promulgated regulations of the kind described in this request, but it is denied that there is any provision of law that requires the promulgation of such regulations. In addition, other provisions of state law, and in some instances, federal law, provide for review of Department decisions when individuals claim that those decisions have denied services to them to which they claim to be entitled. Finally, Defendants are unaware of why a grievance process would even be necessary for a person who has not been denied services, which is a category of persons described in this request.

12. That the South Carolina Department of Disabilities and Special Needs has not promulgated regulations subject to review by the public or by the General Assembly or by the public in accordance with the Administrative Procedures Act which sets forth or provides the procedure for hearings related to the eligibility for services and the services provided or offered to certain citizens in the State of South Carolina as part of the operations of SCDDSN.

RESPONSE: It is admitted that the Department has not promulgated regulations of the kind described in this request, but it is denied that there is any provision of law that requires the promulgation of such regulations. In addition, other provisions of state law, and in some instances, federal law, provide for hearings and review of Department decisions when individuals claim that those decisions have denied services to them to which they claim to be entitled. Finally, it is denied that the subject matter of this request constitutes part of the "operations" of DDSN, as that term is used in § 44-20-220. Specifically, and as already argued

by Defendants in connection with their pending Motion for Summary Judgment, the term "operations," as used in § 44-20-220, relates only to the internal operations of the Department, and not to its mission to the outside world.

13. That the South Carolina Department of Disabilities and Special Needs has not promulgated regulations subject to review by the General Assembly or by the public in accordance with the Administrative Procedures Act which sets forth or provides the procedure for any appeal process or any appeal to an internal or external hearing officer related to the services provided or offered to certain citizens.

RESPONSE: It is admitted that the Department has not promulgated regulations of the kind described in this request, but it is denied that there is any provision of law that requires the promulgation of such regulations. In addition, other provisions of state law, and in some instances, federal law, provide for review of Department decisions when individuals claim that the decisions referenced in this request have denied services to them to which they claim to be entitled.

14. That the South Carolina Department of Disabilities and Special Needs has not promulgated regulations subject to review by the public or by the General Assembly in accordance with the Administrative Procedures Act which sets forth or provides the procedure or methodology for admission to or priority on a waiting list for services.

RESPONSE: It is admitted that the Department has not promulgated regulations of the kind described in this request, but it is denied that there is any provision of law that requires the promulgation of such regulations.

15. That the South Carolina Department of Disabilities and Special Needs (SCDDSN) has not promulgated regulations subject to review by the public or by the General Assembly in

accordance with the Administrative Procedures Acts which establish eligibility criteria which comply with state and federal law for SCDDSN funded residential services.

RESPONSE: It is admitted that the Department has not promulgated regulations of the kind described in this request, but it is denied that there is any provision of law that requires the promulgation of such regulations. In addition, other provisions of state law, and in some instances, federal law, pertain to the subject matter of this request.

16. That the South Carolina Department of Disabilities and Special Needs has not promulgated regulations subject to review by the public or by the General Assembly in accordance with the Administrative Procedures Act which establish and govern policies for the operation of its residential programs.

RESPONSE: It is admitted that the Department has not promulgated regulations of the kind described in this request, but it is denied that there is any provision of law that requires the promulgation of such regulations. In addition, other provisions of state law, and in some instances, federal law, pertain to the subject matter of this request.

17. That the South Carolina Department of Disabilities and Special Needs has not promulgated regulations subject to review by the public or by the General Assembly in accordance with the Administrative Procedures Act which set forth, or establish and govern, policies for its Human Rights Committees.

RESPONSE: It is admitted that the Department has not promulgated regulations of the kind described in this request, but it is denied that there is any provision of law that requires the promulgation of such regulations.

18. That the South Carolina Department of Disabilities and Special Needs has not promulgated regulations subject to review by the public or by the General Assembly in

accordance with the Administrative Procedures Act which set forth policies for research on human subjects as required by S.C. Code § 44-26-180.

RESPONSE: It is admitted that the Department has not promulgated regulations of the kind described in this request. However, on information and belief, the Department has rarely, if ever, conducted the kind of research referenced in S.C. Code § 44-26-180. As a result, there has not yet been a need in practice for such regulations. In addition, on information and belief, none of the Plaintiffs have standing to raise this issue.

19. That the South Carolina Department of Disabilities and Special Needs has not promulgated regulations subject to review by the General Assembly or by the public in accordance with the Administrative Procedures Act which sets forth standards, procedures or process to obtain informed consent of individuals receiving service.

RESPONSE: It is admitted that the Department has not promulgated regulations of the kind described in this request, but it is denied that there is any provision of law that requires the promulgation of such regulations.

DAVIDSON & LINDEMANN, P.A.

By: _____

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ATTORNEYS FOR DEFENDANTS

Columbia, South Carolina

October 29, 2008

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Protection and Advocacy for the People with Disabilities, Inc., M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M.; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S., Plaintiffs, v. South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs, Defendants.	IN THE COURT OF COMMON PLEAS Civil Action No. 07-CP-40-2187 **CERTIFICATE OF SERVICE**

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Defendants, does hereby certify that service of the attached **Defendants' Answers to Plaintiffs' Requests for Admission** in the above-referenced action was made upon all counsel of record by

hand delivery, at the below listed address clearly indicated on said envelope this the 29th day of October, 2008, addressed as follows:

Steven W. Hamm, Esquire
C. Jo Anne Wessinger Hill, Esquire
Richardson, Plowden & Robinson, P.A.
1900 Barnwell Street
Columbia, South Carolina 29201

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Civil Action No. 07-CP-40-2187

Protection and Advocacy for the People with Disabilities, Inc., M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M.; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S.,

Plaintiffs,

v.

South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs,

Defendants.

DEFENDANTS' AMENDED ANSWERS TO PLAINTIFFS' REQUESTS FOR ADMISSION

The Defendants answer Plaintiffs' Requests for Admission as follows:

GENERAL OBJECTION

Defendants object to the definition of "operation," as used in Paragraph 9 of the Definitions in Plaintiffs' Requests. Plaintiffs' attempt to define that term is not in accordance with the definition of that term in the pertinent statutes applicable to DDSN.

RESPONSES

1. That the South Carolina Commission on Disabilities and Special Needs is charged by the General Assembly with the responsibility of determining and establishing policy for the South Carolina Department of Disability and Special Needs.

RESPONSE: Admitted only to the extent that *S.C. Code Ann.* § 44-20-220 provides in part that "The commission shall determine the policy and promulgate regulations governing the operation of the department and the employment of professional staff and personnel." It is denied that this statute, or any other provision of law, creates the rights to which Plaintiffs claim they are entitled in their pleadings in this case.

2. That the South Carolina Department on Disabilities and Special Needs is a state agency subject to comply with and meet the requirements of all laws enacted by the General Assembly.

RESPONSE: Admitted, but it is denied that this broad legal proposition creates the rights to which Plaintiffs claim they are entitled in their pleadings in this case.

3. That the Commission pursuant to § 44-20-220 is the body responsible to promulgate regulations.

RESPONSE: Admitted, but it is denied that this broad legal proposition creates the rights to which Plaintiffs claim they are entitled in their pleadings in this case.

4. That any and all policies established or determined by the Department of Disabilities and Special Needs must be in accordance with its duties and responsibilities in accordance with the law enacted by the General Assembly.

RESPONSE: Admitted, but it is denied that this broad legal proposition creates the rights to which Plaintiffs claim they are entitled in their pleadings in this case.

5. That any and all operations of the Defendant are related to, or are for the purpose of, carrying out and providing services to certain citizens or people who have mental retardation, a related disability, head injury, or spinal cord injury and who are receiving services or who is an infant at risk of having a developmental disability and is receiving services.

RESPONSE: Denied as stated. Specifically, and as already argued by Defendants in connection with their pending Motion for Summary Judgment, the term "operations," as used in § 44-20-220, relates only to the internal operations of the Department, and not to its mission to the outside world.

6. That the South Carolina Department of Disabilities and Special Needs is required to treat and/or provide service to individuals with mental retardation, a related disability, head injury, or spinal cord injury as part of its operations in the State of South Carolina.

RESPONSE: Denied as stated. Specifically, and as already argued by Defendants in connection with their pending Motion for Summary Judgment, the term "operations," as used in § 44-20-220, relates only to the internal operations of the Department, and not to its mission to the outside world.

7. That the South Carolina Department of Disabilities and Special Needs is statutorily required to promulgate regulations related to the operations of the Department.

RESPONSE: Admitted, but it is denied that this broad legal proposition creates the rights to which Plaintiffs claim they are entitled in their pleadings in this case. Specifically, and as already argued by Defendants in connection with their pending Motion for Summary Judgment, the term "operations," as used in § 44-20-220, relates only to the internal operations of the Department, and not to its mission to the outside world.

8. That the South Carolina Department of Disabilities and Special Needs is subject to South Carolina Administrative Procedures Act, § 41-23-10 et. seq. (hereafter "Administrative Procedures Act" or "APA").

RESPONSE: Admitted, but it is denied that this broad legal proposition creates the rights to which Plaintiffs claim they are entitled in their pleadings in this case.

9. That the South Carolina Department of Disabilities and Special Needs has not promulgated regulations subject to review by the public or by the General Assembly in accordance with the Administrative Procedures Act which set forth or provide standards for the eligibility and/or receipt of services.

RESPONSE: It is admitted that the Department has not promulgated regulations of the kind described in this request, but it is denied that there is any provision of law that requires the promulgation of such regulations.

10. That the South Carolina Department of Disabilities and Special Needs has not promulgated regulations subject to review by the public or by the General Assembly in accordance with the Administrative Procedures Act which sets forth or provides the grievance process for individuals who may or may not have been denied services.

RESPONSE: It is admitted that the Department has not promulgated regulations of the kind described in this request, but it is denied that there is any provision of law that requires the

promulgation of such regulations. In addition, other provisions of state law, and in some instances, federal law, provide for review of Department decisions when individuals claim that those decisions have denied services to them to which they claim to be entitled. Finally, Defendants are unaware of why a grievance process would even be necessary for a person who has not been denied services, which is a category of persons described in this request.

11. That the South Carolina Department of Disabilities and Special Needs has not promulgated regulations subject to review by the public or by the General Assembly in accordance with the Administrative Procedures Act which sets forth or provides a uniform grievance process for individuals who may or may not have been denied services.

RESPONSE: It is admitted that the Department has not promulgated regulations of the kind described in this request, but it is denied that there is any provision of law that requires the promulgation of such regulations. In addition, other provisions of state law, and in some instances, federal law, provide for review of Department decisions when individuals claim that those decisions have denied services to them to which they claim to be entitled. Finally, Defendants are unaware of why a grievance process would even be necessary for a person who has not been denied services, which is a category of persons described in this request.

12. That the South Carolina Department of Disabilities and Special Needs has not promulgated regulations subject to review by the public or by the General Assembly or by the public in accordance with the Administrative Procedures Act which sets forth or provides the procedure for hearings related to the eligibility for services and the services provided or offered to certain citizens in the State of South Carolina as part of the operations of SCDDSN.

RESPONSE: It is admitted that the Department has not promulgated regulations of the kind described in this request, but it is denied that there is any provision of law that requires the

promulgation of such regulations. In addition, other provisions of state law, and in some instances, federal law, provide for hearings and review of Department decisions when individuals claim that those decisions have denied services to them to which they claim to be entitled. Finally, it is denied that the subject matter of this request constitutes part of the "operations" of DDSN, as that term is used in § 44-20-220. Specifically, and as already argued by Defendants in connection with their pending Motion for Summary Judgment, the term "operations," as used in § 44-20-220, relates only to the internal operations of the Department, and not to its mission to the outside world.

13. That the South Carolina Department of Disabilities and Special Needs has not promulgated regulations subject to review by the General Assembly or by the public in accordance with the Administrative Procedures Act which sets forth or provides the procedure for any appeal process or any appeal to an internal or external hearing officer related to the services provided or offered to certain citizens.

RESPONSE: It is admitted that the Department has not promulgated regulations of the kind described in this request, but it is denied that there is any provision of law that requires the promulgation of such regulations. In addition, other provisions of state law, and in some instances, federal law, provide for review of Department decisions when individuals claim that the decisions referenced in this request have denied services to them to which they claim to be entitled.

14. That the South Carolina Department of Disabilities and Special Needs has not promulgated regulations subject to review by the public or by the General Assembly in accordance with the Administrative Procedures Act which sets forth or provides the procedure or methodology for admission to or priority on a waiting list for services.

RESPONSE: It is admitted that the Department has not promulgated regulations of the kind described in this request, but it is denied that there is any provision of law that requires the promulgation of such regulations.

15. That the South Carolina Department of Disabilities and Special Needs (SCDDSN) has not promulgated regulations subject to review by the public or by the General Assembly in accordance with the Administrative Procedures Acts which establish eligibility criteria which comply with state and federal law for SCDDSN funded residential services.

RESPONSE: It is admitted that the Department has not promulgated regulations of the kind described in this request, but it is denied that there is any provision of law that requires the promulgation of such regulations. In addition, other provisions of state law, and in some instances, federal law, pertain to the subject matter of this request.

16. That the South Carolina Department of Disabilities and Special Needs has not promulgated regulations subject to review by the public or by the General Assembly in accordance with the Administrative Procedures Act which establish and govern policies for the operation of its residential programs.

RESPONSE: It is admitted that the Department has not promulgated regulations of the kind described in this request, but it is denied that there is any provision of law that requires the promulgation of such regulations. In addition, other provisions of state law, and in some instances, federal law, pertain to the subject matter of this request.

17. That the South Carolina Department of Disabilities and Special Needs has not promulgated regulations subject to review by the public or by the General Assembly in accordance with the Administrative Procedures Act which set forth, or establish and govern, policies for its Human Rights Committees.

RESPONSE: It is admitted that the Department has not promulgated regulations of the kind described in this request, but it is denied that there is any provision of law that requires the promulgation of such regulations.

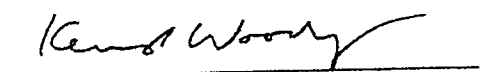
18. That the South Carolina Department of Disabilities and Special Needs has not promulgated regulations subject to review by the public or by the General Assembly in accordance with the Administrative Procedures Act which set forth policies for research on human subjects as required by S.C. Code § 44-26-180.

RESPONSE: It is admitted that the Department has not promulgated regulations of the kind described in this request. However, on information and belief, the Department has rarely, if ever, conducted the kind of research referenced in S.C. Code § 44-26-180. As a result, there has not yet been a need in practice for such regulations. In addition, on information and belief, none of the Plaintiffs have standing to raise this issue.

19. That the South Carolina Department of Disabilities and Special Needs has not promulgated regulations subject to review by the General Assembly or by the public in accordance with the Administrative Procedures Act which sets forth standards, procedures or process to obtain informed consent of individuals receiving service.

RESPONSE: It is admitted that the Department has not promulgated regulations of the kind described in this request, but it is denied that there is any provision of law that requires the promulgation of such regulations.

DAVIDSON & LINDEMANN, P.A.

By: 

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ATTORNEYS FOR DEFENDANTS

Columbia, South Carolina

October 30, 2008

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

Protection and Advocacy for the People with Disabilities, Inc., M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M.; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S.,

Plaintiffs,

v.

South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 07-CP-40-2187

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Defendants, does hereby certify that service of the attached **Defendants' Amended Answers to Plaintiffs' Requests for Admission** in the above-referenced action was made upon all counsel

of record by hand delivery, at the below listed address clearly indicated on said envelope this the 30th day of October, 2008, addressed as follows:

Steven W. Hamm, Esquire
C. Jo Anne Wessinger Hill, Esquire
Richardson, Plowden & Robinson, P.A.
1900 Barnwell Street
Columbia, South Carolina 29201

STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
COUNTY OF RICHLAND	
Protection and Advocacy for the People with Disabilities, Inc., M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M.; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S., Plaintiffs, v. South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs, Defendants.	Civil Action No. 07-CP-40-2187 **DEFENDANTS' RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES**

TO: STEVEN W. HAMM, ESQUIRE; C. JO ANNE WESSINGER HILL, ESQUIRE, AND JOCELYN NEWMAN, ESQUIRE; ATTORNEYS FOR THE PLAINTIFF'S

The Defendants respond to Plaintiffs' written interrogatories pursuant to Rule 34 of the South Carolina Rules of Civil Procedure as follows:

GENERAL OBJECTION

Defendants object to the definition of "operation," as used in Paragraph 4 of the Definitions in Plaintiffs' Interrogatories. Plaintiffs' attempt to define that term is not in accordance with the definition of that term in the pertinent statutes applicable to DDSN.

RESPONSES

1. Give the names, addresses and telephone numbers of any and all persons known to the Defendants or Defendant's counsel to be witnesses concerning the facts of the case, and indicate whether or not written or recorded statements have been taken from the witnesses and who has possession of such statements.

Response:

(a) Dr. Kathi Lacy
DDSN
No written or recorded statements

(b) Robert W. Barfield
DDSN
No written or recorded statements.

(c) Dr. Stanley J. Butkus
DDSN
No written or recorded statements

(d) David Goodell
DDSN
No written or recorded statements

(e) Lois Park Mole
DDSN
No written or recorded statements

2. Set forth a list of photographs, plats, sketches, records, policies, memoranda, standards, decisions, minutes, notes or other prepared documents in possession of the Defendants or Defendants' counsel that relate to the claims or defenses in this case.

Response: At present, with the exception of legal materials filed in the present case, Defendants do not possess "prepared documents," in the sense indicated by this Interrogatory, i.e., documents prepared for the trial of the case. To the extent Plaintiffs might claim that this Interrogatory extends to any document pertaining to this case, Defendants would object to this Interrogatory as overbroad, but also would refer the Plaintiffs to the Defendants' response to more specific Interrogatories and to specific document requests.

3. Set forth the names and addresses of all persons in the Defendants' employ or contracted by the Defendants who are responsible for or involved in the drafting, development, or preparation of :

Response: See individual subheadings. All persons listed are DDSN employees.

(a) regulations, policies, or procedures;

Response: Dr. Kathi Lacy, Dr. Stanley J. Butkus, David Goodell, Lois Park Mole, Robert W. Barfield, David Foshee, Janet Priest, Tana Vanderbilt, Thomas Waring, Richard Wnek, Martin Taylor, Belle Mead Cooper, and Kevin Yacobi.

(b) criteria or other methodologies for eligibility of services used to determine eligibility of services whether such persons are initially applying for services, or they are currently receiving services;

Response: Dr. Kathi Lacy, Belle Mead Cooper

(c) the grievance process, or the operation of the grievance process, for individuals who may or may not have been denied services or who are applying for and/or receiving services from the Defendant;

Response: Dr. Kathi Lacy, Dr. Stanley J. Butkus

(d) the procedure and process for hearings and/or appeals, including notice requirements advising affected persons of a right to appeal or for a hearing;

Response: Dr. Kathi Lacy

(e) the appeal process, or any appeal to an internal or external hearing officer related to the services provided or offered to citizens, including but not limited to notice requirements advising affected persons of a right to appeal or for a hearing;

Response: Dr. Kathi Lacy

(f) the criteria or methodology for admission to or priority on a waiting list for services; and

Response: Dr. Kathi Lacy, Dr. Stanley J. Butkus, David Goodell

(g) the criteria and guidelines for eligibility for operation of SCDDSN residential services.

Response: Dr. Kathi Lacy, Dr. Stanley J. Butkus, David Goodell

4. List the names and addresses of any expert witnesses whom the Defendants propose to use as a witness at the trial of this case.

Response None known at this time.

5. For each person known to the Defendants of Defendants' counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the Plaintiff's of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witness.

Response: Each person listed in the responses to the above Interrogatories is generally familiar with the subject matter topics under which they are listed.

6. Set forth a list of all regulations that the Defendant(s) claim they have promulgated including but not limited to regulations regarding the eligibility for services, the treatment and care of your (Department's) clients, your (Department's) appeal procedures, your (Department's) human rights committees procedures, your (Department's) standards for operation of your (Department's) residential programs, and your (Department's) standards for research on human subjects.

Response: Defendants object to this Interrogatory, because it requests information equally available to both parties. All current, promulgated regulations of the Defendant Department are available in the South Carolina Code of Regulations.

7. Set forth a list of all standards and/or directives that Defendants claim they have developed and /or used including but not limited to standards regarding the eligibility for its services, the treatment and care of your (Department's) clients, your (Department's) appeal procedures, your (Department's) human rights committees procedures, your (Department's) standards for operation of your (Department's) residential programs, and your (Department's) standards for research on human subjects.

Response: Defendants object to this Interrogatory, because it requests information equally available to both parties. All current standards and/or directives of the Defendant Department are available online via the link: http://www.state.sc.us/ddsn/policies/policymain.htm.

8. Set forth a summary of all policies, procedures, and decisions that Defendants claim they have made, established, developed and/or used including but not limited to regulations regarding the eligibility for is services, the treatment and care of your (Department's) clients, your (Department's) appeal procedures, your (Department's) human rights committees procedures, your (Department's) standards for operations of

your (Department's) residential programs and your (Departments') standards for research on human subjects.

Response: Defendants object to this Interrogatory as overbroad, and as requesting information equally available to both parties. Notwithstanding this objection, see Responses to Interrogatories 6 and 7.

9. Set forth a description of the job title and specific job-related responsibilities, function and duties of each of the individual Defendants to this action.

Response: Defendants object to this Interrogatory, because it requests information equally available to both parties. The duties of the individual Defendants are set forth in the applicable statutes.

10. Set forth a description of the purpose, function and duties of Defendant South Carolina Department of Disabilities and Special Needs.

Response: Defendants object to this Interrogatory, because it requests information equally available to both parties. The purpose, function and duties of Defendant South Carolina Department of Disabilities and Special Needs are set forth in the applicable statutes.

11. Set forth a description of the purpose, function and duties of Defendant South Carolina Commission of Disabilities and Special Needs.

Response: Defendants object to this Interrogatory, because it requests information equally available to both parties. The purpose, function and duties of Defendant South Carolina Commission on Disabilities and Special Needs are set forth in the applicable statutes.

12. Set forth the names, titles, and job descriptions of any specific individuals or entities charged with drafting, developing, noticing, submitting, and/or promulgating regulations on behalf of the Defendant SCDDSN for the period of 1993 to present, or from the date of enactment and creation of the SCDDSN to present, which is later.

Response: Defendants object to this Interrogatory as overbroad, seeking to extend to a date fifteen years ago. Defendants would respond that since 2003, the person primarily responsible for the matters described in this Interrogatory is Dr. Kathi Lacy, Associate State Director, Policy at the South Carolina Department of Disabilities and Special Needs. Her Position Description is being sent to Plaintiffs with the Responses to Requests for Production served herewith.

13. Set forth a summary of all policies, procedures, directives, and decisions that the Defendants have, have had, use or have used regarding the determination of whether or not a regulation pursuant to the South Carolina Administrative Procedures Act relating to any and all policies, procedures, directives, practices, or standards of SCDDSN should or should not be promulgated, developed or submitted to the public and to the General Assembly for review.

Response: Defendants object to this Interrogatory as overbroad, seeking to extend to a date fifteen years ago. Notwithstanding this objection, Defendants would advise that they follow state law with respect to deciding whether regulations should be promulgated, but that they have not established formal procedures for making the determination of whether or not a regulation should be promulgated in a given instance.

14. Describe and identify the process, procedure, policy, and practice by which the Defendants make a determination or decide whether or not a regulation should be promulgated by the Defendants.

Response: Defendants would advise that they follow state law with respect to deciding whether regulations should be promulgated, but that they have not established formal procedures for making the determination of whether or not a regulation should be promulgated in a given instance.

15. Identify and describe the process, procedures, practice and authority for the Defendants to develop, purpose and make directives, including but not limited to the method of review by the Defendants and by the public, notices to the public or interested persons, comments, amendments, and finalization.

Response: Authority to develop service standards is found in § 44-20-250. DDSN. Departmental Directive 100-02-DD outlines the procedures for the development and review process and can be found on the DDSN website. DDSN utilizes multiple and diverse methods to solicit input and get feedback from its customers and their families and the public. One of these methods is placement of departmental directives on the DDSN website to collect, synthesize, and incorporate comments.

16. Set forth, describe and explain what procedure is followed by you regarding the development of, and change of, policies, directives and/or standards for the supervision and operation by you of residential services.

Response: In addition to the response to Interrogatory 15, which is incorporated by reference herein, DDSN supervises and operates

four ICFs/MR in five locations across the state. DDSN is accountable to DHEC licensing and certification requirements. Any changes made to DHEC's requirements are established by the Centers for Medicare and Medicaid Services. If a change impacts a DDSN Departmental Directive, the Directive is updated accordingly

17. Set forth any policy, directives and standards used and/or implemented by you for a client or patient to appeal any decision made by you, or to file a grievance regarding such a decision.

Response: Defendants object to this Interrogatory, because it requests information equally available to both parties. All current standards and/or directives of the Defendant Department are available online via the link: http://www.state.sc.us/ddsn/policies/policymain.htm. In addition, the subject matter of this request is governed by general state law, such as the Administrative Procedures Act.

18. Set forth any policy, directives and standards which you have regarding the decision to continue or discontinue services, or to determine which services an individual should receive, including but not limited to the use and placement of individual on waiting list(s) for any residential services offered by you.

Response: Defendants object to this Interrogatory, because it requests information equally available to both parties. All current standards and/or directives of the Defendant Department are available online via the link: http://www.state.sc.us/ddsn/policies/policymain.htm. In addition, the subject matter of this request is governed by general state law, such as the Administrative Procedures Act.

19. State the basis for your defense(s) set forth in your 5th defense.

Response: *See, e.g.,* the Defendants' Memorandum in Support of Motion to Dismiss and Memorandum in Support of Motion for Summary Judgment.

DAVIDSON & LINDEMANN, P.A.

By: /s/ Kenneth P. Woodington

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ATTORNEYS FOR DEFENDANTS

Columbia, South Carolina

December ___, 2008

STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND** Protection and Advocacy for the People with Disabilities, Inc., M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M.; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S., Plaintiffs, v. South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs, Defendants.	**IN THE COURT OF COMMON PLEAS** Civil Action No. 07-CP-40-2187 **DEFENDANTS' RESPONSES TO PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS**

TO: STEVEN W. HAMM, ESQUIRE; C. JO ANNE WESSINGER HILL, ESQUIRE; AND JOCELY NEWMAN, ESQUIRE; ATTORNEY'S FOR THE PLAINTIFF'S

The Defendants respond to Plaintiffs' request for production of documents pursuant to Rule 34 of the South Carolina Rules of Civil Procedure as follows:

GENERAL OBJECTION

Defendants object to the definition of "operation," as used in Paragraph 4 of the Definitions in Plaintiffs' Interrogatories. Plaintiffs' attempt to define that term is not in accordance with the definition of that term in the pertinent statutes applicable to DDSN.

RESPONSES

1. The minutes of any meetings of the commission including, but not limited to, executive sessions and meetings of any board committees, members, subcommittees, or work groups, from the period from 1993 through present regarding the discussion of the promulgation of regulations, of the criteria for the promulgation of regulations, or any decision whether or not to promulgate regulations.

Response: (A) Defendants will make available for inspection and copying, if desired, at a mutually convenient time and place, all regular session minutes of the commission from 1993 through the present. (B) Defendants object to producing minutes of any executive sessions, on the grounds that such minutes are made confidential by law, and Plaintiffs have not shown cause why the confidentiality of such minutes should not be preserved. (C) To the best of counsel's knowledge, after due investigation, there are no minutes of "board committees, members, subcommittees, or work groups" that relate to "the discussion of the promulgation of regulations, of the criteria for the promulgation of regulations, or any decision whether or not to promulgate regulations." If such documents are subsequently located, they will be made available promptly, unless privileged, in which case a privilege log will be supplied.

2. The minutes of any meetings of the board including, but not limited to, executive sessions and meetings of any board committees members, subcommittees, or work groups, from the period from 1993 though present not produced as part of Request No.1 herein.

Response: Defendants object to this request, on the ground that there is no "board" to which it might refer. To the extent that this request is intended to pertain to the Commission on Disabilities and Special Needs, see the response to Request 1.

3. Any document on which you relied in preparing a response to the pleadings or interrogatories.

Response: Aside from statutes and other legal authorities, which are referenced in pleadings and briefs, all such documents are referenced elsewhere in these responses, except for the Position Description of Dr. Kathi Lacy, which is attached as Document 7400-A-001 – 7400-A-002..

4. Any document identified or described in the pleadings or answers to interrogatories.

Response: The only documents referenced in the Answer of the Defendants or the Answers to Interrogatories are regulations of the Department, or policies, directives or standards of the Department. Defendants accordingly object to this Request, on the ground that such documents are equally available to the Plaintiffs as to the Defendants.

5. Copies of any and all regulations promulgated by Defendant South Carolina Department of Disabilities and Special Needs ("SCDDSN") within the last fifteen (15) years.

Response: Defendants object to this Request, on the ground that such documents are equally available to the Plaintiffs as to the Defendants.

6. Copies of any and all memoranda, bulletins, reports, emails, letters, or other documents discussing whether any policies, directives and standards of you and/or SCDDSN should be or should not be issued and promulgated as regulations.

Response: To the best of counsel's knowledge, after due investigation, there are no documents responsive to this request except to the extent that Documents 7400-A-003 through 7400-A-013 may be relevant. If documents responsive to this Request are subsequently located, they will be made available promptly, unless privileged, in which case a privilege log will be supplied.

7. Copies of any and all memoranda, bulletins, reports, emails, letters, or other documents discussing whether any policies, directives and standards of you and or/ SCDDSN regarding service plans or individual service plans that should be or should not be issued and promulgated as regulations.

Response: See response to Request 6.

8. Copies of any and all memoranda, bulletins, reports, emails, letters, communications, or other documents discussing whether any policies, standards or criteria for the eligibility services offered by you or Defendant SCDDSN that should be or should not be issued and promulgated as a regulation.

Response: See response to Request 6.

9. Copies of any and all memoranda, bulletins, reports, emails, letters, communications, or other documents discussing any policies, standards or criteria for the supervision of the services offered by Defendant SCDDSN.

Response: Defendants object to this request as overbroad, because it is not limited to the issues in this case, but instead seeks any and all documents that discuss the substance

of the described policies, standards or criteria themselves, rather than the issue of whether the described policies, standards or criteria should be promulgated as regulations, or other similar issues. If Plaintiffs will re-formulate this request so that it is more narrowly drawn and limited to the issues presented by this action, Defendants will respond accordingly.

10. Copies of any and all memoranda, bulletins, reports, emails, letters, communications, or other documents discussing whether any policies, standards or criteria for the eligibility, operation, standards of supervision, and/or reporting procedures for residential services or residential programs should be or should not be issued and promulgated as a regulation.

Response: See response to Request 6.

11. Copies of any and all memoranda, bulletins, reports, emails, letter, or other documents since 1993 to present regarding the standards, procedures, or criteria for eligibility of the services offered or provided by you or Defendant SCDDSN for individuals believed to have mental retardation, a related disability(s), head injury, spinal cord injury, autism, and for an individual who is an infant at risk of having a developmental disability.

Response: Defendants object to this request as overbroad, because it is not limited to the issues in this case, but instead seeks any and all documents that discuss the substance of the described policies, standards or criteria themselves, rather than the issue of whether the described policies, standards or criteria should be promulgated as regulations, or other similar issues. If Plaintiffs will re-formulate this request so that it is more narrowly drawn and limited to the issues presented by this action, Defendants will respond accordingly.

12. Copies of any and all memoranda, bulletins, reports, emails, letters, communications, or other documents discussing whether any standard, procedures or criteria for the eligibility of services offered or provided by you or Defendant SCDDSN for individuals believed to have mental retardation, a related disability(s), head injury, spinal cord injury, autism, and for an individual who is an infant at risk of having a developmental disability should or should not be issued and promulgated as a regulation.

Response: See response to Request 6.

13. Copies of any and all memoranda, bulletins, reports, emails, letters, communications, or other documents regarding the standards, procedures, or criteria for filing, making or lodging of a complaint and/or grievance against you or the Defendant SCDDSN.

Response: Defendants object to this request as overbroad, because it is not limited to the issues in this case, but instead seeks any and all documents that discuss the substance of the described policies, standards or criteria themselves, rather than the issue of whether the described policies, standards or criteria should be promulgated as regulations, or other

similar issues. If Plaintiffs will re-formulate this request so that it is more narrowly drawn and limited to the issues presented by this action, Defendants will respond accordingly.

14. Copies of any and all intra-agency memoranda, bulletins, reports, emails, letter, communications, or other documents discussing whether any standards, procedures, or criteria for filing, making or lodging of a complaint and/or grievance against you or the Defendant SCDDSN should be or should not be issued and promulgated as a regulation.

Response: See response to Request 6.

15. Copies of any and all memoranda, bulletins, reports, emails, letters, communications, or other documents regarding the standards, procedures, or criteria for filing, making or lodging and appeal for any decision by you or Defendant SCDDSN.

Response: Defendants object to this request as overbroad, because it is not limited to the issues in this case, but instead seeks any and all documents that discuss the substance of the described policies, standards or criteria themselves, rather than the issue of whether the described policies, standards or criteria should be promulgated as regulations, or other similar issues. If Plaintiffs will re-formulate this request so that it is more narrowly drawn and limited to the issues presented by this action, Defendants will respond accordingly.

16. Copies of any and all intra-agency memoranda, bulletins, reports, emails, letters, communications, or other documents discussing whether any standards, procedures, or criteria for filing, making or lodging of and appeal for any decision by you or Defendant SCDDSN should be or should not be issued and promulgated as a regulation.

Response: See response to Request 6.

17. Copies of any and all memoranda, bulletins, reports, emails, letters, communications, or other documents regarding the standards, procedures, or criteria for the eligibility and receipt of services from you or Defendant SCDDSN and the standards used to determine whether to continue or discontinue services to an individual..

Response: Defendants object to this request as overbroad, because it is not limited to the issues in this case, but instead seeks any and all documents that discuss the substance of the described policies, standards or criteria themselves, rather than the issue of whether the described policies, standards or criteria should be promulgated as regulations, or other similar issues. If Plaintiffs will re-formulate this request so that it is more narrowly drawn and limited to the issues presented by this action, Defendants will respond accordingly.

[NOTE:: There are no Requests numbered 18 or 19]

20. Copies of any and all memoranda, bulletins, reports, emails, letters, communications, or other documents present discussing whether any standards, procedures, or criteria for the eligibility and receipt of services from you or Defendant SCDDSN and the standards used to determine whether to continue or discontinue services to and individual should be or should not be issued and promulgated as a regulation.

Response: See response to Request 6.

21. Copies of any and all decisions, policies, memoranda, bulletins, reports, emails, letter, communications, or other documents by you, the Defendants, SCDDSN, your employees and staff that expresses any intent or intention not to adopt and promulgate regulations in accordance with the South Carolina Administrative Procedures Act (§1-23-10 et. seg.) for any responsibility identified by statute or law.

Response: See response to Request 6.

22. Copies of any and all policies, directives and standards developed and/or adopted by you and/or SCDDSN relating to any services provided, offered managed, or supervised by you and/or SCDDSN or subject to the jurisdiction of you and /or SCDDSN other than that specifically requested in paragraphs 1-21. Please include any and all versions (if any) and the effective date.

Response: Defendants do not read Requests 1 through 21 as having requested copies of "policies, directives and standards" themselves. Accordingly, reading this request as seeking "[c]opies of any and all policies, directives and standards developed and/or adopted by you and/or SCDDSN relating to any services provided, offered managed, or supervised by you and/or SCDDSN or subject to the jurisdiction of you and /or SCDDSN," Defendants object to this request as it applies to current policies, standards or directives, because it requests information equally available to both parties. All current standards and/or directives of the Defendant Department are available online via the link: http://www.state.sc.us/ddsn/policies/policymain.htm. With respect to prior versions of policies, standards or directives, Defendants object to this request as overbroad, but if Plaintiffs will re-formulate this request so that it is more narrowly drawn and limited to specific prior policies, standards, or directives, to the extent that such might pertain to the issues presented by this action, Defendants will respond accordingly.

23. Copies of any and all any and all decisions, policies, directives and standards, memoranda, bulletins, reports, emails, letters, communications, or other documents by you, the Defendants, SCDDSN, your employees and staff that relate to any decision, finding determination, ruling, position, discussion, or otherwise on whether any services other that that specifically requested in paragraphs 1-21 which are provided, offered, managed, or supervise by you or SCDDSN or subject to the jurisdiction of you or SCDDSN should be or should not be issued and promulgated as a regulation.

Response: See response to Request 6.

DAVIDSON & LINDEMANN, P.A.

By: _____

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ATTORNEYS FOR DEFENDANTS

Columbia, South Carolina

December 17, 2008

STATE OF SOUTH CAROLINA POSITION DESCRIPTION

GENERAL INFORMATION

0 3 5 0 5 3	J 1 6	SC Department of Disabilities and Special Needs
Position Number	Agency Code	Agency Name
Administration/Office of Policy	Columbia/Richland	
Division / Section / Unit	City / County	
Kathi Kelly Lacy Ph.D.	4 0	Y Y/N
Employee Name	County Code	Is Position in Central Office ?
Program Manager III	A H 5 5	0 0 0 2 / 0 9
Current State Title	Alphanumeric Code	Slot / Band

F O C — Full / Part Time Indicator

0 3 7 5 0 — Hours Per Week

1 9 5 0 — Base Hours

Agency Director	U A 2 1	0 0 0 1
Supervisor State Title	Alphanumeric Code	Slot

SOURCE OF FUNDING

1 0 0 — State %

Federal %

Other %

☐ OHR COPY ☒ AGENCY COPY

OFFICE OF HUMAN RESOURCES

J 1 6	A H 5 5	0 0 0 2
Agency Code	Alphanumeric Code	Slot

Authorized Date

☐ Delegated ☐ New Position ☐ Prototype

☐ State Title Changes ☒ Update

Program Manager III
Approved State Title

Kathi Lacy — 2-5-03
Approval Signature / Date Approved

REQUESTED ACTION INFORMATION

Update	N/A	A H 5 5
Requested Action	Requested State Title	Alphanumeric Code

E FLSA Designation

Supervisor's Signature — 1/28/03 Date — Other Required Signature — 1-29-03 Date

THE FOLLOWING SECTION OF THE POSITION DESCRIPTION IS TO BE COMPLETED BY THE SUPERVISOR

1. **What are the minimum requirements for the position (Minimum requirements must at least meet the state minimum requirements for classified classes but may include additional requirements.)?**

A Doctorate degree in the social sciences and five years of related experience; or a Master's degree in social or health sciences and eight years related experience.

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JAN 2 9 2003
HR CONSULTING SERVICES

2. **What knowledge, skills, and abilities are needed by an employee upon entry to this job including any special certification or license?**

Thorough knowledge of state level policies, procedures, functions, and interagency relationships. Thorough knowledge of public sector administrative practices, procedures, and standards. Extensive knowledge of disability populations and service delivery systems; skilled developer of policies and procedures to enhance efficiency and effectiveness of service delivery system; ability to inspire and lead teams of employees to success; ability to prepare and present reports. Working knowledge of Medicaid programs including the HCB Waiver Program. Ability to develop and coordinate health programs relating to developmental disabilities.

3. **Describe the guidelines and supervision an employee receives to do this job, including the employee's independence and discretion.**

Independent day to day work under limited supervision. Exercises a large degree of independence and discretion in decision-making authority.

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DEC 5 2008
SCDDSN
POLICY / OPERATIONS

4. **Indicate additional comments regarding this position (e.g., work environment, physical requirements, overnight travel).**

MISCELLANEOUS DATA

Employee Number

Position Dept. Number

7400-A-001

0148

STATE OF SOUTH CAROLINA POSITION DESCRIPTION

7400-A-002

0149

1. Job Purpose:

Under limited supervision of the State Director provides leadership and management oversight to the Office of Policy, the Divisions of Mental Retardation, Autism, and Head Spinal Cord Injury, Quality Assurance, and Consumer Assessment Team. Responsible for designing and applying best practices to all program policies and ensuring that agency policies positively affect the service delivery system for all consumers.

2. Job Functions:

		Essential/ Marginal (E or M)	Percentage of Time
1.	Plans, designs, and implements new program policies and procedures. Analyzes implementation of new programs and determines changes that are needed to ensure system is efficient, effective, and responsive to consumers' needs.	E	20%
2.	Develops and assures a comprehensive array of community services and supports for consumers and their families.	E	15%
3.	Directs, develops, and assures eligibility policies are consistent with all applicable federal and state laws and ensures practice is efficient and adheres to the written procedures.	E	15%
4.	Guides and directs the Quality Assurance System for the Agency. Ensures system reliably measures adequacy of consumers' plans, implementation of plans, satisfaction of consumers and families with services and ensures system assists in development of improved practices.	E	15%
5.	Provides leadership in development of strong models of teamwork and improved communication between all divisions, field offices, and providers. Directs, develops, and assesses professional staff in the implementation of programs and services.	E	15%
6.	Participates in Executive Staff Meetings to advise State Director of concerns and progress; gathers sufficient data to ensure decisions are based on facts; participates in DDSN Executive Management decision making process and is held accountable for results.	E	10%
7.	Assesses the satisfaction of consumers with services received; attends public hearings and advocacy group meetings to discuss their concerns; ensures the system is responsive to consumers' needs and concerns.	E	7%
8.	Represents the State Director on interagency committees and meetings as requested.	E	3%

3. Position's Supervisory Responsibilities:

If this position includes supervisory responsibilities, please indicate the state title and number of positions of the three highest subordinates.

	STATE TITLE	NUMBER
(1)	Program Manager II	3
(2)	Program Manager I	2
(3)	Administrative Assistant	1

Number of employees directly supervised: 6

Total number supervised: 120

4. Comments:

Coordinates on a daily basis with DDSN Deputy State Director/Administration, Associate Director of Operations, and Provider Executive Directors.

5. The above description is an accurate and complete description of this job.

Employee's Signature

6/26/02
Date

RICHARDSON, PLOWDEN, CARPENTER & ROBINSON, P.A.

ATTORNEYS AND COUNSELORS AT LAW

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RUSSELL V. TRAW
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KENYA CARVER-MILLER
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G. HAROLD HANLIN

OF COUNSEL
GEORGIA ANNA MITCHELL
NINA REID MACK

RETIRED
DONALD V. RICHARDSON III
CHARLES N. PLOWDEN, JR.

◇ ALSO MEMBER VIRGINIA BAR
△ ALSO MEMBER GEORGIA BAR
☆ ALSO MEMBER TEXAS BAR
○ ALSO MEMBER NORTH CAROLINA BAR
◇ ALSO MEMBER MISSISSIPPI BAR
✱ CERTIFIED SPECIALIST IN BANKRUPTCY LAW BY THE SUPREME COURT OF SC
✚ RN, MS
❖ CERTIFIED SPECIALIST IN EMPLOYMENT AND LABOR LAW BY THE SUPREME COURT OF SC

October 24, 2005

Stan Butkus, Ph.D.
State Director
South Carolina Department of Disabilities and Special Needs
3440 Harden St. Ext.
P.O. Box 4706
Columbia, South Carolina 29240

RE: Administrative Procedures Act – Regulation Promulgation and Related Issues

Dear Dr. Butkus:

As you are aware, Protection and Advocacy for People with Disabilities, Inc. (hereinafter "P&A") is the state and federally mandated entity established to advocate for the rights of individuals with disabilities in South Carolina. P&A promotes this mission by enabling individuals to advocate for themselves, by speaking on their behalf when they have been discriminated against or denied a service to which they are entitled, and by promoting policies and services that respect their choices. The purpose of this letter is to express our increasing concern about the South Carolina Department of Special Needs' (hereinafter "DDSN" or "the Department") failure to promulgate regulations, thereby threatening the rights and wellbeing of individuals with disabilities and the people of this state in general.

The South Carolina Administrative Procedures Act (hereinafter "APA") establishes that significant agency policies and procedures be readily available to the public such that the public and the General Assembly will have an opportunity to participate in the development of policies and procedures that affect thousands of citizens. DDSN, however, is one of the few state agencies that has not established its major policies and procedures pursuant to the APA. Although DDSN has promulgated a limited number of regulations regarding licensing, camps and day programs, many major aspects of its operations have not been promulgated through the APA. DDSN's failure to establish policies and procedures through the APA and to provide an appeals procedure frustrates the purpose of the APA and constitutes a denial of due process and equal protection. Department directives are not established in accordance with the APA and do not provide an opportunity for review and comment by the public and by the General Assembly.

Accordingly, pursuant to S.C. Code Ann. § 1-23-126 and S.C. Code Ann. § 44-20-220, P&A hereby requests that DDSN immediately promulgate regulations establishing procedures for: 1) determination of initial or continuing eligibility for services; 2) appeals from determinations of eligibility for services or of the type of services provided (including a review process with an independent fact-finder); 3) role, composition and procedures of Human Rights Committees that would also provide for uniform operation of these committees; and 4) standards for residential facilities, including but not limited to Community Training Homes and the placement, transfer, or removal of individuals receiving services. Additionally, P&A requests that DDSN immediately post an indexed compilation of all its current directives on its Web site so that the public has meaningful access to them.

We ask that you respond to this request within thirty (30) days. If your response indicates anything other than agreement to promptly begin the promulgation of regulations, P&A will pursue other, more formal means to achieve this important objective.

With kind regards, I am

Sincerely,

Steven W. Hamm

cc: Ms. Edythe C. Dove
8757 E Fairway Woods Circle
North Charleston, SC 29420

Ms. Alicia K. Harvey, Vice-Chairman
5115 Forest Plaza, Suite D
Columbia, SC 29206

Mr. Ronald Forrest
112 Sheldon Avenue
Greenwood, SC 29649

Dr. John Vaughn
Faith Baptist Church
500 West Lee Road
Taylors, SC 29687

Mr. Bill G. Alexander, Chairman
550 Cranborne Chase
Fort Mill, SC 29708

Mr. J. Lewis Stephens, Secretary
719 Laurel Street
Columbia, SC 29201

Mr. W. Robert Harrell
7449 Hendersonville Hwy
Yemassee, SC 29945

Gloria M. Prevost, Executive Director
Protection and Advocacy for People
with Disabilities, Inc.
3710 Landmark Drive, Suite 208
Columbia, SC 29204

Stanley J. Butkus, Ph.D.
State Director
Robert W. Barfield
Deputy State Director
Administration
Ronald G. Dozier
Associate State Director
Operations
Kathi K. Lacy, Ph.D.
Associate State Director
Policy

SOUTH CAROLINA Department OF Disabilities AND Special Needs

3440 Harden Street Ext (29203)
PO Box 4706, Columbia, South Carolina 29240
V/TTY: 803/898-9600, FAX: 803/898-9653
Toll Free: 888/DSN-INFO
Home Page: www.state.sc.us/ddsn/

COMMISSI
Bill G. Alexanc
Chairn
Lyssa Harv
Vice Chairm
J. Lewis Stephe
Secret
Ronald Forre
W. Robert Harr
Edythe C. Do
John C. Vaugl

November 22, 2005

Mr. Steven W. Hamm, Esq.
Richardson, Plowden, Carpenter & Robinson, P.A.
1600 Marion Street
Columbia, SC 29201

RE: Administrative Procedures Act - Regulation Promulgation and Related Issues

Dear Mr. Hamm:

I was contacted by your assistant about meeting with you on October 24, 2005, but the topic for discussion was not conveyed, even upon my request for it. I adjusted my schedule to accommodate a colleague. Although I was again uninformed by your office, you brought Ms. Gloria Prevost, Executive Director, and Ms. Nancy McCormick, Attorney, for South Carolina Protection and Advocacy for People with Disabilities, Inc. to the meeting. You handed me a letter dated October 24, 2005, addressed to Stan Butkus, Ph.D., State Director for SCDDSN and stated that you initially wanted to meet with Dr. Butkus, but were directed to me.

Since I was not told the reason for the meeting, I was not prepared to discuss the issue you raised. As I recall, you stated this was done on purpose. As might be expected the meeting was not productive. Upon review of your letter to Dr. Butkus, it appears that you want SCDDSN to promulgate a series of regulations dealing with eligibility of persons seeking services from SCDDSN, appeals with independent fact finders, Human Rights Committees and standards for placement and transfer of residents in facilities. You also requested that all SCDDSN directives be posted on our website. Further, your letter and discussion intimated that if you did not receive an immediate agreement to do these things that you would seek "more formal means" to achieve your objectives.

As you noted in your letter, DDSN has promulgated regulations. Many agencies have no regulations. Many agencies are like DDSN and have some regulations. DDSN has not needed to promulgate more regulations because the S. C. Code of Laws concerning DDSN state in detail

DISTRICT I
8301 Farrow Road, Columbia SC 29203
Phone 803/935-741
Midlands Center - Phone 803
Whitten Center - Phone 864/8
DISTRICT II
Co
Pee

the issues that might otherwise require regulation. S. C. Code Ann. § 1-23-10 even recognizes that there are policy, guidance or procedures which do not require regulation. Another aspect of this issue is that the code of laws concerning DDSN authorizes DDSN to directly contract for services. This enables DDSN to hold its contractors accountable through detailed contract provisions.

The point you made concerning having the policies available to the public is a reasonable suggestion. Availability of these policies has never been a problem. All requests for copies of policies are fulfilled, but this can be one more way to provide this information. DDSN will add its directives to the website by the spring of next year.

Your letter states its purpose "is to express our increasing concern about DDSN's failure to promulgate regulations...". To my knowledge, Ms. Prevost has not contacted Dr. Butkus with any such concern. Mr. Ron Dozier, DDSN Associate State Director-Operations, and Ms. Robin Wheeler of P & A have been meeting regularly to discuss in good faith any issue of concern of either agency. This issue has not been raised. We are unclear where any lack of regulation has threatened the rights and wellbeing of individuals with disabilities.

In order for us to work with P & A to address their concerns, it would be very useful for P & A to provide actual examples where they feel an individual's rights require a regulation for protection or wellbeing. This will help us be clear about your request and is important in our efforts to make services responsive and accountable. We need to know where there may be issues so that we can address them. You stated on October 24 that you would provide me with this information.

DDSN makes every effort to have a professional and cooperative relationship with P & A. Dr. Butkus is aware of your letter and anticipates your provision of the actual case examples for discussion to further resolve any concerns.

Sincerely,

James R. Hill, Jr.
General Counsel

JRH/cch

Encl.

cc: Dr. Stan Butkus, State Director, SCDDSN
Ms. Gloria Prevost, Executive Director, Protection and Advocacy
Board Members, Protection and Advocacy for People with Disabilities, Inc.
Members, SC Commission on Disabilities and Special Needs

7346085

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

September 17, 1998

The Honorable Joe Wilson
Senator, District No. 23
P.O. Box 5709
West Columbia, South Carolina 29171

Re: Informal Opinion

Dear Senator Wilson:

Your opinion request has been forwarded to me for reply. You have asked, on behalf of one of your constituents, for an interpretation of Section 44-38-370 of the South Carolina Code of Laws, which establishes eligibility criteria for case management services through the Department of Disabilities and Special Needs (hereinafter the "Department"), Head and Spinal Cord Injury Division. You have asked a question concerning the Department's interpretation of the phrase "similar disability" when determining whether an individual is eligible for services under the statute.

By way of background, there is established within the Department of Disabilities and Special Needs the South Carolina Head and Spinal Cord Injury Service Delivery System. The system is a division of the Department to be known as the Head and Spinal Cord Injury Division. The Department is obligated under the statute to develop, coordinate, and enhance the delivery of services to persons with head and spinal injuries. S.C. Code Ann. § 44-38-310.

Section 44-38-340 sets forth the duties of the Department under the statute. This Section provides, among other things, that the Department shall determine a person's eligibility for case management services based on criteria provided in Section 44-38-370, conduct an assessment of services needed, and provide appropriate case management based

7400-A-008

on an individualized treatment plan designed to meet the specific needs of the person.[1] The eligibility criteria found in Section 44-38-370 is, in part, as follows:

> A person is eligible for case management services under this article when at the time of determining eligibility the person has a severe chronic limitation that:
>
> > (1) is attributed to a physical impairment, including head injury, spinal cord injury, or both, or a similar disability, regardless of the age of onset but not associated with the process of a progressive degenerative illness or disease, dementia, or a neurological disorder related to aging (emphasis added);

In regards to an agency's interpretation of a statute, so long as the administrative interpretation is reasonable, courts will defer to that construction even if it is not the only reasonable one or the one the court could have adopted in the first instance. Op. Atty Gen. dated March 12, 1997. The construction given to a statute by the agency charged with its administration will be accorded most respectful consideration and will not be overturned absent compelling reasons. Laurens Co. School Districts 55 and 56 v. Cox, 308 S.C. 171, 417 S.E.2d 560 (1992); Jasper Co. Tax Assessor v. Westvaco, 305 S.C. 346, 409 S.E.2d 333 (1991).

Here, the Department is the agency responsible for the administration of the statute. The Department is charged with determining a person's eligibility for case management services based on the criteria set forth in the statute. The law also provides that the director of the Department or his designee has the final authority over applicant eligibility, determination, or services and admission order, subject to the policies adopted by the commission. Due to the Department's role in this matter, its interpretation of the phrase "similar disability" would be entitled to most respectful consideration by the courts and this Office and would not be overturned absent compelling reasons. Further, as long as the Department's interpretation is reasonable, the courts and this Office will defer to that construction.

[1] The law also provides that the director of the Department or his designee has the final authority over applicant eligibility, determination, or services and admission order, subject to policies adopted by the commission. S.C. Code Ann § 44-20-430.

This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kindest regards, I remain

Very truly yours,

Paul M. Koch

Paul M. Koch
Assistant Attorney General

Head and Spinal Cord Injury Division

SC Department of Disabilities and Special Needs
Head and Spinal Cord Injury Division
3440 Harden Street Ext.
PO Box 4706
Columbia, SC 29240
(803) 737-6450 V/TTY: (803) 737-6474
FAX (803) 737-6323 E-Mail: dwiles-taff@ddsn.state.sc.us

The DDSN Head and Spinal Cord Injury (HASCI) Division was created by the 1993 General Assembly state governmental restructuring. Contingent upon sufficient funding, DDSN is responsible to develop, coordinate, and enhance the delivery of services to persons with head and spinal cord injuries and must coordinate case management with the SC Vocational Rehabilitation Department.

In 1994, the General Assembly appropriated designated funding for DDSN to begin serving people through the HASCI Division. Funding remains limited and waiting lists currently exist throughout the state.

Within the available DDSN funding, priorities for services and supports include:

* information and referral;
* service coordination to directly assist an individual in accessing all appropriate public and private resources;
* modifications to enable a person to better access his or her own home;
* equipment and devices to facilitate greater independence;
* personal assistance for essential activities of daily living; and
* services and supports to improve functioning, increase productivity and and promote self-determination.

These may be funded with DDSN Individual and Family Support state funds, with state and federal funds through the regular Medicaid State Plan and/or the HASCI Medicaid Waiver, or a combination of funding sources. Limited state funds also have been provided by DDSN for several pilot residential and vocational initiatives.

Eligibility

SC Code of Laws Section 44-38-370 defines eligibility for services through the DDSN Head and Spinal Cord Injury Division:

"A person is eligible for case management services under this article when at the time of determining eligibility the person has a severe chronic limitation that:

(1) is attributed to a physical impairment, including head injury, spinal cord injury, or both, or a similar disability, regardless of the age of onset but not associated with the process of a progressive degenerative illness or dementia, or a neurological disorder related to aging;

(2) is likely to continue without intervention;

(3) results in substantial functional limitations in at least two of these life activities:
(a) self-care;
(b) receptive and expressive communication;
(c) learning;
(d) mobility;
(e) self-direction;
(f) capacity for independent living;
(g) economic self-sufficiency; and

(4) reflects the person's need for a combination and sequence of special interdisciplinary or generic care or treatment or other services which are lifelong or extended duration and are individually planned or coordinated."

SC Code of Laws Section 44-38-20 defines head injury and spinal cord injury:

"**Head injury**" means an insult to the skull or brain, not of a degenerative or congenital nature, but one caused by an external physical force that may produce a diminished or altered state of consciousness which results in impairment of cognitive abilities or physical functioning and possibly in behavioral or emotional functioning. It does not include cerebral vascular accidents or aneurysms.

"**Spinal Cord Injury**" means an acute traumatic lesion of neural elements in the spinal canal resulting in any degree of sensory deficit, motor deficit, or major life functions. The deficit or dysfunction may be temporary or permanent.

Applying for Services

Because there are lengthy waiting lists at most local DSN Boards of people who have requested determination of eligibility for service coordination and other assistance through the Head and Spinal Cord Injury (HASCI) Division, DDSN now contracts with the South Carolina Services Information System (SCSIS) to provide a single point of intake and screening for all individuals seeking referral for services through the HASCI Division. The screening protocol used by SCSIS staff also provides people with additional information and referral to other critical agencies, relevant resources and consumer/family support organizations.

If you or a family member has severe disabilities as the result of traumatic brain injury (TBI) and/or spinal cord injury (SCI), you or the family member should contact SCSIS and request to be screened for referral to the HASCI Division.

SOUTH CAROLINA SERVICES INFORMATION SYSTEM
Toll Free: 1-800-922-1107
Columbia Area: (803) 935-5300

A person screened as appropriate for formal consideration of eligibility will be referred by SCSIS to the relevant local DSN Board. The person will be notified by mail that this referral has been made. This will include the name and telephone number of a contact person at the DSN Board.

If necessary, a waiting list of screened individuals will be maintained by the local DSN Board. People on the waiting list will be prioritized based upon referral date, urgency of needs, and whether DDSN can address the primary needs.

The DSN Board will initiate formal DDSN eligibility determination. The referred person will be contacted directly by staff from the DSN Board to begin this process. However, how soon this will happen depends upon whether there is a waiting list and the priority status of the referred person.

If there is a significant change in the condition or circumstances of a person with head or spinal cord injury who is already on a DSN Board waiting list, the person or family member should again contact SCSIS (at the above telephone numbers) and request another screening for referral to the HASCI Division. This may result in the person having different priority for formal eligibility determination by the DSN Board.

STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND** Protection and Advocacy for the People with Disabilities, Inc., M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M.; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S., Plaintiffs, v. South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs, Defendants.	**IN THE COURT OF COMMON PLEAS** Civil Action No. 07-CP-40-2187 **CERTIFICATE OF SERVICE**

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Defendants, does hereby certify that service of the Defendants' Responses to Plaintiffs' First Set of Interrogatories and Defendants' Responses to Plaintiffs' First Set of Requests for Production of Documents in the above-captioned action was made upon all counsel of record by placing same in

the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 17th day of December, 2008, addressed as follows:

C. Jo Anne Wessinger Hill, Esquire
Richardson, Plowden & Robinson, P.A.
1900 Barnwell Street
Post Office Drawer 7788
Columbia, South Carolina 29202

Shelley E. Stafford

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Protection and Advocacy for the People with Disabilities, Inc., et al., Plaintiffs, v. South Carolina Department of Disabilities and Special Needs, et al., Defendants.	)))))))))))	C/A No.: 2007-CP-40-2187 **AFFIDAVIT OF GLORIA M. PREVOST EXECUTIVE DIRECTOR OF PROTECTION AND ADVOCACY FOR PEOPLE WITH DISABILITES, INC.**

RICHLAND COUNTY
FILED
2010 MAY 11 AM 9:44
JEANETTE W. McBRIDE
C.C.P. & G.S.

PERSONALLY APPEARED before me, Gloria M. Prevost, who first being duly sworn, deposes and says that:

1. My name is Gloria M. Prevost and I am the Executive Director of Protection and Advocacy for People with Disabilities, Inc. (P&A). I have served in this position since 1997.

2. P&A is a nonprofit corporation headquartered in Columbia, South Carolina. P&A operates across the State of South Carolina.

3. P&A was established to protect and advocate for people with disabilities. P&A is mandated to investigate allegations of abuse, neglect or exploitation of people with disabilities and to ensure that the human and civil rights of people with disabilities are protected.

4. Due to the importance of the services provided under the administration of the Department of Disabilities and Special Needs (DDSN), P&A has made improving access to those services for people with disabilities a priority.

5. However, the lack of regulations within the developmental disability system in South Carolina harms the population DDSN is mandated to serve. P&A, and its clients, have been, are being, and will continue to be harmed as the direct result of those deficiencies, through denial of services for arbitrary and capricious reasons, inadequate services and unequal availability and quality of services, and lack of an appropriate and defined grievance procedure. All these matters affect the individual Plaintiffs' health, safety, well-being, their right to live and participate in their communities, and their ability to enjoy appropriate lifestyles.

6. Due to the lack of regulations in the developmental disabilities system administered by DDSN, applicants for or recipients of services do not have officially published information about many aspects of DDSN services, including:

a. eligibility for DDSN services;

b. when or how to appeal a denial of eligibility or services;

c. the standards for operation of the residential facilities within the developmental disabilities system operated by DDSN;

d. procedures and standards for human rights committees;

e. standards for research on human subjects, including how consent is obtained for research to be performed; and

f. how decisions about budget cuts are being made and whether those decisions are being made by the Commission or DDSN staff; whether those decisions are uniformly being applied; whether some groups of individuals with developmental disabilities are being impacted more than others;, and whether the decisions are being uniformly applied.

7. Due to the lack of regulations within the developmental disabilities system, in order to adequately represent its clients P&A must expend resources and time in attempting to figure out the "other means" referred to by Dr. Lacy to formulate rules at DDSN; to search for the rules themselves and to determine what criteria and standards apply to each case since there is often no notice of a change in the rules; and to ensure that those standards/criteria are up-to-date, that procedures are designed to protect people with developmental disabilities, and that they are applied fairly.

8. P&A has been injured by DDSN's failure to promulgate regulations.

So sayeth Affiant this the 11th day of May 2010.

Gloria M. Prevost

Gloria M. Prevost

SWORN to and Subscribed before me
this the 11th day of May 2010.

Maria M. Pleasant

NOTARY PUBLIC for South Carolina

My Commission expires: Oct. 15, 2018

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Protection and Advocacy for the People with Disabilities, Inc., et al., Plaintiffs, v. South Carolina Department of Disabilities and Special Needs, et al., Defendants.	)))))))))))	C/A No.: 2007-CP-40-2187 **CERTIFICATE OF SERVICE**

FILED
2010 MAY 11 AM 9:44
JEANETTE W. McBRIDE
C.C.P. & G.S.
COUNTY

The undersigned employee of Richardson, Plowden, & Robinson, P.A., attorneys for the Plaintiff, does hereby certify that service of the Affidavit of Gloria M. Prevost Executive Director of Protection and Advocacy For People with Disabilities, Inc., in the above-captioned action was made upon counsel of record by hand delivering the same at the below listed address, this the 11th day of May 2010 at 9:20 o'clock in the A.M.

Kenneth Woodington
William Davidson
Davidson & Linderman, PA
1611 Devonshire Drive, Second Floor
Columbia, SC

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Protection and Advocacy for the People with Disabilities, Inc., et al., Plaintiffs, v. South Carolina Department of Disabilities and Special Needs, et al., Defendants.	)))))))))))	C/A No.: 2007-CP-40-2187 **AFFIDAVIT OF LARRYE HYDE**

PERSONALLY APPEARED before me, Larrye Hyde, who first being duly sworn, deposes and says that:

1. My name is Larrye Hyde, and I reside at 5932 Main Street in Ravenel, South Carolina. I am over 18 years of age.
2. I also have a granddaughter and adopted daughter, who is 14 years old. (Hereinafter "daughter"). She has a full scale IQ of 63 and has been denied services from DDSN three times.
3. My daughter's current Axis II diagnosis is Cognitive Function in the Mildly Retarded Range. She also has an Axis I diagnosis of Bipolar Disorder, Severely Mood Dysregulated Type, Multi-dimensionally Impaired and generalized anxiety disorder. Her global assessment of function, or GAF score, is 30 out of 100.
4. My daughter has trouble with separation anxiety, rages, irritability, mood swings, distractibility, hyperactivity, impulsivity, restlessness, silliness, issues with her diet, depression, lethargy, low self-esteem, social anxiety, oversensitivity, night

PLAINTIFF'S EXHIBIT 1 5 pages

terrors, short term memory, disorganization, manipulative behavior, paranoia, and hallucinations. Because much of her background is unknown to us, we have little information as to the cause of these problems. More recently, she has developed Parkinson-like symptoms where the muscles in her arms and legs are rigid and she has trouble swallowing.

5. My daughter does not know how to make a telephone call, how to make her breakfast, how to wash clothes, how to get out of the house in an emergency. She knows her telephone number sometimes, but not her address. If she were lost, she would not know what to do. If she were frightened by her surroundings, she would most probably act out.

6. The first time I applied for DDSN services, our initial application, was the summer of 2009. I received a response that did not indicate why services were denied or what I needed to do to appeal. (Attachment 1) I called and asked how to appeal, and I was told that I could only appeal if I had new information and that my case had already been closed. When I was able to get more information on my daughter, I applied a second time with the new information. I did not receive a written response, but I was told that my daughter had been denied services.

7. This spring, Dr. Randolph Waid was able to complete a neuropsychological consultation evaluating my daughter and noted she had a WISC IV Full Scale IQ of 63, placing her at the first percentile. I applied for services again with this new report and my daughter was turned down. (Attachment 2). Again, when I called to ask about appealing, I was told that there was no point because she was not eligible and that her case had already been closed.

8. Because we were turned down for services by DDSN, presumably because my daughter's functioning is too high, we have applied for services from other agencies and entities. However, receiving services from other entities has been difficult because her functioning is too low to benefit from those services. For example, her processing ability is so poor that it is very difficult for her to benefit from therapy. Our daughter seems to fall through the cracks: IQ too high for DDSN, but too low for others.

9. In addition to DDSN denying services, my daughter has also been denied services from the following entities: MUSC Institute of Psychiatry, Palmetto Lowcountry Behavioral Health, and Continuum of Care. Each of these denials has been related to my daughter's low cognitive functioning and essentially an assumption that she will not show improvement through psychiatric treatment. However, we contest this assumption, and we are hopeful.

10. Even though Continuum of Care initially indicated that our daughter was too low functioning to benefit from their services, with help from P&A we have been able to become a client of Continuum of Care. Two P&A advocates have helped us and have attended multiple meetings, traveling from Columbia to attend.

11. Much of the treatment our daughter has been able to receive has been psychiatric treatment, which has had only limited success because of our daughter's difficulty understanding and applying what she learns in therapy.

12. Both my husband and I have nursing backgrounds. We have a biological child who has a developmental disorder and receives services from DDSN. In spite of our education, experience, and background, we have been unable to understand

why our daughter Josie is ineligible for services. We also have access to the internet and have been given a copy of the directive on eligibility. However, the directive specifically mentions that an IQ of below 70 is what is considered "mentally retarded." Furthermore, the directive offers little assistance on what is considered a related disability.

13. My husband and I love our daughter very much. It is very stressful to need so much help and to have so much trouble finding it. The lack of any official rules or regulations promulgated by DDSN that would notify, inform and advise me and others like me of DDSN's policies and procedures within the developmental disability system in South Carolina makes it very difficult to know where to turn. Continuum of Care has agreed to provide services, but their services do not continue into adulthood.

14. Our daughter will need help from an agency like DDSN when she cannot receive services from Continuum of Care and when we are no longer able to care for her. We have been harmed by the lack of regulations because we cannot ensure that services will be there for her in the future. We continue to be harmed as the direct result of those deficiencies, through denial of services for arbitrary and capricious reasons, inadequate services and unequal availability and quality of services, and lack of an appropriate and defined grievance procedure. All these matters affect our daughter's health, safety, well-being, her right to live and participate in the community, and the ability to enjoy appropriate lifestyles.

15. Due to the lack of regulations in the developmental disabilities system administered by DDSN, I do not have reliable information about many aspects of DDSN services, including but not limited to:

a. eligibility for DDSN services;

b. when or how to appeal a denial of eligibility or services;

c. how decisions about budget cuts are being made and whether those decisions are being made by the Commission or DDSN staff; whether those decisions are uniformly being applied; whether some groups of individuals with developmental disabilities are being impacted more than others; and whether the decisions are being uniformly applied.

16. Our daughter has been injured by DDSN's failure to promulgate regulations.

So sayeth Affiant this the 19 day of October, 2010.

Larrye Hyde

SWORN to and Subscribed before me
this the 19 of Oct. 2010.

C. Hollingsworth
NOTARY PUBLIC for South Carolina

My Commission expires: 1-3-13.

DOR-5

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
Protection and Advocacy for the People with Disabilities, Inc.; et al Plaintiffs, v. South Carolina Department of Disabilities and Special Needs, et al, Defendants.	)	C/A No.: 2007-CP-40-2187

RICHLAND COUNTY FILED
2013 OCT 17 PM 5:03
JEANETTE W. McBRIDE C.C.P. & G.S.

CERTIFICATE OF SERVICE

I, the undersigned employee of Richardson Plowden & Robinson, P.A., do hereby certify that I have served the **PLAINTIFFS' NOTICE OF AND MOTION TO ALTER, AMEND OR RECONSIDER JUDGMENT PURSUANT TO RULE 59(E), SCRCP** in the above-captioned matter upon all counsel of record this 17th day of October 2013, by hand-delivery to:

The Hon. G. Thomas Cooper, Jr.
SC Circuit Court
Richland County Judicial Center
1701 Main Street
Columbia, SC 29202

as well as by e-mail and by depositing a copy of same in the U.S. Mail, postage prepaid, addressed as follows on the parties indicated below:

William H. Davidson, II, Esq.
Kenneth P. Woodington, Esq.
Davidson Morrison & Lindermann, PA
P.O. Box 8568
Columbia, SC 29202
kwoodington@dml-law.com
wdavidson@dml-law.com

The Hon. G. Thomas Cooper, Jr.
S.C. Circuit Court
PO Box 192
Columbia, SC 29202
gcooperj@sccourts.org

Kathy J. Templeton

Kathy J. Templeton

October 17, 2013

'STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Protection and Advocacy for thePeople with Disabilities, Inc.; M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as Guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S., Plaintiffs, v. South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, and W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs, Defendants.	)	C/A No.: 2007-CP-40-2187 **MEMORANDUM IN IN OPPOSITION TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

RICHLAND COUNTY
FILED
2010 MAY 13 PM 1:47
JEANETTE W. McBRIDE
C.C.P. & G.S.

TO: WILLIAM H. DAVIDSON, II, ESQUIRE AND KENNETH P. WOODINGTON, ESQUIRE, ATTORNEYS FOR DEFENDANTS

The above-captioned Plaintiffs ("Plaintiffs"), by and through their undersigned counsel, submit this memorandum of law in opposition to the Defendant's motion for

summary judgment. See Rule 56, SCRCP. Based upon the arguments made herein and before the Court on May 13, 2010, the Defendants' Motion should be denied.

FACTS

The Department of Disabilities and Special Needs (DDSN) is a state agency created by statute. S.C. Code § 44-20-10 et seq. The governing body of DDSN is the South Carolina Commission on Disabilities and Special Needs (Commission). S.C. Code § 44-20-30(3). Protection and Advocacy for People with Disabilities, Inc., (P&A) is a private, non-profit corporation established pursuant to Federal and State law to advocate for the rights of people with disabilities. Complaint, ¶ 1. The individual Plaintiffs in this lawsuit are individuals with disabilities who either receive services from DDSN or have applied for services with DDSN and been denied services. Complaint, ¶¶ 2, 14-36.

DDSN has promulgated regulations regarding licensing, DDSN Reg. § 88-105, day programs, DDSN Reg. § 88-405, recreational camps, DDSN Reg. § 88-310, and unclassified facilities and programs, DDSN Reg. § 88-105. DDSN has not promulgated regulations regarding matters of concern to the Plaintiffs and the public including but not limited to such important matters as eligibility for services; appeal procedures; standards for the operation of residential programs; procedures for its Human Rights Committees (HRCs); and standards for research on human subjects. Complaint, ¶ 7.

DDSN issues directives which are comparable to "policy[1]." See, Deposition of Dr. Kathi Lacy (Lacy), p. 25 (Dr. Lacy is the Associate State Director of Policy at

[1] These directives are now posted on DDSN's website but only after a request from P&A. Defendants' Responses to Plaintiffs' First Set of Requests for Production of Documents, Letter from James Hill to Steve Hamm. p. 2. ("DDSN will add its directives to the website by the spring of next year.") The directives are available at the following link: http://www.ddsn.sc.gov/about/directives-standards/Pages/default.aspx.

DDSN, p. 24). *Sloan v. South Carolina Bd. of Physical Therapy Examiners*, 370 S.C. 452, 636 S.E.2d 598, (2006) (Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law. When the action or statement "so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion," then it is a binding norm which should be enacted as a regulation.); *Home Health Service, Inc. v. South Carolina Tax Com'n*, 312 S.C. 324, 440 S.E.2d 375 (1994); *Ryder Truck Lines, Inc. v. U.S.*, 716 F.2d 1369 (C.A.Ga.,1983); S.C. Code Section 1-23-10(4). These directives are to communicate policy to the public, and are the closest promulgation of official agency action as DDSN has regarding the issues raised in the complaint. See Lacy Deposition, p. 27. They change frequently. See Lacy Deposition, p. 38. The Director of DDSN is responsible seeing that directives are consistent with the policy of the Commission. See Lacy Deposition, p. 37. The process regarding how the Director, the directives, and the Commission interact is not the subject of a Directive and is subject to change without prior notice. *See* See Lacy Deposition, p. 38-39. No regulation governs the process of issuing directives. See Lacy Deposition, p. 38. The directives are not published in the State Register. See Lacy Deposition, p. 40-42. The complaint alleges that these policies or directives may change or they may be enforced uniformly without exception or they may be enforced sporadically. *See* Complaint ¶¶ 46 -48, See Lacy Deposition, p. 167 (The "directive on directives" requiring a 30 day period of time prior to the implementation of a new directive, as will be more fully discussed below, is not binding on DDSN.).

In fact, the Defendants have not promulgated regulations, requested public comment, or held public hearings regarding issues of critical concern to applicants and

recipients of its services. Those issues include but are not limited to eligibility for services; appeal procedures; standards for the operation of residential programs; procedures for its Human Rights Committees; and standards for research on human subjects. Complaint, ¶ 38. These policies and procedures are only available through DDSN's website and are subject to change at any time.

DDSN does not have a regulation or a directive stating a policy to not promulgate regulations, nor has the issue been discussed by the Commission in a public setting. See Lacy Deposition, p. 92-93. Dr. Kathi Lacy, Associate State Director of Policy, and Dr. John Vaughn, former Commissioner, testified in their depositions that DDSN has not considered promulgating regulations in their memory. See Lacy Deposition, p. 165, Deposition of Dr. John Vaughn (Vaughn), p. 160-161. The reasoning given by Dr. Lacy for not promulgating regulations was that DDSN is not required to promulgate regulations. See Lacy Deposition, p. 87, 89, 92, 93,193. Also, Dr. Lacy testified that her experience is that it is difficult to get regulations to be approved by the Legislature.[2] See Lacy Deposition, p. 111. Dr. Vaughn testified that regulations are despised by the public. See Vaughn Deposition, p. 120. He also testified that anything that should be in a regulation had been "covered already." See Vaughn Deposition, p. 149-150.

OVERVIEW OF PLAINTIFFS' ARGUMENT

The Plaintiffs allege that Defendants have violated South Carolina Code §§ 44-20-220, 44-26-180 (1976, as amended), and the Administrative Procedures Act (APA), S.C. Code §§ 1-23-10, et seq. (Complaint ¶ 6.) Section 44-20-220 of the South Carolina

[2] Dr. Lacy was part of a subcommittee attempting to get a DHEC law changed "and we got nowhere through the legislative process by promulgating regulations. And I explained to that subcommittee that DDSN could have handled that request instantly by changing a contract or a directive." See Lacy Deposition, p. 111.

Code of Laws specifically states that "[t]he commission shall determine the policy and promulgate regulations governing the operation of the department and the employment of professional staff and personnel." S.C. Code § 44-26-180 requires DDSN to promulgate regulations "to obtain informed consent and to protect the dignity of the individual" with regard to research. This statutory language is mandatory and requires Defendants to promulgate regulations including those regarding issues of critical concern to Plaintiffs. (Complaint ¶¶ 6, 7.)

In addition to violating sections 44-20-220 and 44-26-180, Plaintiffs allege that Defendants have violated the APA. Complaint ¶¶ 6, 18, 42, 46-48. The General Assembly enacted the APA to provide a standardized process for all public agencies to formulate rules in order to invite and obtain public comment and to provide access to agencies' operations as well as an avenue for appellate review of administrative decisions. Instead of following the APA, the Defendants have circumvented the APA by using "other means." "Other means" is the term the Defendants use to describe the way they take action as a state agency. Memorandum in Support of Defendants' Motion for Summary Judgment (Memorandum), p. 1 ("Plaintiffs would prefer state agency action to occur by regulation rather than by other means."). The "other means" is how DDSN creates rules of general applicability without promulgating the rules as regulations.

Further, the decision to use "other means" is not only contrary to the law, but is also arbitrary and without a rational basis. The Defendants' failure to comply with the requirements of the direct mandates of the General Assembly has resulted in South Carolina citizens and entities being unable to find most of DDSN's policies in the Code of Regulations, unable to clearly determine their rights to receive or dispute DDSN

decisions, and unable to participate in the public rule-making process as intended by the General Assembly. The Plaintiffs have been, are being, and will continue to be harmed as the direct result of those deficiencies, through denial of services for arbitrary and capricious reasons, inadequate services and unequal availability and quality of services, and lack of an appropriate and defined grievance procedure. All these matters affect the individual Plaintiffs' health, safety, well-being, their right to live and participate in their communities, and their ability to enjoy appropriate lifestyles. Defendants are not entitled to judgment as a matter of law. The extent to which Defendants have violated the law and the extent to which Plaintiffs are entitled to relief are questions of fact before the Court.

ARGUMENT

A. STANDARD OF REVIEW

Summary judgment is a drastic remedy and "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Watson v. Southern Ry. Co.*,420 F.Supp. 483, 486 (D.S.C.1975); *see also Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986). Summary judgment should be invoked cautiously to avoid improperly denying a party a trial on the disputed factual issues. *Dawkins v. Fields*, 345 S.C.23, 27, 545 S.E.2d 515, 517 (Ct.App.2001) (citing *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)). Summary judgment should only be granted when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ. *Trico Surveying, Inc. v. Godley Auction Co.*, 314 S.C. 542, 431 S.E.2d 565 (1993); see, also *Dawkins v. Fields*, 345 S.C.23, 27, 545 S.E.2d 515, 517 (Ct.App.2001) (citing Rule 56(c), SCRCP; *Quality Towing, Inc. v. City of*

Myrtle Beach, 340 S.C. 29, 33, 530 S.E.2d 369, 371 (2000)) (Summary judgment is proper where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law).

Summary judgment should not be granted even when there is no dispute as to the evidentiary facts if there is dispute as to the conclusions to be drawn from those facts. *Dawkins v. Fields, at 28,* 545 S.E.2d at 517 (citing *Piedmont Engineers, Architects & Planners, Inc. v. First Hartford Realty Corp.*, 278 S.C. 195, 196, 293 S.E.2d 706, 707 (1982)). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Id.* at 28, 545 S.E.2d at 518 (citing *Bishop v. South Carolina Dep't of Mental Health*, 331 S.C. 79, 85, 502 S.E.2d 78, 81 (1998)); see also, *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 443 S.E.2d 392 (1994) (To determine whether an issue of fact exists, the court must view the evidence and all its inferences in a light most favorable to the nonmoving party). "Summary judgment should be invoked cautiously to avoid improperly denying a party a trial on the disputed factual issues." *Id.* (citing *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)).

B. SECTIONS 44-20-220 AND 44-26-180 REQUIRE DDSN TO PROMULGATE REGULATIONS

The relevant sections of the South Carolina Code requiring DDSN to promulgate regulations affecting the work of P&A and the lives of individual Plaintiffs are as follows:

> 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.

S.C. Code § 44-26-180.

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

S.C. Code § 44-20-220.

In interpreting whether these statutes impose a mandatory duty on the Defendants to promulgate regulations, the Court should apply the quintessential rule of statutory construction: determine the intent of the Legislature. *SCANA Corp. v. South Carolina Department of Revenue*, 348 S.C. 388, 393, 683 S.E.2d 468, 470 (2009). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *State v. Sweat*, 386 S.C. 339, 350-51, 688 S.E.2d 569, 575-76 (2010)(quoting *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000)). The plain language of sections 44-20-220 and 44-26-180 create a mandatory duty on Defendants to promulgate regulations. The South Carolina Court of Appeals recently held "[u]nder the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement." *Bradley v. Doe*, 374 S.C. 622, 634, 649 S.E.2d 153, 160 (S.C. App. 2007).

1. **S.C. Code § 44-26-180**

Defendants do not deny that DDSN is mandated to promulgate regulations "to obtain informed consent and to protect the dignity of the individual" with regard to participating in research. S.C. Code § 44-26-180. Also, DDSN does not allege that they have promulgated a regulation on informed consent or to protect the dignity of the individual. Defendants argue that "the Complaint alleges no facts at all with reference to research on human subjects." Defendants' Memorandum in Support, p. 5. The complaint does allege that the issue of "research on human subjects" is of "critical concern" to the plaintiffs. Complaint, ¶ 7. The complaint asserts that the lack of regulations will affect the health and safety of the plaintiffs and requires P&A to expend resources and time on attempting to figure out the "other means" being used to formulate rules at DDSN. Complaint, ¶ 9, 10. The complaint also alleges that Plaintiffs have been denied an opportunity to participate in the rule-making process, as intended by the APA. Complaint, ¶ 8.

Plaintiffs do not need to allege anything more specific because the lack of regulations may have limited Plaintiffs' ability to allege more specific facts. As illustration, the statute requires a regulation on consent. There is not a regulation explaining how consent is obtained. Therefore, Plaintiffs do not have an opportunity to address whether consent is adequately obtained for human research. This lack of access to the rules is one of the issues raised in the complaint. Defendants' choice to violate the statute makes it difficult for Plaintiffs to know what is happening with regard to human research and impossible to make more specific allegations in the Complaint.

The national protection and advocacy system, of which P&A is a part, was established in response to abuses of people with intellectual and other developmental disabilities.[3] Some of these abuses were of human subject experimentation. P&A, as the mandated advocate for people with disabilities, has a strong interest in knowing whether individuals are subject to research without adequate informed consent. DDSN's failure to promulgate regulations about Human Rights Committees, which review abuse, neglect, use of psychotropic drugs, and similarly important matters, raises similar issues.

2. S.C. Code § 44-20-790

Defendants argue that section 44-20-790 only pertains to hearings when an operator's license is suspended, denied or revoked. Defendants' Memorandum in Support, p. 5. Defendants claim that the Plaintiffs do not have standing under this section. S.C. Code § 44-20-790 states: "The procedures governing hearings authorized by 'Notice of Deficiencies . . .' must be **in accordance with regulations promulgated** by the department." (emphasis added). Plaintiffs do not allege that they are operators; however, this section supports Plaintiffs' argument regarding the interpretation of section 44-20-220. This section assumes that regulations have been promulgated. "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *Sweat*, 386 S.C. at 350-51, 688 S.E.2d at 575-76 (quoting *Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992)). "A statute should be so construed that no word, clause, sentence, provision or

[3] While current best practice refers to individuals receiving services from DDSN as people with intellectual or developmental disabilities, the General Assembly has not changed DDSN's name.

part shall be rendered surplusage, or superfluous." *Id.* at 351, 575 (quoting *In re Decker,* 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995)).

Section 44-20-780 discusses the procedures that govern the hearings for deficiencies for licensees. Section 44-20-790 assumes that there are other regulations that also deal with hearings besides only hearings related to deficiencies. The regulations referred to in section 44-20-790 must be those promulgated under section 44-20-220. The reference to hearings in section 44-20-790 indicates the legislature's intent that regulations, relating to hearings, will be promulgated under section 44-20-220. The plain intent of the statute is that the hearings for operators should be consistent with the regulations governing hearings for non-operators, in other words for recipients of services or those who have been denied eligibility.

3. S.C. Code § 44-20-220

Again, the Defendants agree that section 44-20-220 has mandatory language requiring them to promulgate regulations. Defendants argue that they are only required to promulgate regulations relating to the "operations of DDSN." They argue that the term "operations" only refers to the "internal" operations of DDSN, and that such internal operations, even if directed by regulations would not affect the Plaintiffs. Plaintiffs disagree.[4] Plaintiffs assert that the term "operations" relates not only to the internal operations, but to any function of DDSN. The term "operations" is not defined by the statute and, therefore, is to be interpreted according to its dictionary meaning. *Estate of*

[4] Even assuming that the Defendants are correct in their interpretation of "operations," such regulations could impact the Plaintiffs. For example, a grievance procedure would be an internal operation, and would allow the Plaintiffs access to a review process for complaints.

Nicholson v. SCDHHS, 377 S.C. 590, 596, 660 S.E.2d 303, 305 (citing Lee v. Thermal Eng'g Corp., 352 S.C. 81, 91-92, 572 S.E.2d 298, 303-304 (Ct. App. 2002). An operation is a method or way of operating. To operate is to function or to act. *The American Heritage Dictionary*, 594, 4th Ed. Boston: Houghton Mifflin (2001). The function or operations of DDSN, like the function of DDSN's enabling statute, are "to assist persons with mental retardation, related disabilities, head injuries, or spinal cord injuries by providing services to enable them to participate as valued members of their communities . . . ." S.C. Code § 44-20-20 (Purpose of Chapter).

The Defendants attempt to argue that the clause after operations, "the employment of professional staff and personnel" indicates that the term operation is internal[5]. Defendants' interpretation makes the second clause regarding employment superfluous. No phrase in the statute is to become superfluous through interpretation. *Sweat*, 386 S.C. at 351, 688 S.E.2d at 575. If Defendants were correct that "operations" only refers to internal operations, then the employment of staff would be part of the "internal operation." Clearly, the statute does not say "the operation of the department, including the employment of staff." Instead, the statute says operations *and* the employment of professional staff and personnel. S.C. Code § 44-20-220.

The last two sentences in section 44-20-220 offer further support of Plaintiffs' interpretation of the statute. Defendants argue that "is authorized to" promulgate

[5] DDSN has not promulgated any regulations about criteria for hiring or other matters relating to professional staff and personnel. The directives list contains matters as substantial as admitting and discharging individuals from residential programs (Directive 502-01-DD) and as minor as proper use of the internet (Directive 367-09-DD). The Directives are available at: http://www.ddsn.sc.gov/about/directives-standards/Pages/CurrentDDSNDirectives.aspx.

regulations is not the same as "shall promulgate regulations."[6] While this portion of the statute is not clearly mandatory, it is also not clearly permissive. The section does not say "may promulgate regulations," as the Defendants imply. Because the language is ambiguous, the statute must be read as a whole. The last sentence of section 44-20-220 states: "In promulgating these regulations, the commission must consult with the advisory committee of the division[7] for which the regulations shall apply." S.C. Code § 44-20-220. That sentence must be read with the preceding sentences. The last sentence indicates the intent of the legislature, because the sentence assumes regulations will be promulgated. "'A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.' *Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992). In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992)." *Sweat*, 386 S.C. at 350, 688 S.E.2d at 575. When looking at the entire DDSN enabling statute as a whole, clearly DDSN is mandated to promulgate regulations on matters that affect the lives of the Plaintiffs and the individuals whom P&A is mandated to protect. Both sections 44-20-

[6] Defendants cite to a Seventh Circuit case interpreting the language "is authorized to" with relation to the Attorney General's decision to not promulgate regulations. The Court held that the language was ambiguous in that it did not say "shall promulgate regulations" or "may promulgate regulations" but "is authorized to promulgate regulations." *Scalise v. Thornburgh*, 891 F.2d 640, 644 (7th Cir. 1989). Because the language of the statute was ambiguous the Court looked to the legislative history of the case to determine the intent of the Congress in the drafting of the legislation. *Id.* at 644 (FN 5).

[7] These advisory committees as discussed in the statute, do not exist. *See* See Vaughn Deposition, p. 132-133.

220 and 44-20-790 assume that significant regulations would be promulgated by Defendants.

Promulgating regulations is standard agency procedure for matters affecting health and safety. For example, the Department of Health and Environmental Control has regulations for numerous types of residential facilities, e.g. Community Residential Care Facilities. DHEC Reg., 61-84. The is no reason whatever that persons who live in one type of facility should have the protection of duly promulgated regulations while others, such as people who live in DDSN-funded residences, do not.

As a matter of law, DDSN is required to promulgate regulations and has not. The extent to which DDSN must promulgate regulations is still an issue before the Court. At best, Defendants' arguments only go to the extent that DDSN must promulgate regulations, not to their duty to do so. Defendants' arguments raise issues of fact; not an entitlement to judgment as a matter of law.

C. THE APA PROHIBITS RULE MAKING BY "OTHER MEANS"

The statutory language relating to DDSN and the Commission indicates the clear intent of the legislature that DDSN is to promulgate regulations. When read as a whole and interpreted according to the plain meaning of the words, rather than any imposed or stretched meaning, clearly Defendants are required to promulgate regulations. However, even assuming Defendants are not required to promulgate regulations, the "other means" they use to implement their statutory responsibilities and to determine official agency action violates the law. See Bazzle v. Huff, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995)("An administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose.").

1. **Does the APA create a General Obligation to Promulgate Regulations?**

The Defendants assert that the APA, in and of itself, does not create a requirement to promulgate regulations.[8] The Defendants' reliance on the case of *Consolidated Aluminum Corp. v. Tennessee Valley Authority* is misplaced. In *Consolidated Aluminum* the statute at issue expressly noted that the procedures for the sale of land did not have to be promulgated as regulations.[9] 462 F. Supp. 464, 475 (M.D. Tenn. 1978)

The South Carolina Attorney General issued an opinion regarding similar issues for another state agency charged with the duties of providing, developing, and delivering services to severely emotionally disturbed children and youth. Like DDSN, Continuum of Care did not promulgate its established policies for eligibility for consideration of service. S.C. Op. Att'y Gen., Nov. 7, 1990, 1990 WL 599340. The opinion explained the necessity of regulation, both generally, and in accordance to specific statutory authority. "As to the necessity of a state agency generally and the Continuum of Care

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[8] Defendants note "that there is no constitutional duty to promulgate regulations." Memorandum in Support, p.3, fn 2. However, individuals harmed by agency action or lack of action have a constitutional right to both substantive and procedural due process. S.C. Const. Art. 1, § 3; U.S. Const., Amend. XIV. If the agency action affects the substantial rights of an individual and is done in an arbitrary or capricious faction, the agency has violated the individuals' right to substantive due process. *Worsely Companies v. Town of Mt. Pleasant*, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000); *see Anco, Inc. v. State Health and Human Serv. Fin. Comm'n*, 300 S.C. 432, 443, 388 S.E.2d 780, 787 (1989) ("Substantive due process protects a person from being deprived of life, liberty or property for arbitrary reasons. To withstand a substantive due process analysis, the statute must be rationally related to the accomplishment of a legitimate governmental interest.")

[9] The actual quote in its entirety is as follows: "Section 552 of Title 5, United States Code, requires publication in the Federal Register of procedures and rules of procedure which an agency has actually adopted concerning matters relating to public property or contracts. It does not, however, require an agency to adopt such **procedures**; and a court cannot create duties in this regard which are not imposed by statute, particularly since the 'rule making section of the APA, s 553, manifests a clear legislative intent to permit Ad hoc decision making in the distribution of public property.'" *Consolidated Aluminum Corp. v. Tennessee Valley Authority*, 462 F. Supp. 464, 475 (M.D. Tenn. 1978)(emphasis added).

specifically adopting regulations, see §§ 1-23-140 and 20-7-5620 respectively." The opinion indicates that section 1-23-140 creates a general requirement for state agencies to issue regulations. *Id.* at 2. The Continuum subsequently promulgated regulations. COC Reg., 31-10.

2. **Individual Adjudication or Promulgating Rules through Regulation**

Defendants cite the case of *National Small Shipments Traffic Conference, Inc. v. I.C.C.* to support their contention that they are not required to promulgate regulations. 725 F.2d 1442 (D.C. Cir. 1984). *National Small Shipments* involved the highly regulated trucking industry. The Interstate Commerce Commission (ICC) regulates the industry and sets the rates associated with the costs of transporting goods. One of the rates set by the ICC is the cost of handling shipments on platforms. The controversy arose relating to an allocation of smaller sized shipments (namely, should smaller sized shipments pay more per pound than larger sized ones because they require more handling). *Id.* at 1445. The issue surrounding the costs allocation had a long and litigious history, but the ICC eventually decided to settle the debate through regulation. *Id.* at 1446-47. The Petitioners in the case argued that the agency should have resolved the issue through individual adjudication[10] rather than through duly promulgated regulations. *Id.* at 1447. The Court explained the appropriateness of each option:

> Absent specific statutory instructions, the proper focus in determining what procedures apply is on the nature of the administrative task at hand. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 14:4 (2d ed. 1980). Trial-like procedures are particularly appropriate for retrospective determination of specific facts about individual parties. In certain cases, due process may even require such procedures. Notice-and-comment

[10] In *National Small Shipments* the individual adjudications were investigatory proceedings conducted by the ICC. 725 F.2d at 1447.

> procedures, on the other hand, are especially suited to determining legislative facts and policy of general, prospective applicability.

Id. at 1447-48 (citations omitted); *see also* Atty. Gen. Ltr. P. 2 ("In performing its important functions . . . an administrative agency must be equipped to act either by general rule or by individual order.")

Plaintiffs' complaint alleges that the Defendants have not provided a method for individual adjudication before the agency, nor have they properly promulgated rules, through the notice and comment procedures in the APA. Complaint, ¶¶ 36, 46. For example, with regard to eligibility determinations, Defendants have not promulgated regulations nor have they provided a method to adjudicate cases individually through an internal or external hearing or "trail-like" process. Instead the agency has used "other means" to establish rules that apply "community-wide" without the notice or comment procedures that are laid out in the APA.

Other agencies have managed to promulgate regulations allowing for individual adjudication through the administrative process. For example, the regulations adopted by the South Carolina Department of Social Services and the South Carolina Department of Health and Human Services demonstrate that regulations can be adopted for a specific hearing system and other procedures. Social Serv. Reg. 114-100 et seq.; SCDHHS Reg. 126-150 et seq. In sharp contrast, DDSN attempts to avoid both judicial review by not establishing an administrative review process, and legislative review by not promulgating regulations. DDSN acts through "other means."

3. **Concepts of Notice and Fairness**

The second case cited by the Defendant, *Pulido v. Heckler*, provides additional support for Plaintiff's arguments. The case was a successful class action to compel the

Secretary of Health and Human Services ("Secretary") to promulgate regulations regarding paying travel expenses to enable disability claimants to attend administrative hearings. 758 F.2d 503, 504-505(10th Cir. 1985). The Secretary defended against the action by saying that while she had the authority to promulgate the regulations, she was not obligated to do so by the statute. *Id.* at 506. The Tenth Circuit construed the statute broadly to require the Secretary to promulgate regulations. *Id.* at 506. Part of the reasoning for the interpretation went to the need to inform the claimants of their rights. *Id.* at 506-507. The Tenth Circuit noted two examples of how the absence of regulations harmed the individual claimants:

> FN2. Plaintiff John Cary is a case in point. The informal policy of the Secretary is to advance funds where reasonable and necessary. However, he was not advanced funds to make the trip from his home in Cheyenne Wells to the hearing location in Denver, a distance of some 166 miles. Because he did not have the funds to make the trip, he could not attend the hearing to which he was statutorily entitled, and because the advance of funds is not governed by a formal rule plaintiff had no recourse against the Secretary. *Cf.* *Morton v. Ruiz*, 415 U.S. 199, 231-32, 94 S.Ct. 1055, 1072-73, 39 L.Ed.2d 270 (1974).
>
> FN3. The procedure for informing claimants is, at best, inconsistent. It appears that claimants are told of the right to reimbursement, if at all, only after the hearing is over. *See, e.g.*, Record, vol. 1, at 94-95, 147. Such notice is of no help to those who lack funds to travel to the hearing at all. Contrary to the allegations of the defendant, the internal agency guide that is currently used to determine the right to travel expenses does not serve the function of informing the public. The guide is not published in the federal register, and there is no evidence that it is available to the public. In addition, this guide "is not a regulation, it has no legal force, and it does not bind the SSA." *Schweiker v. Hansen*, 450 U.S. 785, 789, 101 S.Ct. 1468, 1471, 67 L.Ed.2d 685 (1981).

Plaintiffs' situations are analogous to these. Without regulations to inform individuals of their rights with regard to eligibility and other issues, Plaintiffs are subject to rules that can change in any way, at any time, without being given an opportunity for formal participation through the State Register. Plaintiffs do not have meaningful notice

of the rules nor access to the rule-making process. Defendants contend that Plaintiffs have an opportunity to comment on directives posted on its website. This opportunity, however, can be revoked at any time, and is of no assistance to an individual without access to the internet.

4. **Rules of General Applicability That Create Binding Norms**

While the federal cases Defendants cite are good examples and offer guidance on why DDSN should promulgate regulations (or at least provide a method for individual adjudication through regulations), they are not directly relevant to South Carolina. The South Carolina APA controls the regulatory process. First, section 1-23-140 states that, "[n]o agency rule, order or decision is valid or effective against any person or party, nor may it be invoked by the agency for any purpose until it has been made available for public inspection as required by this article and Article 2." Second, section 1-23-40 requires that, "[a]ll regulations promulgated or proposed to be promulgated by state agencies which have general public applicability and legal effect" be filed with the Legislative Council and published in the State Register. Third, section 1-23-10 defines "regulation" as "each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency." Fourth, these regulations, or rules of "general public applicability and legal effect" are not to be "valid against a person who has not had actual knowledge of it until the document or regulation has been filed with the office of Legislative Council, printed in the State Register and made available for public inspection as provided by this article." S.C. Code § 1-23-60. Finally, if DDSN promulgated regulations, the Plaintiffs would have availability of relief under section 1-23-150, giving those affected by the rules of an agency an opportunity to

receive a declaratory ruling from the agency, and to petition to the Circuit Court for relief from the rule. Defendants should not be allowed to circumvent the APA by simply not promulgating their rules, and instead creating general rules of applicability, creating binding norms through "other means."

In *Home Health Service, Inc. v. South Carolina Tax Commission*, the South Carolina Supreme Court looked at when a rule violated the APA because it established a rule of general applicability without being promulgated as a regulation. 312 S.C. 324, 440 S.E.2d375 (1994). *Home Health Service* involved a bingo operator and whether the operator could allow an employee to temporarily sit in for a player "during the player's absence from the game." *Id.* at 326, 377. While the Court did not find that the policy issued by the Tax Commission was a rule of general applicability, establishing a binding norm, the Court cautioned the Tax Commission against circumventing the regulation process:

> Whether a particular agency proceeding announces a rule or a general policy statement depends upon whether the agency action establishes a binding norm. Ryder Truck Lines, Inc. v. United States, 716 F.2d 1369 (1983). In our view, the document issued was similar to a policy statement as opposed to a binding norm given that the document was not issued by the commissioners and thus, no final agency approval had been given. Therefore, we do not find that the APA was violated in this instance. We caution respondent that when there is a close question whether a pronouncement is a policy statement or regulation, the commission should promulgate the ruling as a regulation in compliance with the APA (emphasis added).

Id. at 328-29, 378.

In the case of *Sloan v. South Carolina Board of Physical Therapy Examiners*, the Supreme Court, again sends a warning to agencies who wish to circumvent the APA. 370 S.C. 452, 636 S.E.2d 598 (2006). *Sloan* involved the ability of a physical therapist to

be employed by a doctor, who will refer patients to her. The Board had endorsed an opinion by the Attorney General that such employment arrangements violated S.C. Code § 40-45-110(A)(1). *Id.* at 476, 611.

> Under the line of federal cases we relied on in *Home Health Service,* courts have held that whether an agency's action or statement amounts to a rule-which must be formally enacted as a regulation-or a general policy statement-which does not have to be enacted as a regulation-depends on whether the action or statement establishes a "binding norm." When the action or statement "so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion," then it is a binding norm which should be enacted as a regulation. But if the agency remains free to follow or not follow the policy in an individual case, the agency has not established a binding norm. *Ryder Truck Lines, Inc. v. U.S.*, 716 F.2d 1369, 1377-78 (11th Cir.1983) (citing cases).

Id. at 475-476, 610; s*ee also, S.C. Coastal Conservation League v. South Carolina Dept. of Health and Environmental Control*, 363 S.C. 67, 74-75, 610 S.E.2d 482, 485-486 (2005)(A regulation failed for vagueness because it did not include a test to determine what "small" was; the test had to be promulgated by regulation.); *Puritt v. SCDHHS*, Admin. Law Ct. 06-ALJ-08-0605-AP fn 7 (2008)(Agencies have been warned that "policies attempting to establish a 'binding norm' should be promulgated as regulations.").

Whether the directives issued by DDSN create binding norms is an issue of fact raised by the complaint. For example, the complaint alleges that DDSN has created a binding norm by determining that DDSN will not serve individuals with Asperger's Syndrome or Pervasive Developmental Disorder, regardless of their particular functioning or the need for DDSN's expertise. Whether the agency has established a binding norm with regard to some of its policies is a question of fact.

5. **Defendants' Action Is Without a Rational Basis**

"The court may reverse or modify the decision [of an agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are . . . arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code § 1-23-380. "A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Deese v. South Carolina State Board of Dentistry,* 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct.App. 1985)(citing *Hatcher v. South Carolina District Council of Assemblies of God, Inc.,* 267 S.C. 107, 226 S.E.2d 253 (1976); *Turbeville v. Morris,* 203 S.C. 287, 26 S.E.2d 821 (1943)).

The decision to not promulgate regulations is without a rational basis. As Dr. Lacy and Dr. Vaughn testified, DDSN simply does not promulgate regulations. See See Lacy Deposition, p. 165; See Vaughn Deposition, p. 148-150. No course of reasoning or exercise of judgment has occurred, because the Commission has not even discussed the issue. See Lacy Deposition, p. 92-93; See Vaughn Deposition, p. 150. It is the pleasure of the agency, because it is easy. No fixed rules or standards apply to when the agency will promulgate regulations and when it does not. The agency does not even have a process for individual consideration of situations where regulation may not be necessary. The only reasoning for the decision in the current record is the opinion of Dr. Lacy that promulgating regulations is "ineffective" and Dr. Vaughn's opinion that the public despises them. See Lacy Deposition, p. 111, See Vaughn Deposition, p. 120. Plaintiffs

have alleged that Defendants' actions are arbitrary and Defendants have offered no contrary proof.

CONCLUSION

Plaintiffs' case is simple. DDSN, as a state agency, must comply with the mandatory language of its own enabling statute and with the APA, even if the agency disagrees with the APA process. DDSN has abused its discretion by refusing to make a reasoned decision about the need for its policies to be regulations. DDSN refused Plaintiffs' request made pursuant to [section about requesting promulgation; possibly attach letter] . Plaintiffs are not attempting to tell DDSN what to say in their regulations. Instead, Plaintiffs are asking the Court to order the Defendants to promulgate regulations in compliance with their own enabling legislation and the APA. The defendants do not even deny that they are mandated to promulgate regulations. Defendants' motion should be denied because they are not entitled to judgment as a matter of law, and the extent to which they must promulgate regulations is still an issue before this Court.

Respectfully submitted this 13th day of May, 2010.

Steven W. Hamm
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ATTORNEYS FOR PLAINTIFFS

Columbia, South Carolina
May 13, 2010

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF RICHLAND
PROTECTION AND ADVOCACY
FOR THE PEOPLE WITH
DISABILITIES, INC., ET. AL,
Plaintiffs,
vs. CASE NO. 07-CP-40-2187
SOUTH CAROLINA DEPARTMENT
OF DIABILITIES AND SPECIAL
NEEDS, ET. AL,
Defendants.

DEPOSITION OF: KATHI M. LACY

DATE: July 9, 2009

TIME: 9:30 a.m.

LOCATION: Law Offices of
Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: L. Skyler Hare,
Court Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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Charlotte, NC (704) 573-3919

Q. And I don't say this disrespectfully, are you the policy guru for DDSN?

A. Well, it's my title.

Q. All right. And that's why I'm asking.

A. I'm not sure if I'm a guru or not but I -- but I have that title, yes.

Q. So if you have that title, do you have ownership of the creation of policy?

A. Part of the distinction between the policy directive is that the Commission is ultimately responsible, that's the Board of Directors, so to speak, to DDSN. And the Commission really sets forth the policy and the direction for the agency. And the directives are the instruments used to communicate that policy to DDSN, its network of providers, our customers, their family, the public.

Q. In terms of these directives, you've told me that they describe the expectation of DDSN for the services received by your -- you use the word "customer" and you talked about providers and so forth. Help me understand how you understand what the policy is of the Commission.

A. There are a couple ways, one is through the Code of Laws, it sets up the department. And

A. As far as I can remember, I was at the May one also.

Q. Okay. Well, let me make it easier. I'm not -- going back in relatively recent time, when did you miss?

A. I missed one this year.

Q. Okay.

A. I'm not sure what month it was.

Q. Okay. And that was just simply reflection of you can't be more than one place --

A. I was on vacation.

Q. Oh, good.

A. I was on vacation.

Q. Good for you. Good for you.

So I'm very intrigued by these directives and I'm -- and you just told me that the Commission doesn't formally -- they don't -- let me rephrase. Do you have a practice of submitting the directives to the Commission for approval?

A. No.

Q. So if they're not directly approved by the Commission, who are the directives approved by?

A. The State Director.

Q. Okay.

A. And whoever originated the document.

Q. Okay. Well, how -- help me understand how it is that you as the Associate State Director of Policy would know that a directive, in fact, comported with the wishes of the Commission?

MR. WOODINGTON: Object to the form.

THE WITNESS: Through the State Director.

BY MR. HAMM:

Q. Okay. And I say this respectively so I'm not being a smart aleck. So the State Director serves as the filter for whatever the Commission is thinking. And if the State Director is happy with a directive, that's where it stops.

MR. WOODINGTON: Object to the form.

THE WITNESS: Directives are changed frequently so and the process used to get information from our customers and their families and other stakeholders is incorporated into the document. And one of the Commission policies is to ensure that we are being responsive to consumers and their family's needs.

Q. Is there a checklist or a chart that you must consult in constructing a directive?

A. Those kinds of things don't exist anywhere.

Q. So the Commission establishes policy, you report to the Director -- let me make sure I'm clear of what you're telling me. As the Associate State Director of Policy, do you have ownership of all directives so that they're consistent with whatever the so-called policy is?

MR. WOODINGTON: Object to the form.

THE WITNESS: To a certain agree, yes.

BY MR. HAMM:

Q. Okay. Are you telling me that -- well, let me asked it another way: Have you created a directive that says we're going to make sure every directive meets the following standards and is there a document that says, all right, here's the directive and here's what we've got to make sure every directive does and I'm going to make sure they meet that. I think I just heard you say, no, Steve, that's just not how we do things; is that a fair characterization?

A. I mean, I've worked in different sectors that it just -- yeah, it just doesn't work that way. There's not a manual for creating policy. You can learn about what components and, you know, what needs to be included in policy, what doesn't need to be included in policy, what might need to be

more of a guideline or a principle. So there's, you know, things that you learn, you know, through your education and experience that help you shape policy.

Q. So to the extent that an individual is not in your position or is indeed not even employed by DDSN, they might not know about the consideration, construction, or adoption of a directive; is that correct?

A. Can you rephrase it?

Q. I'll be happy to.

A. Yeah.

Q. Let's just use me. I don't work for DDSN. I have developed a great interest in your fine organization. I want to say that. And I want to know about directives that are under consideration, how would I learn that?

A. Through the Web site.

Q. All right. Now -- but the Web site as I understand it reflects directives that have been adopted; is that correct?

A. No, it also reflects directives that are undergoing review or new directives.

Q. All right. Now, have you all done a determination that all of the individuals served by DDSN have computers and access to the DDSN Web site?

A. No, I would say not everybody does.

Q. Okay. So to the extent that I don't have a computer, what notices do you send out to potentially affected parties that you are considering a directive that might either change or eliminate some service I'm currently receiving?

MR. WOODINGTON: Object to the form.

THE WITNESS: Directives don't eliminate services, first of all, so I can't answer the question the way it was phrased.

BY MR. HAMM:

Q. All right. Well, let me just phrase it another way.

You just told me that I don't ever need to worry, no directive has ever eliminated a current existing service.

A. Correct.

Q. All right. Has a directive ever changed the standards or eligibility by which a service might be received?

A. The eligibility directive has undergone revision.

Q. Okay.

A. Yes, just like the other directives.

Q. Okay. Let me -- let's go back to what

I was just saying.

A. Okay.

Q. I -- I live in Laurens, I don't have a computer. Someone in my family is the recipient of services from DDSN, I don't know about the Web site. What -- what is the policy that ensures that a directive that might change or alter my son or daughter's eligibility, how do I -- what is the procedure and policy to make sure I know about it?

A. Well, there's all kinds of vehicles that are used. We used advocacy organizations to communicate that to people. We have our service coordination system.

Q. What does that mean?

A. These are people that work directly with our customers and that they are responsible for ensuring that people, you know, are informed about services and how best to meet their needs, options that might be available to them, things of that nature.

Q. Is there a -- how do you know that that's taken place? Is there a directive that says, that someone could report to you, is there a form that I would know, I'm in Laurens, how is it that you know that that communication with an advocacy

any.

A. Uh-huh.

Q. So I'm trying to understand if the Commission has never even under their minutes discussed policies through regulations, I'm trying to understand how it is that you as the head of the office of policy have been guided with regard to the use of regulations when the Commission's minutes don't reflect any discussion on that issue.

MR. WOODINGTON: I object to the form of that --

BY MR. HAMM:

Q. That's fine, you have to answer. Go ahead and answer.

A. Since I've been at DDSN, the practice has been and the interpretation of the state statue has been that the issuance or promulgation of regulations is permissible but not required. And --

Q. There has been a change in the composition of the Commission.

A. Yes.

Q. Remind me how many -- are there seven members of the Commission?

A. Yes.

Q. And am I correct that, what, there's

Q. All right. Have you had that conversation with the -- Dr. Laurent, the new Director?

A. Dr. Laurent did -- we did have a conversation about that.

Q. All right. Tell me about that conversation.

A. I just told him what my understanding was of the state statute.

Q. And that understanding is what?

A. It that the promulgation of regulations is permissible.

Q. Okay. And who decides -- who decides what the policy is with regard to DDSN with regard to how they create policies? Is that you or the Commission?

A. Of how policies are created?

Q. Yes.

A. The only policies that we have are created by the Commission.

Q. Okay. But you told me you don't have a process of having the Commission review and approve directives, right?

A. That's right.

Q. And you've told me that you had not had

Q. Okay. Turn to Page 2, if you would, Kathi, and question No. 1. Would you read into the record the question No. 1, please.

A. "The minutes of any meetings of the Commission including but not limited to executive sessions and meetings of any board committees, members, subcommittees, support groups from the period from 1993 through present regarding discussion of the promulgation of regulations of the criteria for the promulgation of regulations or any decision whether or not to promulgate regulations."

Q. Okay. And would you read -- you're welcome to read all of it -- the only thing that I think is relevant but I leave that -- you have a Ph.D -- I think the relevant answer is contained in the subsection C as in cat. Would you read that.

A. "To the best of counsel's knowledge after due investigation, there are no minutes of board committees, members, subcommittees, support groups that relate to the discussion of promulgation of regulations, the criteria for the promulgation of regulations or any decision whether or not to promulgate regulations. If such documents are subsequently located, they will be made available promptly unless privileged in which case the

privileged law will be supplied."

Q. Okay. Now, this document was provided in response dated December the 17th, 2008.

A. 17th, yes.

Q. Okay. Since December the 17th of 2008, do you, as we're sitting here today, are you aware of any discussion regarding the criteria for the promulgation of regulations or any decision whether or not to promulgate regulations?

A. With the Commission?

Q. Yes.

A. No.

Q. This is telling me that since 1993, the minutes of the Commission show that it was not an issue ever put before them to decide one way or the other; is that correct?

A. Yes.

Q. Okay. So help me understand --

MR. WOODINGTON: Could we go off the record for a second?

MR. HAMM: Sure.

(Off-the-record conference.)

BY MR. HAMM:

Q. Hello again.

A. We're on the record.

mean, I've experienced times where we've tried to use the regulatory process to no avail. In fact, Ms. Gloria Prevost in this room has been part of a subcommittee where we were trying to get DHEC law changed and we got nowhere through the legislative process by promulgating regulations. And I explained to that subcommittee that DDSN could have handled that request instantly by changing a contract or a directive.

So I've been involved in times where the regulatory process is ineffective, it's not time sensitive and it's -- you know, our process that we have in place gives the entire public, the nation really, an opportunity to comment at any time on any of our directives.

Q. But we've already -- we've already established that you don't have a procedure or a directive to deal with folks that may not have access to the Internet, correct?

A. That is correct.

Q. Okay. And you've already told me that you don't publish notices of potential changes in directives and anything in newspapers, you don't do it in the documents. What's the state -- and you don't do it in the State Register, correct?

Q. Well, you haven't thought about it in such a way that, okay, Steve, I've thought about and I reached the following conclusions. Again, I'm not trying to put words in your mouth but I think that's what I heard you say and if I'm wrong --

A. Well, my job is to follow what, you know, the State Director asked me to do.

Q. Right.

A. Based on what he gets from the Commission.

Q. Okay.

A. And so the assumption there is that we were following the wishes of the Commission since there have been no promulgation of regulation issued since I've been at the department.

Q. Okay. And when you -- of course you've been at the department since 1996, is that the time frame you're referencing?

A. Well, I also worked there previously.

Q. Okay. So at least since '96, then, your answer would apply?

A. Yeah.

Q. Let's now talk about the enforceability of a directive.

A. Okay.

feedback, a minimum of 30-calendar days will be default, and I understood in an earlier question that you couldn't change it without that 30-days. That that was the minimum time period before the directive on directives would allow a directive to be changed.

A. That's the -- that's the typical -- that's the routine.

Q. Okay.

A. That directives have been issued without -- under a 30-day period of time.

Q. In less than 30 days?

A. Yeah.

Q. So this directive when it says a minimum of 30-calendar days will be the default is, in fact, not a final and binding position for DDSN?

A. Right.

Q. Okay. So to the extent that someone thought they had 30 days and saw this --

A. It would be posted with the directive so that they would know they had under 30 days if we did that.

Q. Okay. And you just told me you have done that.

A. I believe we have sent one out that --

we are wrong.

There's plenty of opportunity for that. And I'm not saying that if our Commission didn't want us to promulgate regulations that I would say try to talk them out of it. I mean, that's a decision that they get to make.

What I'm saying is that when I read the Code, it is permissible. And that we do have other ways and that is what I think our Commission has chosen to do via the vehicle of my State Director in asking me to continue to write policies, directives, service standards, et cetera. The federal government accepts it. They're a major source of funding. Usually when you're funding agency likes what you're doing, you're in pretty good shape.

The Medicaid Agency looks at all of our level of care determinations where a diagnosis of mental retardation with a disability issues and we're in 100 percent compliance. So we've got somebody else looking over our shoulders to ensure that how we're interpreting and applying our own policies are being followed.

Q. You've mentioned contracts and you've mentioned directives, help me just --

A. Service standards, manuals.

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF RICHLAND CASE NO. 07-CP-40-2187

PROTECTION AND ADVOCACY FOR
PEOPLE WITH DISABILITIES, INC., ET AL.,

Plaintiffs,

vs.

SOUTH CAROLINA DEPARTMENT OF DISABILITIES
AND SPECIAL NEEDS, ET AL.,
Defendant.

DEPOSITION OF: JOHN C. VAUGHN

DATE: April 26, 2010

TIME: 11:06 a.m.

LOCATION: Law Offices of Richardson,
Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiffs

REPORTED BY: Susan M. Valsecchi, RPR, CRR
Certified Realtime Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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sorry.

A. No, that's all right.

Q. Do you think it's a bad idea for the commission, as a matter of policy, to enact regulations that would eliminate this controversy about eligibility standards referenced in state law?

MR. WOODINGTON: Object to the form of the question.

BY MR. HAMM:

Q. Go ahead and answer.

A. I think you're describing a utopian concept that is not verified in reality. Regulations are almost universally despised by the general public. And regulatory behavior is usually used as the reason government can't work; so let me elaborate on that.

Q. Go ahead.

A. I don't believe that it's a realistic everyday response outside -- pardon me -- the legal community -- to suggest that these proposed regulations would eliminate the pain of these suffering people.

Q. If they eliminated even part of it, would that be a good thing?

educating the public and so on.

It says, then 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 and spinal cord injuries. In promulgating these regulations, the commission must consult with the advisory committee of the division for which the regulation shall apply.

So as a commission, we look at this and think, all right, there are two types of regulations that are mentioned here. There's a promulgation of regulations governing the operation of the department and employment of professional staff and personnel. We covered those things in these policies.

Now we come down here and it says, if we're going to promulgate regulations about the kinds of concerns that you have asked me about today, then in order to promulgate those regulations, we must consult with advisory committees.

Q. Did you do so?

A. We're trying to determine who these

advisory committees are and are they the ones that are being discussed in the next paragraph.

Q. Is that a matter of which the commission has asked for a legal opinion from the attorney general or anyone else so that you'll know what that construction is?

A. We asked for clarification on it.

Q. You asked for clarification from whom?

A. We asked the staff to find clarification. I talked to my senator and said, we need some help on this, and I think that the statute is going to have to be looked at.

Q. Let me -- let's go back to the very first sentence.

A. Well, okay, but there's one more factor I want to point out.

Q. Go ahead.

A. In Paragraph 225, the governor shall appoint a seven-member consumer advisory board with the advice and consent of the senate for each of those same divisions that were mentioned above.

Now we're thinking, okay, we've got 220 and then we've got 225. Is there a 221, 23, 24? I mean, maybe not. We're not lawyers here. All we have is what we have in front of us. Was something

Now, with respect to those things that you asked me about, I believe that these permitted regulations are the ones that you're asking for.

BY MR. HAMM:

Q. Okay. Look at 44-20-230. Read the first sentence of that, please.

A. Right. I have no problem with that.

Q. All right. During your service, in fairness to you, you can't be responsible for anything that did or didn't happen before you got there.

A. Uh-huh.

Q. Did you ever have a conversation discussing what a regulation might or might not entail in order to make a decision, no, we don't need a regulation?

A. Did I have a conversation?

Q. Yes.

A. Yes.

Q. With who?

A. Hmmm. I can't ask him.

MR. WOODINGTON: If it's with a lawyer, he can state that it's with a lawyer and that's --

MR. HAMM: Well, if that's his answer. Let me wait. I have no idea what he's liable to

say, Ken.

THE WITNESS: I honestly don't remember who I talked to, but I do know what answer I was given. And I know every time I asked about regulations -- and my questions about regulations always followed public statements demanding regulations by someone who was in the media, not a commissioner, but there would be an attorney or someone else there who would come on --

MR. WOODINGTON: Excuse me. You may be talking about some other attorney, but I don't want you to say anything that a DDSN attorney or Will Davidson said to you.

THE WITNESS: No, no, no. It wouldn't be. No, it wasn't them.

BY MR. HAMM:

Q. Or anything that's said in an open meeting is not --

A. Somebody would say in an open meeting, why doesn't DDSN have any regulations? Okay? And then there would be a discussion and the explanation would be given that all of these issues are covered by statute, or something like that.

And then there would be some interaction, you know, among commissions or staff

or somebody later about, what's the deal on this thing with regulations? And the answer would be given, there's nothing that's not covered already.

Q. Well, in looking at the minutes, I never saw anything where the commission actually addressed the exact question that we have decided, as a matter of policy, that we're not going to use regulations implementing our statutes. I didn't find that. Do you know something I don't know?

A. So you're saying that there's nothing in the minutes where we decided we were not going to have regulations?

Q. Yes.

A. Well, that would be correct, but we wouldn't write down every statement that was made by somebody who was attending a meeting as a part of the public.

Q. Did you ever -- were you ever told by staff that the appeal or eligibility process was not part of the governing the operation of the department?

MR. WOODINGTON: Object to the form of the question.

THE WITNESS: Staff --

MR. WOODINGTON: You're talking about

authority even if they don't have it, right?

A. Then they should be held to account and --

Q. And who holds the executive director of DDSN accountable?

A. The commission is charged with that responsibility.

Q. Does this lawsuit in your mind reflect that some people do not believe the commission held him accountable?

A. It seems to indicate that.

Q. And can you appreciate that people of good faith might reach that conclusion?

A. Apparently they did.

Q. Okay. I've asked you this, but I want to make sure I'm clear about it, as we get ready to go into another area:

Did you ever receive, as a member of the commission, a presentation, legal or otherwise, about regulations and whether or not the commission or the staff should try to avoid them?

A. I don't know. I don't remember any statement or presentation indicating that they were taboo.

Any statements that I'm recalling were

in the vein of, nobody is in danger, let's work on this other thing. I mean, in other words, that's covered, let's get these other things -- let's take first things first kind of approach. In other words, let's get our policies straightened out and then we'll get into these other layers.

Q. And first things first is --

A. -- policy.

Q. 15 years after the statute is enacted, we don't have everything done, first things first; so before we're going to turn to regulation, we're going to do first things first in 2005 on a statute enacted in 1990.

MR. WOODINGTON: Object to the form of the question.

THE WITNESS: I came on in 2005. I found this in the middle of 2006. We got it changed by the first of 2007. We were moving, is my point. I don't think it would have taken us another 17 years to get it done.

But if I may interject a ministerial comment, the Lord's will be done, and He raises it up and He puts down and we serve and we do the best we can.

Q. Amen.

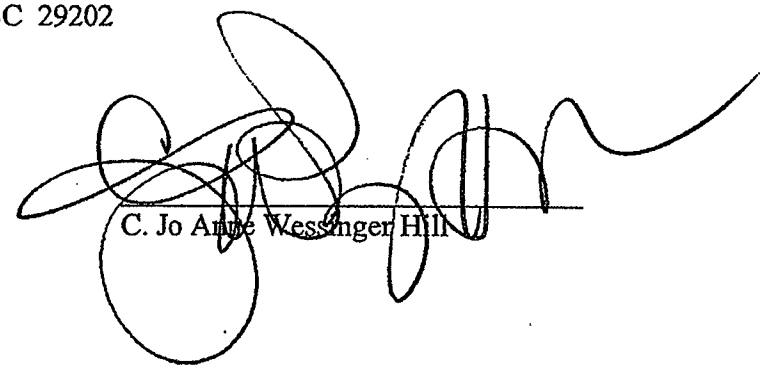
STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF RICHLAND)	Civil Action No.: 2007-CP-40-2187
Protection and Advocacy for the People with Disabilities, Inc.; M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as Guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S.,	
Plaintiffs,	
v.	
South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, and W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs,	CERTIFICATE OF SERVICE
Defendants.	

FILED
2010 MAY 13 PM 1:47
JEANETTE W. McBRIDE
C.C.P. & G.S.

I, the undersigned attorney of the firm of Richardson Plowden and Robinson, P. A., attorneys for the Plaintiffs, do hereby certify that I have served the foregoing Plaintiffs'

Memorandum in Opposition to Defendants' Motion For Summary Judgment by hand delivery to Defendants' counsel at the hearing at the Richland County Courthouse on May 13, 2010:

William H. Davidson, II
Kenneth P. Woodington, Esq.
1611 Devonshire Drive, Second Floor
PO Box 8568
Columbia, SC 29202



C. Jo Anne Wessinger Hill

May 13, 2010

Columbia, South Carolina

STATE OF SOUTH CAROLINA 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.	IN THE COURT OF COMMON PLEAS Civil Action No. 07-CP-40-2187 **REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Defendants submit this Reply Brief in response to the Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment that was filed and served on May 13, 2010, the day of the scheduled hearing on the Motion for Summary Judgment. Defendants respectfully submit that Plaintiffs have not provided any evidence that would suggest that a factual dispute is present, and that Plaintiffs likewise have not offered any valid legal argument that is consistent with the plainly non-mandatory language of § 44-20-220, the primary statute at issue. Plaintiffs also attempt to assert claims under other statutes, but they have made no suggestion that they fall within the situations addressed in those statutes. As a result, Plaintiffs lack standing to make certain of their claims, as set forth below. For all of these reasons, summary judgment should be granted for the Defendants.

ARGUMENT

1. No statute requires the promulgation of regulations in the situations described in the Complaint.

Defendants' primary argument in this case has been, and remains, that the plain language of the statute pertaining to regulations by DDSN in certain situations is permissive, rather than mandatory, as related to the subject areas to which Plaintiffs' claims are related. This is shown by the language of the statute itself, which provides that with respect to the agency's mission, "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." § 44-20-220. *See, e.g., Scalise v. Thornburgh*, 891 F.2d 640 (7th Cir. 1989), which holds that the language that an agency "is authorized to" promulgate regulations does not create a mandatory duty to do so. Defendants have already presented their statutory construction arguments in their initial brief in support of the motion, so will not reiterate them here.

Dr. Kathi Lacy, who is the person at DDSN normally responsible for policy directives, testified in her deposition that the portion of § 44-20-220 that contains the mandatory "shall . . . promulgate regulations governing the operation of the department and the employment of professional staff and personnel" refers to "how we operate internally as an organization and the employment of professional staff and personnel." Lacy Deposition, p. 234, lines 15-18.[1] Dr. Lacy also testified that the part of the same statute which provides that commission is authorized to promulgate regulations to carry out the provisions of this chapter and other laws related to mental retardation," etc., was

[1] Defendants assume that Plaintiffs have supplied this deposition to the Court, since their brief refers to it. If not, Defendants will supply a copy to the Court on or before the argument date.

"permissive language." Lacy Deposition, p. 235, lines 8-12. Dr. Lacy also testified that since at least the mid-1990's, when she was employed by the agency at a policymaking level, the practice had been not to promulgate regulations in the areas covered by the language "is authorized to" in § 44-20-220. Specifically, she testified that "Since I've been at DDSN [i.e., since the early 1990's], the practice has been and the interpretation of the state statue has been that the issuance or promulgation of regulations is permissible but not required." Lacy Deposition, p. 87, lines 15-18; *see also,* Lacy Deposition, pp. 100-101, 105, 193. As this testimony indicates, the agency has regarded the subject language as permissive, but not mandatory, ever since the statute was enacted in the early 1990's.. It is well settled, of course, that the construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons. .*See, e.g., Bursey v. South Carolina Dept. of Health and Environmental Control,* 369 S.C. 176, 186, 631 S.E.2d 899, 905 (2006).

Defendants would note that the 1990 Attorney General's opinion cited by Plaintiffs, 1990 WL 599340, is completely inapposite. The statute therein referenced (now superseded, but attached as Exhibit A hereto) provided that the agency "shall promulgate regulations." That language was clearly mandatory. For the same reason, Plaintiffs' reliance on *Pulido v. Heckler*, 758 F.2d 503 (10th Cir. 1985), is misplaced, because the statute in that case also contained the mandatory language "shall adopt reasonable and proper rules and regulations." 758 F.2d at 506 (emphasis added).

It should also be noted that as a purely practical matter, such limited harm as is claimed by Plaintiffs, especially as set forth in the recently-filed Prevost Affidavit, is

simply not present. In that Affidavit, Ms. Prevost asserts that "applicants for or recipients of services do not have officially published information about many aspects of DDSN services." Prevost Affidavit, Paragraph 6. It is not clear what is meant by "officially published information," but there is no question that DDSN has made extensive publication on its website of approximately 120 DDSN Directives, which set forth agency policy and guidance on a wide range of subjects. A copy of the top page, with links to the Standards and Directives, all of which are available online, is attached hereto as Exhibit B. Paragraph 7 of the Prevost Affidavit suggests that P & A is required to spend undue time trying to determine DDSN's position on certain aspects of its mission, but this claim is simply not credible in light of the easy online access to all of DDSN's standards and directive. Thus, while DDSN is not required to promulgate regulations with respect to most aspects of its mission, it has nevertheless made its standards and directives available for convenient public access.

2. Plaintiffs have shown no harm to themselves as a result of the absence of regulations pertaining to informed consent for research on human subjects.

As Defendants have previously argued, 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.

Plaintiffs' brief makes no improvement on this failure to show harm to them. Even assuming, without conceding, that Plaintiff P & A would have standing to assert a claim on behalf of a person within the defined class of those it may represent, there still must be a showing that such a person exists and has suffered injury as a result of the

actions of the Defendants. Thus, for instance, in *Doe v. Stincer*, 175 F.3d 879 (11th Cir. 1999), an advocacy group similar to P & A was deemed 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"). For exactly the same reasons, the Court need not consider P & A's claim relating to the informed consent statute, because no instance of individual harm has been shown.

Nor does has Plaintiff P & A shown any standing in its own right. P & A asserts, via Affidavit of Gloria Prevost, Paragraph 8, that "P&A has been injured by DDSN's failure to promulgate regulations." This completely conclusory statement 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. The Prevost Affidavit is also devoid of any allegations pertaining to any specific individual.

3. Plaintiffs have shown no harm to themselves with regard to § 44-20-790, the statute pertaining to regulations governing hearings that may be requested after notices of deficiencies in a program or operation.

Plaintiffs still maintain that they have a claim under § 44-20-790, which 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 As the Defendants have previously argued, none of the Plaintiffs 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.

4. Plaintiffs' argument pertaining to a "binding norm" is without factual support.

Although this action has been pending for approximately three years, Plaintiffs had never argued until their recently-filed brief that DDSN has created a "binding norm" by means other than a regulation. Pl. Mem. Opp. 19-21. While this argument is not really even hinted at in the Complaint, the point will be addressed herein, because it is without factual support in any event.

The only specific claim that Plaintiffs make with respect to an alleged "binding norm" is their claim that "DDSN has created a binding norm by determining that DDSN will not serve individuals with Asperger's Syndrome or Pervasive Developmental Disorder, regardless of their particular functioning or the need for DDSN's expertise." This is simply an incorrect statement of fact. As set forth in Paragraph 4 of the Lacy Affidavit (Exhibit C, attached), DDSN, beginning in 2007 and 2008, has established a Pervasive Developmental Disorder (PDD) Program that has both state and federal

funding, and that covers individuals with Asperger's Syndrome as well. Defendants advised of this in Paragraph 21 of their Answer, filed in December 2007.

Aside from the above factually-incorrect claim regarding Asperger's Syndrome or Pervasive Developmental Disorder, Plaintiffs have neither pled nor proven any other instances of a DDSN policy that they claim has created a binding norm, much less given any reasons why such a policy might create a binding norm. It is the burden of the Plaintiffs, of course, to produce facts that support their claim. In addition, when a party moves for summary judgment, as the Defendants have done in this case, Rule 56(e) provides that the nonmoving party's "response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Plaintiffs have not shown any specific facts showing a genuine factual issue, even though the Defendants' Motion for Summary Judgment and the brief in support of it were filed a year and a half ago. As a result, the Court should not accord any credence to this late, factually unsupported, argument by Plaintiffs.

5. DDSN's actions were consistent with the permissive nature of § 44-20-220, and therefore were taken with a rational basis.

Plaintiff's final argument is that "the decision not to promulgate regulations is without a rational basis." Pl. Mem. at 22. However, as set forth above, the statute simply does not mandate that regulations be promulgated in the areas of most concern to the Plaintiffs, and as a result, it is completely rational for the agency to elect not to promulgate them.

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that their motion for summary judgment should be granted, and that this case should be dismissed with prejudice.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

By:

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ATTORNEYS FOR DEFENDANTS

Columbia, South Carolina

May 28, 2010

EXHIBIT A

Former §20-7-5620 (part of Act No. 95 of 1989)

(referenced in 1990 Attorney General's Opinion cited by Plaintiffs)

South Carolina General Assembly
108th Session, 1989-1990

Bill 3414

Current Status

Bill Number:	3414
Ratification Number:	150
Act Number	95
Introducing Body:	House
Subject:	Continuum of care for emotionally disturbed children

View additional legislative information at the LPITS web site.

(Text matches printed bills. Document has been reformatted to meet World Wide Web specifications.)

(A95, R150, H3414)

AN ACT TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING ARTICLE 23 TO CHAPTER 7, TITLE 20, SO AS TO PROVIDE FOR THE CONTINUUM OF CARE FOR EMOTIONALLY DISTURBED CHILDREN BY SETTING FORTH ITS PURPOSES AND PROVIDING FOR BOARD MEMBERS, MEETINGS, AN ADVISORY COUNCIL, THE CHILDREN TO BE SERVED, DUTIES AND FUNCTIONS, DIRECTOR AND STAFF EMPLOYMENT, REPORTS TO THE GOVERNOR AND GENERAL ASSEMBLY, AND ADMINISTRATIVE SUPPORT; TO REPEAL CHAPTER 83, TITLE 44, RELATING TO THE CONTINUUM OF CARE FOR EMOTIONALLY DISTURBED CHILDREN; AND TO PROVIDE FOR THE INITIAL TERMS OF THE COMMISSION AND ADVISORY COUNCIL AND INITIAL APPOINTMENT OF A PARENT OF A CHILD CURRENTLY RECEIVING SERVICES FROM THE CURRICULUM.

Be it enacted by the General Assembly of the State of South Carolina:

Continuum of care for emotionally disturbed children

SECTION 1. Chapter 7, Title 20 of the 1976 Code is amended by adding:

"Article 23

Continuum of Care for Emotionally Disturbed Children

* * *

Section 20-7-5620. (A) The South Carolina Continuum of Care for Emotionally Disturbed Children Board is created to serve as the governing board for the Continuum of

Care. The board consists of five members knowledgeable in services to emotionally disturbed children. One member must be appointed by the Governor from each Continuum of Care region, as determined by the Continuum of Care, upon the recommendation of the chairmen of the Joint Committee on Mental Health and Mental Retardation and the Joint Legislative Committee on Children, with the advice and consent of the Senate.

(B) The term of office for the board members is four years and until their successors are appointed and qualify. The terms expire on June thirtieth of the appropriate year. A vacancy must be filled by the Governor for the remainder of the unexpired term, with the advice and consent of the Senate.

(C) The board shall elect from its members a chairman for a term of two years. Three members constitute a quorum for the transaction of business. The board shall meet at least six times annually and more frequently upon the call of the chairman to review and coordinate its activities. Members shall receive per diem, subsistence, and mileage as provided by law for members of state boards, commissions, and committees while engaged in the work of the board.

(D) The board [redacted] in accordance with this article and the provisions of the Administrative Procedures Act and formulate necessary policies and procedures of administration and operation to carry out effectively the objectives of this article.

EXHIBIT B

Online index to DDSN Directives and Standards

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Proposed DDSN Directives
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DDSN Standards

Current DDSN Standards

Proposed DDSN Standards

Attachments to Directives

SUB-CATEGORIES OF DIRECTIVES:

For convenience, DDSN Policies and Directives are organized under general numeric categories as follows:

100-General Administrative, Community Education, Legal

200-Fiscal, Internal Audit, Community Contracts

300-Engineering, Services and Supplies, IT

400-Human Resource Management

500-SCDDSN Services, STS, Advocacy, Staff Development

600-Regional Services and Programs

700-Community Services and Programs

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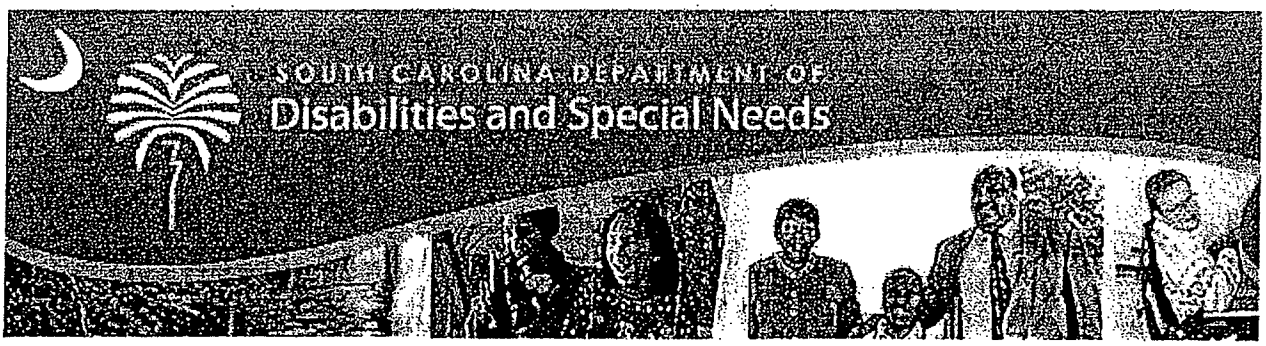

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Current DDSN Directives

Current DDSN Directives
You are welcome to comment on any current d
Click on the "Send comment" link to the right of the Direc

Title of Document

Commission Policies

SCDDSN Ends Policy

SCDDSN Governance Process Policy

SCDDSN Executive Limitations Policy

SCDDSN Commission Staff Linkage Delegation

SCDDSN Public Invocation Act

SCDDSN Commission By-Laws

Departmental Directives

Absence with Leave of District Director or Facility Administr from Duty Station

Acceptable Use of Network Services and the Internet

Accounts Receivable Collection Policy

Acquiring Information Technology (IT) Products and Servic

Admissions/Discharge of Individuals To/From DDSN Fund Community Residential Settings

Advance Directives

AIDS Policy

Alcohol and Drug-Testing for Employees with Commercial D License and Safety-Sensitive Employees

Annual Certification of Electrical, Mechanical, Fire Alarm a Sprinkler Systems for Renewal of Licensure

Appeal and Reconsideration Policy and Procedures

Appeal Procedure for Licensed Programs Serving Persons v Mental Retardation

Aquatics Program at DDSN-Operated Facilities

Behavior Support Plans

Calculation of Room and Board for Non-ICF/MR Program

Central Office Telephone Call Coverage Backup Policy

Certification in First Aid and Cardiopulmonary Resuscitatic

Community Capital Funding Applications

Community Residence Maintenance Management Contra Requirements

Competency to Stand Trial Evaluations

Compliance with Title VI of the Civil Rights Act of 1964, Ameri with Disabilities Act of 1990, Age Discrimination Act of 1975 Section 504 of the Rehabilitation Act of 1975 and Establishm a Complaint Process

Computer Data Security

Concerns of People Receiving Services: Reporting and Reso

Confidentiality of Client Records

Consumer Elopement

Consumer Involvement with Criminal Justice System

Contacts with Agency Heads of Other State Departments Constitutional Offices and Certain State Government Execut

Copy Costs--Freedom of Information Act

Cost Principles for Grants and Contracts with Community Providers

Criminal Record Checks and Reference Checks of Direc Caregivers

Critical Incident Reporting

DDSN Employee of the Year

DDSN Waiting Lists

Death or Impending Death of Persons Receiving Services F DDSN

Dental Treatment for Uncooperative Consumers

Departmental Affirmative Action Plan for Equal Employme

Diet Manual for the Department of Disabilities and Special N

Disaster Preparedness Plan for DSN and Other Agencie providing Services to Persons with Disabilities and Special n

Discharge Planning for Those Leaving ICFs/MR and Enrollir the Mental Retardation/Related Disabilites (MR/RD) Waiv

Do Not Resuscitate (DNR) Operational Guideline

Dual Relationships

Educational Credentials

Electronic Communications System

Eligibility Diagnostic Criteria, Screening and Intake Processe Eligibility, and Appeal Procedures

Employee Grievance Procedure

Employee Health Requirements

Employee Orientation, Pre-service and Annual Training Requirements

Employee Performance Management System Policy

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Energy Management Systems Operations and Parameter

Establishing and Filling Personnel Positions

Ethics Committees-Regional Centers

Exceptional Service Coordination for Persons with Disabilitie Special Needs in Alternative Residential Placement

Fair Labor Standards Act

Family Involvement

Federal Grant Application and Change Policy

Fees for Residential Services Provided by SCDDSN

Financial Management of Personal Funds

Freedom of Information Requests

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Guidelines for Screening for Tuberculosis

Human Rights Committee

ICF/MR Conversion Protocol

Immunization Procedure for Regional Centers

Implementation Procedures for the Internal Communicatio System

Individual and Family Support Stipend - State Funding

Individual Clothing and Personal Property

Individual Clothing and Personal Property-Regional Cente

Individual Service Delivery Records Management

Individual Travel at Regional Centers

Individuals' Funds Maintained at Residential Level

Insuring Informed Choice in Living Preference For Those Res in Community Intermediate Care Facilities for the Mentall Retarded (ICFs/MR)

Latex Protocol for Regional Centers

Levels of Service Coordination

Maintenance of Physical Plant

Management of Funds for Individuals Participating in Commu Residential Programs

Management of Individuals Exposed to Potential Bloodbor Pathogens

Media and Publication Policies

Medication Error/Event Reporting

Medication Technician Certification

Missing Property Reporting

Monitoring Psychopharmacologic and Antiepileptic Medicatio Side Effects

Naming of Facilities, Building Dedications and Groundbreaki

National Voter Registration Act (Motor Voter)

Obtaining Consent For Minors and Adults

Outlier Funding Request System - Capitated Funding Syst

Physical Management

Pilot Services or Programs

Policy for Management of Occupational Exposures of Health Personnel to Potential Bloodborne Pathogens

Preventing and Responding to Disruptive Behavior and Cri Situations

Preventing and Responding to Suicidal Behavior

Procedures for Implementation of SCDDSN Provider Audit P

Procedures for Preventing and Reporting Abuse, Neglect, Exploitation of People Receiving Services from DDSN or Contract Provider Agency

Procedures for Providing Genetic Services in DDSN Regio Facilities

Procurement Requirements for Community Local DSN Boa

Proprietary Software

Quality Management

Reduction-In-Force Policy

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Relatives/Family Members Serving As Paid Caregivers of Ce Medicaid Waiver Services

Relatives/Family Members Serving As Paid Caregivers of Re Services

Review and Approval of Research Involving Persons Recei
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Disabilities and Special Needs

Risk Management Program

SCDDSN Certification & Licensure of Residential and Da
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Sexual Assault Prevention, and Incident Procedure Follow-

Shift Differential Policy

Short-Term Admission Services in a Regional Center or
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Social-Sexual Development

Standards of Disciplinary Action

State Director's Absence from Office

State Service Award Program

Supervision of People Receiving Services

Tardive Dyskinesia Monitoring

Telephone Policy

Teri and Retiree Employment

Travel Regulations

Use of Adaptive Behavior Scales

Use of Consultants

Use of Regional Center Facilities by Outside Groups and Off-
Employees

Vaccination Information

Vehicle Management Program

Voluntary Contributions and Donations

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Contact DI

EXHIBIT C

Affidavit of Kathi Lacy

STATE OF SOUTH CAROLINA 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.	IN THE COURT OF COMMON PLEAS Civil Action No. 07-CP-40-2187 **AFFIDAVIT OF KATHI LACY**

Personally appeared before me, Kathi K. Lacy, duly sworn, who deposes and says the following:

1. I am over 21 years old and am personally familiar with the matters set forth herein.

2. I am employed as the Associate State Director, Policy at the South Carolina Department of Disabilities and Special Needs ("DDSN"), and have held that position since May 2002.

3. Plaintiffs have claimed that "DDSN has created a binding norm by determining that DDSN will not serve individuals with Asperger's Syndrome or Pervasive Developmental Disorder, regardless of their particular functioning or the need for DDSN's expertise."

4. This statement is incorrect. In 2007, DDSN created a Pervasive Developmental Disorder (PDD) Program, which has two primary operational components: the Pervasive Developmental Disorder Waiver and the Pervasive Developmental Disorder State Funded Program. Both components focus on utilizing the principles of Applied Behavior Analysis to treat children who have been diagnosed with a Pervasive Developmental Disorder to include Autistic Disorder (here in after referred to as autism) and Asperger's Syndrome. See Exhibit A, attached.

FURTHER AFFIANT SAYETH NOT.

Kathi K. Lacy, Ph.D.

SWORN TO BEFORE ME THIS 28TH

DAY OF MAY, 2010.

(SEAL)

NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES:

COLLEEN HONEY
NOTARY PUBLIC
SOUTH CAROLINA

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

Protection and Advocacy for the People with Disabilities, Inc., M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M.; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S.,

Plaintiffs,

v.

South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs,

Defendants.

Civil Action No. 07-CP-40-2187

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Defendants, does hereby certify that service of the **Reply Memorandum In Support of Defendants' Motion for Summary Judgment** in the above-captioned action was made upon all counsel of record by

hand delivery, at the below listed address clearly indicated on said envelope this the 28th day of May, 2010, addressed as follows:

C. Jo Anne Wessinger Hill, Esquire
Richardson, Plowden & Robinson, P.A.
1900 Barnwell Street
Columbia, South Carolina 29201

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
Protection and Advocacy for People with Disabilities, Inc., et al., Plaintiffs,	)	Civil Action No.: 07-CP-402187
	)	
v.	)	PLAINTIFFS' NOTICE OF AND MOTION FOR SUMMARY JUDGMENT
	)	
South Carolina Department of Disabilities and Special Needs, et al., Defendants.	)	

RICHLAND COUNTY
FILED
2013 JUN -6 PM 3:46
JEANETTE W. McBRIDE
C.C.P. & G.S.

TO: WILLIAM H. DAVIDSON, II, ESQUIRE AND KENNETH P. WOODINGTON, ESQUIRE, ATTORNEYS FOR DEFENDANTS

YOU WILL PLEASE TAKE NOTICE that the undersigned attorneys for the Plaintiffs do hereby move before the Presiding Judge of the Fifth Judicial Circuit at the Richland County Courthouse, Columbia, South Carolina on the tenth (10^{th}) day after service hereof at 10:00 a.m., or as soon thereafter as counsel may be heard and at such time and place as may be set by the Court, for an Order, pursuant to Rule 56, South Carolina Rules of Civil Procedure, granting summary judgment to the Plaintiffs, or in the alternative partial summary judgment in favor of the Plaintiffs.

The motion is based on the ground that there is no genuine issue as to any material fact, and Plaintiffs are entitled to judgment as a matter of law. The enabling legislation of the Department of Disabilities and Special Needs (DDSN) requires that the South Carolina Commission on Disabilities and Special Needs (Commission) promulgate regulations related to the operations of the department. S.C. Code Ann. § 44-20-220 (Supp. 2011). DDSN must also promulgate regulations to "obtain informed consent and to protect the dignity of the individual." S.C. Code Ann. § 44-26-180 (Supp. 2011).

Agency rule making is governed by the Administrative Procedures Act (APA), which provides the means by which an agency may create rules. Defendants acknowledge that they create rules through "other means," which are not addressed or contained in the APA. The justification given for using other means to create and enforce rules is that the requirements for promulgating regulations established by the APA are time consuming and difficult. Neither the enabling legislation of DDSN nor the APA provides an alternative means by which DDSN can create rules. DDSN's decision to not promulgate regulations is without a rational basis or a substantial justification. Plaintiffs are entitled to a declaratory judgment as a matter of law that the Defendants must promulgate regulations.

This motion is based on the pleadings, depositions, admissions of Defendants, affidavits, and the law of South Carolina. This motion is also based upon a memorandum of law and other supporting evidence as may be filed herein at a later date under separate cover, which shall more fully explicate the reasons in support of said Motion. This motion is further based upon the rules of Court, statutes, applicable law, such other evidence as may be acceptable to the Court, and upon such other matters as may be presented to and received by the Court.

RICHARDSON, PLOWDEN, & ROBINSON, PA

BY: _____

Steven W. Hamm
C. Jo Anne Wessinger Hill
1900 Barnwell Street
Columbia, South Carolina 29201
803-771-4400
803-779-0016 (fax)

ATTORNEYS FOR PLAINTIFFS

Columbia, South Carolina
June 5th, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT

Protection and Advocacy for the People with Disabilities, Inc.; M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as guardians of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.F.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M.; R.P. on behalf of and as Guardian of S.P.; R.R. and J.R. on behalf of and as guardians of K.D.R.; and J.K. on behalf of and as guardian of S.S., Plaintiffs, v. South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, and W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs, Defendants.	)	C/A No.: 2007-CP-40-2187 **CERTIFICATE OF SERVICE**

RICHLAND COUNTY
FILED
2013 JUN -6 PM 3:46
JEANETTE W. McBRIDE
C.C.P. & G.S.

I, the undersigned employee of Richardson Plowden & Robinson, P.A., do hereby certify that I have served the **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** in the above-

captioned matter upon all counsel of record this 6th day of June 2013, by depositing a copy of same in the U.S. Mail, postage prepaid, addressed as follows on the parties indicated below:

William H. Davidson, II, Esq.
Kenneth P. Woodington, Esq.
Davidson Morrison & Lindermann, PA
P.O. Box 8568
Columbia, SC 29202

Teresa A. Thurmond

June 6, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	CASE NO.: 2007-CP-40-2187
Protection and Advocacy for the People with Disabilities, Inc., et al	)	**MOTION AND ORDER INFORMATION**
Plaintiff,	)	**FORM AND COVERSHEET**
vs.	)	
South Carolina Department of Disabilities and Special Needs et al	)	
Defendant.	)	

Plaintiff's Attorney:	Defendant's Attorney:
Steven W. Hamm, C. JoAnne Wessinger Hill, Bar No. 2634 and 15025, respectively Address: PO Drawer 7788 Columbia SC 29202 Phone: 803-771-4400Fax 803-779-0016 E-mail: shamm@richardsonplowden.comOther: jhill@richardsonplowden.com	Kenneth P. Woodington, Bar No. _____ Address: 1611 Devonshire Drive, PO Box 8568 Columbia, SC 29202 Phone: 803-806-8222 Fax803-806-8855 E-mail: kwoodington@dml-law.comOther: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

FILED
RICHLAND COUNTY
2013 JUN -6 PM 3:46
JEAN H. TOAL McBRIDE
C.C.P. & G.S.

SECTION I: Hearing Information

Nature of Motion: Notice and Motion for Summary Judgment
Estimated Time Needed: 35 minutes Court Reporter Needed: ☒ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ June 6, 2013
Signature of Attorney for ☒ Plaintiff /☐ Defendant Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ _____
☐ EXEMPT:
(check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
Protection and Advocacy for People with Disabilities, Inc., et al., Plaintiffs,	)	Civil Action No.: 07-CP-40-2187
v.	)	**PLAINTIFFS' MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**
South Carolina Department of Disabilities and Special Needs, et al., Defendants.	)	

RICHLAND COUNTY FILED
2013 AUG -1 AM 11:35
JEANETTE W. WALKER
C.C.P. & G.S.

I. INTRODUCTION

For decades the South Carolina Department of Disabilities and Special Needs (DDSN) has been operating without scrutiny from the public or subject to legislative oversight, by purporting to regulate through "other means" rather than through duly promulgated regulations as required by law pursuant to the South Carolina Administrative Procedures Act. This lawsuit simply seeks to require DDSN to comply with established South Carolina law and integrate legislative oversight, transparency, and public access into the creation of its policies through the process of promulgating regulations. This lawsuit does not seek to control the policy itself, only to bring the agency into compliance with its own enabling statute and the Administrative Procedures Act (APA). Complaint, ¶¶ 6, 8, and Prayer for Relief.

The Plaintiffs are interested persons under the Declaratory Judgment Act, and have been and are being harmed through DDSN's failure to promulgate lawful regulations. *See* S.C. Code Ann. § 15-53-30 (2005). The issues presented in this case are matters of great public interest. *See generally Hooper v. Ebenezer Sr. Services and Rehabilitation Ctr.*, 386 S.C. 108, 687 S.E.2d 29 (2009) (holding that an equitable tolling of the statute of limitations should apply when a

nursing home has failed to designate a registered agent with the Secretary of State: "The statute of limitations' purpose of protecting defendants from stale claims must give way to the public's interest in being able to rely on public records required by law."). Defendants have been mandated to provide services to individuals with "intellectual disabilities, related disabilities [including those with autism], head injuries, or spinal cord injuries . . . ." *See* S.C. Code Ann. §§ 44-20-210 (Supp. 2012); 44-20-240 (Supp. 2012). Individuals with these disabilities are among the most vulnerable individuals in the state. Even though Defendants are charged with the care of individuals with serious disabilities, they continue to resist this lawsuit which only asks for the application of the oversight and transparency mandated by the General Assembly through the promulgation of regulations which will give citizens the ability to learn about the services available, the process or requirements for obtaining such services, and the opportunity to participate or appeal.

Defendants are required to promulgate regulations because:

- S.C. Code Ann. §§ 44-20-220 (Supp. 2012) and 44-26-180 (Supp. 2012) require the Defendants to promulgate regulations;
- The legislature has not granted Defendants authority to regulate by "other means"; and
- Defendant's choice to avoid official regulation lacks a rational basis or a substantial justification.

DDSN has not promulgated regulations regarding matters of concern to the Plaintiffs and the public, including but not limited to eligibility for services; appeal procedures; standards for the operation of residential programs; procedures for its Human Rights Committees (HRCs); and standards for research on human subjects. Complaint, ¶ 7. Plaintiffs are entitled to a declaratory

judgment ordering the Defendants to promulgate regulations as required by the APA as a matter of law.

II. BACKGROUND

The Plaintiffs bring this action under the Uniform Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10 to 140 (2005) for a declaration that the Defendants must promulgate regulations regarding the important matters listed in Plaintiffs' complaint. Complaint, ¶ 7. The Plaintiffs allege that the Defendants have refused to promulgate regulations in direct violation of DDSN's enabling legislation as well as the Administrative Procedures Act.

DDSN is a state agency created by statute. S.C. Code Ann. §§ 44-20-10 to 44-20-1170 (Supp. 2012). The governing body of DDSN is the South Carolina Commission on Disabilities and Special Needs (Commission). S.C. Code Ann. § 44-20-30(3) (Supp. 2012); 44-20-210 (Supp. 2012); 44-20-220 (Supp. 2012). Protection and Advocacy for People with Disabilities, Inc., (P&A) is a private, non-profit corporation established pursuant to federal and state law to advocate for the rights of people with disabilities. Complaint, ¶ 1; Affidavit of Gloria Prevost, ¶ 2, 3. The individual Plaintiffs in this lawsuit are individuals with disabilities or parents or guardians of individuals with disabilities who either receive services from DDSN or have applied for services with DDSN and been denied services. Complaint, ¶¶ 2, 14-36. All of the Plaintiffs have an interest in the lawful operations of DDSN.

DDSN has promulgated regulations regarding licensing, 26 S.C. Code Ann. Regs. §§ 88-105 to 88-140 (Supp. 2012); day programs, §§ 88-405 to 88-440 (Supp. 2012); recreational camps, §§ 88-310 to 88-395 (Supp. 2012); and unclassified facilities and programs, §§ 88-910 to 88-920 (Supp. 2012). DDSN has not promulgated regulations regarding matters of major concern to the Plaintiffs and the public. Complaint, ¶ 7; Defendants' Answers to Plaintiffs'

Request for Admissions, ¶ 9 (eligibility for services); ¶¶ 10, 11 (grievance procedures); ¶ 12 (hearings); ¶ 13 (appeals); ¶ 14 (waiting lists); ¶15 (eligibility for residential services); ¶ 16 (operation of residential programs); ¶ 17 (Human Rights Committees); ¶ 18 (research on human subjects); and ¶ 19 (obtaining consent).

DDSN issues directives, standards, and manuals that purport to state the policies of the agency, regulate the operations of the agency, set out the standards applicable to providers and licensees of residential programs, and guide the various decision makers in the agency. *See* Dr. Kathi Lacy Deposition (Lacy), 25:21 – 26:4 (Dr. Lacy was the Associate State Director, Policy,[1] at DDSN, Lacy, 24:11-18. She has recently been replaced by Susan Beck). *See, Exhibit 1.* Specifically, these directives are to communicate policy to the public. *See* Lacy, p. 27:9-17, *Exhibit 2.* The directives are the closest promulgation of official agency action that DDSN has regarding the issues raised in the complaint. The directives are posted on the website but are subject to change at any time without notice and do change frequently. *See,* Lacy, 38:15-21, *Exhibit 3.*

DDSN does not have a regulation or a directive stating a policy to not promulgate regulations, nor has the issue been directly discussed by the Commission in a public setting. *See,* Lacy, 92:17- 93:17, *Exhibit 4*; *See,* Dr. John Vaughn Deposition (Vaughn), 160:18 – 161:8, *Exhibit 5.* The reasoning given by Dr. Lacy for not promulgating regulations was that DDSN is not required to promulgate regulations. *See,* Lacy, 87:15-18; 89:11-12, *Exhibit 6.* Also, Dr. Lacy testified that her experience is that it is difficult to get regulations approved by the Legislature. *See,* Lacy, 111:1-15, *Exhibit 7.* Dr. Vaughn testified that regulations are despised by the public. *See,* Vaughn, 120:14-17, *Exhibit 8.* He also testified that anything that should be

[1] Sometimes Dr. Lacy is referred to as "the Associate State Director of Policy" and sometimes as the "Associate State Director, Policy."

in a regulation had been "covered already." *See,* Vaughn, 149:19-25; 150:1-3, *Exhibit 9.* Finally, Defendant Deborah McPherson, a Commission member and former DDSN employee, testified that she agrees that the agency should promulgate regulations. *See,* Mrs. Deborah McPherson Deposition (McPherson), 119:6-11; 114:15-22, *Exhibit 10.* Ms. McPherson noted that the Commission Policy is contrary to the State Code. She would return to policies that mirror the Code; however, her understanding is that current commission policy prevents them from complying with the State Code. *See,* McPherson, 67:18 68:14; 75:17-19; 76:6-11 ("So it's interesting, when you look at it, when it's saying promulgate regulations of the operation, and yet we've got policies, commission policies that are—have been pretty clear to say you don't get involved in the day-to-day operations. You can't have it both ways."), *Exhibit 11.*

III. STANDARD OF REVIEW

Rule 56(c) of the South Carolina Rules of Civil Procedure governs summary judgment. Summary judgment is an appropriate remedy "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. However, summary judgment is a drastic legal tool and "should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." *Murphy v. Tyndall*, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct. App. 2009); *see also Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, & Regulation*, 337 S.C. 476, 485, 523 S.E.2d 795, 799 (Ct. App. 1999).

On summary judgment, the court's task is not to try issues of fact but to determine if genuine issues of material fact exist. *Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 402, 408, 563 S.E.2d 109, 112 (Ct. App. 2002). "The problem besetting courts lies in deciding what is

or what is not a 'genuine issue as to any material fact.'" *Spencer v. Miller*, 259 S.C. 453, 456, 192 S.E.2d 863, 864 (1972). Summary judgment should only be granted when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ. *Trico Surveying, Inc. v. Godley Auction Co.*, 314 S.C. 542, 544, 431 S.E.2d 565, 566 (1993) (quoting *Byerly v. Connor*, 307 S.C. 441, 445, 415 S.E.2d 796, 799 (1992)). Therefore, when the evidence is susceptible to more than one reasonable interpretation, the issue should be turned over to the finder of fact, rather than resolved at summary judgment stage. *Vaughn v. Town of Lyman*, 370 S.C. 436, 635 S.E.2d 631 (2006).

IV. ARGUMENT

Plaintiffs are entitled to summary judgment because there is no genuine issue of material fact, and Plaintiffs are, as a matter of law, entitled to this Court's declaration that the Defendants must promulgate regulations pursuant to state law for transparency and oversight. "Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder." S.C. Code Ann. § 15-53-30 (2005). The Plaintiffs are individuals "whose rights, status, or other legal relations are affected by" DDSN's enabling legislation and by the APA. Plaintiffs have raised a question of construction regarding those statutes and are asking the court to declare whether or not the agency must promulgate regulations under the plain wording of those statutes. The relief provided under the Declaratory Judgment Act is remedial and its purpose is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." S.C. Code Ann. § 15-53-130 (2005).

The Plaintiffs are asking for the court to declare what the rights are between the parties. Do the Plaintiffs have to continue to make do and be subject to with the "other means" DDSN uses to establish rules, or does DDSN have to formalize its rulemaking process through the promulgation of regulations? In promulgating regulations under the APA, Plaintiffs will be able to present public comment, have access to legal remedies currently unavailable, and know that their elected officials will have to review proposed regulations, adding accountability, transparency, and oversight to the operations of DDSN. *See* S.C. Code Ann. §§ 1-23-10 to 1-23-160 (2005 and Supp. 2012).

A. S.C. Code Ann. §§ 44-20-220 (Supp. 2011) and 44-26-180 (Supp. 2011) require the Defendants to promulgate regulations.

The relevant sections of the South Carolina Code requiring DDSN to promulgate regulations affecting the work of P&A and the lives of individual Plaintiffs are as follows:

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

S.C. Code Ann. § 44-20-220 (Supp. 2012).

> 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.

S.C. Code Ann. § 44-26-180 (Supp. 2012).

The quintessential rule of statutory construction requires the Court to determine the intent of the Legislature. *SCANA Corp. v. South Carolina Department of Revenue*, 384 S.C. 388, 393, 683 S.E.2d 468, 470 (2009). Intent must first be determined by the plain meaning of the statute. "When a statute's terms are clear and unambiguous on their face, there is no room for statutory

construction and a court must apply the statute according to its literal meaning." *Sloan v. S.C. Board of Physical Therapy Examiners*, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006). "Under the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement." *Bradley v. Doe*, 374 S.C. 622, 634, 649 S.E.2d 153, 160 (Ct. App. 2007). The plain meaning of S.C. Code §§ 44-20-220 and 44-26-180 is that the Defendants must promulgate regulations regarding informed consent, to protect the dignity of the individual, to govern the operations of the department, and regarding employment of professional staff and personnel. The Defendants have a mandatory duty to promulgate regulations because the statute uses the word "shall."

1. **S.C. Code Ann. § 44-20-220 (Supp. 2011) ("shall determine the policy and promulgate regulations governing the operation of the department and the employment of professional staff and personnel . . . .")**

Plaintiffs contend that DDSN's enabling statute requires Defendants to promulgate regulations related to operations of its department, including eligibility for its services, appeal procedures, standards for operation of its residential programs, and procedures for its Human Rights Committees. The plain meaning of the enabling statute requires Defendants to promulgate regulations. The South Carolina Court of Appeals has held "[u]nder the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement." *Bradley* at 634, 649 S.E.2d at 160.

Defendants have admitted that they are required to promulgate regulations related to the operations of the Department. *See,* Defendants' Answers to Plaintiffs' Requests for Admission, Response #7, *Exhibit 12.* However, Defendants have consistently claimed that the term operations "as used in § 44-20-220, relates only to the internal operations of the Department, and not to its mission to the outside world." *See,* Defendants' Answers to Plaintiffs' Requests for

Admission, Response #5, *Exhibit 13*. Other than this statement, the Defendants do not explain how "internal" operations are distinguished from "external" operations. Presumably, Defendants have concluded that internal operations do not affect applicants, beneficiaries, or providers or do not relate to eligibility for services; appeal procedures; standards for the operation of residential programs; procedures for DDSN's Human Rights Committees (HRCs); or standards for research on human subjects. Such a definition of operations would be very narrow indeed because each topic for proposed regulation contains both internal and external aspects. The Defendants do not explain how they determine or apply standards in establishing what operations are "internal" and what are "external". They do not have a policy or directive that explains that distinction to the public. They also do not have any regulations that cover "internal" operations. *See* S.C. Code Ann Regs., § 88-105 *et seq*.

In interpreting the meaning of the term "operations," the Court should determine, and apply the intent of the Legislature. *SCANA Corp.* 348 at 393, 683 S.E.2d 470. Legislative intent should first be determined from the plain language of the statute. Only if the statute is ambiguous would the Court look to the purpose behind the statute. "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *State v. Sweat*, 386 S.C. 339, 350-51, 688 S.E.2d 569, 575-76 (2010) (quoting *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000)). The Defendants' interpretation of "operations" ignores the plain meaning of the word "operations" and ignores the purpose of the enabling legislation and the APA, which does not distinguish between the "inside world" and the "outside world" at DDSN.

The plain meaning of the term "operations": The ordinary meaning of "operations" does not indicate merely internal operations. Because the statute does not define "operations," the ordinary, dictionary definition should be given. *Estate of Nicholson v. SCDHHS*, 377 S.C. 590, 596, 660 S.E.2d 303, 305 (Ct. App. 2008) (citing *Lee v. Thermal Eng'g Corp.*, 352 S.C. 81, 91-92, 572 S.E.2d 298, 303-304 (Ct. App. 2002)). An operation is a method or way of operating; to operate is to function or to act. The American Heritage Dictionary 594 (4th Ed. Boston: Houghton Mifflin 2001). The function of DDSN is to interact with applicants, beneficiaries, and providers—the outside world. DDSN does not function to serve itself but to serve individuals with disabilities.

Dr. Lacy, the originator of many DDSN directives, noted that, as the Associate State Director for Policy, she has "[primary] responsibility for . . . the directives related to how the department . . . functions, responsibilities it carries out, setting forth policy . . . setting forth the service standards . . . ." *See,* Lacy, 24:13-18, *Exhibit 14.* In other words, she creates directives that relate to the on-going functions or operations of DDSN. Mrs. McPherson defined operations at length in her deposition testimony. *See,* McPherson, 59-67, *Exhibit 15.* Essentially, she agreed that "[w]hat the director tells [staff] to do, what they do every day when they come into the office is part of the operations of the department." *Id.* at 65:7-11. Dr. Vaughn noted that eligibility and appeals were part of the operations of DDSN, but noted, like Ms. McPherson, that the Commission did not involve itself with the day-to-day operations of DDSN. *See,* Vaughn Deposition, 151:4-152:9, *Exhibit 16.*

The purpose behind the enabling legislation and the APA: If the term "operations" is ambiguous, then it must be interpreted in the context of the purpose of the legislation. *State v. Sweat*, at 350-51, 688 S.E.2d at 575-76.

> "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *Browning v. Hartvigsen,* 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992). In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. *Hitachi Data Sys. Corp. v. Leatherman,* 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

Id. The purpose of DDSN's enabling legislation is "to assist persons with mental retardation, related disabilities, head injuries, or spinal cord injuries by providing services to enable them to participate as valued members of their communities . . . ." S.C. Code Ann. § 44-20-20 (Supp. 2012) (Purpose of Chapter). The Defendants' interpretation of the term "operations" as referring only to internal matters of DDSN is inconsistent with the purpose of the legislation, namely to assist individuals with disabilities to be valued members of their communities. DDSN seeks and continues to avoid the transparency and oversight of its operations by ignoring the need for regulations that relate to its purpose, which is to help and assist individuals live in the "outside world."

Defendants' interpretation is also inconsistent with the express purpose behind the enactment of the APA. Regulations are a method of formalizing rules governing a regulatory agency, like DDSN. *See* S.C. Code Ann. § 1-23-10 (1), 10 (4) (2005). In South Carolina, the APA sets forth the process for creating regulations. S.C. Code Ann. §§ 1-23-10 to 1-23-160 (2005 and Supp. 2012). The process must be public and it requires formal comment procedures and approval by the General Assembly. S.C. Code Ann. §§ 1-23-110 to 1-23-126 (2005 and Supp. 2012). The Defendants' argument is that the legislature intended such formal procedures only for internal agency matters and not how the agency "relates to the outside world." *See* Defendants' Answers to Plaintiffs' Requests for Admission, #7, *Exhibit 17.* The argument is unsupported by the purpose of the APA, which by definition involves the public and the outside world. Notably, the definition of "regulation" specifically excludes "procedures applicable only

to agency personnel." S.C. Code Ann. § 1-23-10 (4) (2005). The purpose of the APA and the reason for regulations is to allow the agency to make statements "of general public applicability that implements or prescribes law or policy or practice requirements of [the] agency." *Id.* By definition, a regulation is public, not private; external, not internal. *See id.* Regulations are related to the way an agency acts pursuant to its legislative authority and how it relates to the "general public." For example, when an agency is establishing procedural requirements, internal procedures do not have to be promulgated as a regulation, but "procedural requirements dealing with the public, such as permit applications, filing of petitions and complaints, conduct of hearings and so forth, prescribe the practice requirements of an agency and **require formal rulemaking.**" David E. Shipley & Randolph R. Lowell, *South Carolina Administrative Practice & Procedure* p. 108 (2d ed. 2008) (emphasis added). A purely internal policy that has no effect on applicants, beneficiaries, or the public does not need to be vetted through public promulgation. Defendants' definition of "operations" ignores the basic purpose of both DDSN's enabling legislation and the APA.

As stated by Chief Judge Kittrell in his Order dated July 16, 2008 in the matter of *Corbett vs. SC Dept. Health and Human Services*, Docket No. 07-ALJ-08-0278-AP, the approach of using a Manual containing policies of the state agency that are determinative of eligibility for certain programs does not comply with the requirements of the APA requiring the promulgations of regulations in order to have the full force and effect of law. Pp. 7-8. The ALJ Court evaluated whether the Manual was a binding norm or not as in the case of *Home Health Serv. Inc. v. SC Tax Comm'n*, 312 S.C. 324, 440 S.E.2d 375 (1994), by examining the actions of the Department and concluded that the Manual was treated as binding by the Department despite the label placed upon it by the Department. Likewise, in the case at hand, the Defendants look to

and use the policies established in the directives as binding upon the parties and citizens who seek, obtain, receive, or use their services. Thus, such directives which have not been promulgated as a regulation by the Defendants cannot be binding upon the Plaintiffs or anyone to the detriment of the individual Plaintiffs and all citizens of South Carolina. *See, also Edge et. al. v. SC Dept of Health and Human Services*, Docket No. 10-ALJ-08-0501-AP.

General concepts underlying rulemaking and the purpose of the South Carolina APA require that DDSN promulgate regulations related to operations that affect or impact on the consumers and applicants DDSN was created to serve. Everything regarding the APA and the statutory duties of the Defendants demonstrate a legislative intent that DDSN is to promulgate regulations regarding how it operates. If there were a meaningful way to distinguish between "internal" and "external" operations, then both the APA and the DDSN enabling legislation clearly point to an interpretation which would address how the agency relates to "the outside world."

2. S.C. Code Ann. § 44-26-180 (Supp. 2011) ("the department shall promulgate regulations to obtain informed consent and to protect the dignity of the individual")

Defendants do not deny that DDSN is mandated to promulgate regulations "to obtain informed consent and to protect the dignity of the individual." S.C. Code Ann. § 44-26-180 (Supp. 2012); Defendants' Reply Memorandum in Support of Defendants' Motion for Summary Judgment, p. 4-5. However, Defendants, do admit that they have not promulgated a regulation on informed consent or a regulation to protect the dignity of the individual. *See,* Defendants' Response to Plaintiffs' Request to Admit, Resp. 18, 19. Instead, Defendants argue that Plaintiffs do not have standing and "the Complaint alleges no facts at all with reference to research on human subjects." Defendants' Memorandum in Support, p. 5. Defendants' arguments are

without merit. First, the complaint does allege that the issue of "research on human subjects" is of "critical concern" to the plaintiffs. Complaint, ¶ 7. The complaint asserts that the lack of regulations will affect the health and safety of the Plaintiffs and requires P&A to expend resources and time on attempting to figure out the "other means" being used to formulate rules at DDSN. Complaint, ¶ 9, 10. The complaint also alleges that Plaintiffs have been denied an opportunity to participate in the rule-making process, as intended by the General Assembly when it enacted the APA. Complaint, ¶ 8.

Defendant's argument that Plaintiffs lack standing does not have merit. In South Carolina, the concept of standing is flexible. *Davis v. Richland County Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007). "[S]tanding may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." *Id.* Under the Declaratory Judgment Act, the general rule is that only a real party in interest may assert standing. "A real party in interest is one with a real, material, or substantial interest." *Baird v. Charleston Cnty.*, 333 S.C. 519, 530, 511 S.E.2d 69, 75 (1999). While the general rule is that only those with a personal interest at stake have standing to bring a lawsuit, an exception is made in declaratory judgment actions involving the public interest. *Sloan v. Dep't of Transp.*, 379 S.C. 160, 666 S.E.2d 236 (2008).

The Plaintiff, P&A, clearly has standing on whether the agency must promulgate regulations on informed consent and the dignity of the individual. The national protection and advocacy system, of which P&A is a part, "is mandated [by both federal and state law] to investigate allegations of abuse, neglect or exploitation of people with disabilities and to ensure that the human and civil rights of people with disabilities are protected." Affidavit of Gloria Prevost, ¶ 3; S.C. Code Ann. § 43-33-350 (Supp. 2011) ("[P&A] shall protect and advocate for

the rights of all developmentally disabled persons."); 42 U.S.C.A. § 15043 ("The State shall have in effect a system to protect and advocate for the rights of individuals with developmental disabilities."). P&A, as the mandated advocate for people with developmental disabilities, has a strong interest in knowing whether individuals are subject to research without adequate informed consent. Affidavit of Gloria Prevost, ¶ 6. The Defendants' failure to promulgate regulations relating to consent and the dignity of the individual unlawfully interfere with P&A's ability to protect and advocate. *See* Affidavit of Gloria Prevost, ¶ 7. Whether or not DDSN is obtaining consent for research, the way in which DDSN obtains consent, and whether the dignity of the individual is being protected are matters of continuing interest, and concern, to P&A, as the protection and advocacy system for South Carolina. P&A has a direct and "personal interest" in the outcome of this lawsuit.

The Plaintiffs who receive services from DDSN or wish to receive services from DDSN are also interested parties and have standing. They may or may not have already been subjected to human research. Without a duly promulgated regulation that informs individuals as to how consent is obtained, uncertainty and doubt surround this substantial public issue rather than transparency and clarity. The complaint in this case does not seek damages because consent was not obtained. Instead, the complaint is asking the Court to order the Defendants to promulgate regulations regarding consent, the lack of a specific allegation as to a failure to obtain consent does not mean the Plaintiffs lack standing. [2]

[2] S.C. Code Ann. § 1-23-150 (2005) would specifically provide standing for each individual Plaintiff in a Declaratory Judgment Action with regard to a regulation. "[A]ny person affected by the provisions of any regulation of an agency may petition the Circuit Court for a declaratory judgment and/or injunctive relief if it is alleged that the regulation or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff or that the regulation exceeds the regulatory authority of the agency." S.C. Code Ann. § 1-23-150(b) (2005). The Defendants should not be allowed to avoid the creation of

Furthermore, because the subject matter of this declaratory judgment action is a matter of on-going public interest, the Defendants' argument that Plaintiffs lack standing is irrelevant and not the guiding standard. Public health and welfare is a matter of public interest. *Baird* at 531, 511 S.E.2d at 75 (finding doctors had standing in a case involving "hospital bonds, [which clearly impact] a profound public interest--the public health and welfare."). Obtaining consent for human research involves the health and welfare of the individuals and is a matter of public interest. In addition, the way in which treatment for alcohol and drug addiction is received, another type of specialized group, is a matter of profound public interest. *Thompson v. South Carolina Comm'n on Alcohol and Drug Abuse*, 267 S.C. 463, 467, 229 S.E.2d 718, 719 (1976) (standing was conferred in a case interpreting the Uniform Alcohol and Intoxication Treatment Act). If a matter is one of the public interest, standing may even be conferred upon a taxpayer. *E.g., Sloan* at 170-171, 666 S.E.2d at 241 (alleging "a misuse of the statutory emergency procurement provision and therefore an unlawful expenditure by public officials"). Taxpayers have "standing to challenge unauthorized or illegal governmental acts." *Sloan v. School Dist. of Greenville County*, 342 S.C. 515, 520, 537 S.E.2d 299, 301 (Ct. App. 2000). Even if the only interest of the Plaintiffs was that they are taxpayers, standing should be conferred. This case involves a matter of substantial public interest, particularly with regard to obtaining lawful consent and research on human subjects.

All of the cases cited above involved actions brought under the Declaratory Judgment Act in South Carolina. In sharp contrast, the Defendants cited three cases for the proposition that P&A does not have standing. *See,* Defendants' Reply Memorandum in Support of Defendants' Motion for Summary Judgment, p. 5. None of the cases cited by Defendant are relevant to

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standing for individual Plaintiffs by avoiding their mandated duty to promulgate regulations under S.C. Code Ann. § 44-26-180 (Supp. 2011).

whether the Plaintiffs in this declaratory judgment action have standing. In *Doe v. Stincer*, the court found that the Advocacy Center for Persons with Disabilities did not have associational standing to bring a law suit under the Americans with Disabilities Act (ADA). 175 F.3d 879 (11th Cir. 1999). In *Tennessee Protection & Advocacy, Inc. v. Board of Education*, the Court denied institutional standing in a case brought under the Individuals with Disabilities Education Act (IDEA). 24 F.Supp.2d 808 (M.D. Tenn. 1998). The final case cited by Defendants, *Pa. Protection & Advocacy, Inc. v. Houston*, found that the P&A did have standing in the lawsuit, which involved waiting lists for services. The Court did find that the individual plaintiffs' claims were not ripe, which may be the reason the Defendants mis-cited the case. 136 F. Supp. 2d 353, 361 (E.D. Pa. 2001). Neither the ADA nor the IDEA are worded as broadly as the South Carolina Declaratory Judgment Act, where, as noted above, the concept of standing is flexible, especially if the matter involves an issue of public interest. Defendants' standing argument is not valid and is irrelevant given the importance to the public that the Defendants' comply with long standing law.

Plaintiffs are entitled to a declaration that Defendants must promulgate regulations in compliance with S.C. Code Ann. § 44-26-180 (Supp. 2012). Defendants have failed to present any credible argument or any evidence that Plaintiffs are not entitled to such a declaration as a matter of law.

B. The legislature has not granted Defendants authority to regulate by "other means."

S.C. Code Ann. §§ 44-20-220 (Supp. 2012) and 44-26-180 (Supp. 2012) include mandatory language that requires the Defendants to promulgate regulations. Even if these sections did not include mandatory language, Plaintiffs would still be entitled to judgment as a matter of law, because nothing in either the APA nor DDSN's enabling legislation allows them

to create rules of general applicability through "other means." *Bazzle v. Huff*, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995) ("An administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose.") "As a creature of statute, a regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged." *Captain's Quarters Motor Inn, Inc. v. South Carolina Coastal Council,* 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991). Even if the agency's grant of authority to promulgate regulations is merely permissive and not mandatory, the APA provides the only means by which Defendants can regulate.[3] An agency can create policy, but cannot create regulation and yet call it something else. Recent case law and the record in this case present a clear picture that DDSN does not just create policy, it regulates through directives, standards, and policy manuals.[4] Defendants create and impose binding rules upon all entities providing services and individuals with developmental disabilities through unpromulgated regulations. Neither DDSN's enabling legislation nor the APA allow it to use "other means" to regulate.

The Defendants argue that they are not mandated to promulgate regulations; therefore, they may regulate by "other means." They defend their creation of policy through "directives," "standards," and "manuals," many of which create general rules of applicability, by arguing that they have been given permission to use such other means by the failure of the legislation to clearly mandate that they promulgate regulations in the enabling statute. They do not cite to any

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[3] In *Spectre, L.L.C. v. S.C. Dept. of Health & Envtl. Control*, the South Carolina Supreme Court found that SCDHEC had been granted a way to regulate coastal management by the legislature under the Coastal Zone Management Act. 386 S.C. 357, 360, 688 S.E.2d 844, 845 (2010). No such legislative action has taken place with regard to DDSN's "other means."

[4] Not every agency action requires regulation. In *Edisto Aqua Culture Corp. v. S.C. Wildlife & Marine Res.*, the South Carolina Supreme Court found that permits were sufficiently like licenses (exempt under S.C. Code Ann. § 1-23-10 (4) (2005)) that a permit requirement did not have to be promulgated as a regulation. 311 S.C. 37, 39, 426 S.E.2d 753, 754 (1993).

support for this proposition other than § 44-20-220 itself. The Defendants use of "other means" to create general rules of applicability is in clear violation of the APA, regardless as to whether it is not in direct violation of DDSN's enabling legislation. *See Bazzle* at 445, 462 S.E.2d at 274 ("An administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose.").

Even absent a statutory requirement to promulgate regulations, the law in South Carolina is clear that an agency cannot regulate through unpromulgated policy statements.

> "Regulation" means each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of the agency. Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law. The term "regulation" includes general licensing criteria and conditions and the amendment or repeal of a prior regulation, but does not include descriptions of agency procedures applicable only to agency personnel; . . . orders of the supervisory or administrative agency of a penal, mental, or medical institution, in respect to the institutional supervision, custody, control, care, or treatment of inmates, prisoners, or patients; . . . and other agency actions relating only to specified individuals.

S.C. Code Ann. § 1-23-10 (4) (2005). Listed among the duties of state agencies is the following: "No agency rule, order or decision is valid or effective against any person or party, nor may it be invoked by the agency for any purpose until it has been made available for public inspection as required by this article and Article 2." S.C. Code Ann. § 1-23-140 (2005).

In the recent "Occupy Columbia" case, the Federal District Court of South Carolina rejected the argument that policy can be enforced against individuals when an agency has permission to promulgate regulations but is not specifically mandated to do so. *Occupy Columbia v. Haley*, 866 F.Supp.2d 545 (D.S.C. 2011) (Attachment A). The court found that the South Carolina Budget and Control Board was "authorized" to promulgate regulations, not mandated to promulgate them. "Although the Board has never passed any regulations relating to the use of the State House grounds, Board Defendants argue that § 10–1–30 allows the Board

to create restrictions *or* regulations regarding use of the State House grounds, and that the Board created restrictions on the use of the State House grounds when it created the document entitled 'Conditions.'" *Id.* Plaintiffs successfully argued that the "Conditions" were not enforceable because they were not promulgated as regulations. *Id.* The court held that absent a duly promulgated regulation, the unpromulgated restrictions could not be used as a valid time, place, and manner restriction on free speech. *Id.* at. 8. The court granted Plaintiff's Motion for a Preliminary Injunction; however, the injunction was removed once the Board promulgated an emergency regulation. *Occupy Columbia v. Haley*, No. 3:11-CV-03253-CMC, 2011 WL 6698990, slip op. (D.S.C. Dec. 22, 2011) (Attachment B).

Like the Budget and Control Board's "Conditions," Defendants have also created directives, standards, and manuals as the "other means" by which they regulate those with which they interact. Even if an agency is permitted but not required to promulgate regulations, the APA, as interpreted by the Federal District Court, does not permit "other means" by which general rules of applicability may be enforced by a public entity, like DDSN.

In a recent South Carolina Supreme Court decision, the Court held "DDSN's policy guidelines are not entitled to any deference . . . . The scope of DDSN's rulemaking authority is defined by the South Carolina General Assembly, and DDSN may exercise such authority only in that manner." *Doe v. S.C. Dept. of Health & Human Serv.*, 398 S.C. 62, 727 S.E.2d 605 (2011) (Attachment C). The case involved a Medicaid appeal to the Department of Health and Human Services (SCDHHS) from a decision made by DDSN that Jane Doe was not eligible for Medicaid waiver services provided by DDSN. The "other means" being used by DDSN cannot be used to entitle DDSN to deference.

> In accordance with our statutory law, we hold an agency guideline does not have the force of law and in any event, can never trump a regulation. Our law provides

> that "'[r]egulation' means each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency. *Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law.*" [5]

Id. at 15, FN 7 (quoting S.C. Code Ann. § 1-23-10(4) (2005)) (emphasis in the original).

The Administrative Law Court, also found that DDSN's policy guidelines cannot be used as "other means" to regulate. Like the Doe case, the *Hickey v. SCDHHS* case involved Medicaid waiver services. An unpromulgated DDSN policy limited Personal Care services to 28 hours per week. In attempting to enforce the policy, SCDHHS argued that its enabling legislation (not DDSN's), particularly S.C. Code Ann. § 44-6-90 (2002) allows, but does not require, SCDHHS to promulgate regulations.[6] The court's analysis noted that "the cardinal rule of statutory interpretation requires the trier of fact to ascertain the intent of the legislature." *Hickey v. SCDHHS*, Administrative Law Court, Docket # 10-ALJ-08-0656-AP, order at 8 (filed July 19, 2011) (Attachment D). The court noted that when "there is one statute addressing an issue in general terms and another statute dealing with the issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and give such effect." *Id.*, p. 8. Finally, the court held "I conclude that the general language allowing [SCDHHS] to promulgate regulations does not override the more specific requirements of the APA. To interpret Section 44-6-90 as urged by [SCDHHS] would imply that every agency given general authority to promulgate regulations is thereby exempted from the requirements of the APA. Such an interpretation does not yield a reasonable and practical

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[5] The *Doe* decision was decided in December of 2011. However, the unpromulgated policy *Doe* overturned remains on DDSN's website and may still be followed by anyone interacting with the agency. Eligibility Directive, available at http://www.ddsn.sc.gov/about/directives-standards/Documents/currentdirectives/100-30-DD%20(090110).pdf (last viewed on 7/31/13) (Exhibit 18).

[6] S.C. Code Ann. § 44-6-90 (2002) states, "[SCDHHS] may promulgate regulations to carry out its duties."

construction consistent with the purpose and policy expressed in either the APA or § 44-6-90." *Id.*

Plaintiffs do not concede that Defendants' enabling legislation is permissive. However, even assuming that the statute is permissive regarding whether the Defendants must promulgate regulations, Defendants cannot create general rules of applicability through other means. Like SCDHHS, the Defendants are arguing that because the statute does not mandate them to promulgate regulations that they are then entitled to promulgate policies and procedures through "other means." However, Defendants current method of regulating is in direct violation of the APA even if it is not in violation of the Defendants' general grant of authority to promulgate regulations.

These South Carolina holdings are consistent with many other jurisdictions' interpretation of similar statutory provisions. In Kansas, the failure to promulgate regulations regarding the way in which hearings would be conducted was held to violate the due process clause. *Denning v. Johnson County, Sheriff's Civil Service Bd.*, 266 P.3d 557, 571 (Kan. Ct. App. 2011) ("The failure of a civil service board to enact rules and regulations for its hearing procedures and orders creates an inference that its decision was arbitrary and capricious."). In Indiana, a cap on services must be promulgated as a regulation:

> The Defendants argue that the state's sixty hour cap on respite services is merely an internal policy and does not amount to a rule, but this argument fails. The state's sixty hour cap has general applicability to all individuals in Indiana receiving services under the Aged and Disabled Waiver program. The cap is designed to have the effect of law, and it implements law in a way that affects substantive rights by denying services to which individuals would otherwise be entitled. Such a cap meets the definition of a rule under Indiana law, is more than a merely internal policy, and, absent promulgation, is invalid.

B.N. v. Murphy, No. 3:09-CV-199-TLS, 2011 WL 5838976, slip op. at 5 (N.D. Ind. filed Nov. 16, 2011) (Attachment E).

The directives, standards and manuals developed by staff at DDSN are used and applied as general rules of applicability by the agency in its operations. Rather than promulgating regulations, as mandated by the statute, DDSN seeks to operate through these statements. The evidence in the record that the policy statements of DDSN are treated like general rules of applicability is extensive.

- "Departmental Directive (DD) - A **mandate** requiring compliance by applicable Central Office, District Office, Regional Center, DSN Board or Contracted Provider staff. A directive may address policy and/or more specific implementation procedures." Lacy Deposition, Exhibit 7 (emphasis added).
- "[T]here had been the understanding that the promulgation of regulations was not something that [DDSN] did because we used other vehicles to – to issue directives and hold people accountable to what our expectations were." *See,* Lacy Deposition, 100:1-5, Exhibit 19.
- "[W]e were trying to get DHEC law changed and we got nowhere through the legislative process by promulgating regulations. And I explained to that subcommittee that DDSN could have handled that request instantly by changing a contract or a directive." *See,* Lacy Deposition, 111:4-9, Exhibit 20.
- In explaining a directive Dr. Lacy stated, "It's comparable to policy and it describes certain expectations that the department has regarding people that we support, services that they receive, the responsibilities that providers have." *See,* Lacy Deposition, 25:22 – 26:1, Exhibit 21.
- Dr. Lacy explained that regulations were unnecessary because "we have a vehicle that accomplishes the same thing." *See,* Lacy Deposition, 164:3-4, Exhibit 22.

- Anything that should be in a regulation had been "covered already." *See*, Vaughn Deposition, 150:2-3, Exhibit 23.
- "The expectation is that the directive will be followed." *See,* McPherson Deposition, 103:7-8, Exhibit 24. With regard to standards, "they're also supposed to follow those standards and cannot deviate from them either? Yes." *See,* McPherson Deposition, 103:10-18; *see also* pp. 102, 104 ("They're supposed to follow the directive or standard. That is the expectation."), Exhibit 25.
- "Plaintiffs would prefer state agency action to occur by regulation rather than by other means." *See,* Memorandum in Support of Defendant's Motion for Summary Judgment, p. 1.

Defendants consistently admit that they regulate through "other means." *Id.* However, the Defendants have not provided any legal support for their argument that such other means is authorized by statute or other law in this state. Regulating through "other means" is not an alternative to regulating pursuant to the APA. Whether S.C. Code Ann. § 44-20-220 (Supp. 2011) requires DDSN to promulgate regulations, or merely allows DDSN to promulgate regulations is irrelevant because DDSN cannot avoid regulation through the use of "other means."

C. Defendant's choice to avoid official regulation lacks a rational basis or a substantial justification and is an arbitrary abuse and exercise of discretion.

"The court may reverse or modify the decision [of an agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are . . . arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380 (Supp. 2011). "A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of

reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985) (citing *Hatcher v. South Carolina District Council of Assemblies of God, Inc.*, 267 S.C. 107, 226 S.E.2d 253 (1976); *Turbeville v. Morris*, 203 S.C. 287, 26 S.E.2d 821 (1943)).

Dr. Lacy in her deposition questions the ability of the legislature to timely approve regulations or to wisely approve them. *See,* Lacy, 110:20-25 – 111:1-15 ("we got nowhere through the legislative process by promulgating regulations . . . . the regulatory process is ineffective, it's not time sensitive . . . ."), Exhibit 26. A regulation, of which she and P&A approved, failed to get through the legislative process. Her conclusion was that she is capable of doing a better job than the legislature by avoiding regulations all together. She can "do that in a day." *Id.* Whether Dr. Lacy or elected officials are wiser or better stewards of the state's laws and regulations, is irrelevant to the matter before the Court. However, by avoiding official promulgation of regulations, the Plaintiffs are not afforded an opportunity to obtain the transparency and oversight provided in the promulgation of regulations under the APA. They are also denied the ability to hold their elected officials accountable if they fail to act wisely or quickly on an issue of importance to the Plaintiffs. The DDSN decision to not promulgate regulations is without a rational basis. As Dr. Lacy and Dr. Vaughn testified, DDSN does not promulgate regulations because it is "covered already." *See,* Vaughn, 150:2-3, Exhibit 27; Lacy, 164:3-4, Exhibit 28. No course of reasoning or exercise of judgment has occurred, because the Commission has not even discussed the issue. *See* Lacy, p. 92:17-25 – 93:1-17, Exhibit 29; Vaughn, 150:10-17, Exhibit 30. No fixed rules or standards apply to when the agency will promulgate regulations and when it does not. The agency does not even have a process for

individual consideration of situations where regulation is necessary. The only reasoning for the decision in the current record is the opinion of Dr. Lacy that promulgating regulations is "ineffective" and Dr. Vaughn's opinion that the public despises regulations. *See,* Lacy, 111:10-11, Exhibit 31; Vaughn, 120:14-15, Exhibit 32. Plaintiffs have alleged that Defendants' actions are arbitrary and capricious, and Defendants have offered no contrary proof. Defendants' only defense to this argument is that they have not acted arbitrarily because promulgating regulations is not mandatory. *See,* Reply Memorandum in Support of Defendants' Motion for Summary Judgment, p. 7. Their argument is circular, arguing that the assumption that they have discretion means that they may exercise such discretion not to comply with the APA as they please. Even assuming Defendants are not mandated by statute to promulgate regulations, they must act rationally in their governance and any application of discretion requires a factual basis. [Hamm v. SCE&G cite]. A lack of a mandate does not equate to the lack of a duty to govern rationally and provide basic due process rights to Plaintiff.

D. Individuals with Asperger's Disorder and Pervasive Development Disorder (PDD) Seeking Services from DDSN Serves as a Vivid Example of a Dysfunctional System

In Plaintiffs' Memorandum in Opposition to the Defendant's Motion for Summary Judgment, Plaintiffs asserted, as they continue to do in this Memorandum, that DDSN creates and applies on-going general rules of applicability without formal promulgation of regulations in violation of the APA. DDSN regulates through "other means." As an example, Plaintiffs' earlier Memorandum noted that, "DDSN has created a binding norm by determining that DDSN will not serve individuals with Asperger's Syndrome or Pervasive Developmental Disorder, regardless of their particular functioning or the need for DDSN's expertise." *See,* Memorandum in Opposition, p. 21.

In Defendants' Reply Memorandum in Support of Defendants' Motion for Summary Judgment, Defendants replied that "DDSN, beginning in 2007 and 2008, has established a Pervasive Developmental Disorder (PDD) Program that has both state and federal funding and that covers individuals with Asperger's Syndrome as well." *See,* Reply Memorandum, p. 6-7. The Complaint was filed in April of 2007. Defendants' noted that Plaintiffs' statement was "factually-incorrect." Plaintiffs apologize for the mis-statement, but Plaintiffs' error highlights just how difficult it is for any individual, even legal counsel with access to the internet, to traverse the maze that the Defendants' created and now assert is a substitution for promulgating regulations.

First, assuming an individual has access to the internet, the individual seeking services will probably go to DDSN's website.[7] Defendants fail to note that access to the internet varies widely around the state and is difficult to access in rural areas. One of the links at the top of the page is "Applying for Services." This link has four categories under which someone may apply for services:

- FOR PEOPLE WITH INTELLECTUAL DISABILITY AND RELATED DISABILITIES
- FOR PEOPLE WITH AUTISM
- FOR PEOPLE WITH TRAUMATIC BRAIN INJURY AND/OR SPINAL CORD INJURY (HASCI) AND SIMILAR DISABILITIES
- FOR HIGH RISK INFANTS AND TODDLERS

[7] DDSN Home page, *available at* http://www.ddsn.sc.gov/Pages/default.aspx (last viewed 7/31/13).

The page "Applying for Services" does not mention "for people with PDD or Asperger's." [8] Many individuals at that point may quit, especially considering that the care of a child with a severe disability is extremely difficult and time-consuming. Some individuals may be more tenacious: they might try to find the policy related to eligibility to see if their child might fit under the "related disabilities" category or under the "autism" category. None of the links from the "Home" page mention anything about criteria for eligibility.[9] The "About DDSN" page states that DDSN "serves persons with intellectual disability, autism, traumatic brain injury and spinal cord injury and conditions related to each of these four disabilities," but does not say how to find the policy on eligibility.[10] The webpages entitled "DDSN Commission," "Service Providers," "Services," "Job Opportunities," and "Relevant Links" do not appear to give any details on who may be eligible for services and who may not be eligible for services. The page entitled "Consumers and Families" contains a link to the "Applying for Services" page that again mentions only the disabilities bulleted above.

On the "About DDSN" page, the directives and standards are listed, but the term "directive" is not defined. If an individual does go to the "Current DDSN Directives" page, this individual will find the online index of directives. Defendants' Reply Memorandum in Support of Defendants' Motion for Summary Judgment, Exhibit B (listing 128 directives). The long list of directives can be found numerically or alphabetically, but is not organized between those directives as to which apply to applicants, beneficiaries, providers, or internal staff. The directives range from substantive matters like "Eligibility Diagnostic Criteria, Screening and

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[8] Applying for Services, *available at* http://www.ddsn.sc.gov/consumers/Pages/ApplyingforServices.aspx (last viewed 3/16/2012).

[9] DDSN Home Page, *available at* http://www.ddsn.sc.gov/Pages/default.aspx (last viewed 7/31/13).

[10] About DDSN Page, *available at* http://www.ddsn.sc.gov/ABOUT/Pages/default.aspx (last viewed 7/31/13).

Intake Processes for Eligibility and Appeal Procedures" to minor administrative matters like "Central Office Telephone Call Coverage Backup Policy." [11] *See,* Exhibit 33 and 34.

The Eligibility Directive does not mention whether an individual might be eligible for the PDD Waiver, which is a Medicaid service provided through the Department of Health and Human Services but is operated by DDSN. The Eligibility Directive lists the same categories for eligibility as are listed on the "Applying for Services" page but does not mention Asperger's or PDD. A truly persistent individual, trying to learn if a child with PDD or Asperger's is eligible for services and willing to ignore the Eligibility Directive, might use the "search option" available on all of DDSN's webpages. The search term "eligibility" produces approximately 314 results. The search term "eligibility for services," if in quotes, produces 20 results. The search term "Asperger's" has 34 results; "PDD" has 36 results; and "Pervasive Developmental Disorder" has 119 results, as of July 30, 2012. The process for applying for the PDD Waiver is listed first in the search under "Pervasive Developmental Disorder; howeer, the criteria for eligibility for the PDD Waiver does not seem to be listed.

If an individual is adept at negotiating DDSN's website and is aware that the PDD Waiver is available, or an individual has the time to read much of the materials publically available on the website, then an individual may or may not find the eligibility criteria on the website for the PDD Waiver. The eligibility criteria for the PDD Waiver formerly was available by first going to the "Service Provider" webpage. On the "Service Provider" webpage is a link to "Medicaid Waiver Services."[12] One of the options on the "Medicaid Waiver Services" page is

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[11] Eligibility Directive, *available at* http://www.ddsn.sc.gov/about/directives-standards/Documents/currentdirectives/100-30-DD%20(090110).pdf. (last viewed 7/31/13).
[12] Service Provider Page, *available at* http://www.ddsn.sc.gov/providers/Pages/default.aspx (last viewed 7/31/13).

the "Pervasive Development Disorder (PDD) Waiver."[13] The "PDD Waiver" page has a link to the PDD Waiver Manual, which has a link to "Chapter 3, Eligibility Criteria."[14] See, Exhibit 35. Chapter 3 is now entitled "Requesting a Slot" and contains information on the process butr not the criteria for determining eligibility. However, the previously available Eligibility Criteria for the PDD Waiver make it clear that the waiver is only available for individuals ages 3 to 10. The fact that DDSN operates the PDD Waiver under the direction of the Department of Health and Human Services, does not se4rve to make the rules DDSN uses to determine who is eligible to receive what services any less generally applicable. DDSN still applies binding norms regarding who is eligible and what services they can receive without regulations promulgated under the APA.

Plaintiffs cannot assert that the information listed above will not change between the date it was reviewed on July 30, 2013, and the date the Court reviews the information. According to the Commission Minutes from June of 2013, the eligibility for the PDD Waiver as well as the Autism Division's services is undergoing change due to a new change in the Diagnostic and Statistical Manual of Mental Disorders (DSM 5). Exhibit 36; see generally American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 5, 50-59 (2013). Upon information and belief, the changes in eligibility are being made to adjust to the change in the DSM 5 without a request for public comment.

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[13] Medicaid Waiver Page, *available at* http://www.ddsn.sc.gov/providers/medicaidwaiverservices/Pages/default.aspx (last viewed 7/31/13).

[14] PDD Waiver Page, *available at* http://www.ddsn.sc.gov/providers/medicaidwaiverservices/pdd/Pages/PDD.aspx. (last viewed 7/31/13); PDD Manual Page, *available at* http://www.ddsn.sc.gov/providers/medicaidwaiverservices/pdd/Pages/PDDManual.aspx (last viewed 7/31/13); Chapter 3 of the PDD Manual, *available at* http://www.ddsn.sc.gov/providers/medicaidwaiverservices/pdd/Documents/PDDM_Chapter3.pdf (last viewed 7/31/13).

Plaintiffs cannot assert that they have not missed some other exception or nuance hidden further or deeper in the bowels of the website. Plaintiffs cannot assert that anything they note about the DDSN services is one hundred percent factual or accurate. Plaintiffs cannot rely upon the information available because it has not been formally promulgated as regulations. The "factual inaccuracy" noted by the Defendants as to Plaintiffs' assertion is one of the many reasons why Plaintiffs brought this lawsuit. The problem with this "internet promulgation" is one of the reasons this lawsuit was brought. *See,* Gloria Prevost Affidavit, ¶ 7 (P&A must expend resources and time in attempting to figure out the 'other means' referred to by Dr. Lacy to formulate rules at DDSN; to search for the rules themselves and to determine what criteria and standards apply to each case . . . ."). The "other means" or "internet promulgation" also means that occasionally individuals will make mistakes or be "factually-incorrect" about what is available to whom. Only those inside DDSN really know what it is the agency does or does not do for individuals with disabilities. The outsiders, represented by the Plaintiffs, are left with an internet maze - only if they **have** internet access in the first place. DDSN's opaque policies and procedures are the opposite of the publically developed and readily available regulatory process required by the APA and the General Assembly.

V. CONCLUSION

Title 44, Chapter 20, the enabling legislation for DDSN and the Commission, states a policy vision of the way in which the state will treat individuals with intellectual disabilities, related disabilities, and head and spinal cord injuries.

> The State of South Carolina recognizes that a person with intellectual disability, a related disability, head injury, or spinal cord injury is a person who experiences the benefits of family, education, employment, and community as do all citizens. It is the purpose of this chapter to assist persons with intellectual disability,

> related disabilities, head injuries, or spinal cord injuries by providing services to enable them to participate as valued members of their communities to the maximum extent practical and to live with their families or in family settings in the community in the least restrictive environment available.

S.C. Code Ann. § 44-20-20 (Supp. 2012). Individuals with these disabilities should also be able to experience the benefits of additional transparency and oversight that will be a part of the process of official promulgation of regulation. The Defendants attempt to imply that individuals with disabilities would not benefit from the promulgation of regulations. The Defendants have no authority to reach or apply such a conclusion

The need for a declaration of what the law is with regard to promulgation of regulations is clearly necessary and imperative. Does "Commission policy" control the Commission or does the statute requiring them to promulgate regulations control? When asked why she wanted to be on the Commission, Commissioner McPherson stated:

> Basically, because I felt that there was a need to help improve the service delivery system. And I'll be honest. I mean, I as an individual, having a daughter with a disability over the years I've heard people's stories time and time again, and I also know their frustrations. And I was hoping that by serving on the commission, maybe I would be able to help. . . . Have I been frustrated serving on the commission? Yes. I have felt, at times, my hands have been tied. . . . Been tied basically because of commission policy.

See, McPherson Deposition, 78:15-25 – 79:1-6, Exhibit 37.

Plaintiffs' case is simple. DDSN, as a state agency, must comply with the mandatory language of its own enabling statute and with the APA, even if the agency disagrees with the APA process or questions the ability of the legislature to act wisely. Statutory interpretation is a question of law. *Sweat,* at 373, 665 S.E.2d at 648. As a matter of law, Defendants must promulgate regulations relating to obtaining consent prior to human experimentation and relating to the "operations" of the agency. Even if Defendants' interpretation of S.C.Code Ann. § 44-20-220 (Supp. 2012) is correct and operations of the agency only refers to "internal" matters, DDSN

cannot regulate through "other means." The evidence is overwhelming that DDSN regularly avoids compliance with the APA by regulating through the issuance of directives, standards, and manuals and posting them on an internet website. Finally, even if everything is assumed in favor of the Defendants, both legally and factually, and DDSN has discretion to use "other means" to issue regulation, DDSN has abused its discretion by refusing to make a reasoned and public reviewable decision about the need for its policies to not be regulations. Plaintiffs are not attempting to tell DDSN what to say in their regulations. Instead, Plaintiffs are asking the Court to order the Defendants to promulgate regulations in compliance with their own enabling legislation and the APA. Defendants have presented no material issue of fact, as noted in their own motion for summary judgment, and Plaintiffs are entitled to Judgment as a matter of law.

Respectfully submitted this 31 day of July, 2013.

RICHARDSON, PLOWDEN,
& ROBINSON, PA

BY: _____

Steven W. Hamm
C. Jo Anne Wessinger Hill
P.O. Drawer 7788
1900 Barnwell Street (29201)
Columbia, South Carolina 29202
803-771-4400

ATTORNEYS FOR PLAINTIFFS

Columbia, South Carolina

July 31, 2013

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF RICHLAND)	Civil Action No.: 2007-CP-40-2187
Protection and Advocacy for the People with Disabilities, Inc.; M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as Guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S.,	
Plaintiffs,	
v.	
South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, and W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs,	CERTIFICATE OF SERVICE
Defendants.	

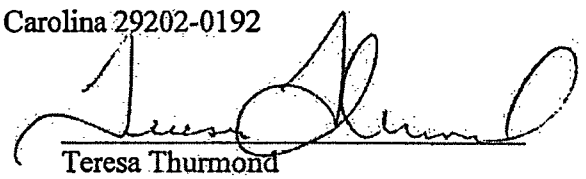
FILED
2013 AUG -1 AM 11:34
JEANETTE W. WALDEN
C.C.P. & G.S.

I, the undersigned employee with the firm of Richardson Plowden and Robinson, P. A., attorneys for the Plaintiffs, do hereby certify that I have served upon the following the foregoing

Plaintiffs' Memorandum in Support of Plaintiffs' Motion For Summary Judgment as indicated below on July 31, 2013:

VIA EMAIL AND U.S. MAIL
William H. Davidson, II
Kenneth P. Woodington, Esq.
1611 Devonshire Drive, Second Floor
PO Box 8568
Columbia, SC 29202

VIA EMAIL AND U.S. MAIL
The Honorable G. Thomas Cooper, Jr.
Circuit Court Judge
Richland County Courthouse
P.O. Box 192
Columbia, South Carolina 29202-0192



Teresa Thurmond

July 31, 2013

Columbia, South Carolina

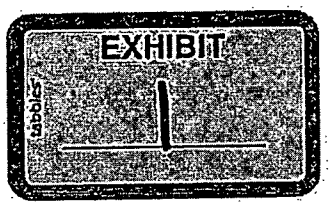


EXHIBIT
1

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF RICHLAND
PROTECTION AND ADVOCACY
FOR THE PEOPLE WITH
DISABILITIES, INC., ET. AL,
Plaintiffs,

vs. CASE NO. 07-CP-40-2187
SOUTH CAROLINA DEPARTMENT
OF DIABILITIES AND SPECIAL
NEEDS, ET. AL,
Defendants.

DEPOSITION OF: KATHI M. LACY

DATE: July 9, 2009

TIME: 9:30 a.m.

LOCATION: Law Offices of
Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: L. Skyler Hare,
Court Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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A. The other -- I'm responsible for five different divisions.

Q. What are they?

A. Mental retardation, head and spinal cord injury, autism, consumer assessment team. They are the group that determine eligibility. And quality management.

Q. Is the position that you hold now that same position that you've earned -- that you were appointed to? Who -- well, let me -- first answer that.

A. I'm in the same position.

Q. And who -- did Dr. Butkus -- who -- I don't understand --

A. Dr. Butkus, yes, hired me in the position I am in now.

Q. Okay. Now, you make -- you told me that you were responsible for directives of the department.

A. Yes.

Q. Tell me what a directive is.

A. It's comparable to policy and it describes certain expectations that the department has regarding people that we support, services that they receive, the responsibilities that providers

have.

Q. Where does the term "directive" come from?

A. It's been there since I've gotten there, so I can't --

Q. I went hunting for a statute that talked about directives, and is there one that I've just simply missed?

A. Not that I'm aware of.

Q. So the term "directive" is a term created by DDSN as a way of addressing its responsibilities?

A. Yes, I assume so.

Q. You said that -- you said that a directive was comparable to policy and I didn't exactly understand what that meant.

A. Well, I mean, in, you know, my educational experience, I mean, healthcare policy, you know, is a broad term used to describe, you know, many, many, you know, different things.

Health insurance companies use policy to communicate to their subscribers about what they cover, what their reimbursement rates are, who the providers that can render those services and things like that.

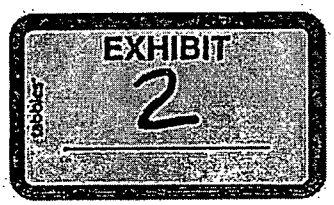
EXHIBIT
2

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Q. And I don't say this disrespectfully, are you the policy guru for DDSN?

A. Well, it's my title.

Q. All right. And that's why I'm asking.

A. I'm not sure if I'm a guru or not but I -- but I have that title, yes.

Q. So if you have that title, do you have ownership of the creation of policy?

A. Part of the distinction between the policy directive is that the Commission is ultimately responsible, that's the Board of Directors, so to speak, to DDSN. And the Commission really sets forth the policy and the direction for the agency. And the directives are the instruments used to communicate that policy to DDSN, its network of providers, our customers, their family, the public.

Q. In terms of these directives, you've told me that they describe the expectation of DDSN for the services received by your -- you use the word "customer" and you talked about providers and so forth. Help me understand how you understand what the policy is of the Commission.

A. There are a couple ways, one is through the Code of Laws, it sets up the department. And

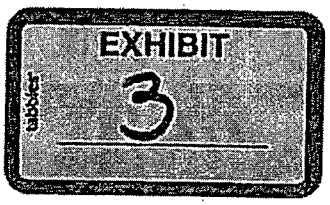
EXHIBIT
3

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF RICHLAND
PROTECTION AND ADVOCACY
FOR THE PEOPLE WITH
DISABILITIES, INC., ET. AL,
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Q. Okay. Well, how -- help me understand how it is that you as the Associate State Director of Policy would know that a directive, in fact, comported with the wishes of the Commission?

MR. WOODINGTON: Object to the form.

THE WITNESS: Through the State Director.

BY MR. HAMM:

Q. Okay. And I say this respectively so I'm not being a smart aleck. So the State Director serves as the filter for whatever the Commission is thinking. And if the State Director is happy with a directive, that's where it stops.

MR. WOODINGTON: Object to the form.

THE WITNESS: Directives are changed frequently so and the process used to get information from our customers and their families and other stakeholders is incorporated into the document. And one of the Commission policies is to ensure that we are being responsive to consumers and their family's needs.

Q. Is there a checklist or a chart that you must consult in constructing a directive?

A. Those kinds of things don't exist anywhere.

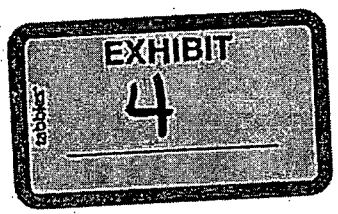
EXHIBIT
4

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF RICHLAND
PROTECTION AND ADVOCACY
FOR THE PEOPLE WITH
DISABILITIES, INC., ET. AL,
Plaintiffs,

vs. CASE NO. 07-CP-40-2187
SOUTH CAROLINA DEPARTMENT
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NEEDS, ET. AL,
Defendants.

DEPOSITION OF: KATHI M. LACY

DATE: July 9, 2009

TIME: 9:30 a.m.

LOCATION: Law Offices of
Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: L. Skyler Hare,
Court Reporter

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Q. Okay. Turn to Page 2, if you would, Kathi, and question No. 1. Would you read into the record the question No. 1, please.

A. "The minutes of any meetings of the Commission including but not limited to executive sessions and meetings of any board committees, members, subcommittees, support groups from the period from 1993 through present regarding discussion of the promulgation of regulations of the criteria for the promulgation of regulations or any decision whether or not to promulgate regulations."

Q. Okay. And would you read -- you're welcome to read all of it -- the only thing that I think is relevant but I leave that -- you have a Ph.D -- I think the relevant answer is contained in the subsection C as in cat. Would you read that.

A. "To the best of counsel's knowledge after due investigation, there are no minutes of board committees, members, subcommittees, support groups that relate to the discussion of promulgation of regulations, the criteria for the promulgation of regulations or any decision whether or not to promulgate regulations. If such documents are subsequently located, they will be made available promptly unless privileged in which case the

privileged law will be supplied."

Q. Okay. Now, this document was provided in response dated December the 17th, 2008.

A. 17th, yes.

Q. Okay. Since December the 17th of 2008, do you, as we're sitting here today, are you aware of any discussion regarding the criteria for the promulgation of regulations or any decision whether or not to promulgate regulations?

A. With the Commission?

Q. Yes.

A. No.

Q. This is telling me that since 1993, the minutes of the Commission show that it was not an issue ever put before them to decide one way or the other; is that correct?

A. Yes.

Q. Okay. So help me understand --

MR. WOODINGTON: Could we go off the record for a second?

MR. HAMM: Sure.

(Off-the-record conference.)

BY MR. HAMM:

Q. Hello again.

A. We're on the record.

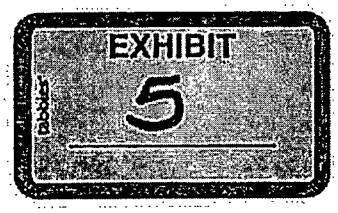
EXHIBIT
5

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF RICHLAND CASE NO. 07-CP-40-2187

PROTECTION AND ADVOCACY FOR PEOPLE WITH DISABILITIES, INC., ET AL.,

Plaintiffs,

vs.

SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS, ET AL.,

Defendant.

DEPOSITION OF:	JOHN C. VAUGHN
DATE:	April 26, 2010
TIME:	11:06 a.m.
LOCATION:	Law Offices of Richardson, Plowden & Robinson 1900 Barnwell Street Columbia, SC
TAKEN BY:	Counsel for the Plaintiffs
REPORTED BY:	Susan M. Valsecchi, RPR, CRR Certified Realtime Reporter

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authority even if they don't have it, right?

A. Then they should be held to account and --

Q. And who holds the executive director of DDSN accountable?

A. The commission is charged with that responsibility.

Q. Does this lawsuit in your mind reflect that some people do not believe the commission held him accountable?

A. It seems to indicate that.

Q. And can you appreciate that people of good faith might reach that conclusion?

A. Apparently they did.

Q. Okay. I've asked you this, but I want to make sure I'm clear about it, as we get ready to go into another area:

Did you ever receive, as a member of the commission, a presentation, legal or otherwise, about regulations and whether or not the commission or the staff should try to avoid them?

A. I don't know. I don't remember any statement or presentation indicating that they were taboo.

Any statements that I'm recalling were

in the vein of, nobody is in danger, let's work on this other thing. I mean, in other words, that's covered, let's get these other things -- let's take first things first kind of approach. In other words, let's get our policies straightened out and then we'll get into these other layers.

Q. And first things first is --

A. -- policy.

Q. 15 years after the statute is enacted, we don't have everything done, first things first; so before we're going to turn to regulation, we're going to do first things first in 2005 on a statute enacted in 1990.

MR. WOODINGTON: Object to the form of the question.

THE WITNESS: I came on in 2005. I found this in the middle of 2006. We got it changed by the first of 2007. We were moving, is my point. I don't think it would have taken us another 17 years to get it done.

But if I may interject a ministerial comment, the Lord's will be done, and He raises it up and He puts down and we serve and we do the best we can.

Q. Amen.

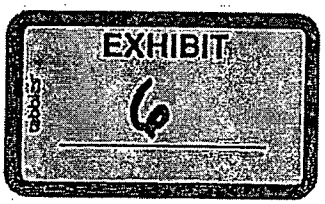
EXHIBIT
6

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF RICHLAND
PROTECTION AND ADVOCACY
FOR THE PEOPLE WITH
DISABILITIES, INC., ET. AL,
Plaintiffs,

vs. CASE NO. 07-CP-40-2187

SOUTH CAROLINA DEPARTMENT
OF DIABILITIES AND SPECIAL
NEEDS, ET. AL,
Defendants.

DEPOSITION OF: KATHI M. LACY

DATE: July 9, 2009

TIME: 9:30 a.m.

LOCATION: Law Offices of
Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: L. Skyler Hare,
Court Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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any.

A. Uh-huh.

Q. So I'm trying to understand if the Commission has never even under their minutes discussed policies through regulations, I'm trying to understand how it is that you as the head of the office of policy have been guided with regard to the use of regulations when the Commission's minutes don't reflect any discussion on that issue.

MR. WOODINGTON: I object to the form of that --

BY MR. HAMM:

Q. That's fine, you have to answer. Go ahead and answer.

A. Since I've been at DDSN, the practice has been and the interpretation of the state statue has been that the issuance or promulgation of regulations is permissible but not required. And --

Q. There has been a change in the composition of the Commission.

A. Yes.

Q. Remind me how many -- are there seven members of the Commission?

A. Yes.

Q. And am I correct that, what, there's

Q. All right. Have you had that conversation with the -- Dr. Laurent, the new Director?

A. Dr. Laurent did -- we did have a conversation about that.

Q. All right. Tell me about that conversation.

A. I just told him what my understanding was of the state statute.

Q. And that understanding is what?

A. It that the promulgation of regulations is permissible.

Q. Okay. And who decides -- who decides what the policy is with regard to DDSN with regard to how they create policies? Is that you or the Commission?

A. Of how policies are created?

Q. Yes.

A. The only policies that we have are created by the Commission.

Q. Okay. But you told me you don't have a process of having the Commission review and approve directives, right?

A. That's right.

Q. And you've told me that you had not had

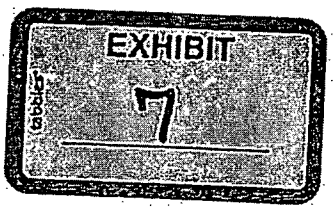
EXHIBIT
7

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF RICHLAND
PROTECTION AND ADVOCACY
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mean, I've experienced times where we've tried to use the regulatory process to no avail. In fact, Ms. Gloria Prevost in this room has been part of a subcommittee where we were trying to get DHEC law changed and we got nowhere through the legislative process by promulgating regulations. And I explained to that subcommittee that DDSN could have handled that request instantly by changing a contract or a directive.

So I've been involved in times where the regulatory process is ineffective, it's not time sensitive and it's -- you know, our process that we have in place gives the entire public, the nation really, an opportunity to comment at any time on any of our directives.

Q. But we've already -- we've already established that you don't have a procedure or a directive to deal with folks that may not have access to the Internet, correct?

A. That is correct.

Q. Okay. And you've already told me that you don't publish notices of potential changes in directives and anything in newspapers, you don't do it in the documents. What's the state -- and you don't do it in the State Register, correct?

EXHIBIT
8

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

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PROTECTION AND ADVOCACY FOR PEOPLE WITH DISABILITIES, INC., ET AL.,

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TAKEN BY:	Counsel for the Plaintiffs
REPORTED BY:	Susan M. Valsecchi, RPR, CRR Certified Realtime Reporter

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sorry.

A. No, that's all right.

Q. Do you think it's a bad idea for the commission, as a matter of policy, to enact regulations that would eliminate this controversy about eligibility standards referenced in state law?

MR. WOODINGTON: Object to the form of the question.

BY MR. HAMM:

Q. Go ahead and answer.

A. I think you're describing a utopian concept that is not verified in reality. Regulations are almost universally despised by the general public. And regulatory behavior is usually used as the reason government can't work; so let me elaborate on that.

Q. Go ahead.

A. I don't believe that it's a realistic everyday response outside -- pardon me -- the legal community -- to suggest that these proposed regulations would eliminate the pain of these suffering people.

Q. If they eliminated even part of it, would that be a good thing?

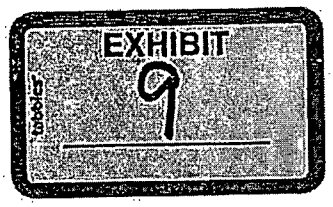
EXHIBIT
9

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF RICHLAND CASE NO. 07-CP-40-2187

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say, Ken.

THE WITNESS: I honestly don't remember who I talked to, but I do know what answer I was given. And I know every time I asked about regulations -- and my questions about regulations always followed public statements demanding regulations by someone who was in the media, not a commissioner, but there would be an attorney or someone else there who would come on --

MR. WOODINGTON: Excuse me. You may be talking about some other attorney, but I don't want you to say anything that a DDSN attorney or Will Davidson said to you.

THE WITNESS: No, no, no. It wouldn't be. No, it wasn't them.

BY MR. HAMM:

Q. Or anything that's said in an open meeting is not --

A. Somebody would say in an open meeting, why doesn't DDSN have any regulations? Okay? And then there would be a discussion and the explanation would be given that all of these issues are covered by statute, or something like that.

And then there would be some interaction, you know, among commissions or staff

or somebody later about, what's the deal on this thing with regulations? And the answer would be given, there's nothing that's not covered already.

Q. Well, in looking at the minutes, I never saw anything where the commission actually addressed the exact question that we have decided, as a matter of policy, that we're not going to use regulations implementing our statutes. I didn't find that. Do you know something I don't know?

A. So you're saying that there's nothing in the minutes where we decided we were not going to have regulations?

Q. Yes.

A. Well, that would be correct, but we wouldn't write down every statement that was made by somebody who was attending a meeting as a part of the public.

Q. Did you ever -- were you ever told by staff that the appeal or eligibility process was not part of the governing the operation of the department?

MR. WOODINGTON: Object to the form of the question.

THE WITNESS: Staff --

MR. WOODINGTON: You're talking about

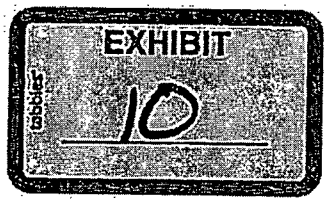
EXHIBIT
10

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF RICHLAND

PROTECTION AND ADVOCACY
FOR THE PEOPLE WITH
DISABILITIES, INC., et al.,

Plaintiff,

vs.

CASE NO. 07-CP-40-2187

SOUTH CAROLINA DEPARTMENT
OF DISABILITIES AND SPECIAL
NEEDS, et al.,

Defendant.

DEPOSITION OF: DEBORAH C. McPHERSON

DATE: September 23, 2011

TIME: 10:08 A.M.

LOCATION: Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: SANDRA K. BJERKE, RMR, RDR, CRR

A. WILLIAM ROBERTS, JR. & ASSOCIATES

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I'm just not aware.

Q. I'm not aware of any either. It's not one of the five with regard to it, so you're correct.

A. I'm not aware.

Q. Do you think there should be regulations with regard to the -- to protect the rights of individuals receiving services within those programs, for there to be regulations for them?

A. Yes.

Q. What kind of training have you received as a commissioner?

A. Initially when I came on board Dr. Laurent spent some time. There were four new commissioners. And Mr. Huntress could not be there so he met with Ms. Banov, Ms. Lait and myself, and we spent like an afternoon. And then following that we had a two-day work session, and each year there's been like a work session.

We just finished -- and we're doing it a little bit differently this time in that we're not doing it several days together, but we're tacking it on to our commission meeting time, that we're having a work session.

A. If there had been a meeting and there had been some substantive -- you know, something that would have been recommended, whatever, yes, it would have been reported out to the full commission.

Q. Are you aware -- and you probably are since you worked at the Department of Health and Human Services -- that they have a fair hearing regulation and procedures outlined in reg for the public to know?

Are you familiar with it or just aware of its existence?

A. I just aware. I'm not familiar with it, but I'm aware of it.

Q. But you are aware that DDSN doesn't have a comparable regulation outlining a hearing process for folks that may have an issue or problem with regard to a decision that DDSN has made.

A. Yes.

Q. Do you think there should be one for DDSN, a fair hearing regulation?

A. Personally, yes.

MS. HILL: Can we take just a quick break? And I may be close to finishing.

THE WITNESS: Sure.

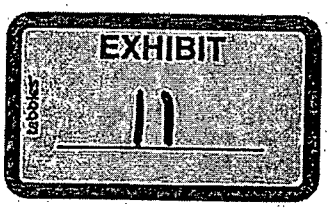
EXHIBIT
11

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF RICHLAND

PROTECTION AND ADVOCACY FOR THE PEOPLE WITH DISABILITIES, INC., et al.,

Plaintiff,

vs. CASE NO. 07-CP-40-2187

SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS, et al.,

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DEPOSITION OF: DEBORAH C. McPHERSON

DATE: September 23, 2011

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TAKEN BY: Counsel for the Plaintiff

REPORTED BY: SANDRA K. BJERKE, RMR, RDR, CRR

to be undertaken which is not.

A. Correct.

Q. Um-hum. And it's still not to this day.

A. Correct. There was an attempt under Governor Sanford, and, in fact, contacts were made. We as commission members were requested to submit names of individuals from our congressional district for those three divisions, and we did, and those appointments were never made.

Q. Are there -- let me see. Well, since -- what types of -- whether you drafted them or not, are you aware of any other policies that existed prior to the five 800 series ones now?

Can you tell me a little bit about what types of policies they were prior to the five existing ones?

A. The biggest difference that I find with the existing policies versus the policies that were in place before is a clear line has been delineated for the commission as far as this is your responsibility to oversee the state director, and you're not to be involved in the day-to-day operations of the commission -- of the department, rather. I'm sorry. That, to me, if you look at

those new policies, I see that as being the biggest difference.

The other difference with the existing policies is the old policies you could sit and read and they mirrored the state code.

Q. Um-hum. And the current ones don't.

A. And the current ones don't. But that to me is the two biggest differences between the old commission policies and the policies that we have in place today.

And I guess because of my involvement in those previous policies, I know there's a difference of opinion among commissioners. I see some value to policies mirroring state code.

Q. With regard -- you'd mentioned a little bit earlier this morning, too, that the commission -- and you just did previously too. The commission -- the director -- excuse me. The director actually -- executive director actually answers to the commission.

A. The state director.

Q. Yes, ma'am, state director. And who is that currently right now?

A. Dr. Beverly Buscemi.

Q. And how is the state director obtained

I think it was 2002 and before that, were you -- were you involved in the communication between the executive director and the commission since you were the --

A. The state director?

Q. Yes, ma'am.

A. No. State director communicated with commission. I did not. On occasion I might have too, but it generally would have been something about -- regarding meeting or meeting arrangements or things like that.

Q. I know we've talked about those directives right there, and I do have copies of them if you need them.

If you were able today, what would you change from those five policies?

A. If it were up to me as commissioner, I would repeal those policies and go back to policies that mirror the state code.

Q. And I believe you said earlier that one of the duties of the department or the commission is to promulgate regulations.

Would that be something you would change also?

A. Well, there are two things now that -

you know, looked at the state code this morning. The state code says promulgate regulations for the operation of the department, and then it implies that shall promulgate regulations regarding the services and such.

So it's interesting, when you look at it, when it's saying promulgate regulations of the operation, and yet we've got policies, commission policies that are -- have been pretty clear to say you don't get involved in the day-to-day operations. You can't have it both ways.

Q. Makes it a little difficult, doesn't it?

A. Yes.

Q. Ma'am, you also mentioned when you switched Heather from her waiver -- and please tell me if I got it wrong. You also mentioned that there were various reasons, but one of them also, you had an issue with the local board?

A. (Witness moves head up and down.)

Q. What type of issue did you have with the local board?

A. Well, my main complaint at that time was Heather's service plan that was developed had major errors, and that particular year the director

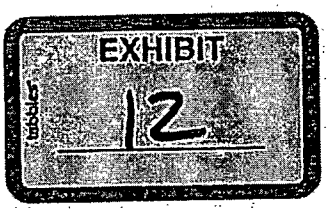
EXHIBIT
12

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Protection and Advocacy for the People with Disabilities, Inc., M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M.; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S.,

Plaintiffs,

v.

South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs,

Defendants.

Civil Action No. 07-CP-40-2187

DEFENDANTS' ANSWERS TO PLAINTIFFS' REQUESTS FOR ADMISSION

The Defendants answer Plaintiffs' Requests for Admission as follows:

5. That any and all operations of the Defendant are related to, or are for the purpose of, carrying out and providing services to certain citizens or people who have mental retardation, a related disability, head injury, or spinal cord injury and who are receiving services or who is an infant at risk of having a developmental disability and is receiving services.

RESPONSE: Denied as stated. Specifically, and as already argued by Defendants in connection with their pending Motion for Summary Judgment, the term "operations," as used in § 44-20-220, relates only to the internal operations of the Department, and not to its mission to the outside world.

6. That the South Carolina Department of Disabilities and Special Needs is required to treat and/or provide service to individuals with mental retardation, a related disability, head injury, or spinal cord injury as part of its operations in the State of South Carolina.

RESPONSE: Denied as stated. Specifically, and as already argued by Defendants in connection with their pending Motion for Summary Judgment, the term "operations," as used in § 44-20-220, relates only to the internal operations of the Department, and not to its mission to the outside world.

7. That the South Carolina Department of Disabilities and Special Needs is s tatutorily required to promulgate regulations related to the operations of the Department.

RESPONSE: Admitted, but it is denied that this broad legal proposition creates the rights to which Plaintiffs claim they are entitled in their pleadings in this case. Specifically, and as already argued by Defendants in connection with their pending Motion for Summary Judgment, the term "operations," as used in § 44-20-220, relates only to the internal operations of the Department, and not to its mission to the outside world.

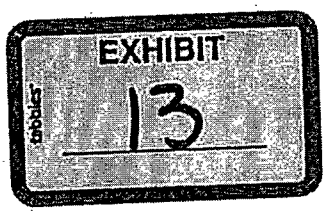
EXHIBIT
13

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Protection and Advocacy for the People with Disabilities, Inc., M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M.; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S.,

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RESPONSE: Denied as stated. Specifically, and as already argued by Defendants in connection with their pending Motion for Summary Judgment, the term "operations," as used in § 44-20-220, relates only to the internal operations of the Department, and not to its mission to the outside world.

7. That the South Carolina Department of Disabilities and Special Needs is statutorily required to promulgate regulations related to the operations of the Department.

RESPONSE: Admitted, but it is denied that this broad legal proposition creates the rights to which Plaintiffs claim they are entitled in their pleadings in this case. Specifically, and as already argued by Defendants in connection with their pending Motion for Summary Judgment, the term "operations," as used in § 44-20-220, relates only to the internal operations of the Department, and not to its mission to the outside world.

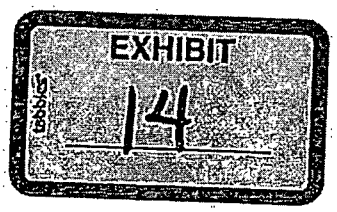
EXHIBIT
14

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF RICHLAND
PROTECTION AND ADVOCACY
FOR THE PEOPLE WITH
DISABILITIES, INC., ET. AL,
Plaintiffs,

vs. CASE NO. 07-CP-40-2187
SOUTH CAROLINA DEPARTMENT
OF DIABILITIES AND SPECIAL
NEEDS, ET. AL,
Defendants.

DEPOSITION OF: KATHI M. LACY

DATE: July 9, 2009

TIME: 9:30 a.m.

LOCATION: Law Offices of
Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: L. Skyler Hare,
Court Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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THE WITNESS: Yeah, 2002.
MR. HAMM: Excuse me, what did I say?
THE WITNESS: That's okay.
MR. WOODINGTON: 1992.
THE WITNESS: Yeah, I was like, what?
MR. HAMM: Back in time.
THE WITNESS: Okay, so we're in 2002 and I was promoted to the Associate State Director of Policy.
BY MR. HAMM:
Q. Associate State Director. And an Associate State Director of Policy would do what?
A. Primarily responsible for the -- the directives related to how the department, you know, functions, responsibilities that it carries out, setting forth policy based on the Commission's direction, setting forth the service standards, some of the things in my previous job.
Q. Only is it fair at this point that the scope of your job is just it's now broader, it now encompasses more than mental retardation, right?
A. Yes.
Q. All right. What's next?
A. The other responsibilities that I have?
Q. Yes.

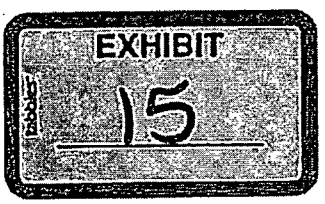
EXHIBIT
15

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF RICHLAND

PROTECTION AND ADVOCACY
FOR THE PEOPLE WITH
DISABILITIES, INC., et al.,

Plaintiff,

vs. CASE NO. 07-CP-40-2187

SOUTH CAROLINA DEPARTMENT
OF DISABILITIES AND SPECIAL
NEEDS, et al.,

Defendant.

DEPOSITION OF: DEBORAH C. McPHERSON

DATE: September 23, 2011

TIME: 10:08 A.M.

LOCATION: Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: SANDRA K. BJERKE, RMR, RDR, CRR

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is spent in educating the general assembly and coordinating services with other state agencies, ensuring that the policies of the department are carried out and one who's ultimately held accountable by the commission.

Q. And can you explain to me, what are the planning and coordination of services? What would that be?

A. Planning the direction, for example, of the department. And that would include all services. A major part of the Department of Disabilities and Special Needs too is coordinating with the Department of Health and Human Services since the majority of our services are Medicaid funded. It may be, for example, ensuring that the needs of their -- I'll give you a good example.

CMS ruled a couple years ago that folks that were receiving individual rehab supports, that that was considered rehabilitation, and folks with developmental disabilities cannot be rehabilitated. They have to be habilitated.

So that, in essence, was a need that we knew we had. And then department then addressed it by development of a new waiver, community supports waiver, where folks that had been in individual

rehab supports were able to be moved into that new waiver. So addressing future needs.

One of the things, for example, right now that we're looking at is a new assessment tool. So it's trying to address current as well as future needs and planning for those needs.

Q. Okay. And the waiver you mentioned as an example, was that a waiver that was developed and also -- not only by DDSN, but is it administered by DDSN?

A. No. It is operated by DDSN through contract with the Department of Health and Human Services. The Department of Health and Human Services is the Medicaid agency responsible for administration of all Medicaid waivers.

Q. Okay. And when you just mentioned planning of the department and all services, and what do you mean by all services?

Is that including like -- and when I'm talking about -- not the Medicaid or federal related services or Health and Human Services -- Department of Health and Human Services, just DDSN services. What would those be?

A. It could be early intervention services, it could be prevention services, it could

be day services, it could be residential services, it could be family support services, which would encompass respite.

Q. And in following their statutory requirements that the department's been charged with and the executive director is supposed to implement and carry out, in handling those particular services that are DDSN services you just went now and listed, how does the -- what are the director's responsibility? How does he do that? Or she -- excuse me -- do that?

A. Basically through staff and basically through contracts with local boards in the state as well as working with private providers for the provision of those services.

Q. Okay. All right. And everything you just mentioned to me related to -- not the other federal related stuff or Department of Health and Human Services stuff. Just the DDSN stuff. That is part of the operations of DDSN.

MR. WOODINGTON: Object to the form of the question.

BY MS. HILL:

Q. You can go ahead and answer. And I'm talking about the stuff you just mentioned, the

nonfederal, non-HHS stuff.

A. But as I indicated before, over 60 percent of the funding for DDSN services is federal, you know, Medicaid.

Q. I understand.

A. And so the majority of it is Medicaid funded, but the services that I just mentioned are all --

Q. DDSN, state-funded services. Or DDSN-responsible services, whether it's funded -- however it may be funded. And --

A. They are services that are currently provided by DDSN.

Q. Okay.

A. Now, remember, waiver services in this state are optional services.

Q. Um-hum.

A. Our Medicaid agency could say we're no longer going to participate in waiver services.

Q. Um-hum.

A. And so a lot of those services that I just mentioned are funded through Medicaid. We would have no funding for them.

Q. Okay. But even regardless of state or federal funding, doesn't DDSN have some

responsibility in the provision of those services through the legislature since they are one of the entities that's got to -- is charged with providing a certain type of service to South Carolinians that avail themselves of it if they meet that criteria that's established by statute?

A. There are services, but I don't believe -- if you go back and read the state code, they're not -- the services that I've listed out are not specific in the state code.

Q. No, ma'am. I wouldn't expect them to be.

A. Right.

Q. But you had previously mentioned to me that that's part of the operations of the department.

A. That's correct.

Q. And, I believe, the planning and coordinating of services and in the director's responsibilities in seeing what the needs are and what services need to be provided.

MR. WOODINGTON: Object to the form.

BY MS. HILL:

Q. Is that correct?

A. Correct.

Q. Other than -- is there anything -- and I believe you mentioned that the director also, in carrying out the operations of the department, does work through and use staff.

A. Correct.

MR. WOODINGTON: Object to the form.

BY MS. HILL:

Q. So is it fair to say then whatever staff does is part of the operations of the Department of Disabilities and Special Needs?

MR. WOODINGTON: Object to the form.

THE WITNESS: Yes.

BY MS. HILL:

Q. Okay. And I realize you're in a unique position because you not only are currently a commissioner, but you've also been a prior staff member of DDSN and also its predecessor entity.

And based upon your knowledge, is that, in your view, what -- what you've told me, what the operations of the department have been and currently are?

MR. WOODINGTON: Object to the form.

BY MS. HILL:

Q. Or should be?

A. Can you repeat the question?

Q. Okay. I'll try, I'll try. Because you've actually -- you just mentioned what the operations of the department are, and the director does work through staff in order to carry out operations of the department. And so what the staff does would be considered their functions.

What the director tells them to do, what they do every day when they come into the office is part of the operations of the department; correct?

A. Correct.

MR. WOODINGTON: Object to the form.

BY MS. HILL:

Q. Previously when we were talking you mentioned that whenever you were on staff, because you were -- I call it like a liaison, the staff person for the commission itself. And you actually interacted with them, and you were the person who initially drafted many of the documents and things of that nature that the department did use.

You'd mentioned that those policies and procedures -- policies, department policies that were in place prior to the five 800 series current DDSN policies -- what types of policies were in place previously before the five existing ones?

What would those areas have covered?

A. What I was involved in was only the drafting of commission policies.

Q. Okay.

A. I was not involved in the drafting of directives that weren't in place at that time.

Q. What types of commission policies existed?

A. The commission policies were drafted to be consistent with the state code when the Department of Disabilities and Special Needs was first created.

For example, one policy I remember drafting, but it was never sent to the commission for approval, was regarding the establishment of advisory committees for the three divisions. That's never been done.

No governor has ever appointed those three advisory councils, but that was one of the -- one of the commission policies that I drafted.

Q. Um-hum. And I bet you drafted it, as you just said, because it's found in state code. They're supposed to.

A. It's found in state code, correct.

Q. And it's a requirement that is supposed

to be undertaken which is not.

A. Correct.

Q. Um-hum. And it's still not to this day.

A. Correct. There was an attempt under Governor Sanford, and, in fact, contacts were made. We as commission members were requested to submit names of individuals from our congressional district for those three divisions, and we did, and those appointments were never made.

Q. Are there -- let me see. Well, since -- what types of -- whether you drafted them or not, are you aware of any other policies that existed prior to the five 800 series ones now?

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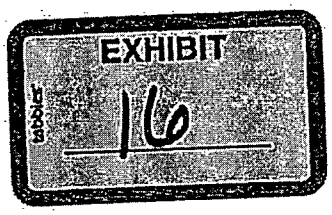
EXHIBIT
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STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF RICHLAND CASE NO. 07-CP-40-2187

PROTECTION AND ADVOCACY FOR PEOPLE WITH DISABILITIES, INC., ET AL.,

Plaintiffs,

vs.

SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS, ET AL.,

Defendant.

DEPOSITION OF: JOHN C. VAUGHN

DATE: April 26, 2010

TIME: 11:06 a.m.

LOCATION: Law Offices of Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiffs

REPORTED BY: Susan M. Valsecchi, RPR, CRR
Certified Realtime Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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non-lawyer staff, right?

BY MR. HAMM:

Q. Yeah.

A. Did staff tell me that eligibility --

Q. -- and appeals --

A. -- and appeals --

Q. -- were not part of the operation of the department?

MR. WOODINGTON: And, again, object to the form.

THE WITNESS: They were part of the operation.

BY MR. HAMM:

Q. All right, okay.

A. But, however, we often used the word operations as distinct from policy.

In other words, when we were talking about Carver -- and it may even state this in Carver's Policy of Governance.

Now, I see the statute and I understand why you're asking me about the term operation. But we made the distinction between management and staff, between -- I'm sorry -- management would be the executive director and then his staff -- but between governing and administration, or between

policy and operations.

And often I would hear the term by a commissioner or by one of our chairman that would say, that's a matter of operations, meaning that's something for the director or the staff to take care of. And they weren't trying to distinguish that or redefine this term. They were just identifying staff work. Day-to-day operations was often the way it was expressed.

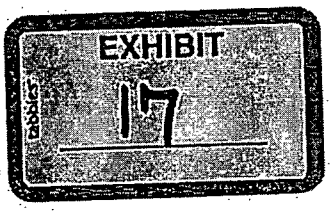
Q. But you were kind enough to acknowledge to me that eligibility and appeals is a fundamental part of the operations of the department; and I don't think you and I are disagreeing on that.

What I'm understanding you to say is, without ever voting on it, there was just some understanding that when in doubt we were not going to use a regulation. Is that a fair -- I'm trying to openly in my mind characterize what I'm hearing you tell me.

I'm hearing a tone of we're going to stay away from all of the regulation, as far as we can.

A. Are you hearing that from me?

Q. I'm asking. That's what I think I'm -- well, I know as a matter of fact, even though the



EXHIBIT
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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Protection and Advocacy for the People with Disabilities, Inc., M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as guardian of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M.; R.P. on behalf of and as guardian of S.P.; R.R. and J.R. on behalf of and as guardian of K.D.R.; and J.K. on behalf of and as guardian of S.S., Plaintiffs, v. South Carolina Department of Disabilities and Special Needs; Dr. Stanley J. Butkus, in his official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs, Defendants.	IN THE COURT OF COMMON PLEAS Civil Action No. 07-CP-40-2187 **DEFENDANTS' ANSWERS TO PLAINTIFFS' REQUESTS FOR ADMISSION**

The Defendants answer Plaintiffs' Requests for Admission as follows:

5. That any and all operations of the Defendant are related to, or are for the purpose of, carrying out and providing services to certain citizens or people who have mental retardation, a related disability, head injury, or spinal cord injury and who are receiving services or who is an infant at risk of having a developmental disability and is receiving services.

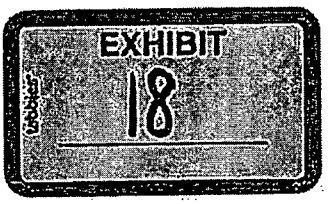
RESPONSE: Denied as stated. Specifically, and as already argued by Defendants in connection with their pending Motion for Summary Judgment, the term "operations," as used in § 44-20-220, relates only to the internal operations of the Department, and not to its mission to the outside world.

6. That the South Carolina Department of Disabilities and Special Needs is required to treat and/or provide service to individuals with mental retardation, a related disability, head injury, or spinal cord injury as part of its operations in the State of South Carolina.

RESPONSE: Denied as stated. Specifically, and as already argued by Defendants in connection with their pending Motion for Summary Judgment, the term "operations," as used in § 44-20-220, relates only to the internal operations of the Department, and not to its mission to the outside world.

7. That the South Carolina Department of Disabilities and Special Needs is s tatutorily required to promulgate regulations related to the operations of the Department.

RESPONSE: Admitted, but it is denied that this broad legal proposition creates the rights to which Plaintiffs claim they are entitled in their pleadings in this case. Specifically, and as already argued by Defendants in connection with their pending Motion for Summary Judgment, the term "operations," as used in § 44-20-220, relates only to the internal operations of the Department, and not to its mission to the outside world.



EXHIBIT
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Beverly A. H. Buscemi, Ph.D.
State Director
David A. Goodell
Associate State Director
Operations
Kathi K. Lacy, Ph.D.
Associate State Director
Policy
Thomas P. Waring
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Reference Number:	100-30-DD
Title Document:	Eligibility Diagnostic Criteria, Screening and Intake Processes for Eligibility, and Appeal Procedures
Date of Issue:	November 7, 2008 (Created from Existing Policy)
Effective Date:	November 7, 2008
Last Review Date:	September 1, 2010
Date of Last Revision:	September 1, 2010
Applicability:	Person Applying For DDSN Services, DSN Boards, Qualified Providers, Regional Centers & Other Interested Parties

I. Introduction

The following Departmental Directive sets forth the policy, process and procedures used in the determination of eligibility for services and supports through the South Carolina Department of Disabilities and Special Needs (DDSN).

Criteria designated within South Carolina Code of Laws indicate seven (7) different categories of eligibility under the authority of DDSN: Mental Retardation; a Related Disability to Mental Retardation; High Risk Infant; Autism; Head Injury (i.e., traumatic brain injury); Spinal Cord Injury; and Similar Disability. Some individuals may meet DDSN eligibility criteria under more than one (1) category. In such situations, DDSN will consider which DDSN division offers the most appropriate resources and service models to address the needs of the particular person and his/her family. Individuals with primarily medical conditions such as Diabetes, Hypertension, Stroke, Multiple Sclerosis, Parkinson's Disease, Cancer, etc., do not meet DDSN eligibility criteria under any category unless other qualifying conditions are met.

II. Criteria for Mental Retardation

A. Definition

S.C. Code Ann. §44-20-30 defines "Mental Retardation" as significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

B. Diagnostic Criteria

DDSN evaluates referred individuals in accordance with the definition of Mental Retardation outlined in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders-Fourth Edition, Text Revision (DSM-IV-TR, 2000).

Mental retardation refers to substantial limitations in present functioning. Diagnosis of mental retardation based on the DSM-IV-TR definition requires the following three (3) criteria be met:

1. Significantly sub-average intellectual functioning; an IQ of approximately 70 or below on an individually administered intelligence test (for infants, a clinical judgment of significantly sub-average intellectual functioning);

2. Concurrent deficits in present overall adaptive functioning (i.e. the person's effectiveness in meeting the standards expected for his/her age by his/her cultural group) with deficits in at least two (2) of the following adaptive skills areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety;

3. The onset of mental retardation is before age 18 years.

There must be concurrent deficits in intellectual and adaptive functioning that fall approximately two (2) or more standard deviations below the mean on standardized measures (approximately 70 or below) in order to meet criteria for diagnosis of mental retardation. However, a score of 70 on any intelligence and/or adaptive test does not equate to a diagnosis of mental retardation.

DDSN relies on qualified providers to administer psychological testing to applicants. This includes testing conducted by school psychologists and other professionals who regularly administer psychological tests to persons with disabilities. The tests are then analyzed by the DDSN Consumer Assessment Team to determine if they are reliable and valid, and to determine whether they are consistent and congruent with other psychological tests, school records including academic achievement scores, placement in special education & Individualized Education Plan data, medical reports, psychiatric and mental health

records, family history, and other pertinent information. In order to ensure the reliability and validity of the tests administered to applicants, only standardized measures are used to determine if criteria for mental retardation are met. Therefore, DDSN maintains a list of all approved psychometric tests that must be used for eligibility purposes.

III. Criteria for Related Disability

A. Definition and Diagnostic Criteria

S.C. Code Ann. §44-20-30 and 42 CFR 435.1009 defines eligibility for DDSN services under **"Related Disability"** as follows:

A severe, chronic condition found to be closely related to mental retardation or to require treatment similar to that required for persons with mental retardation and must meet all **four** (4) of the following conditions:

1. It is attributable to cerebral palsy, epilepsy, or any other condition other than mental illness found to be closely related to mental retardation because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of persons with mental retardation and requires treatment or services similar to those required for these persons;

2. the related disability is likely to continue indefinitely;

3. it results in substantial functional limitations in three (3) or more of the following areas of major life activity: self-care, understanding and use of language, learning, mobility, self-direction, and capacity for independent living; AND

4. The onset is before age 22 years.

DDSN relies on qualified providers to administer psychological testing to applicants. This includes testing conducted by school psychologists and other professionals who regularly administer psychological tests to persons with disabilities. The tests are then analyzed by the DDSN Consumer Assessment Team to determine if they are reliable and valid, and to determine whether they are consistent and congruent with other psychological tests, school records including academic achievement scores, placement in special education & Individualized Education Plan data, medical reports, psychiatric and mental health records, family history, and other pertinent information. In order to ensure the reliability and validity of the decisions made, DDSN uses standardized measures to determine if criteria for a related disability are met. Specifically, a standardized test of functional abilities that yield a composite score of two (2) standard deviations or more (i.e., Composite < 70) must be met to qualify for

eligibility under the Related Disability category. DDSN maintains a list of all approved psychometric tests that will be used to determine if criteria for a related condition are met.

IV. Criteria for High-Risk Infant

A. Definition

S.C. Code Ann. §44-20-30 defines "high-risk infant" as a child less than 36 months of age whose genetic, medical or environmental history is predictive of a substantially greater risk for a developmental disability than that for the general population.

B. Diagnostic Criteria

Children younger than 36 months of age are served under this category when they exhibit significant documented delays in three (3) or more areas of development or have an approved diagnosis confirmed by a medical professional and exhibit significant documented delays in two (2) areas of development.

This category of eligibility allows DDSN to provide services to infants and young children under 36 months in instances where the future diagnosis is not absolutely clear due to situations (genetic, environmental or medical) present at birth or manifesting themselves thereafter, including accident and injury. In such instances, eligibility may be established in a time-limited fashion until a more comprehensive and conclusive assessment can be made regarding the presence or absence of a qualifying disability (not to exceed 36 months of age). Infants and young children under 36 months are eligible to receive all DDSN services for which they qualify based on need and resource availability. Once the child turns 36 months of age, he/she must qualify for DDSN eligibility in another category, such as mental retardation, a related disability, autism, traumatic brain injury or spinal cord injury to continue to receive services from DDSN. The one exception is for those children ages three (3) to six (6) years of age eligible in the at-risk category. These children may continue to receive early intervention services (i.e., family training and service coordination provided by an Early Interventionist) until further notified by the State Director. Any child 36 months of age or older whose eligibility is not updated by DDSN's Consumer Assessment Team by their 37 month of age must have their file closed. The child is no longer eligible to receive any service from DDSN.

V. Criteria for Autism

A. Definition

DDSN uses the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders-Fourth Edition, Text Revision (DSM-IV-

TR, 2000) definition of "Autistic Disorder" (i.e. Autism) which states Autistic Disorder is "an abnormal or impaired development in social interaction and communication and a markedly restricted repertoire of activity and interest. The disturbance must be manifested prior to the age of three (3) years."

B. Diagnostic Criteria

DDSN evaluates referred individuals in accordance with the definition of Autistic Disorder outlined in the Diagnostic and Statistical Manual of Mental Disorders-Fourth Edition, Text Revision (DSM-IV-TR, 2000). Criteria for diagnosis of autism requires the presence of at least six (6) (or more) items from (1), (2), and (3), with at least two from (1), and one each from (2) and (3):

1) **Qualitative impairment in social interaction, as manifested by at least two of the following:**

   a) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction;
   b) failure to develop peer relationships appropriate to developmental level;
   c) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest);
   d) lack of social or emotional reciprocity.

2) **Qualitative impairments in communication as manifested by at least one of the following:**

   a) delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime);
   b) in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others;
   c) stereotyped and repetitive use of language or idiosyncratic language;
   d) lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level.

3) **Restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following:**

   a) encompassing preoccupation with one (1) or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus;

b) apparently inflexible adherence to specific, nonfunctional routines or rituals;
c) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole body movements);
d) persistent preoccupation with parts of objects.

VI. Procedures for Screening for Children ages Birth to 3 years old

A. Screening Process

1. Not yet in BabyNet Program

a) If the child is under birth to 2 years 11 months old, a referral to the BabyNet Program, administered by First Steps, must occur first.

b) If the child is at or over 2 years 11 months of age, screening must occur prior to intake. See Section VII.

2. In BabyNet Program

If the child is already receiving services from an Early Interventionist via the BabyNet Program, and the child is in the Consumer Data Support System (CDSS) as BabyNet only or as High-Risk, the Early Interventionist can skip the screening process and begin the intake process as outlined under VII. (B) 3. Please note that any child who reaches 37 months of age without an eligibility determination by the DDSN Consumer Assessment Team will no longer be eligible for any service and their file must be closed.

VII. Procedures for Screening for MR, RD, Autism and for Persons at or over 2 years 11 Months of Age

A. Screening Process

1. Effective July 1, 2010, the USC School of Medicine – Center for Disability Resources will conduct screening for any person suspected of having mental retardation, a related disability, Autism or for a child considered At-Risk (children three (3) to six (6) years old). The toll-free number is 1-800-289-7012.

2. Residency – Applicants must be legal South Carolina residents and legal U.S. citizens to be considered for DDSN eligibility.

3. If determined during screening that the individual is not likely to be eligible for services (i.e., they are screened out), the person/legal guardian will be informed of other community resources or providers from whom

assistance may be sought. The person/legal guardian may appeal the screening results. If screened in, the screener will provide the applicant with a list of all available Service Coordination or Early Intervention (if under six (6) years old) providers in which to take the applicant through intake and eligibility. Additional information, including the DDSN website address, will be mailed to each applicant.

B. Intake Process

1. When screened in, all available information by the USC School of Medicine-Center for Disability Resources will be forwarded to the applicant's chosen Service Coordinator/Early Intervention provider within 24 hours or the next business day following screening.

2. Appropriate information must be entered into CDSS by the chosen Service Coordinator/Early Intervention provider within seven (7) working days of receiving the referral.

3. The Service Coordinator/Early Interventionist will begin the process for establishing eligibility through the intake process. The following steps will be completed during the intake process:

   - No individual believed to have mental retardation, autism, a related disability or a child believed to be a high-risk infant may be admitted to the services of DDSN until an assessment of the applicant has been completed, approved, and certified by the Department as delineated in S.C. Code Ann. §44-20-390. An assessment of an applicant must be completed and approved by the DDSN Consumer Assessment Team to determine if an applicant has mental retardation, autism or a related disability, or a child believed to be a high-risk infant, or approved in the at-risk category and to be in need of services, before he/she may become eligible and receive any service, including family training.

   - It is expected that DDSN eligibility decisions will be made within three (3) months of the case open date. This means the Service Coordinator/Early Interventionist must send the DDSN Consumer Assessment Team a complete packet no later than two and a half (2.5) months of the case open date.

   - If an eligibility decision has not been made within three (3) months of the case open date, the Service Coordinator/Early Interventionist or Service Coordinator Assistant will discuss with the applicant/legal guardian the reasons for delay in eligibility and document the discussion in the service notes. It is assumed that the reason for the delay is not due to a lack of effort by the Service

Coordinator/Early Interventionist. The applicant will be placed on Level II Service Coordination status or if an Early Interventionist is involved, no reporting of case management to DDSN may occur; and the Service Coordinator/Early Interventionist will inform the Service Coordinator/Early Intervention Supervisor the reasons for the delay. The Service Coordinator/Early Interventionist will continue to work with the applicant/legal guardian to complete the eligibility packet for up to an additional three (3) months, unless otherwise indicated by the applicant/legal guardian. If eligibility is delayed due to the Service Coordinator/Early Interventionist or Service Coordinator Assistant being unable to locate or contact the applicant/legal guardian, the Service Coordinator/Early Interventionist or Service Coordinator Assistant will meet with the Service Coordinator/Early Intervention Supervisor to discuss the case and determine if intake should be extended or the case closed.

NOTE: No reporting to DDSN can occur for Intake beyond three (3) months, this includes reporting by an Early Interventionist.

- If eligibility is not determined within six (6) months of the case open date, the Service Coordinator/Early Interventionist or Service Coordinator Assistant will discuss the reason for delay with the applicant/legal guardian, choices of further extension or case closure, and the option of re-applying if services are needed in the future. Any discussions and contacts with the applicant/legal guardian during the intake process, along with justification for any extensions, must be documented in service notes. If an extension is chosen, the Service Coordinator/Early Interventionist will notify the Service Coordinator/Early Intervention Supervisor and Executive Director.

  NOTE: No reporting to DDSN can occur for Intake beyond three (3) months.

VIII. Criteria for Head and Spinal Cord Injury and Similar Disability

A. Definition

Under **S.C. Code Ann. §44-38-370,** which establishes DDSN **legislative authority for the Head and Spinal Cord Injury (HASCI) Division,** a person is eligible for **case management services** under this article when at the time of determining eligibility the person has a severe chronic limitation that:

1. is attributed to a physical impairment, including head injury, spinal cord injury or both, or a similar disability, regardless of the age of onset but not

associated with the process of a progressive degenerative illness or disease, dementia, or a neurological disorder related to aging;

2. is likely to continue indefinitely without intervention;

3. results in substantial functional limitation in at least two (2) of these life activities:

   a) self-care;
   b) receptive and expressive communication;
   c) learning;
   d) mobility;
   e) self-direction;
   f) capacity for independent living;
   g) economic self-sufficiency; and

4. reflects the person's need for a combination and sequence of special interdisciplinary or generic care or treatment or other services, which are of lifelong or extended duration and are individually planned and coordinated.

B. Diagnostic Criteria

S.C. Code Ann. §44-38-20, which relates to the South Carolina Head and Spinal Cord Information System, **defines head injury and spinal cord injury**:

"Head injury" means an insult to the skull or brain, not of a degenerative or congenital nature, but one caused by an external physical force that may produce a diminished or altered state of consciousness, which results in impairment of cognitive abilities or physical functioning and possibly in behavioral or emotional functioning. It does not include cerebral vascular accidents or aneurysms.

"Spinal cord injury" means an acute traumatic lesion of neural elements in the spinal canal resulting in any degree of sensory deficit, motor deficit, or major life functions. The deficit or dysfunction may be temporary or permanent.

"Similar disability" is not specifically defined within the South Carolina State Code of Laws; however, S.C. Code Ann. §44-38-370 states that similar disability is "not associated with the process of a progressive degenerative illness or dementia, or a neurological disorder related to aging."

There must be medical documentation and functional/adaptive assessments to substantiate that traumatic brain injury, spinal cord injury or similar disability occurred and produced ongoing substantial functional limitations. There must be documentation of pre-existing/concurrent conditions, which impact functioning.

C. Procedures for Intake

If an individual or a family member has severe impairment(s) believed to be a result of traumatic brain injury, spinal cord injury, or both, or a similar disability:

1. All children under six (6) year old at time of referral, will go through screening and intake under the MR/RD Division to be considered for the Related Disability category or for the High-Risk Infant or At-Risk Child category in order to receive Early Intervention services.

   Upon reaching age six (6) years, children in the High-Risk Infant or At-Risk Child Category must qualify for eligibility in another category, such as Related Disability, Traumatic Brain Injury, Spinal Cord Injury, or Similar Disability to continue to receive services from DDSN. Children with Spinal Cord Injury are not eligible under the Related Disability category.

2. All children ages six (6) to16 years at time of referral who sustained brain injury during infancy or childhood will go through screening and intake under the MR/RD Division to be considered first for the Related Disability category.

   If determined ineligible for the Related Disability category, the DDSN Consumer Assessment Team may consider eligibility for the HASCI Division under the Traumatic Brain Injury or Similar Disability category.

3. For children ages six (6) to16 years with spinal cord injury and all applicants 17 years or older at time of referral, contact HASCI Division Information and Referral (I&R) toll free at 1-866-867-3864 to be screened for referral to the HASCI Division.

   It may be determined during screening that an applicant 17 years or older at time of referral who sustained brain injury during infancy or childhood is more appropriate to go through screening and intake under the MR/RD Division to be considered first for the Related Disability category. If determined ineligible for the Related Disability category, the DDSN Consumer Assessment Team may consider eligibility for the HASCI Division under the Traumatic Brain Injury or Similar Disability category.

4. If screened as appropriate for formal consideration of HASCI Division eligibility, referral will be made to the approved provider of HASCI Service Coordination chosen by the applicant.

5. The applicant will be contacted by the chosen Service Coordinator provider to begin formal intake and eligibility determination procedures.

IX. APPEAL PROCEDURES FOR APPLICANTS SEEKING ELIGIBILITY FOR DDSN SERVICES

Because of the clinical nature of decisions made regarding eligibility for DDSN services, separate appeal procedures have been established for applicants.

Written notice of an eligibility decision will be provided to the applicant by the Service Coordinator/Early Intervention provider within five (5) working days of the provider's receipt of an eligibility decision. This notice will outline the basic reasons why the applicant did not meet eligibility criteria and will include information on the applicant's right to appeal an eligibility denial and the procedures for appeal. Upon request of the applicant, the Service Coordinator/Early Intervention provider must read or explain the eligibility decision and appeal procedures to the applicant if eligibility is denied.

When an appeal is desired by the applicant, a signed and dated formal written appeal of an eligibility denial must be made within 30 calendar days of the eligibility decision. The appeal must be made by the applicant, his/her guardian, or any other person/entity advocating on behalf of the applicant, with the applicant's approval and must state the reason for believing that the denial of eligibility was in error. This written appeal must be given to the Service Coordinator/Early Intervention provider. If an oral request for appeal is made by the applicant to the Service Coordinator/Early Intervention provider and the applicant requires assistance, the Service Coordinator/Early Intervention provider must assist the applicant in writing the appeal.

The applicant's record on CDSS will remain open until the time to request an appeal is over or until all appeals are completed.

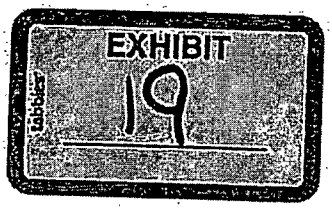
The formal written appeal of a determination of ineligibility will be forwarded by the Service Coordinator/Early Intervention provider to the Director of the DDSN Consumer Assessment Team within five (5) workdays of receipt from the applicant. All pertinent documents upon which the eligibility denial was based will be reviewed. If new or additional information is provided which was not part of the original eligibility determination documents, the appeal will be considered a re-evaluation. Should new testing or assessment be indicated such testing or assessment will be conducted by persons not conducting the previous testing or assessment. A subsequent eligibility decision will be rendered by the DDSN Consumer Assessment Team within 30 days of receipt of the appeal or receipt of new testing/assessment results, whichever is later, and communicated to the applicant via the Service Coordinator/Early Intervention provider.

If no new or additional information is provided, or in the case of re-evaluation, a subsequent determination of ineligibility is challenged, the appeal will be forwarded to the Associate State Director for Policy, who will review the decision with input from the DDSN Consumer Assessment Team and appropriate Division Directors. The Associate State Director for Policy will review the case with the State Director, who has final authority over applicant eligibility in accordance with S.C. Code Ann. §44-20-430 (Supp. 2006). A written decision will be rendered within 30 days of receipt of appeal by the DDSN Consumer Assessment Team and communicated to the applicant in writing.

State law requires that applicants be residents of South Carolina [S.C. Code Ann. §44-20-390 (D) (Supp. 2006)]. During the review for eligibility determination by the DDSN Consumer Assessment Team, the applicant's residency will also be reviewed for compliance with state law. An adverse decision concerning residency will result in a denial of eligibility. This adverse residency decision may be re-evaluated by the DDSN Consumer Assessment Team according to the previously stated appeal procedures and additional information may be submitted. If no new or additional information is provided, the appeal of the residency status will be forwarded to the Associate State Director for Policy in accordance with the previously stated provisions.

Kathi K. Lacy, Ph.D.
Associate State Director-Policy
(Originator)

Beverly A.H. Buscemi, Ph.D.
State Director
(Approved)



EXHIBIT
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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF RICHLAND
PROTECTION AND ADVOCACY
FOR THE PEOPLE WITH
DISABILITIES, INC., ET. AL,
Plaintiffs,

vs. CASE NO. 07-CP-40-2187

SOUTH CAROLINA DEPARTMENT
OF DIABILITIES AND SPECIAL
NEEDS, ET. AL,
Defendants.

DEPOSITION OF: KATHI M. LACY

DATE: July 9, 2009

TIME: 9:30 a.m.

LOCATION: Law Offices of
Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: L. Skyler Hare,
Court Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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had been there had been the understanding that the promulgation of regulations was not something that we did because we used other vehicles to -- to issue directives and hold people accountable to what our expectations were.

Q. All right. And tell me how you arrived at that understanding.

A. From reading the code, the state statute.

Q. Okay. So had you -- I'm not asking what you were told. Have you met with your legal counsel at any time during your service as the office of policy to discuss the issue of promulgation of regulations of policy?

A. Have I met with my legal staff -- repeat it again, I'm sorry.

Q. You met with your legal staff --

A. Uh-huh.

Q. I mean, with regard to the issue of promulgations of regulations, since you've just told me you told Andy Laurent your understanding of the law was that you didn't do it.

A. That we -- that we were not required to promulgate regulations.

Q. All right. And but that's an

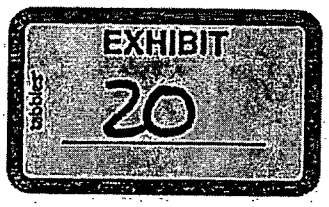
EXHIBIT
20

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF RICHLAND
PROTECTION AND ADVOCACY
FOR THE PEOPLE WITH
DISABILITIES, INC., ET. AL,
Plaintiffs,

vs. CASE NO. 07-CP-40-2187
SOUTH CAROLINA DEPARTMENT
OF DIABILITIES AND SPECIAL
NEEDS, ET. AL,
Defendants.

DEPOSITION OF: KATHI M. LACY

DATE: July 9, 2009

TIME: 9:30 a.m.

LOCATION: Law Offices of
Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: L. Skyler Hare,
Court Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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Columbia, SC	Greenville, SC	Charlotte, NC
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mean, I've experienced times where we've tried to use the regulatory process to no avail. In fact, Ms. Gloria Prevost in this room has been part of a subcommittee where we were trying to get DHEC law changed and we got nowhere through the legislative process by promulgating regulations. And I explained to that subcommittee that DDSN could have handled that request instantly by changing a contract or a directive.

So I've been involved in times where the regulatory process is ineffective, it's not time sensitive and it's -- you know, our process that we have in place gives the entire public, the nation really, an opportunity to comment at any time on any of our directives.

Q. But we've already -- we've already established that you don't have a procedure or a directive to deal with folks that may not have access to the Internet, correct?

A. That is correct.

Q. Okay. And you've already told me that you don't publish notices of potential changes in directives and anything in newspapers, you don't do it in the documents. What's the state -- and you don't do it in the State Register, correct?

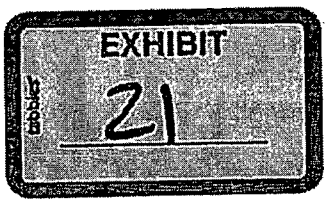
EXHIBIT
21

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF RICHLAND
PROTECTION AND ADVOCACY
FOR THE PEOPLE WITH
DISABILITIES, INC., ET. AL,
Plaintiffs,

vs. CASE NO. 07-CP-40-2187
SOUTH CAROLINA DEPARTMENT
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DEPOSITION OF: KATHI M. LACY

DATE: July 9, 2009

TIME: 9:30 a.m.

LOCATION: Law Offices of
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1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: L. Skyler Hare,
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A. The other -- I'm responsible for five different divisions.

Q. What are they?

A. Mental retardation, head and spinal cord injury, autism, consumer assessment team. They are the group that determine eligibility. And quality management.

Q. Is the position that you hold now that same position that you've earned -- that you were appointed to? Who -- well, let me -- first answer that.

A. I'm in the same position.

Q. And who -- did Dr. Butkus -- who -- I don't understand --

A. Dr. Butkus, yes, hired me in the position I am in now.

Q. Okay. Now, you make -- you told me that you were responsible for directives of the department.

A. Yes.

Q. Tell me what a directive is.

A. It's comparable to policy and it describes certain expectations that the department has regarding people that we support, services that they receive, the responsibilities that providers

have.

Q. Where does the term "directive" come from?

A. It's been there since I've gotten there, so I can't --

Q. I went hunting for a statute that talked about directives, and is there one that I've just simply missed?

A. Not that I'm aware of.

Q. So the term "directive" is a term created by DDSN as a way of addressing its responsibilities?

A. Yes, I assume so.

Q. You said that -- you said that a directive was comparable to policy and I didn't exactly understand what that meant.

A. Well, I mean, in, you know, my educational experience, I mean, healthcare policy, you know, is a broad term used to describe, you know, many, many, you know, different things.

Health insurance companies use policy to communicate to their subscribers about what they cover, what their reimbursement rates are, who the providers that can render those services and things like that.

EXHIBIT
22

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF RICHLAND
PROTECTION AND ADVOCACY
FOR THE PEOPLE WITH
DISABILITIES, INC., ET. AL,
Plaintiffs,

vs. CASE NO. 07-CP-40-2187

SOUTH CAROLINA DEPARTMENT
OF DIABILITIES AND SPECIAL
NEEDS, ET. AL,
Defendants.

DEPOSITION OF: KATHI M. LACY

DATE: July 9, 2009

TIME: 9:30 a.m.

LOCATION: Law Offices of
Richardsón, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: L. Skyler Hare,
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A. I didn't say I was opposed.

Q. Okay.

A. I said I think that we have a vehicle that accomplishes the same thing.

Q. Okay. Well, we've already -- you have already acknowledged that your current -- are you aware that the process referenced in your directive since you're the one that originated it, the directive on directives, that the notice provisions are different than the notice provisions of regulations? Are you aware of that?

A. I would assume they're different.

Q. Okay. So you have -- and I recognize you're not a lawyer and I'm not trying to make you one. But you have concluded that any additional notice requirements of the Administrative Procedure Act should not apply to directives?

A. No, I'm saying I -- we haven't either thought about it or done it or anything in between.

Q. Okay. So that's simply not an issue that you've considered for purposes of trying to render an opinion one way or the other. Is that fair based on what I just heard you say?

A. That I haven't given it consideration? That I haven't --

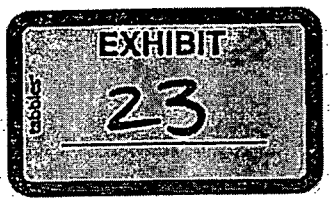
EXHIBIT
23

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF RICHLAND CASE NO. 07-CP-40-2187

PROTECTION AND ADVOCACY FOR PEOPLE WITH DISABILITIES, INC., ET AL.,

Plaintiffs,

vs.

SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS, ET AL.,

Defendant.

DEPOSITION OF: JOHN C. VAUGHN

DATE: April 26, 2010

TIME: 11:06 a.m.

LOCATION: Law Offices of Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiffs

REPORTED BY: Susan M. Valsecchi, RPR, CRR
Certified Realtime Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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or somebody later about, what's the deal on this thing with regulations? And the answer would be given, there's nothing that's not covered already.

Q. Well, in looking at the minutes, I never saw anything where the commission actually addressed the exact question that we have decided, as a matter of policy, that we're not going to use regulations implementing our statutes. I didn't find that. Do you know something I don't know?

A. So you're saying that there's nothing in the minutes where we decided we were not going to have regulations?

Q. Yes.

A. Well, that would be correct, but we wouldn't write down every statement that was made by somebody who was attending a meeting as a part of the public.

Q. Did you ever -- were you ever told by staff that the appeal or eligibility process was not part of the governing the operation of the department?

MR. WOODINGTON: Object to the form of the question.

THE WITNESS: Staff --

MR. WOODINGTON: You're talking about

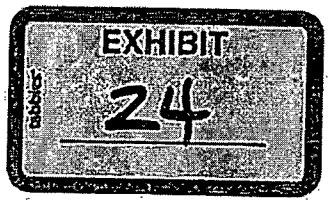
EXHIBIT
24

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF RICHLAND

PROTECTION AND ADVOCACY
FOR THE PEOPLE WITH
DISABILITIES, INC., et al.,

Plaintiff,

vs.

CASE NO. 07-CP-40-2187

SOUTH CAROLINA DEPARTMENT
OF DISABILITIES AND SPECIAL
NEEDS, et al.,

Defendant.

DEPOSITION OF: DEBORAH C. McPHERSON

DATE: September 23, 2011

TIME: 10:08 A.M.

LOCATION: Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: SANDRA K. BJERKE, RMR, RDR, CRR

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(704) 573-3919

he's technically an employee of his own department too, is required to follow that directive. It doesn't have the discretion to just deviate from it based upon any particular circumstance or whatever, but they're supposed to follow it.

MR. WOODINGTON: Object to the form.

THE WITNESS: The expectation is that the directive will be followed.

BY MS. HILL:

Q. Okay. Is it also similar that the expectation is that -- same way with a standard as well? That if you've got a standard in place that's already been reviewed and gone through the process and approved by the director in operating the department, that they're also supposed to follow those standards and cannot deviate from them either?

A. Yes.

MR. WOODINGTON: Object to the form.

BY MS. HILL:

Q. And let me just clarify, and I'll try to combine it for ease. So if it's different for either one, please let me. So basically, make sure I understand.

That if you've got a directive that's

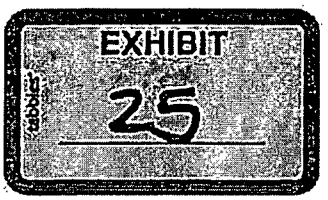
EXHIBIT
25

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF RICHLAND

PROTECTION AND ADVOCACY
FOR THE PEOPLE WITH
DISABILITIES, INC., et al.,

Plaintiff,

vs.

CASE NO. 07-CP-40-2187

SOUTH CAROLINA DEPARTMENT
OF DISABILITIES AND SPECIAL
NEEDS, et al.,

Defendant.

DEPOSITION OF:	DEBORAH C. McPHERSON
DATE:	September 23, 2011
TIME:	10:08 A.M.
LOCATION:	Richardson, Plowden & Robinson 1900 Barnwell Street Columbia, SC
TAKEN BY:	Counsel for the Plaintiff
REPORTED BY:	SANDRA K. BJERKE, RMR, RDR, CRR

A. WILLIAM ROBERTS, JR. & ASSOCIATES

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he's technically an employee of his own department too, is required to follow that directive. It doesn't have the discretion to just deviate from it based upon any particular circumstance or whatever, but they're supposed to follow it.

MR. WOODINGTON: Object to the form.

THE WITNESS: The expectation is that the directive will be followed.

BY MS. HILL:

Q. Okay. Is it also similar that the expectation is that -- same way with a standard as well? That if you've got a standard in place that's already been reviewed and gone through the process and approved by the director in operating the department, that they're also supposed to follow those standards and cannot deviate from them either?

A. Yes.

MR. WOODINGTON: Object to the form.

BY MS. HILL:

Q. And let me just clarify, and I'll try to combine it for ease. So if it's different for either one, please let me. So basically, make sure I understand.

That if you've got a directive that's

Q. Okay. Is there any reason, to your knowledge, why that directive has not been placed in regulation form on dealing with informed consent?

A. No.

Q. I have a question: With regard to the directives, whenever whomever, a staff person or the director or anyone else that would be required to follow the directive, not the consumer person, but either a provider or the caseworker or anyone else that would make a decision, are they able to deviate from the directive, or are they supposed to follow that directive?

A. They are supposed to follow the directive. That's not saying that it doesn't happen, but I'm just saying that they're expected to follow the directive.

Q. And based upon the commission's knowledge of how the department's operating, if there is a directive out there, y'all expect -- or would expect either through the director -- the state director down to the staff and everyone else that if there is a directive out there, that the department itself, even the state director to a certain degree, I would suppose, would apply since

in place and you -- and/or you've got a standard that is in place -- and by in place I mean that it's been approved by the director, gone through the process of what it's supposed to do.

A. It's signed.

Q. Signed and everything else. That when it comes to implementing that directive or that standard, whomever is implementing it within the department itself or otherwise, they cannot deviate from that directive. They are supposed to follow that directive or follow that standard, whatever the case -- or both may be at the time.

A. They are supposed --

MR. WOODINGTON: And I object to the form.

THE WITNESS: They're supposed to follow the directive or standard. That is the expectation.

BY MS. HILL:

Q. Okay. And to your knowledge, they don't have the discretion to deviate from that.

A. (Witness moves head from side to side.)

MR. WOODINGTON: Object to the form again.

BY MS. HILL:

EXHIBIT
26

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF RICHLAND
PROTECTION AND ADVOCACY
FOR THE PEOPLE WITH
DISABILITIES, INC., ET. AL,
Plaintiffs,

vs. CASE NO. 07-CP-40-2187

SOUTH CAROLINA DEPARTMENT
OF DIABILITIES AND SPECIAL
NEEDS, ET. AL,
Defendants.

DEPOSITION OF: KATHI M. LACY

DATE: July 9, 2009

TIME: 9:30 a.m.

LOCATION: Law Offices of
Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: L. Skyler Hare,
Court Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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But you told me the Commission established policy and I understand this answer to say and your earlier responses to say, well, Steve, Kathi Lacy, as the head of office of policy, I sure didn't raise that policy question with the Commission, you've told me that.

I'm sort of struck by the phrase well, that's the way we've always done it. Is that where this policy is coming from? Since the Commission, at least in your seven years, based on your best knowledge of what you know, and that's all we can talk about is what you know, they haven't addressed it. So help me understand how you're so firm in your position that that's the Commission's policy?

MR. WOODINGTON: Object to the form.

THE WITNESS: That's something that I learned from working for, you know, my boss.

BY MR. HAMM:

Q. Okay.

A. Is that this is the way that things had -- you know, had been determined that these were -- there were better ways and I agreed with those --

Q. Okay.

A. -- to hold providers accountable. I

mean, I've experienced times where we've tried to use the regulatory process to no avail. In fact, Ms. Gloria Prevost in this room has been part of a subcommittee where we were trying to get DHEC law changed and we got nowhere through the legislative process by promulgating regulations. And I explained to that subcommittee that DDSN could have handled that request instantly by changing a contract or a directive.

So I've been involved in times where the regulatory process is ineffective, it's not time sensitive and it's -- you know, our process that we have in place gives the entire public, the nation really, an opportunity to comment at any time on any of our directives.

Q. But we've already -- we've already established that you don't have a procedure or a directive to deal with folks that may not have access to the Internet, correct?

A. That is correct.

Q. Okay. And you've already told me that you don't publish notices of potential changes in directives and anything in newspapers, you don't do it in the documents. What's the state -- and you don't do it in the State Register, correct?

EXHIBIT
21

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF RICHLAND CASE NO. 07-CP-40-2187

PROTECTION AND ADVOCACY FOR PEOPLE WITH DISABILITIES, INC., ET AL.,

Plaintiffs,

vs.

SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS, ET AL.,

Defendant.

DEPOSITION OF: JOHN C. VAUGHN

DATE: April 26, 2010

TIME: 11:06 a.m.

LOCATION: Law Offices of Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiffs

REPORTED BY: Susan M. Valsecchi, RPR, CRR
Certified Realtime Reporter

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or somebody later about, what's the deal on this thing with regulations? And the answer would be given, there's nothing that's not covered already.

Q. Well, in looking at the minutes, I never saw anything where the commission actually addressed the exact question that we have decided, as a matter of policy, that we're not going to use regulations implementing our statutes. I didn't find that. Do you know something I don't know?

A. So you're saying that there's nothing in the minutes where we decided we were not going to have regulations?

Q. Yes.

A. Well, that would be correct, but we wouldn't write down every statement that was made by somebody who was attending a meeting as a part of the public.

Q. Did you ever -- were you ever told by staff that the appeal or eligibility process was not part of the governing the operation of the department?

MR. WOODINGTON: Object to the form of the question.

THE WITNESS: Staff --

MR. WOODINGTON: You're talking about

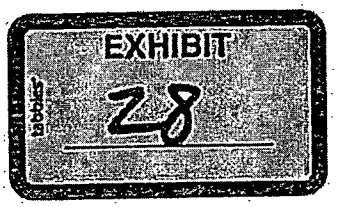
EXHIBIT
28

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF RICHLAND
PROTECTION AND ADVOCACY
FOR THE PEOPLE WITH
DISABILITIES, INC., ET. AL,
Plaintiffs,

vs. CASE NO. 07-CP-40-2187
SOUTH CAROLINA DEPARTMENT
OF DIABILITIES AND SPECIAL
NEEDS, ET. AL,
Defendants.

DEPOSITION OF: KATHI M. LACY

DATE: July 9, 2009

TIME: 9:30 a.m.

LOCATION: Law Offices of
Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: L. Skyler Hare,
Court Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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A. I didn't say I was opposed.

Q. Okay.

A. I said I think that we have a vehicle that accomplishes the same thing.

Q. Okay. Well, we've already -- you have already acknowledged that your current -- are you aware that the process referenced in your directive since you're the one that originated it, the directive on directives, that the notice provisions are different than the notice provisions of regulations? Are you aware of that?

A. I would assume they're different.

Q. Okay. So you have -- and I recognize you're not a lawyer and I'm not trying to make you one. But you have concluded that any additional notice requirements of the Administrative Procedure Act should not apply to directives?

A. No, I'm saying I -- we haven't either thought about it or done it or anything in between.

Q. Okay. So that's simply not an issue that you've considered for purposes of trying to render an opinion one way or the other. Is that fair based on what I just heard you say?

A. That I haven't given it consideration? That I haven't --

EXHIBIT
29

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF RICHLAND
PROTECTION AND ADVOCACY
FOR THE PEOPLE WITH
DISABILITIES, INC., ET. AL,
Plaintiffs,
vs. CASE NO. 07-CP-40-2187
SOUTH CAROLINA DEPARTMENT
OF DIABILITIES AND SPECIAL
NEEDS, ET. AL,
Defendants.

DEPOSITION OF: KATHI M. LACY

DATE: July 9, 2009

TIME: 9:30 a.m.

LOCATION: Law Offices of
Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: L. Skyler Hare,
Court Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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Q. Okay. Turn to Page 2, if you would, Kathi, and question No. 1. Would you read into the record the question No. 1, please.

A. "The minutes of any meetings of the Commission including but not limited to executive sessions and meetings of any board committees, members, subcommittees, support groups from the period from 1993 through present regarding discussion of the promulgation of regulations of the criteria for the promulgation of regulations or any decision whether or not to promulgate regulations."

Q. Okay. And would you read -- you're welcome to read all of it -- the only thing that I think is relevant but I leave that -- you have a Ph.D -- I think the relevant answer is contained in the subsection C as in cat. Would you read that.

A. "To the best of counsel's knowledge after due investigation, there are no minutes of board committees, members, subcommittees, support groups that relate to the discussion of promulgation of regulations, the criteria for the promulgation of regulations or any decision whether or not to promulgate regulations. If such documents are subsequently located, they will be made available promptly unless privileged in which case the

privileged law will be supplied."

Q. Okay. Now, this document was provided in response dated December the 17th, 2008.

A. 17th, yes.

Q. Okay. Since December the 17th of 2008, do you, as we're sitting here today, are you aware of any discussion regarding the criteria for the promulgation of regulations or any decision whether or not to promulgate regulations?

A. With the Commission?

Q. Yes.

A. No.

Q. This is telling me that since 1993, the minutes of the Commission show that it was not an issue ever put before them to decide one way or the other; is that correct?

A. Yes.

Q. Okay. So help me understand --

MR. WOODINGTON: Could we go off the record for a second?

MR. HAMM: Sure.

(Off-the-record conference.)

BY MR. HAMM:

Q. Hello again.

A. We're on the record.

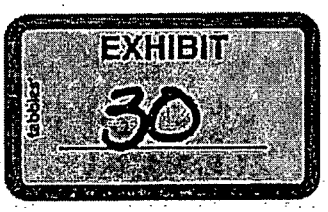
EXHIBIT
30

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF RICHLAND CASE NO. 07-CP-40-2187

PROTECTION AND ADVOCACY FOR PEOPLE WITH DISABILITIES, INC., ET AL.,

Plaintiffs,

vs.

SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS, ET AL.,

Defendant.

DEPOSITION OF: JOHN C. VAUGHN

DATE: April 26, 2010

TIME: 11:06 a.m.

LOCATION: Law Offices of Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiffs

REPORTED BY: Susan M. Valsecchi, RPR, CRR
Certified Realtime Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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or somebody later about, what's the deal on this thing with regulations? And the answer would be given, there's nothing that's not covered already.

Q. Well, in looking at the minutes, I never saw anything where the commission actually addressed the exact question that we have decided, as a matter of policy, that we're not going to use regulations implementing our statutes. I didn't find that. Do you know something I don't know?

A. So you're saying that there's nothing in the minutes where we decided we were not going to have regulations?

Q. Yes.

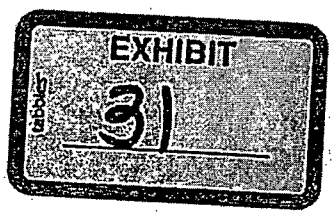
A. Well, that would be correct, but we wouldn't write down every statement that was made by somebody who was attending a meeting as a part of the public.

Q. Did you ever -- were you ever told by staff that the appeal or eligibility process was not part of the governing the operation of the department?

MR. WOODINGTON: Object to the form of the question.

THE WITNESS: Staff --

MR. WOODINGTON: You're talking about



EXHIBIT
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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF RICHLAND
PROTECTION AND ADVOCACY
FOR THE PEOPLE WITH
DISABILITIES, INC., ET. AL,
Plaintiffs,

vs. CASE NO. 07-CP-40-2187

SOUTH CAROLINA DEPARTMENT
OF DIABILITIES AND SPECIAL
NEEDS, ET. AL,
Defendants.

DEPOSITION OF: KATHI M. LACY

DATE: July 9, 2009

TIME: 9:30 a.m.

LOCATION: Law Offices of
Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: L. Skyler Hare,
Court Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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mean, I've experienced times where we've tried to use the regulatory process to no avail. In fact, Ms. Gloria Prevost in this room has been part of a subcommittee where we were trying to get DHEC law changed and we got nowhere through the legislative process by promulgating regulations. And I explained to that subcommittee that DDSN could have handled that request instantly by changing a contract or a directive.

So I've been involved in times where the regulatory process is ineffective, it's not time sensitive and it's -- you know, our process that we have in place gives the entire public, the nation really, an opportunity to comment at any time on any of our directives.

Q. But we've already -- we've already established that you don't have a procedure or a directive to deal with folks that may not have access to the Internet, correct?

A. That is correct.

Q. Okay. And you've already told me that you don't publish notices of potential changes in directives and anything in newspapers, you don't do it in the documents. What's the state -- and you don't do it in the State Register, correct?

EXHIBIT
32

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF RICHLAND CASE NO. 07-CP-40-2187

PROTECTION AND ADVOCACY FOR PEOPLE WITH DISABILITIES, INC., ET AL.,

Plaintiffs,

vs.

SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS, ET AL.,

Defendant.

DEPOSITION OF: JOHN C. VAUGHN

DATE: April 26, 2010

TIME: 11:06 a.m.

LOCATION: Law Offices of Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiffs

REPORTED BY: Susan M. Valsecchi, RPR, CRR
Certified Realtime Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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sorry.

A. No, that's all right.

Q. Do you think it's a bad idea for the commission, as a matter of policy, to enact regulations that would eliminate this controversy about eligibility standards referenced in state law?

MR. WOODINGTON: Object to the form of the question.

BY MR. HAMM:

Q. Go ahead and answer.

A. I think you're describing a utopian concept that is not verified in reality. Regulations are almost universally despised by the general public. And regulatory behavior is usually used as the reason government can't work; so let me elaborate on that.

Q. Go ahead.

A. I don't believe that it's a realistic everyday response outside -- pardon me -- the legal community -- to suggest that these proposed regulations would eliminate the pain of these suffering people.

Q. If they eliminated even part of it, would that be a good thing?

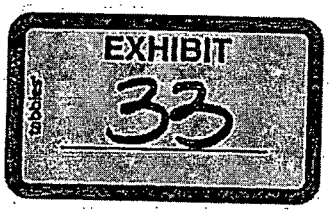
EXHIBIT
33

Beverly A. H. Buscemi, Ph.D.
State Director
David A. Goodell
Associate State Director
Operations
Kathi K. Lacy, Ph.D.
Associate State Director
Policy
Thomas P. Waring
Associate State Director
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Vice Chairman
Otis D. Speight, MD, MBA, CPE
Secretary
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Kelly Hanson Floyd
Nancy L. Banov, M.Ed.

Reference Number:	100-30-DD
Title Document:	Eligibility Diagnostic Criteria, Screening and Intake Processes for Eligibility, and Appeal Procedures
Date of Issue:	November 7, 2008 (Created from Existing Policy)
Effective Date:	November 7, 2008
Last Review Date:	September 1, 2010
Date of Last Revision:	September 1, 2010
Applicability:	Person Applying For DDSN Services, DSN Boards, Qualified Providers, Regional Centers & Other Interested Parties

I. Introduction

The following Departmental Directive sets forth the policy, process and procedures used in the determination of eligibility for services and supports through the South Carolina Department of Disabilities and Special Needs (DDSN).

Criteria designated within South Carolina Code of Laws indicate seven (7) different categories of eligibility under the authority of DDSN: Mental Retardation; a Related Disability to Mental Retardation; High Risk Infant; Autism; Head Injury (i.e., traumatic brain injury); Spinal Cord Injury; and Similar Disability. Some individuals may meet DDSN eligibility criteria under more than one (1) category. In such situations, DDSN will consider which DDSN division offers the most appropriate resources and service models to address the needs of the particular person and his/her family. Individuals with primarily medical conditions such as Diabetes, Hypertension, Stroke, Multiple Sclerosis, Parkinson's Disease, Cancer, etc., do not meet DDSN eligibility criteria under any category unless other qualifying conditions are met.

DISTRICT I
P.O. Box 239
Clinton, SC 29325-5328
Phone: (864) 938-3497

Midlands Center - Phone: 803/935-7500
Whitten Center - Phone: 864/833-2733

DISTRICT II
9995 Miles Jamison Road
Summerville, SC 29485
Phone: 843/832-5576

Coastal Center - Phone: 843/873-5750
Pee Dee Center - Phone: 843/664-2600
Saleeby Center - Phone: 843/332-4104

II. Criteria for Mental Retardation

A. Definition

S.C. Code Ann. §44-20-30 defines "Mental Retardation" as significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

B. Diagnostic Criteria

DDSN evaluates referred individuals in accordance with the definition of Mental Retardation outlined in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders-Fourth Edition, Text Revision (DSM-IV-TR, 2000).

Mental retardation refers to substantial limitations in present functioning. Diagnosis of mental retardation based on the DSM-IV-TR definition requires the following three (3) criteria be met:

1. Significantly sub-average intellectual functioning; an IQ of approximately 70 or below on an individually administered intelligence test (for infants, a clinical judgment of significantly sub-average intellectual functioning);

2. Concurrent deficits in present overall adaptive functioning (i.e. the person's effectiveness in meeting the standards expected for his/her age by his/her cultural group) with deficits in at least two (2) of the following adaptive skills areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety;

3. The onset of mental retardation is before age 18 years.

There must be concurrent deficits in intellectual and adaptive functioning that fall approximately two (2) or more standard deviations below the mean on standardized measures (approximately 70 or below) in order to meet criteria for diagnosis of mental retardation. However, a score of 70 on any intelligence and/or adaptive test does not equate to a diagnosis of mental retardation.

DDSN relies on qualified providers to administer psychological testing to applicants. This includes testing conducted by school psychologists and other professionals who regularly administer psychological tests to persons with disabilities. The tests are then analyzed by the DDSN Consumer Assessment Team to determine if they are reliable and valid, and to determine whether they are consistent and congruent with other psychological tests, school records including academic achievement scores, placement in special education & Individualized Education Plan data, medical reports, psychiatric and mental health

records, family history, and other pertinent information. In order to ensure the reliability and validity of the tests administered to applicants, only standardized measures are used to determine if criteria for mental retardation are met. Therefore, DDSN maintains a list of all approved psychometric tests that must be used for eligibility purposes.

III. Criteria for Related Disability

A. Definition and Diagnostic Criteria

S.C. Code Ann. §44-20-30 and 42 CFR 435.1009 defines eligibility for DDSN services under **"Related Disability"** as follows:

A severe, chronic condition found to be closely related to mental retardation or to require treatment similar to that required for persons with mental retardation and must meet all **four** (4) of the following conditions:

1. It is attributable to cerebral palsy, epilepsy, or any other condition other than mental illness found to be closely related to mental retardation because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of persons with mental retardation and requires treatment or services similar to those required for these persons;

2. the related disability is likely to continue indefinitely;

3. it results in substantial functional limitations in three (3) or more of the following areas of major life activity: self-care, understanding and use of language, learning, mobility, self-direction, and capacity for independent living; AND

4. The onset is before age 22 years.

DDSN relies on qualified providers to administer psychological testing to applicants. This includes testing conducted by school psychologists and other professionals who regularly administer psychological tests to persons with disabilities. The tests are then analyzed by the DDSN Consumer Assessment Team to determine if they are reliable and valid, and to determine whether they are consistent and congruent with other psychological tests, school records including academic achievement scores, placement in special education & Individualized Education Plan data, medical reports, psychiatric and mental health records, family history, and other pertinent information. In order to ensure the reliability and validity of the decisions made, DDSN uses standardized measures to determine if criteria for a related disability are met. Specifically, a standardized test of functional abilities that yield a composite score of two (2) standard deviations or more (i.e., Composite < 70) must be met to qualify for

eligibility under the Related Disability category. DDSN maintains a list of all approved psychometric tests that will be used to determine if criteria for a related condition are met.

IV. Criteria for High-Risk Infant

A. Definition

S.C. Code Ann. §44-20-30 defines "high-risk infant" as a child less than 36 months of age whose genetic, medical or environmental history is predictive of a substantially greater risk for a developmental disability than that for the general population.

B. Diagnostic Criteria

Children younger than 36 months of age are served under this category when they exhibit significant documented delays in three (3) or more areas of development or have an approved diagnosis confirmed by a medical professional and exhibit significant documented delays in two (2) areas of development.

This category of eligibility allows DDSN to provide services to infants and young children under 36 months in instances where the future diagnosis is not absolutely clear due to situations (genetic, environmental or medical) present at birth or manifesting themselves thereafter, including accident and injury. In such instances, eligibility may be established in a time-limited fashion until a more comprehensive and conclusive assessment can be made regarding the presence or absence of a qualifying disability (not to exceed 36 months of age). Infants and young children under 36 months are eligible to receive all DDSN services for which they qualify based on need and resource availability. Once the child turns 36 months of age, he/she must qualify for DDSN eligibility in another category, such as mental retardation, a related disability, autism, traumatic brain injury or spinal cord injury to continue to receive services from DDSN. The one exception is for those children ages three (3) to six (6) years of age eligible in the at-risk category. These children may continue to receive early intervention services (i.e., family training and service coordination provided by an Early Interventionist) until further notified by the State Director. Any child 36 months of age or older whose eligibility is not updated by DDSN's Consumer Assessment Team by their 37 month of age must have their file closed. The child is no longer eligible to receive any service from DDSN.

V. Criteria for Autism

A. Definition

DDSN uses the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders-Fourth Edition, Text Revision (DSM-IV-

TR, 2000) definition of "Autistic Disorder" (i.e. Autism) which states Autistic Disorder is "an abnormal or impaired development in social interaction and communication and a markedly restricted repertoire of activity and interest. The disturbance must be manifested prior to the age of three (3) years."

B. Diagnostic Criteria

DDSN evaluates referred individuals in accordance with the definition of Autistic Disorder outlined in the Diagnostic and Statistical Manual of Mental Disorders-Fourth Edition, Text Revision (DSM-IV-TR, 2000). Criteria for diagnosis of autism requires the presence of at least six (6) (or more) items from (1), (2), and (3), with at least two from (1), and one each from (2) and (3):

1) **Qualitative impairment in social interaction, as manifested by at least two of the following:**

   a) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction;
   b) failure to develop peer relationships appropriate to developmental level;
   c) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest);
   d) lack of social or emotional reciprocity.

2) **Qualitative impairments in communication as manifested by at least one of the following:**

   a) delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime);
   b) in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others;
   c) stereotyped and repetitive use of language or idiosyncratic language;
   d) lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level.

3) **Restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following:**

   a) encompassing preoccupation with one (1) or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus;

b) apparently inflexible adherence to specific, nonfunctional routines or rituals;
c) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole body movements);
d) persistent preoccupation with parts of objects.

VI. Procedures for Screening for Children ages Birth to 3 years old

A. Screening Process

1. Not yet in BabyNet Program

a) If the child is under birth to 2 years 11 months old, a referral to the BabyNet Program, administered by First Steps, must occur first.

b) If the child is at or over 2 years 11 months of age, screening must occur prior to intake. See Section VII.

2. In BabyNet Program

If the child is already receiving services from an Early Interventionist via the BabyNet Program, and the child is in the Consumer Data Support System (CDSS) as BabyNet only or as High-Risk, the Early Interventionist can skip the screening process and begin the intake process as outlined under VII. (B) 3. Please note that any child who reaches 37 months of age without an eligibility determination by the DDSN Consumer Assessment Team will no longer be eligible for any service and their file must be closed.

VII. Procedures for Screening for MR, RD, Autism and for Persons at or over 2 years 11 Months of Age

A. Screening Process

1. Effective July 1, 2010, the USC School of Medicine – Center for Disability Resources will conduct screening for any person suspected of having mental retardation, a related disability, Autism or for a child considered At-Risk (children three (3) to six (6) years old). The toll-free number is 1-800-289-7012.

2. Residency – Applicants must be legal South Carolina residents and legal U.S. citizens to be considered for DDSN eligibility.

3. If determined during screening that the individual is not likely to be eligible for services (i.e., they are screened out), the person/legal guardian will be informed of other community resources or providers from whom

assistance may be sought. The person/legal guardian may appeal the screening results. If screened in, the screener will provide the applicant with a list of all available Service Coordination or Early Intervention (if under six (6) years old) providers in which to take the applicant through intake and eligibility. Additional information, including the DDSN website address, will be mailed to each applicant.

B. Intake Process

1. When screened in, all available information by the USC School of Medicine-Center for Disability Resources will be forwarded to the applicant's chosen Service Coordinator/Early Intervention provider within 24 hours or the next business day following screening.

2. Appropriate information must be entered into CDSS by the chosen Service Coordinator/Early Intervention provider within seven (7) working days of receiving the referral.

3. The Service Coordinator/Early Interventionist will begin the process for establishing eligibility through the intake process. The following steps will be completed during the intake process:

   - No individual believed to have mental retardation, autism, a related disability or a child believed to be a high-risk infant may be admitted to the services of DDSN until an assessment of the applicant has been completed, approved, and certified by the Department as delineated in S.C. Code Ann. §44-20-390. An assessment of an applicant must be completed and approved by the DDSN Consumer Assessment Team to determine if an applicant has mental retardation, autism or a related disability, or a child believed to be a high-risk infant, or approved in the at-risk category and to be in need of services, before he/she may become eligible and receive any service, including family training.

   - It is expected that DDSN eligibility decisions will be made within three (3) months of the case open date. This means the Service Coordinator/Early Interventionist must send the DDSN Consumer Assessment Team a complete packet no later than two and a half (2.5) months of the case open date.

   - If an eligibility decision has not been made within three (3) months of the case open date, the Service Coordinator/Early Interventionist or Service Coordinator Assistant will discuss with the applicant/legal guardian the reasons for delay in eligibility and document the discussion in the service notes. It is assumed that the reason for the delay is not due to a lack of effort by the Service

Coordinator/Early Interventionist. The applicant will be placed on Level II Service Coordination status or if an Early Interventionist is involved, no reporting of case management to DDSN may occur; and the Service Coordinator/Early Interventionist will inform the Service Coordinator/Early Intervention Supervisor the reasons for the delay. The Service Coordinator/Early Interventionist will continue to work with the applicant/legal guardian to complete the eligibility packet for up to an additional three (3) months, unless otherwise indicated by the applicant/legal guardian. If eligibility is delayed due to the Service Coordinator/Early Interventionist or Service Coordinator Assistant being unable to locate or contact the applicant/legal guardian, the Service Coordinator/Early Interventionist or Service Coordinator Assistant will meet with the Service Coordinator/Early Intervention Supervisor to discuss the case and determine if intake should be extended or the case closed.

NOTE: No reporting to DDSN can occur for Intake beyond three (3) months, this includes reporting by an Early Interventionist.

- If eligibility is not determined within six (6) months of the case open date, the Service Coordinator/Early Interventionist or Service Coordinator Assistant will discuss the reason for delay with the applicant/legal guardian, choices of further extension or case closure, and the option of re-applying if services are needed in the future. Any discussions and contacts with the applicant/legal guardian during the intake process, along with justification for any extensions, must be documented in service notes. If an extension is chosen, the Service Coordinator/Early Interventionist will notify the Service Coordinator/Early Intervention Supervisor and Executive Director.

  NOTE: No reporting to DDSN can occur for Intake beyond three (3) months.

VIII. Criteria for Head and Spinal Cord Injury and Similar Disability

A. Definition

Under **S.C. Code Ann. §44-38-370,** which establishes DDSN **legislative authority for the Head and Spinal Cord Injury (HASCI) Division,** a person is eligible for **case management services** under this article when at the time of determining eligibility the person has a severe chronic limitation that:

1. is attributed to a physical impairment, including head injury, spinal cord injury or both, or a similar disability, regardless of the age of onset but not

associated with the process of a progressive degenerative illness or disease, dementia, or a neurological disorder related to aging;

2. is likely to continue indefinitely without intervention;

3. results in substantial functional limitation in at least two (2) of these life activities:

   a) self-care;
   b) receptive and expressive communication;
   c) learning;
   d) mobility;
   e) self-direction;
   f) capacity for independent living;
   g) economic self-sufficiency; and

4. reflects the person's need for a combination and sequence of special interdisciplinary or generic care or treatment or other services, which are of lifelong or extended duration and are individually planned and coordinated.

B. Diagnostic Criteria

S.C. Code Ann. §44-38-20, which relates to the South Carolina Head and Spinal Cord Information System, **defines head injury and spinal cord injury:**

"Head injury" means an insult to the skull or brain, not of a degenerative or congenital nature, but one caused by an external physical force that may produce a diminished or altered state of consciousness, which results in impairment of cognitive abilities or physical functioning and possibly in behavioral or emotional functioning. It does not include cerebral vascular accidents or aneurysms.

"Spinal cord injury" means an acute traumatic lesion of neural elements in the spinal canal resulting in any degree of sensory deficit, motor deficit, or major life functions. The deficit or dysfunction may be temporary or permanent.

"Similar disability" is not specifically defined within the South Carolina State Code of Laws; however, S.C. Code Ann. §44-38-370 states that similar disability is "not associated with the process of a progressive degenerative illness or dementia, or a neurological disorder related to aging."

There must be medical documentation and functional/adaptive assessments to substantiate that traumatic brain injury, spinal cord injury or similar disability occurred and produced ongoing substantial functional limitations. There must be documentation of pre-existing/concurrent conditions, which impact functioning.

C. Procedures for Intake

If an individual or a family member has severe impairment(s) believed to be a result of traumatic brain injury, spinal cord injury, or both, or a similar disability:

1. All children under six (6) year old at time of referral, will go through screening and intake under the MR/RD Division to be considered for the Related Disability category or for the High-Risk Infant or At-Risk Child category in order to receive Early Intervention services.

   Upon reaching age six (6) years, children in the High-Risk Infant or At-Risk Child Category must qualify for eligibility in another category, such as Related Disability, Traumatic Brain Injury, Spinal Cord Injury, or Similar Disability to continue to receive services from DDSN. Children with Spinal Cord Injury are not eligible under the Related Disability category.

2. All children ages six (6) to16 years at time of referral who sustained brain injury during infancy or childhood will go through screening and intake under the MR/RD Division to be considered first for the Related Disability category.

   If determined ineligible for the Related Disability category, the DDSN Consumer Assessment Team may consider eligibility for the HASCI Division under the Traumatic Brain Injury or Similar Disability category.

3. For children ages six (6) to16 years with spinal cord injury and all applicants 17 years or older at time of referral, contact HASCI Division Information and Referral (I&R) toll free at 1-866-867-3864 to be screened for referral to the HASCI Division.

   It may be determined during screening that an applicant 17 years or older at time of referral who sustained brain injury during infancy or childhood is more appropriate to go through screening and intake under the MR/RD Division to be considered first for the Related Disability category. If determined ineligible for the Related Disability category, the DDSN Consumer Assessment Team may consider eligibility for the HASCI Division under the Traumatic Brain Injury or Similar Disability category.

4. If screened as appropriate for formal consideration of HASCI Division eligibility, referral will be made to the approved provider of HASCI Service Coordination chosen by the applicant.

5. The applicant will be contacted by the chosen Service Coordinator provider to begin formal intake and eligibility determination procedures.

IX. APPEAL PROCEDURES FOR APPLICANTS SEEKING ELIGIBILITY FOR DDSN SERVICES

Because of the clinical nature of decisions made regarding eligibility for DDSN services, separate appeal procedures have been established for applicants.

Written notice of an eligibility decision will be provided to the applicant by the Service Coordinator/Early Intervention provider within five (5) working days of the provider's receipt of an eligibility decision. This notice will outline the basic reasons why the applicant did not meet eligibility criteria and will include information on the applicant's right to appeal an eligibility denial and the procedures for appeal. Upon request of the applicant, the Service Coordinator/Early Intervention provider must read or explain the eligibility decision and appeal procedures to the applicant if eligibility is denied.

When an appeal is desired by the applicant, a signed and dated formal written appeal of an eligibility denial must be made within 30 calendar days of the eligibility decision. The appeal must be made by the applicant, his/her guardian, or any other person/entity advocating on behalf of the applicant, with the applicant's approval and must state the reason for believing that the denial of eligibility was in error. This written appeal must be given to the Service Coordinator/Early Intervention provider. If an oral request for appeal is made by the applicant to the Service Coordinator/Early Intervention provider and the applicant requires assistance, the Service Coordinator/Early Intervention provider must assist the applicant in writing the appeal.

The applicant's record on CDSS will remain open until the time to request an appeal is over or until all appeals are completed.

The formal written appeal of a determination of ineligibility will be forwarded by the Service Coordinator/Early Intervention provider to the Director of the DDSN Consumer Assessment Team within five (5) workdays of receipt from the applicant. All pertinent documents upon which the eligibility denial was based will be reviewed. If new or additional information is provided which was not part of the original eligibility determination documents, the appeal will be considered a re-evaluation. Should new testing or assessment be indicated such testing or assessment will be conducted by persons not conducting the previous testing or assessment. A subsequent eligibility decision will be rendered by the DDSN Consumer Assessment Team within 30 days of receipt of the appeal or receipt of new testing/assessment results, whichever is later, and communicated to the applicant via the Service Coordinator/Early Intervention provider.

If no new or additional information is provided, or in the case of re-evaluation, a subsequent determination of ineligibility is challenged, the appeal will be forwarded to the Associate State Director for Policy, who will review the decision with input from the DDSN Consumer Assessment Team and appropriate Division Directors. The Associate State Director for Policy will review the case with the State Director, who has final authority over applicant eligibility in accordance with S.C. Code Ann. §44-20-430 (Supp. 2006). A written decision will be rendered within 30 days of receipt of appeal by the DDSN Consumer Assessment Team and communicated to the applicant in writing.

State law requires that applicants be residents of South Carolina [S.C. Code Ann. §44-20-390 (D) (Supp. 2006)]. During the review for eligibility determination by the DDSN Consumer Assessment Team, the applicant's residency will also be reviewed for compliance with state law. An adverse decision concerning residency will result in a denial of eligibility. This adverse residency decision may be re-evaluated by the DDSN Consumer Assessment Team according to the previously stated appeal procedures and additional information may be submitted. If no new or additional information is provided, the appeal of the residency status will be forwarded to the Associate State Director for Policy in accordance with the previously stated provisions.

Kathi K. Lacy, Ph.D.
Associate State Director-Policy
(Originator)

Beverly A.H. Buscemi, Ph.D.
State Director
(Approved)

EXHIBIT
34

DDSN Official Directives and Policies
Listed by Reference Number

Reference Number	Title of Document
100-01-DD	Electronic Communications System
100-02-DD	Implementation Procedures for the Internal Communications System
100-04-DD	Use of Adaptive Behavior Scales
100-05-DD	Endorsement of Solicitation Proposals and Projects
100-06-DD	Contacts with Agency Heads of Other State Departments, Constitutional Offices and Certain State Government Executives
100-07-DD	Naming of Facilities, Building Dedications and Groundbreakings
100-08-DD	State Director's Absence from Office
100-09-DD	Reporting of Critical Incidents
100-10-DD	Consumer Elopement
100-11-DD	Absence with Leave of District Director or Facility Administrator from Duty Station
100-12-DD	AIDS Policy
100-17-DD	Family Involvement
100-25-DD	Disaster Preparedness Plan for DDSN and Other Agencies Providing Services to Persons with Disabilities and Special Needs
100-26-DD	Risk Management Program
100-27-DD	Dual Relationships
100-28-DD	Quality Management
100-29-DD	Medication Error/Event Reporting
100-30-DD	Eligibility Diagnostic Criteria, Screening and Intake Processes for Eligibility, and Appeal Procedures
101-02-DD	Preventing and Responding to Suicidal Behavior
101-03-DD	Procedures for Providing Genetic Services in DDSN Regional Facilities
103-01-DD	Federal Grant Applicant and Change Policy
104-01-DD	DDSN Certification and Licensure of Residential and Day Facilities and New Requirements for DHEC Licensed CRCFs
104-02-DD	ICF/ID Conversion Protocol
133-01-DD	Media and Publication Policies
133-02-DD	Freedom of Information (FOIA) Requests
167-01-DD	Appeal Procedure for Licensed Programs Serving Persons with Intellectual Disability
167-06-DD	Confidentiality of Personal Information

As of February 27, 2013

200-01-DD	Personal Funds Maintained at Residential Level
200-02-DD	Financial Management of Personal Funds
200-03-DD	Accounts Receivable Collection Policy
200-04-DD	Voluntary Contributions and Donations
200-05-DD	Use of Consultants
200-08-DD	Travel Regulations
200-09-DD	Fees for Residential Services Provided by DDSN
200-12-DD	Management of Funds for Individuals Participating in Community Residential Programs
200-14-DD	Community Capital Funding Applications
250-05-DD	Cost Principles for Grants and Contracts with Community Providers
250-08-DD	Procurement Requirements for Local DSN Boards
250-09-DD	Calculation of Room and Board for Non-ICF/ID Programs
250-10-DD	Funding for Services
250-11-DD	Outlier Funding Request System – Capitated Funding System
250-12-DD	Competitive Funding for Special Service Contract: Statewide Consumer/Family Support Network
275-01-DD	Missing Property Reporting
275-04-DD	Procedures for Implementation of DDSN Provider Audit Policy
275-05-DD	General Duties of the Internal Audit Division
300-03-DD	Annual Certification of Electrical, Mechanical, Fire Alarm and Sprinkler Systems for Renewal of Licensure .
300-04-DD	Maintenance of Physical Plant
300-05-DD	Maintenance Management Contract Requirements for Community Residential Homes
300-06-DD	Energy Management Systems Operations and Parameters
334-02-DD	Use of Regional Center Facilities by Outside Groups and Off-Duty Employees
334-03-DD	Vehicle Management Program
334-04-DD	Alcohol and Drug-Testing for Employees with Commercial Drivers License and Safety-Sensitive Employees
335-01-DD	Diet Manual for DDSN
367-02-DD	Acquiring Information Technology (IT) Products and Services
367-04-DD	Proprietary Software
367-08-DD	Central Office Telephone Call Coverage Backup Policy
367-09-DD	Acceptable use of Network Services and the Internet
367-11-DD	Telephone Policy

367-12-DD	Computer Data Security
367-13-DD	Electronic Signature Policy
367-14-DD	Email Retention Policy
368-01-DD	Individual Service Delivery Records Management
400-01-DD	State Service Award Program
400-04-DD	Copy Costs: Freedom of Information Act
400-08-DD	Establishing and Filling Personnel Positions
400-21-DD	Educational Credentials
401-01-DD	Shift Differential Policy
402-01-DD	Employee Performance Management System Policy
403-01-DD	DDSN Employee of the Year
405-01-DD	Employee Grievance Procedure
406-03-DD	Reduction-In-Force Policy
406-04-DD	Criminal Record Checks and Reference Checks of Direct Caregivers
407-01-DD	Departmental Affirmative Action Plan for Equal Employment
413-01-DD	Standards of Disciplinary Action
414-01-DD	Fair Labor Standards Act
418-01-DD	Teri and Retiree Employment
502-01-DD	Admissions/Discharge of Individuals to/from DDSN Funded Community Residential Setting
502-04-DD	Short-Term Admission Services in a Regional Center or Community ICF/ID
502-05-DD	DDSN Waiting Lists
502-08-DD	Ethics Committees-Regional Centers
502-10-DD	Transition of Individuals from Regional Centers to Community
503-01-DD	Consumer Involvement with Criminal Justice System
505-02-DD	Death or Impending Death of Persons Receiving Services from DDSN
508-01-DD	Competency to Stand Trial Evaluations
510-01-DD	Supervision of People Receiving Services

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533-02-DD	Sexual Assault Prevention, and Incident Procedure Follow-Up
534-02-DD	Procedures for Preventing and Reporting Abuse, Neglect, or Exploitation of People Receiving Services from DDSN or a Contracted Provider Agency
534-03-DD	The Long Term Care Ombudsman Program
535-02-DD	Human Rights Committee
535-07-DD	Obtaining Consent for Minors and Adults
535-08-DD	Concerns of People Receiving Services: Reporting and Resolution
535-09-DD	Review and Approval of Research Involving Persons Receiving Services from or Staff Employed by DDSN
535-10-DD	National Voter Registration Act (Motor Voter)
535-11-DD	Appeal and Reconsideration Policy and Procedures
535-12-DD	Advance Directives
536-01-DD	Social-Sexual Development
567-01-DD	Employee Orientation, Pre-Service and Annual Training Requirements
567-04-DD	Preventing and Responding to Disruptive Behavior and Crisis Situations
600-05-DD	Behavior Support, Psychotropic Medications and Prohibited Practices
600-04-DD	Individual Travel at Regional Centers
600-10-DD	Individual Clothing and Personal Property-Regional Centers
600-11-DD	Physical Management
602-02-DD	Aquatics Program at DDSN Operated Facilities
603-01-DD	Tardive Dyskinesia Monitoring
603-02-DD	Employee Health Requirements
603-03-DD	Medical and Dental Treatment for Uncooperative Consumers
603-05-DD	Policy for Management of Occupational Exposures of Health Care Personnel to Potential Blood Borne Pathogens
603-06-DD	Guidelines for Screening for Tuberculosis
603-07-DD	Do Not Resuscitate (DNR) Operational Guidelines
603-08-DD	Vaccination Information
603-09-DD	Management of Individuals Exposed to Potential Blood Borne Pathogens
603-10-DD	Latex Protocol for Regional Centers
603-12-DD	Immunization Procedure for Regional Centers
603-13-DD	Medication Technician Certification

604-01-DD	Individual Clothing and Personal Property
604-04-DD	Certification in First Aid and Cardiopulmonary Resuscitation
700-02-DD	Compliance with Title VI of the Civil Rights Act of 1964, American's with Disabilities Act of 1990, Age Discrimination Act of 1975, Section 504 of the Rehabilitation Act of 1975 and Establishment of a Complaint Process
700-03-DD	Insuring Informed Choice in Living Preference for Those Residing in ICF/IDs
700-04-DD	Levels of Service Coordination
700-05-DD	Pilot Services or Programs
732-01-DD	Exceptional Service Coordination for Persons with Disabilities and Special Needs in Alternative Residential Placement
734-01-DD	Individual and Family Support and Respite – State Funding
735-02-DD	Relatives/Family Members Serving As Paid Caregivers of Respite Services
736-01-DD	Relatives/Family Members Serving As Paid Caregivers of Medicaid Waiver Services
738-01-DD	Discharge Planning for those leaving ICF/IDs and Enrolling in the ID/RD Waiver

DDSN COMMISSION POLICIES

800-01-CP	DDSN Ends Policy
800-02-CP	DDSN Governance Process Policy
800-03-CP	DDSN Executive Limitations Policy
800-04-CP	DDSN Commission Staff Linkage Delegation
800-05-CP	DDSN Public Invocation Act

EXHIBIT
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CHAPTER 3

ELIGIBILITY CRITERIA

In order to be eligible for services through the PDD Waiver/PDD State Funded Program, all children must:

1. Meet the target population criteria as follows:

    - Be ages 3 through 10 years.

    - Diagnosed with a PDD by age eight years. The diagnosis must be made by a qualified, licensed or certified diagnostician. Children who are currently eligible for DDSN under the Autism Division must also meet these criteria. Diagnostic documentation must include information supporting a DSM-IV rating.

        a. For an autism diagnosis, there must be evidence of at least two of the following: Autism Diagnostic Observation Schedule (ADOS), Autism Diagnostic Interview (ADI), Social Communication Questionnaire (SCQ), or Childhood Autism Rating Scale (CARS).

        b. For an Asperger's Syndrome diagnosis there must be evidence ruling out autism using previously mentioned tools and concluding with an additional adaptive behavior scale (i.e. Vineland) and one of the following: DSM-IV Criteria Checklist/Asperger's Disorder 299.80, Asperger's Syndrome Diagnostic Scale (ASDS), Asperger's Syndrome Diagnostic Interview (ASDI) or Online Asperger's Syndrome Information and Support (OASIS).

        c. For other PDD diagnosis there must be evidence ruling out autism using previously mentioned tools and the DSM-IV Criteria Checklist/Pervasive Developmental Disorder – Not Otherwise Specified (PDD-NOS) 299.80 and the Scale of Pervasive Developmental Disorder in Mentally Retarded Persons (PDD-MRS).

2. Meet Medicaid financial criteria or provide documentation of financial ineligibility for Medicaid.

3. Assure that the child meets ICF/MR Level of Care medical criteria (as determined by the DDSN Consumer Assessment Team for this program).

When gathering information on a child, the Case Manager should refer to the **Recipients Special Programs Overlap Table** to ensure the child is not receiving any services that would conflict with PDD Waiver services or to ensure that allowable services (e.g. CHPC) are not terminated.

Children who do not meet ICF/MR Level of Care, but meet all other eligibility requirements may receive services outside the waiver through the State Funded PDD program if funding is available. However, the child and parents/guardians must comply with all other program requirements and stipulations.

To maintain eligibility for services via the PDD Waiver or the PDD State Funded Program:

1. Services must be received within 30 days of enrollment into the PDD Waiver/State Funded Program.

2. The child must receive at least one (waiver) service each month documented in the participant's record. A participant who has not received a documented service at least monthly shall be discontinued from the PDD Waiver or State Funded Program. Case Management will satisfy the requirement of a documented monthly service.

3. The Case Manager and, when specified, the Autism Division must receive required documentation from the EIBI provider within the timeframes identified. Failure to submit completed information/reports by the required timeframes may result in the responsible Consultant being sanctioned.

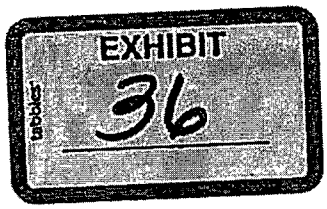
    - Program Checklist: Must be submitted to the child's Case Manager monthly and demonstrate/document that drills are conducted as scheduled. The Case Manager must receive the previous month's reports no later than the 15th day of the following month (e.g. March reports must be received no later than April 15th).

    - Data reports: Must be submitted to the child's Case Manager quarterly and contain cumulative graphs of target areas demonstrating progress or areas of concern. The Case Manager must receive the previous quarter's reports no later than the 15th day of the month that immediately follows the quarter (e.g. the quarterly report for April, May and June must be received no later than July 15th).

    - Assessment of Basic Language and Learning Skills-Revised (ABLLS-R): Must be submitted to the child's Case Manager and the Autism Division semi-annually per the initial assessment date. The Case Manager and the Autism Division must receive the completed ABLLS-R no later than 15 days after the end of the semi-annual period (e.g. the annual period runs from April 1, 2007 – April 1, 2008; the September 30, 2007 semi-annual ABLLS-R must be received no later than October 15, 2007).

    - Peabody Picture Vocabulary Test (PPVT-IV), the Expressive Vocabulary Test (EVT-II) and Vineland Adaptive Behavioral Skills-II: Must be submitted to the Case Manager and the Autism Division annually per the initial assessment date. The Case Manager and the Autism Division must receive the completed PPVT-IV, EVT-II and Vineland-II no later than 15 days after the end of the annual period (e.g. reports from the annual period of April 15, 2007 – April 15, 2008 must be received no later than April 30, 2008).

4. Proof of progress from the initial baseline derived from the preliminary assessment tool must be provided by the EIBI provider to the child's Case Manager and the Autism Division every six months. Lack of progress at a six month interval will initiate a 6 month probationary period to determine appropriateness and continuation of EIBI services.



EXHIBIT
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Autism Spectrum Disorder

Autism Spectrum Disorder

Diagnostic Criteria 299.00 (F84.0)

A. Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history (examples are illustrative, not exhaustive; see text):

1. Deficits in social-emotional reciprocity, ranging, for example, from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.
2. Deficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.
3. Deficits in developing, maintaining, and understanding relationships, ranging, for example, from difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers.

Specify current severity:
Severity is based on social communication impairments and restricted, repetitive patterns of behavior (seeTable 2).

B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history (examples are illustrative, not exhaustive; see text):

1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypies, lining up toys or flipping objects, echolalia, idiosyncratic phrases).
2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat same food every day).
3. Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to or preoccupation with unusual objects, excessively circumscribed or perseverative interests).
4. Hyper- or hyporeactivity to sensory input or unusual interest in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling or touching of objects, visual fascination with lights or movement).

Specify current severity:
Severity is based on social communication impairments and restricted, repetitive patterns of behavior (see Table 2).

C. Symptoms must be present in the early developmental period (but may not become fully manifest until social demands exceed limited capacities, or may be masked by learned strategies in later life).

D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.

E. These disturbances are not better explained by intellectual disability (intellectual developmental disorder) or global developmental delay. Intellectual disability and autism spectrum disorder frequently co-occur; to make comorbid diagnoses of autism spectrum disorder and intellectual disability, social communication should be below that expected for general developmental level.

Note: Individuals with a well-established DSM-IV diagnosis of autistic disorder, Asperger's disorder, or pervasive developmental disorder not otherwise specified should be given the diagnosis of autism spectrum disorder. Individuals who have marked deficits in social communication, but whose symptoms do not otherwise meet criteria for autism spectrum disorder, should be evaluated for social (pragmatic) communication disorder.

Specify if:

With or without accompanying intellectual impairment

With or without accompanying language impairment

Associated with a known medical or genetic condition or environmental factor (**Coding note:** Use additional code to identify the associated medical or genetic condition.)

Associated with another neurodevelopmental, mental, or behavioral disorder (**Coding note:** Use additional code[s] to identify the associated neurodevelopmental, mental, or behavioral disorder[s].)

With catatonia (refer to the criteria for catatonia associated with another mental disorder, pp. 119–120, for definition) (**Coding note:** Use additional code 293.89 [F06.1] catatonia associated with autism spectrum disorder to indicate the presence of the comorbid catatonia.)

Recording Procedures

For autism spectrum disorder that is associated with a known medical or genetic condition or environmental factor, or with another neurodevelopmental, mental, or behavioral disorder, record autism spectrum disorder associated with (name of condition, disorder, or factor) (e.g., autism spectrum disorder associated with Rett syndrome). Severity should be recorded as level of support needed for each of the two psychopathological domains in Table 2 (e.g., "requiring very substantial support for deficits in social communication and requiring substantial support for restricted, repetitive behaviors"). Specification of "with accompanying intellectual impairment" or "without accompanying intellectual impairment" should be recorded next. Language impairment specification should be recorded thereafter. If there is accompanying language impairment, the current level of verbal functioning should be recorded (e.g., "with accompanying language impairment—no intelligible speech" or "with accompanying language impairment—phrase speech"). If catatonia is present, record separately "catatonia associated with autism spectrum disorder."

Specifiers

The severity specifiers (see Table 2) may be used to describe succinctly the current symptomatology (which might fall below level 1), with the recognition that severity may vary by context and fluctuate over time. Severity of social communication difficulties and restricted, repetitive behaviors should be separately rated. The descriptive severity categories should not be used to determine eligibility for and provision of services; these can only be developed at an individual level and through discussion of personal priorities and targets.

Regarding the specifier "with or without accompanying intellectual impairment," understanding the (often uneven) intellectual profile of a child or adult with autism spectrum disorder is necessary for interpreting diagnostic features. Separate estimates of verbal and nonverbal skill are necessary (e.g., using untimed nonverbal tests to assess potential strengths in individuals with limited language).

TABLE 2 Severity levels for autism spectrum disorder

Severity level	Social communication	Restricted, repetitive behaviors
Level 3 "Requiring very substantial support"	Severe deficits in verbal and nonverbal social communication skills cause severe impairments in functioning, very limited initiation of social interactions, and minimal response to social overtures from others. For example, a person with few words of intelligible speech who rarely initiates interaction and, when he or she does, makes unusual approaches to meet needs only and responds to only very direct social approaches.	Inflexibility of behavior, extreme difficulty coping with change, or other restricted/repetitive behaviors markedly interfere with functioning in all spheres. Great distress/difficulty changing focus or action.
Level 2 "Requiring substantial support"	Marked deficits in verbal and nonverbal social communication skills; social impairments apparent even with supports in place; limited initiation of social interactions; and reduced or abnormal responses to social overtures from others. For example, a person who speaks simple sentences, whose interaction is limited to narrow special interests, and who has markedly odd nonverbal communication.	Inflexibility of behavior, difficulty coping with change, or other restricted/repetitive behaviors appear frequently enough to be obvious to the casual observer and interfere with functioning in a variety of contexts. Distress and/or difficulty changing focus or action.
Level 1 "Requiring support"	Without supports in place, deficits in social communication cause noticeable impairments. Difficulty initiating social interactions, and clear examples of atypical or unsuccessful responses to social overtures of others. May appear to have decreased interest in social interactions. For example, a person who is able to speak in full sentences and engages in communication but whose to-and-fro conversation with others fails, and whose attempts to make friends are odd and typically unsuccessful.	Inflexibility of behavior causes significant interference with functioning in one or more contexts. Difficulty switching between activities. Problems of organization and planning hamper independence.

To use the specifier "with or without accompanying language impairment," the current level of verbal functioning should be assessed and described. Examples of the specific descriptions for "with accompanying language impairment" might include no intelligible speech (nonverbal), single words only, or phrase speech. Language level in individuals "without accompanying language impairment" might be further described by speaks in full sentences or has fluent speech. Since receptive language may lag behind expressive language development in autism spectrum disorder, receptive and expressive language skills should be considered separately.

The specifier "associated with a known medical or genetic condition or environmental factor" should be used when the individual has a known genetic disorder (e.g., Rett syndrome, Fragile X syndrome, Down syndrome), a medical disorder (e.g. epilepsy), or a history of environmental exposure (e.g., valproate, fetal alcohol syndrome, very low birth weight).

Additional neurodevelopmental, mental or behavioral conditions should also be noted (e.g., attention-deficit/hyperactivity disorder; developmental coordination disorder; disruptive behavior, impulse-control, or conduct disorders; anxiety, depressive, or bipolar disorders; tics or Tourette's disorder; self-injury; feeding, elimination, or sleep disorders).

Diagnostic Features

The essential features of autism spectrum disorder are persistent impairment in reciprocal social communication and social interaction (Criterion A), and restricted, repetitive patterns of behavior, interests, or activities (Criterion B). These symptoms are present from early childhood and limit or impair everyday functioning (Criteria C and D). The stage at which functional impairment becomes obvious will vary according to characteristics of the individual and his or her environment. Core diagnostic features are evident in the developmental period, but intervention, compensation, and current supports may mask difficulties in at least some contexts. Manifestations of the disorder also vary greatly depending on the severity of the autistic condition, developmental level, and chronological age; hence, the term *spectrum*. Autism spectrum disorder encompasses disorders previously referred to as early infantile autism, childhood autism, Kanner's autism, high-functioning autism, atypical autism, pervasive developmental disorder not otherwise specified, childhood disintegrative disorder, and Asperger's disorder.

The impairments in communication and social interaction specified in Criterion A are pervasive and sustained. Diagnoses are most valid and reliable when based on multiple sources of information, including clinician's observations, caregiver history, and, when possible, self-report. Verbal and nonverbal deficits in social communication have varying manifestations, depending on the individual's age, intellectual level, and language ability, as well as other factors such as treatment history and current support. Many individuals have language deficits, ranging from complete lack of speech through language delays, poor comprehension of speech, echoed speech, or stilted and overly literal language. Even when formal language skills (e.g., vocabulary, grammar) are intact, the use of language for reciprocal social communication is impaired in autism spectrum disorder.

Deficits in social-emotional reciprocity (i.e., the ability to engage with others and share thoughts and feelings) are clearly evident in young children with the disorder, who may show little or no initiation of social interaction and no sharing of emotions, along with reduced or absent imitation of others' behavior. What language exists is often one-sided, lacking in social reciprocity, and used to request or label rather than to comment, share feelings, or converse. In adults without intellectual disabilities or language delays, deficits in social-emotional reciprocity may be most apparent in difficulties processing and responding to complex social cues (e.g., when and how to join a conversation, what not to say). Adults who have developed compensation strategies for some social challenges still struggle in novel or unsupported situations and suffer from the effort and anxiety of consciously calculating what is socially intuitive for most individuals.

Deficits in nonverbal communicative behaviors used for social interaction are manifested by absent, reduced, or atypical use of eye contact (relative to cultural norms), gestures, facial expressions, body orientation, or speech intonation. An early feature of autism spectrum disorder is impaired joint attention as manifested by a lack of pointing, showing, or bringing objects to share interest with others, or failure to follow someone's pointing or eye gaze. Individuals may learn a few functional gestures, but their repertoire is smaller than that of others, and they often fail to use expressive gestures spontaneously in communication. Among adults with fluent language, the difficulty in coordinating nonverbal communication with speech may give the impression of odd, wooden, or exaggerated "body language" during interactions. Impairment may be relatively subtle within individual modes (e.g., someone may have relatively good eye contact when speaking) but noticeable in poor integration of eye contact, gesture, body posture, prosody, and facial expression for social communication.

Deficits in developing, maintaining, and understanding relationships should be judged against norms for age, gender, and culture. There may be absent, reduced, or atypical social interest, manifested by rejection of others, passivity, or inappropriate approaches that seem aggressive or disruptive. These difficulties are particularly evident in young children, in whom there is often a lack of shared social play and imagination (e.g., age-appropriate flexible pretend play) and, later, insistence on playing by very fixed rules. Older individuals may struggle to understand what behavior is considered appropriate in one situation but not another (e.g., casual behavior during a job interview), or the different ways that language may be used to communicate (e.g., irony, white lies). There may be an apparent preference for solitary activities or for interacting with much younger or older people. Frequently, there is a desire to establish friendships without a complete or realistic idea of what friendship entails (e.g., one-sided friendships or friendships based solely on shared special interests). Relationships with siblings, co-workers, and caregivers are also important to consider (in terms of reciprocity).

Autism spectrum disorder is also defined by restricted, repetitive patterns of behavior, interests, or activities (as specified in Criterion B), which show a range of manifestations according to age and ability, intervention, and current supports. Stereotyped or repetitive behaviors include simple motor stereotypies (e.g., hand flapping, finger flicking), repetitive use of objects (e.g., spinning coins, lining up toys), and repetitive speech (e.g., echolalia, the delayed or immediate parroting of heard words; use of "you" when referring to self; stereotyped use of words, phrases, or prosodic patterns). Excessive adherence to routines and restricted patterns of behavior may be manifest in resistance to change (e.g., distress at apparently small changes, such as in packaging of a favorite food; insistence on adherence to rules; rigidity of thinking) or ritualized patterns of verbal or nonverbal behavior (e.g., repetitive questioning, pacing a perimeter). Highly restricted, fixated interests in autism spectrum disorder tend to be abnormal in intensity or focus (e.g., a toddler strongly attached to a pan; a child preoccupied with vacuum cleaners; an adult spending hours writing out timetables). Some fascinations and routines may relate to apparent hyper- or hyporeactivity to sensory input, manifested through extreme responses to specific sounds or textures, excessive smelling or touching of objects, fascination with lights or spinning objects, and sometimes apparent indifference to pain, heat, or cold. Extreme reaction to or rituals involving taste, smell, texture, or appearance of food or excessive food restrictions are common and may be a presenting feature of autism spectrum disorder.

Many adults with autism spectrum disorder without intellectual or language disabilities learn to suppress repetitive behavior in public. Special interests may be a source of pleasure and motivation and provide avenues for education and employment later in life. Diagnostic criteria may be met when restricted, repetitive patterns of behavior, interests, or activities were clearly present during childhood or at some time in the past, even if symptoms are no longer present.

Criterion D requires that the features must cause clinically significant impairment in social, occupational, or other important areas of current functioning. Criterion E specifies that the social communication deficits, although sometimes accompanied by intellectual disability (intellectual developmental disorder), are not in line with the individual's developmental level; impairments exceed difficulties expected on the basis of developmental level.

Standardized behavioral diagnostic instruments with good psychometric properties, including caregiver interviews, questionnaires and clinician observation measures, are available and can improve reliability of diagnosis over time and across clinicians.

Associated Features Supporting Diagnosis

Many individuals with autism spectrum disorder also have intellectual impairment and/or language impairment (e.g., slow to talk, language comprehension behind production). Even those with average or high intelligence have an uneven profile of abilities. The gap between intellectual and adaptive functional skills is often large. Motor deficits are often present, including odd gait, clumsiness, and other abnormal motor signs (e.g., walking on tiptoes). Self-injury (e.g., head banging, biting the wrist) may occur, and disruptive/challenging behaviors are more common in children and adolescents with autism spectrum disorder than other disorders, including intellectual disability. Adolescents and adults with autism spectrum disorder are prone to anxiety and depression. Some individuals develop catatonic-like motor behavior (slowing and "freezing" mid-action), but these are typically not of the magnitude of a catatonic episode. However, it is possible for individuals with autism spectrum disorder to experience a marked deterioration in motor symptoms and display a full catatonic episode with symptoms such as mutism, posturing, grimacing and waxy flexibility. The risk period for comorbid catatonia appears to be greatest in the adolescent years.

Prevalence

In recent years, reported frequencies for autism spectrum disorder across U.S. and non-U.S. countries have approached 1% of the population, with similar estimates in child and adult samples. It remains unclear whether higher rates reflect an expansion of the diagnostic criteria of DSM-IV to include subthreshold cases, increased awareness, differences in study methodology, or a true increase in the frequency of autism spectrum disorder.

Development and Course

The age and pattern of onset also should be noted for autism spectrum disorder. Symptoms are typically recognized during the second year of life (12–24 months of age) but may be seen earlier than 12 months if developmental delays are severe, or noted later than 24 months if symptoms are more subtle. The pattern of onset description might include information about early developmental delays or any losses of social or language skills. In cases where skills have been lost, parents or caregivers may give a history of a gradual or relatively rapid deterioration in social behaviors or language skills. Typically, this would occur between 12 and 24 months of age and is distinguished from the rare instances of developmental regression occurring after at least 2 years of normal development (previously described as childhood disintegrative disorder).

The behavioral features of autism spectrum disorder first become evident in early childhood, with some cases presenting a lack of interest in social interaction in the first year of life. Some children with autism spectrum disorder experience developmental plateaus or regression, with a gradual or relatively rapid deterioration in social behaviors or use of language, often during the first 2 years of life. Such losses are rare in other disorders and may be a useful "red flag" for autism spectrum disorder. Much more unusual and warranting more extensive medical investigation are losses of skills beyond social communication (e.g., loss of self-care, toileting, motor skills) or those occurring after the

second birthday (see also Rett syndrome in the section "Differential Diagnosis" for this disorder).

First symptoms of autism spectrum disorder frequently involve delayed language development, often accompanied by lack of social interest or unusual social interactions (e.g., pulling individuals by the hand without any attempt to look at them), odd play patterns (e.g., carrying toys around but never playing with them), and unusual communication patterns (e.g., knowing the alphabet but not responding to own name). Deafness may be suspected but is typically ruled out. During the second year, odd and repetitive behaviors and the absence of typical play become more apparent. Since many typically developing young children have strong preferences and enjoy repetition (e.g., eating the same foods, watching the same video multiple times), distinguishing restricted and repetitive behaviors that are diagnostic of autism spectrum disorder can be difficult in preschoolers. The clinical distinction is based on the type, frequency, and intensity of the behavior (e.g., a child who daily lines up objects for hours and is very distressed if any item is moved).

Autism spectrum disorder is not a degenerative disorder, and it is typical for learning and compensation to continue throughout life. Symptoms are often most marked in early childhood and early school years, with developmental gains typical in later childhood in at least some areas (e.g., increased interest in social interaction). A small proportion of individuals deteriorate behaviorally during adolescence, whereas most others improve. Only a minority of individuals with autism spectrum disorder live and work independently in adulthood; those who do tend to have superior language and intellectual abilities and are able to find a niche that matches their special interests and skills. In general, individuals with lower levels of impairment may be better able to function independently. However, even these individuals may remain socially naive and vulnerable, have difficulties organizing practical demands without aid, and are prone to anxiety and depression. Many adults report using compensation strategies and coping mechanisms to mask their difficulties in public but suffer from the stress and effort of maintaining a socially acceptable facade. Scarcely anything is known about old age in autism spectrum disorder.

Some individuals come for first diagnosis in adulthood, perhaps prompted by the diagnosis of autism in a child in the family or a breakdown of relations at work or home. Obtaining detailed developmental history in such cases may be difficult, and it is important to consider self-reported difficulties. Where clinical observation suggests criteria are currently met, autism spectrum disorder may be diagnosed, provided there is no evidence of good social and communication skills in childhood. For example, the report (by parents or another relative) that the individual had ordinary and sustained reciprocal friendships and good nonverbal communication skills throughout childhood would rule out a diagnosis of autism spectrum disorder; however, the absence of developmental information in itself should not do so.

Manifestations of the social and communication impairments and restricted/repetitive behaviors that define autism spectrum disorder are clear in the developmental period. In later life, intervention or compensation, as well as current supports, may mask these difficulties in at least some contexts. However, symptoms remain sufficient to cause current impairment in social, occupational, or other important areas of functioning.

Risk and Prognostic Factors

The best established prognostic factors for individual outcome within autism spectrum disorder are presence or absence of associated intellectual disability and language impairment (e.g., functional language by age 5 years is a good prognostic sign) and additional mental health problems. Epilepsy, as a comorbid diagnosis, is associated with greater intellectual disability and lower verbal ability.

Environmental. A variety of nonspecific risk factors, such as advanced parental age, low birth weight, or fetal exposure to valproate, may contribute to risk of autism spectrum disorder.

Genetic and physiological. Heritability estimates for autism spectrum disorder have ranged from 37% to higher than 90%, based on twin concordance rates. Currently, as many as 15% of cases of autism spectrum disorder appear to be associated with a known genetic mutation, with different de novo copy number variants or de novo mutations in specific genes associated with the disorder in different families. However, even when an autism spectrum disorder is associated with a known genetic mutation, it does not appear to be fully penetrant. Risk for the remainder of cases appears to be polygenic, with perhaps hundreds of genetic loci making relatively small contributions.

Culture-Related Diagnostic Issues

Cultural differences will exist in norms for social interaction, nonverbal communication, and relationships, but individuals with autism spectrum disorder are markedly impaired against the norms for their cultural context. Cultural and socioeconomic factors may affect age at recognition or diagnosis; for example, in the United States, late or underdiagnosis of autism spectrum disorder among African American children may occur.

Gender-Related Diagnostic Issues

Autism spectrum disorder is diagnosed four times more often in males than in females. In clinic samples, females tend to be more likely to show accompanying intellectual disability, suggesting that girls without accompanying intellectual impairments or language delays may go unrecognized, perhaps because of subtler manifestation of social and communication difficulties.

Functional Consequences of Autism Spectrum Disorder

In young children with autism spectrum disorder, lack of social and communication abilities may hamper learning, especially learning through social interaction or in settings with peers. In the home, insistence on routines and aversion to change, as well as sensory sensitivities, may interfere with eating and sleeping and make routine care (e.g., haircuts, dental work) extremely difficult. Adaptive skills are typically below measured IQ. Extreme difficulties in planning, organization, and coping with change negatively impact academic achievement, even for students with above-average intelligence. During adulthood, these individuals may have difficulties establishing independence because of continued rigidity and difficulty with novelty.

Many individuals with autism spectrum disorder, even without intellectual disability, have poor adult psychosocial functioning as indexed by measures such as independent living and gainful employment. Functional consequences in old age are unknown, but social isolation and communication problems (e.g., reduced help-seeking) are likely to have consequences for health in older adulthood.

Differential Diagnosis

Rett syndrome. Disruption of social interaction may be observed during the regressive phase of Rett syndrome (typically between 1–4 years of age); thus, a substantial proportion of affected young girls may have a presentation that meets diagnostic criteria for autism spectrum disorder. However, after this period, most individuals with Rett syndrome improve their social communication skills, and autistic features are no longer a major area of concern. Consequently, autism spectrum disorder should be considered only when all diagnostic criteria are met.

Selective mutism. In selective mutism, early development is not typically disturbed. The affected child usually exhibits appropriate communication skills in certain contexts and settings. Even in settings where the child is mute, social reciprocity is not impaired, nor are restricted or repetitive patterns of behavior present.

Language disorders and social (pragmatic) communication disorder. In some forms of language disorder, there may be problems of communication and some secondary social difficulties. However, specific language disorder is not usually associated with abnormal nonverbal communication, nor with the presence of restricted, repetitive patterns of behavior, interests, or activities.

When an individual shows impairment in social communication and social interactions but does not show restricted and repetitive behavior or interests, criteria for social (pragmatic) communication disorder, instead of autism spectrum disorder, may be met. The diagnosis of autism spectrum disorder supersedes that of social (pragmatic) communication disorder whenever the criteria for autism spectrum disorder are met, and care should be taken to enquire carefully regarding past or current restricted/repetitive behavior.

Intellectual disability (intellectual developmental disorder) without autism spectrum disorder. Intellectual disability without autism spectrum disorder may be difficult to differentiate from autism spectrum disorder in very young children. Individuals with intellectual disability who have not developed language or symbolic skills also present a challenge for differential diagnosis, since repetitive behavior often occurs in such individuals as well. A diagnosis of autism spectrum disorder in an individual with intellectual disability is appropriate when social communication and interaction are significantly impaired relative to the developmental level of the individual's nonverbal skills (e.g., fine motor skills, nonverbal problem solving). In contrast, intellectual disability is the appropriate diagnosis when there is no apparent discrepancy between the level of social-communicative skills and other intellectual skills.

Stereotypic movement disorder. Motor stereotypies are among the diagnostic characteristics of autism spectrum disorder, so an additional diagnosis of stereotypic movement disorder is not given when such repetitive behaviors are better explained by the presence of autism spectrum disorder. However, when stereotypies cause self-injury and become a focus of treatment, both diagnoses may be appropriate.

Attention-deficit/hyperactivity disorder. Abnormalities of attention (overly focused or easily distracted) are common in individuals with autism spectrum disorder, as is hyperactivity. A diagnosis of attention-deficit/hyperactivity disorder (ADHD) should be considered when attentional difficulties or hyperactivity exceeds that typically seen in individuals of comparable mental age.

Schizophrenia. Schizophrenia with childhood onset usually develops after a period of normal, or near normal, development. A prodromal state has been described in which social impairment and atypical interests and beliefs occur, which could be confused with the social deficits seen in autism spectrum disorder. Hallucinations and delusions, which are defining features of schizophrenia, are not features of autism spectrum disorder. However, clinicians must take into account the potential for individuals with autism spectrum disorder to be concrete in their interpretation of questions regarding the key features of schizophrenia (e.g., "Do you hear voices when no one is there?" "Yes [on the radio]").

Comorbidity

Autism spectrum disorder is frequently associated with intellectual impairment and structural language disorder (i.e., an inability to comprehend and construct sentences with proper grammar), which should be noted under the relevant specifiers when applicable. Many individuals with autism spectrum disorder have psychiatric symptoms that do not form part of the diagnostic criteria for the disorder (about 70% of individuals with autism spectrum disorder may have one comorbid mental disorder, and 40% may have two or more comorbid mental disorders). When criteria for both ADHD and autism spectrum disorder are met, both diagnoses should be given. This same principle applies to concurrent diagnoses of autism spectrum disorder and developmental coordination disorder, anxiety disorders, depressive

disorders, and other comorbid diagnoses. Among individuals who are nonverbal or have language deficits, observable signs such as changes in sleep or eating and increases in challenging behavior should trigger an evaluation for anxiety or depression. Specific learning difficulties (literacy and numeracy) are common, as is developmental coordination disorder. Medical conditions commonly associated with autism spectrum disorder should be noted under the "associated with a known medical/genetic or environmental/acquired condition" specifier. Such medical conditions include epilepsy, sleep problems, and constipation. Avoidant-restrictive food intake disorder is a fairly frequent presenting feature of autism spectrum disorder, and extreme and narrow food preferences may persist.

Attention-Deficit/Hyperactivity Disorder

Attention-Deficit/Hyperactivity Disorder

Diagnostic Criteria

A. A persistent pattern of inattention and/or hyperactivity-impulsivity that interferes with functioning or development, as characterized by (1) and/or (2):

1. **Inattention:** Six (or more) of the following symptoms have persisted for at least 6 months to a degree that is inconsistent with developmental level and that negatively impacts directly on social and academic/occupational activities:
   Note: The symptoms are not solely a manifestation of oppositional behavior, defiance, hostility, or failure to understand tasks or instructions. For older adolescents and adults (age 17 and older), at least five symptoms are required.
   a. Often fails to give close attention to details or makes careless mistakes in schoolwork, at work, or during other activities (e.g., overlooks or misses details, work is inaccurate).
   b. Often has difficulty sustaining attention in tasks or play activities (e.g., has difficulty remaining focused during lectures, conversations, or lengthy reading).
   c. Often does not seem to listen when spoken to directly (e.g., mind seems elsewhere, even in the absence of any obvious distraction).
   d. Often does not follow through on instructions and fails to finish schoolwork, chores, or duties in the workplace (e.g., starts tasks but quickly loses focus and is easily sidetracked).
   e. Often has difficulty organizing tasks and activities (e.g., difficulty managing sequential tasks; difficulty keeping materials and belongings in order; messy, disorganized work; has poor time management; fails to meet deadlines).
   f. Often avoids, dislikes, or is reluctant to engage in tasks that require sustained mental effort (e.g., schoolwork or homework; for older adolescents and adults, preparing reports, completing forms, reviewing lengthy papers).
   g. Often loses things necessary for tasks or activities (e.g., school materials, pencils, books, tools, wallets, keys, paperwork, eyeglasses, mobile telephones).
   h. Is often easily distracted by extraneous stimuli (for older adolescents and adults, may include unrelated thoughts).
   i. Is often forgetful in daily activities (e.g., doing chores, running errands; for older adolescents and adults, returning calls, paying bills, keeping appointments).

Neurodevelopmental Disorders

The neurodevelopmental disorders are a group of conditions with onset in the developmental period. The disorders typically manifest early in development, often before the child enters grade school, and are characterized by developmental deficits that produce impairments of personal, social, academic, or occupational functioning. The range of developmental deficits varies from very specific limitations of learning or control of executive functions to global impairments of social skills or intelligence. The neurodevelopmental disorders frequently co-occur; for example, individuals with autism spectrum disorder often have intellectual disability (intellectual developmental disorder), and many children with attention-deficit/hyperactivity disorder (ADHD) also have a specific learning disorder. For some disorders, the clinical presentation includes symptoms of excess as well as deficits and delays in achieving expected milestones. For example, autism spectrum disorder is diagnosed only when the characteristic deficits of social communication are accompanied by excessively repetitive behaviors, restricted interests, and insistence on sameness.

Intellectual disability (intellectual developmental disorder) is characterized by deficits in general mental abilities, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience. The deficits result in impairments of adaptive functioning, such that the individual fails to meet standards of personal independence and social responsibility in one or more aspects of daily life, including communication, social participation, academic or occupational functioning, and personal independence at home or in community settings. Global developmental delay, as its name implies, is diagnosed when an individual fails to meet expected developmental milestones in several areas of intellectual functioning. The diagnosis is used for individuals who are unable to undergo systematic assessments of intellectual functioning, including children who are too young to participate in standardized testing. Intellectual disability may result from an acquired insult during the developmental period from, for example, a severe head injury, in which case a neurocognitive disorder also may be diagnosed.

The communication disorders include language disorder, speech sound disorder, social (pragmatic) communication disorder, and childhood-onset fluency disorder (stuttering). The first three disorders are characterized by deficits in the development and use of language, speech, and social communication, respectively. Childhood-onset fluency disorder is characterized by disturbances of the normal fluency and motor production of speech, including repetitive sounds or syllables, prolongation of consonants or vowel sounds, broken words, blocking, or words produced with an excess of physical tension. Like other neurodevelopmental disorders, communication disorders begin early in life and may produce lifelong functional impairments.

Autism spectrum disorder is characterized by persistent deficits in social communication and social interaction across multiple contexts, including deficits in social reciprocity, nonverbal communicative behaviors used for social interaction, and skills in developing, maintaining, and understanding relationships. In addition to the social communication deficits, the diagnosis of autism spectrum disorder requires the presence of restricted, repetitive patterns of behavior, interests, or activities. Because symptoms change with development and may be masked by compensatory mechanisms, the diagnostic criteria may

be met based on historical information, although the current presentation must cause significant impairment.

Within the diagnosis of autism spectrum disorder, individual clinical characteristics are noted through the use of specifiers (with or without accompanying intellectual impairment; with or without accompanying structural language impairment; associated with a known medical/genetic or environmental/acquired condition; associated with another neurodevelopmental, mental, or behavioral disorder), as well as specifiers that describe the autistic symptoms (age at first concern; with or without loss of established skills; severity). These specifiers provide clinicians with an opportunity to individualize the diagnosis and communicate a richer clinical description of the affected individuals. For example, many individuals previously diagnosed with Asperger's disorder would now receive a diagnosis of autism spectrum disorder without language or intellectual impairment.

ADHD is a neurodevelopmental disorder defined by impairing levels of inattention, disorganization, and/or hyperactivity-impulsivity. Inattention and disorganization entail inability to stay on task, seeming not to listen, and losing materials, at levels that are inconsistent with age or developmental level. Hyperactivity-impulsivity entails overactivity, fidgeting, inability to stay seated, intruding into other people's activities, and inability to wait—symptoms that are excessive for age or developmental level. In childhood, ADHD frequently overlaps with disorders that are often considered to be "externalizing disorders," such as oppositional defiant disorder and conduct disorder. ADHD often persists into adulthood, with resultant impairments of social, academic and occupational functioning.

The neurodevelopmental motor disorders include developmental coordination disorder, stereotypic movement disorder, and tic disorders. Developmental coordination disorder is characterized by deficits in the acquisition and execution of coordinated motor skills and is manifested by clumsiness and slowness or inaccuracy of performance of motor skills that cause interference with activities of daily living. Stereotypic movement disorder is diagnosed when an individual has repetitive, seemingly driven, and apparently purposeless motor behaviors, such as hand flapping, body rocking, head banging, self-biting, or hitting. The movements interfere with social, academic, or other activities. If the behaviors cause self-injury, this should be specified as part of the diagnostic description. Tic disorders are characterized by the presence of motor or vocal tics, which are sudden, rapid, recurrent, nonrhythmic, sterotyped motor movements or vocalizations. The duration, presumed etiology, and clinical presentation define the specific tic disorder that is diagnosed: Tourette's disorder, persistent (chronic) motor or vocal tic disorder, provisional tic disorder, other specified tic disorder, and unspecified tic disorder. Tourette's disorder is diagnosed when the individual has multiple motor and vocal tics that have been present for at least 1 year and that have a waxing-waning symptom course.

Specific learning disorder, as the name implies, is diagnosed when there are specific deficits in an individual's ability to perceive or process information efficiently and accurately. This neurodevelopmental disorder first manifests during the years of formal schooling and is characterized by persistent and impairing difficulties with learning foundational academic skills in reading, writing, and/or math. The individual's performance of the affected academic skills is well below average for age, or acceptable performance levels are achieved only with extraordinary effort. Specific learning disorder may occur in individuals identified as intellectually gifted and manifest only when the learning demands or assessment procedures (e.g., timed tests) pose barriers that cannot be overcome by their innate intelligence and compensatory strategies. For all individuals, specific learning disorder can produce lifelong impairments in activities dependent on the skills, including occupational performance.

The use of specifiers for the neurodevelopmental disorder diagnoses enriches the clinical description of the individual's clinical course and current symptomatology. In addition to specifiers that describe the clinical presentation, such as age at onset or severity ratings, the neurodevelopmental disorders may include the specifier "associated with a known medical or genetic condition or environmental factor." This specifier gives clini-

cians an opportunity to document factors that may have played a role in the etiology of the disorder, as well as those that might affect the clinical course. Examples include genetic disorders, such as fragile X syndrome, tuberous sclerosis, and Rett syndrome; medical conditions such as epilepsy; and environmental factors, including very low birth weight and fetal alcohol exposure (even in the absence of stigmata of fetal alcohol syndrome).

Intellectual Disabilities

Intellectual Disability (Intellectual Developmental Disorder)

Diagnostic Criteria

Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met:

A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.

B. Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.

C. Onset of intellectual and adaptive deficits during the developmental period.

Note: The diagnostic term *intellectual disability* is the equivalent term for the ICD-11 diagnosis of *intellectual developmental disorders*. Although the term *intellectual disability* is used throughout this manual, both terms are used in the title to clarify relationships with other classification systems. Moreover, a federal statute in the United States (Public Law 111-256, Rosa's Law) replaces the term *mental retardation* with *intellectual disability*, and research journals use the term *intellectual disability*. Thus, *intellectual disability* is the term in common use by medical, educational, and other professions and by the lay public and advocacy groups.

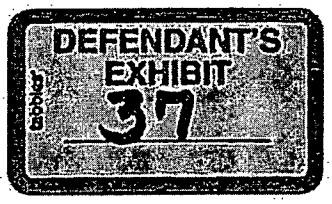
Coding note: The ICD-9-CM code for intellectual disability (intellectual developmental disorder) is **319**, which is assigned regardless of the severity specifier. The ICD-10-CM code depends on the severity specifier (see below).

Specify current severity (see Table 1):

(F70) Mild
(F71) Moderate
(F72) Severe
(F73) Profound

Specifiers

The various levels of severity are defined on the basis of adaptive functioning, and not IQ scores, because it is adaptive functioning that determines the level of supports required. Moreover, IQ measures are less valid in the lower end of the IQ range.


DEFENDANT'S
EXHIBIT
37

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF RICHLAND

PROTECTION AND ADVOCACY
FOR THE PEOPLE WITH
DISABILITIES, INC., et al.,

Plaintiff,

vs.

CASE NO. 07-CP-40-2187

SOUTH CAROLINA DEPARTMENT
OF DISABILITIES AND SPECIAL
NEEDS, et al.,

Defendant.

DEPOSITION OF: DEBORAH C. McPHERSON

DATE: September 23, 2011

TIME: 10:08 A.M.

LOCATION: Richardson, Plowden & Robinson
1900 Barnwell Street
Columbia, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: SANDRA K. BJERKE, RMR, RDR, CRR

A. WILLIAM ROBERTS, JR. & ASSOCIATES

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residential services, and that was the only service that I couldn't get through community long-term care that I could get through the Department of Disabilities and Special Needs. And so I just decided at that point I was going to make my life a whole lot easier.

Did I know at that time I would later be serving on the commission? No. That had no influence. It had no influence on my wanting to be on the commission. It was just a matter of wanting to make my life a lot easier and for my daughter to get the services that she needed.

Q. Why did you want to be on the commission?

A. Basically, because I felt that there was a need to help improve the service delivery system. And I'll be honest. I mean, I as an individual, having a daughter with a disability, over the years I've heard people's stories time and time again, and I also know their frustrations. And I was hoping that by serving on the commission, maybe I would be able to help.

Q. Um-hum.

A. Have I been frustrated serving on the commission? Yes. I have felt, at times, my hands

have been tied.

Q. And with your hands being tied, would that be tied by the director, state director, or by whom?

A. Been tied basically because of commission policy.

Q. Okay. Can you tell me a little bit about -- how does DDSN's relationship with the local boards work?

How is that -- how do they interact and what responsibilities, if any, does DDSN have with regard to them?

A. DDSN subcontracts with the local disability boards. They are not their employees. So the state director -- for example, the executive director of a local board does not answer to the state director. It's basically a contractual relationship.

Q. Okay. So it's almost like they're a provider of services, technically. Or, I mean, you contract with them in order to do a function.

A. But it's different in the sense that state code, you know, specifies the local -- the existence of the local boards.

Q. Okay. And so the only -- with them

ATTACHMENT A

866 F.Supp.2d 545
(Cite as: 866 F.Supp.2d 545)

▷

United States District Court,
D. South Carolina,
Columbia Division.

OCCUPY COLUMBIA; Walid Hakim; Melissa Harmon; Bradley Powell; Timothy Liszewski; David Bland; Ashley Blewer; and David Arroyo, Plaintiffs,

v.

Nikki HALEY, Governor of South Carolina; State of South Carolina; Leroy Smith, Director of the South Carolina Department of Public Safety; Zachary Wise, Chief of the South Carolina Bureau of Protective Services; Nikki Haley, Chairwoman of the South Carolina Budget & Control Board; Harvey S. Peeler, Jr., Chairman of the South Carolina State House Committee; M. Richbourg Roberson, Division of General Services; Sterling L. Morrison, Division of General Services; Curtis Loftis, State Treasurer; Richard Eckstrom, Comptroller General; Hugh Leatherman, Senate Finance Committee; Brian White, House Ways and Means Committee; James Carr; Joe Hodge; Andrew Schmidt; and Marvin Harris, III, Defendants.

C/A No. 3:11–cv–03253–CMC.
Dec. 16, 2011.

Background: Protesters brought § 1983 action against South Carolina government officials in state court, seeking preliminary injunction to enjoin officials from interfering with protesters' 24-hour occupation of State House grounds, including sleeping on grounds, and use of sleeping bags and tents. Officials removed action to federal court.

Holdings: The District Court, Cameron McGowan Currie, J., held that:
(1) protesters were likely to succeed on merits of their claims;
(2) protesters established that irreparable injury would result absent injunction;
(3) balance of equities favored issuing injunction; and
(4) issuance of injunction was in public interest.

Motion for preliminary injunction granted.

West Headnotes

[1] Injunction 212 ⇐1075

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(A) Nature, Form, and Scope of Remedy
212k1075 k. Extraordinary or unusual nature of remedy. Most Cited Cases

Preliminary injunction is extraordinary remedy which is to be applied only in limited circumstances which clearly demand it.

[2] Injunction 212 ⇐1074

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(A) Nature, Form, and Scope of Remedy
212k1074 k. Preservation of status quo. Most Cited Cases

Traditional purpose of preliminary injunction is to protect status quo and to prevent irreparable harm during pendency of lawsuit ultimately to preserve district court's ability to render meaningful judgment on merits.

[3] Injunction 212 ⇐1092

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1092 k. Grounds in general; multiple factors. Most Cited Cases

To qualify for preliminary injunctive relief, a plaintiff must show (1) likelihood he will succeed

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on merits, (2) likelihood he will suffer irreparable harm in absence of injunction, (3) that balance of equities tips in his favor, and (4) that injunction is in public interest.

[4] Injunction 212 ⚷1096

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1094 Entitlement to Relief
212k1096 k. Likelihood of success on merits. Most Cited Cases

Injunction 212 ⚷1572

212 Injunction
212V Actions and Proceedings
212V(E) Evidence
212k1567 Weight and Sufficiency
212k1572 k. Clear showing or proof. Most Cited Cases

Winter- Real Truth standard for preliminary injunctive relief requires party seeking injunction to make "clear showing" that he is likely to succeed on merits; this standard compels moving party to show that he is likely to prevail.

[5] Injunction 212 ⚷1097

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1094 Entitlement to Relief
212k1097 k. Serious or substantial question on merits. Most Cited Cases

Regardless of balance of hardships, it is insufficient for party seeking preliminary injunction to show only that grave or serious questions are presented in litigation.

[6] Injunction 212 ⚷1103

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1101 Injury, Hardship, Harm, or Effect
212k1103 k. Unclear, unlikely, doubtful or speculative injury. Most Cited Cases

Injunction 212 ⚷1572

212 Injunction
212V Actions and Proceedings
212V(E) Evidence
212k1567 Weight and Sufficiency
212k1572 k. Clear showing or proof. Most Cited Cases

Party seeking preliminary injunction must make clear showing that he is likely to be irreparably harmed if relief is denied; to meet this test, party must show more than mere possibility of harm.

[7] Injunction 212 ⚷1100

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1100 k. Public interest considerations. Most Cited Cases

A district court must give "particular regard" to public consequences of granting preliminary injunction.

[8] Injunction 212 ⚷1092

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1092 k. Grounds in general; multiple factors. Most Cited Cases

Each requirement for issuance of preliminary injunction, namely, likelihood moving party will succeed on merits, likelihood he will suffer irreparable harm in absence of injunction, that balance of equities tips in his favor, and that injunction is in

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public interest, must be fulfilled as articulated.

[9] Civil Rights 78 ⚿1457(1)

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(1) k. In general. Most Cited Cases

Factor for preliminary injunctive relief requiring likelihood of success on merits takes on greater significance in context of alleged violation of First Amendment rights; this is because a plaintiff's claimed irreparable harm is inseparably linked to likelihood of success on merits of First Amendment claim. U.S.C.A. Const.Amend. 1.

[10] Civil Rights 78 ⚿1457(2)

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(2) k. Public accommodations or facilities. Most Cited Cases

Protesters were likely to succeed on merits of their claims that their camping and sleeping on South Carolina House grounds in connection with their 24-hour occupation was expression protected by First Amendment, and that unwritten "no-camping or sleeping" policy violated their constitutional rights, as supported issuance of preliminary injunction enjoining state government officials from interfering with occupation, including sleeping on grounds, and use of sleeping bags and tents. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law 92 ⚿1735

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1732 Public Forum in General
92k1735 k. Justification for exclusion or limitation. Most Cited Cases

Government may reasonably restrict expression in public forums. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law 92 ⚿1739

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1736 Traditional Public Forum in General
92k1739 k. Justification for exclusion or limitation. Most Cited Cases

In traditional public forums, government may restrict speech as long as restrictions are reasonable time, place, and manner restrictions, content-neutral, and are narrowly tailored to serve significant governmental interest. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law 92 ⚿1739

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1736 Traditional Public Forum in General
92k1739 k. Justification for exclusion or limitation. Most Cited Cases

Content-based restrictions on speech may be imposed in traditional public forum where there is clear and present danger that speech will bring about the substantive evils that government has right to prevent, and where restrictions are narrowly drawn to serve that compelling state interest. U.S.C.A. Const.Amend. 1.

[14] Constitutional Law 92 ⚿1150

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92 Constitutional Law
92X First Amendment in General
92X(A) In General
92k1150 k. In general. Most Cited Cases

Fact that policy is not committed to writing does not of itself constitute First Amendment violation. U.S.C.A. Const.Amend. 1.

[15] Constitutional Law 92 ⇐1514

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1514 k. Narrow tailoring requirement; relationship to governmental interest. Most Cited Cases

Constitutional Law 92 ⇐1515

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1515 k. Existence of other channels of expression. Most Cited Cases

To survive First Amendment challenge, time, place, and manner restrictions must be content-neutral, narrowly-tailored to serve significant government interest, and leave open ample, alternative channels of communication. U.S.C.A. Const.Amend. 1.

[16] Civil Rights 78 ⇐1457(1)

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(1) k. In general. Most Cited Cases

In context of alleged violation of First Amendment rights, a plaintiff's claimed irreparable harm is inseparably linked to likelihood of success on merits of plaintiff's First Amendment claim, for purposes of preliminary injunctive relief. U.S.C.A. Const.Amend. 1.

[17] Civil Rights 78 ⇐1457(2)

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(2) k. Public accommodations or facilities. Most Cited Cases

Protesters established that irreparable injury would result absent preliminary injunction enjoining South Carolina government officials from interfering with protesters' 24-hour occupation of State House grounds, including sleeping on grounds, and use of sleeping bags and tents, as supported issuance of injunction; officials stated that they planned to enforce no-camping policy should injunction be denied, and fear of inconsistent application of policy created risk that protesters would be silenced in violation of First Amendment. U.S.C.A. Const.Amend. 1.

[18] Civil Rights 78 ⇐1457(2)

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(2) k. Public accommodations or facilities. Most Cited Cases

Balance of equities favored issuing preliminary injunction enjoining South Carolina government officials from interfering with protesters' 24-hour occupation of State House grounds, including sleeping on grounds, and use of sleeping bags and tents; protesters had little remedy should their First Amendment rights be violated as result of inconsistently applied and ever-changing policies regarding use of grounds. U.S.C.A. Const.Amend. 1.

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[19] Civil Rights 78 ⇐1457(2)

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(2) k. Public accommodations or facilities. Most Cited Cases

Issuance of preliminary injunction enjoining South Carolina government officials from interfering with protesters' 24-hour occupation of State House grounds, including sleeping on grounds and use of sleeping bags and tents, was in public interest; although public had interest in having properly maintained grounds that could be enjoyed by everyone, including those not involved with protest movement, and protesters' encampment was causing at least some damage to grounds, public also had interest in access to grounds, including for purpose of protesting, and that interest, protected by First Amendment, could only be limited by reasonable time, place, and manner restrictions, of which there were none. U.S.C.A. Const.Amend. 1.

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MEMORANDUM OPINION ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

CAMERON McGOWAN CURRIE, District Judge.

This matter came before the court on December 14, 2011, for oral argument on Plaintiffs' motion for preliminary injunction to enjoin Defendants from interfering with Plaintiffs' 24–hour occupation of the State House grounds, including sleeping on the State House grounds, and the use of sleeping bags and tents. By order entered that same day, the court granted Plaintiffs' motion and indicated that it would issue a separate memorandum opinion setting forth its reasons for the decision no later than December 19, 2011. The court now issues its supporting memorandum opinion.

BACKGROUND

Plaintiff Occupy Columbia is part of the Occupy Movement that began with Occupy Wall Street in Manhattan's Financial District on September 17, 2011. Occupy Columbia was organized in early October 2011, and protestors began occupying the State House grounds on October 15, 2011.[FN1] According to Plaintiffs:

> FN1. Occupy members remained on the State House grounds 24 hours a day, utilizing tarps (but not tents) and sleeping bags.

*549 Occupy Columbia is now an established occupation located on the State House grounds. Like the other Occupy protests in other locations across the country, literal occupation of the State House grounds 24 hours a day is a core component of the Occupy Columbia movement and a key message that the Occupy Columbia protestors seek to communicate to the government and to the world. "Around the clock" is not merely a symbol, but functions as an exemplar to the community demonstrating the protestors' vision of a more just and equal society. Physically occupying the State House grounds, including sleeping overnight on the grounds, is the only effective manner in which Occupy Columbia members can express their message of taking back our state to create a more just, economically egalitarian society.

Dkt. No. 1–1 at 15. Occupy Columbia alleges that it is a peaceful movement and that the occu-

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pation of the State House grounds has caused no damage to the property. The group alleges that it keeps the sidewalks clear of clutter, uses a portable bathroom or the public bathroom at the State House, and does not cook on the grounds. *Id.* at 14. Further, the group alleges it has developed a security committee to ensure that protestors and their belongings are safe and secure during the night. *Id.* The group also alleges that it works with the horticulturist who maintains the grounds to minimize its impact on the lawn and with the Bureau of Protective Services ("BPS"),[FN2] the law enforcement and security force for the State House grounds, in an effort to maintain a peaceful protest. Dkt. No. 1–7 at 3.

> FN2. According to the South Carolina Department of Public Safety, the Bureau of Protective Services (BPS) Department was formed in 1994.
>
> Prior to 1994, this Department was named the South Carolina Capitol Police and operated under the State Law Enforcement Division (SLED). It is one of three accredited state police agencies functioning under the South Carolina Department of Public Safety. The South Carolina Highway Patrol Division and the State Transport Police Division are the other two.
>
> BPS provided [sic] comprehensive law enforcement, public safety and security services for state employees and more than 220,000 annual visitors to the Capitol Complex. This includes members of the State Legislature, the Governor, Lieutenant Governor and their families. The Capitol Complex area includes the State Capitol Building, Gressette Building (Senate offices), Solomon Blatt Building (Congressional offices), Wade Hampton Building, Calhoun Building (Court of Appeals), Brown Building, Dennis Building, Department of Transportation, Rutledge Building (Department of Education), South Carolina State Library and the State Supreme Court.
>
> http:// www. scdps. org/ bps/ who_ we_ are. asp (last accessed on December 15, 2012). A copy of this web page is attached to this Opinion.

During the first week of the occupation, Plaintiff Timothy Liszewski, Occupy Columbia's Police Liaison, approached the Division of General Services ("General Services") to determine whether the group needed a permit. Dkt. No. 1–7 at 3 (Liszewski Affidavit). General Services is a division of the State Budget and Control Board ("Board") and provides a variety of services, including facilities management, to the state. According to Mr. Liszewski, an employee of General Services stated that the group would need a permit, especially if the group intended to use the electrical outlets on the Gervais Street side of the Capitol. The General Services' employee provided a copy of a two-page document entitled "Conditions for Use of South Carolina State House and Grounds" ("Conditions").[FN3] Paragraph 8 of the Conditions provides:

> FN3. A copy of the Conditions is attached to this Opinion.

***550** All activities on the grounds or in the State House must strictly adhere to the times as scheduled to insure that the activities will not conflict with any other scheduled activities. Activities will not be scheduled beyond 5:00 p.m. in the State House and 6:00 p.m. on the grounds unless special provisions in writing have been made to extend the time.

Dkt. No. 1–5 at 29 ("6:00 p.m. policy"). Plaintiff Liszweski allegedly asked the General Services' employee if the group "could have open-ended permission to stay on the grounds beyond 6 p.m." and "she said probably not."[FN4] Dkt. No. 1–7 at 4. Plaintiffs believe that "no application for a per-

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mit is available on any public source such as the internet or at the front counter of the Division of General Services." Dkt. No. 1–1 at 19. Defendants confirm that there is no licensing or permit process for use of the State House grounds.[FN5] Dkt. Nos. 13 at 8–9; 13–1 at 4 (Griffin Affidavit).

FN4. Mr. Liszweski alleges that he spoke with Carla Griffin, the Deputy Director of General Services. Dkt. No. 1–7 at 3–4. Carla Griffin affirmed that she remembers meeting Mr. Liszweski but does not "remember the exact words of the conversation." Dkt. No. 13–1 at 3. She also affirmed, "No one has ever requested to camp continuously on State House grounds, so if he had asked for 'open-ended permission to stay on the grounds,' I would have informed him of the 'Conditions of Use of South Carolina State House and Grounds' and requested greater detail about his request. I certainly would not have authorized a request to camp continuously on State House grounds." *Id.*

FN5. Board Defendants admit that the State Budget and Control Board has no permit requirements for organizations seeking use of the State House grounds. In fact, Board Defendants describe General Services' role in authorizing the use of the State House grounds as "an entity that takes reservations." Dkt. No. 13 at 9.

Although "special provisions in writing" to extend the 6:00 p.m. limitation have not been received by Occupy Columbia, the group alleges it received permission from the Budget and Control Board's State House and Grounds Committee to sleep under a portico on the Gervais Street side of the State House when there is inclement weather. Dkt. No. 1–7 at 4. The group alleges it has agreed to leave the portico by 8:00 a.m. when the portico is used. *Id.*

At 4:00 p.m. on November 16, 2011, over a month after the occupation began, Governor Haley announced in a press conference that Plaintiffs were required to leave the State House grounds every night by 6:00 p.m. and could return at 6:00 a.m. every morning. Dkt. No. 1–5 at 5. On the same date, Governor Haley sent a letter to the Interim Director of the Department of Public Safety ("DPS") and the Chief of Police of BPS requesting assistance "in removing any individual associated with the 'Occupy Columbia' group, as well as his or her belongings, who remains on Statehouse grounds after 6:00 p.m. without written authorization from the Budget and Control Board." Dkt. No. 1–2 at 3. At 6:15 p.m., after allegedly removing their belongings from the State House grounds,[FN6] nineteen Occupy protestors "gathered arm-in-arm" on the paved area at the foot of the Confederate battle flag on the State House grounds. Dkt. No. 1–5 at 18 (Hakim Affidavit). There is no indication that the nineteen protestors were impeding foot traffic on the State House grounds during this time. At approximately 6:30 p.m., the nineteen protestors were arrested by BPS officers and taken to the Alvin S. Glenn *551 Detention Center. All nineteen were charged with trespassing in violation of either S.C.Code Ann. § 10–11–20 or § 10–11–30.[FN7] All were released on personal recognizance bonds by the morning of November 17, 2011. On December 1, 2011, the Fifth Circuit Solicitor announced that he was dismissing all charges against the protestors.

FN6. Plaintiff Liszewski states that they "rented a U–Haul truck and moved all supplies by 5:15 p.m." Dkt. No. 1–7 at 7. Defendants presented no evidence to the contrary.

FN7. There is some confusion as to whether the protestors were arrested for violating S.C.Code § 10–11–20, which makes it "unlawful to use the State House or grounds for any purpose not authorized by law," or for violating S.C.Code Ann. § 10–11–30, which provides:

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> It shall be unlawful for any person to trespass upon the grass plots or flower beds of the grounds of the State House or the Governor's mansion, or of the grounds surrounding any of the State office buildings located in the area bounded by Assembly, Gervais, Bull, and Pendleton Streets in the city of Columbia, to damage or deface any of the buildings, or to cut down, deface, mutilate or otherwise injure any of the statues, trees, shrubs, grasses or flowers on the grounds or commit any other trespass upon any property of the State, real or personal, located thereon.

On November 22, 2011, 2011 WL 6698990, Plaintiffs—Occupy Columbia, Walid Hakim, Melissa Harmon, Bradley Powell, Timothy Liszewski, David Bland, Ashley Blewer, and David Arroyo (collectively, "Plaintiffs" or "Occupy Columbia")—filed a Complaint in state court and sought temporary relief to enjoin Defendants, including but not limited to South Carolina Governor Nikki Haley, the members of the State Budget and Control Board, and the Director of BPS, from interfering with Plaintiffs' 24–hour occupation of the State House grounds, including sleeping on the State House grounds, and the use of sleeping bags and tents. On November 23, 2011, a state circuit court judge granted Plaintiffs' motion for a temporary restraining order ("TRO") to restrain "Defendants from preventing the Plaintiffs from being on the grounds of the South Carolina State House (including using sleeping bags and tents) 24 hours a day." [FN8] Dkt. No. 1–5 at 1. The TRO was effective for no more than ten days unless extended by the court. A hearing on Plaintiffs' motion for preliminary injunction was scheduled for December 1, 2011. However, on November 30, 2011, Defendants removed the case to federal court. On December 1, 2011, the parties filed a stipulation agreeing to extend the TRO until 5:00 p.m. on December 15, 2011. This court scheduled the hearing on Plaintiff's motion for preliminary injunction on December 14, 2011, at 10:30 a.m.

> FN8. After the state court issued the TRO, Plaintiffs began using tents.

STANDARD

This civil rights action under 42 U.S.C. § 1983 seeks injunctive relief [FN9] for alleged violations of Plaintiffs' First Amendment rights of free speech, peaceable assembly, and petition.[FN10] The court considers Plaintiffs' motion for preliminary injunction to enjoin Defendants from interfering with their 24–hour occupation of the State House grounds, including sleeping on the State House grounds, and using sleeping bags and tents, pending final resolution of this case.

> FN9. According to their Complaint, "Plaintiffs later intend to amend their complaint and seek damages pursuant to 42 U.S.C. § 1983." Dkt. 1–1 at 10.

> FN10. Plaintiffs' claims are founded on the South Carolina Constitution, the United States Constitution, and South Carolina common law (false imprisonment). For purposes of this motion, the court need only consider Plaintiffs' claims pursuant to the First Amendment to the United States Constitution.

[1][2][3] A preliminary injunction is "an extraordinary remedy ... which is to be ***552** applied only in [the] limited circumstances which clearly demand it." *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir.1991) (internal quotation marks omitted) (citation omitted). The traditional purpose of a preliminary injunction is to "protect the status quo and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits." *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir.2003). As held by the Supreme Court and the Fourth Circuit Court of Appeals, to qualify for injunctive relief, a plaintiff must show (1) likeli-

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hood he will succeed on the merits; (2) likelihood he will suffer irreparable harm in the absence of a preliminary injunction; (3) that the balance of equities tips in his favor; and (4) that the injunction is in the public interest. *Winter v. NRDC, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008); *Real Truth About Obama v. FEC*, 575 F.3d 342, 346 (4th Cir.2009), vacated on other grounds, 558 U.S. ——, 130 S.Ct. 2371, 176 L.Ed.2d 764 (2010) FN11

FN11. In *Real Truth*, the Fourth Circuit modified its prior approach, which required district courts to balance the likelihood of irreparable harm to each party as a "first step" in its analysis, and then to consider the likelihood of success only as a secondary matter, dependent upon the outcome of the initial balance-of-hardships test. *See Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co.*, 550 F.2d at 195–96. The Supreme Court recently vacated *Real Truth* and remanded the case for further consideration in light of *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010), which related to corporate electioneering communications under the First Amendment. *See Real Truth About Obama, Inc. v. FEC*, 558 U.S. ——, 130 S.Ct. 2371, 176 L.Ed.2d 764 (2010). The Fourth Circuit remanded the First Amendment-related aspects of the case to the district court but reissued, *inter alia*, the portion of the 2009 opinion setting forth the *Winter– Real Truth* preliminary injunction standard. *See Real Truth About Obama, Inc. v. FEC*, 607 F.3d 355 (4th Cir.2010).

[4][5] The *Winter – Real Truth* standard requires the party seeking the injunction to make a "clear showing" that he is likely to succeed on the merits. *Real Truth*, 575 F.3d at 345; *see also Winter v. NRDC*, 555 U.S. at 22, 129 S.Ct. 365. This standard compels the moving party to show that he is *likely* to prevail. Regardless of the balance of hardships, it is insufficient for the party to show only that "grave or serious questions are presented" in the litigation. *Compare Real Truth*, 575 F.3d at 346 *with Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co.*, 550 F.2d 189, 196 (4th Cir.1977).

[6][7][8] Second, the moving party must make a clear showing that he is likely to be irreparably harmed if preliminary relief is denied. To meet this test, the party must show more than a mere *possibility* of harm. *Winter*, 555 U.S. at 21, 129 S.Ct. 365. Third, the moving party must show that the balance of equities tips in his favor. *Id.* at 21, 26, 129 S.Ct. 365. Fourth, the district court must consider whether grant or denial of the injunction is in the public interest. The court must give "particular regard" to the public consequences of granting a preliminary injunction. *Id.* at 24, 129 S.Ct. 365; *Real Truth*, 575 F.3d at 347. The Fourth Circuit no longer recognizes a "flexible interplay" among these criteria. Instead, each requirement must be fulfilled as articulated. *Real Truth*, 575 F.3d at 347 (quoting *Blackwelder*, 550 F.2d at 196).

[9] The first factor—likelihood of success on the merits—takes on greater significance "in the context of an alleged violation of First Amendment rights[.]" ***553** *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir.2009) (addressing First Amendment challenge to limitations on advertising). This is because "a plaintiff's claimed irreparable harm is 'inseparably linked' to the likelihood of success on the merits of [the] First Amendment claim." *Id. See also Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 254–55 (4th Cir.2003) (noting that a determination of likelihood of success on the merits as to a First Amendment claim supports a finding of irreparable harm); *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (noting that loss of First Amendment freedoms, even for a short period of time, constitutes an irreparable injury); *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir.1978) ("Violations of [F]irst [A]mendment

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rights constitute per se irreparable injury.").

DISCUSSION

The court considers Plaintiffs' state court memorandum filed in support of their motion for TRO and preliminary injunction as Plaintiffs' opening brief. Plaintiffs argue that there is no law or regulation that prohibits Plaintiffs from occupying the State House grounds 24 hours a day or using sleeping bags and tents on the grounds. Plaintiffs argue that, pursuant to S.C.Code Ann. § 10–1–30, the Director of General Services may only limit use of the State House grounds in accordance with regulations promulgated by the State Budget and Control Board, and that the Board has not promulgated any regulations restricting the use of the grounds. Neither has the Board promulgated an emergency regulation under S.C.Code Ann. § 1–23–130.[FN12] Finally, Plaintiffs argue that the informal policies that purport to restrict the use of the State House grounds are unconstitutional restrictions on free expression in a public forum.

> FN12. S.C.Code Ann. § 1–23–130 provides that an agency may file a regulation with the Legislative Council "[i]f an agency finds that an imminent peril to public health, safety, or welfare requires immediate promulgation of an emergency regulation." An emergency regulation becomes effective as of the time of filing and generally remains in effect for ninety days. *Id.*

Defendants filed their briefs in opposition to the motion for preliminary injunction on December 8, 2011. Governor Haley, sued as Governor and as Chairwoman of the State Budget and Control Board, filed a brief and stipulation containing the Governor's "prospective enforcement policy" ("Stipulation"). The Stipulation provides,

> Governor will not order the arrest of members of Occupy Columbia (including Plaintiffs) when on the grounds of the South Carolina State House for violations of South Carolina Code § 10–11–20 ("Unauthorized use of State House or grounds") or the South Carolina Budget and Control Board's "Conditions for Use of South Carolina State House and Grounds" policy unless the members of Occupy Columbia (including Plaintiffs) are camping on the State House grounds.

Dkt. No. 17–1. The Stipulation then defines "camping."

Governor Haley indicates that she has no intention of enforcing the 6:00 p.m. policy against Occupy Columbia in the future. Governor Haley explains that she is no longer concerned with the 24–hour occupation, but rather with sleeping and camping on the State House grounds. She states that when participants of Occupy Columbia returned to the State House grounds on November 17, 2011, after the arrests, the 6:00 p.m. policy was not enforced because they returned "without *554 bringing their belongings" and "they did not appear to be re-attempting to convert the State House grounds into a campsite." Dkt. No. 17 at 3. Governor Haley notes that, on November 16, 2011, she sought "assistance in preventing the plaintiffs and others from living on State House property unless they receive written permission to do so pursuant to the Budget and Control Board's policy entitled 'Conditions of Use of South Carolina State House and Grounds.' "[FN13] Dkt. No. 17 at 2.

> FN13. Governor Haley also contends Plaintiffs were properly "asked to remove their belongings from the grounds after they had squatted on the property for approximately thirty days." Dkt. No. 17 at 5. She cites S.C.Code Ann. § 10–11–20, which provides that it is unlawful "to use the State House grounds for any purpose not authorized by law," and § 10–11–30, which provides that it is unlawful "for any person to trespass upon the grass plots or flower beds of the grounds of the State House." *Id.* Governor Haley, however, acknowledges that the propriety of the arrests of nineteen protestors based on violations

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of these laws is not before the court at this time. She does not otherwise rely on these statutes as a basis to prohibit Plaintiffs' future conduct. *Id.*

Plaintiffs respond that the State House grounds are open to the public, *see Edwards v. South Carolina,* 372 U.S. 229, 230, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963), and therefore "the public [has] the implied consent of the owner to enter the premises." Thus, Plaintiffs argue that there can be no trespass on the State House grounds by virtue of being on the property. Plaintiffs acknowledge that the defacing of monuments or destruction of vegetation could be a violation of § 10–11–30, but deny that Occupy members have committed such acts.

Governor Haley also argues that the Board need not promulgate regulations to restrict use of the State House grounds. She submits that government agencies cannot be expected to promulgate regulations in anticipation of every situation, and that all government agencies rely on internal policies to fulfill their duties.

Defendants Curtis Loftis, Richard Eckstrom, Hugh Leatherman, and Brian White ("Board Defendants") are the four remaining members of the State Budget and Control Board.[FN14] Board Defendants filed a brief stating that they took no action against Plaintiffs and had no interaction with Plaintiffs prior to November 23, 2011.[FN15] Board Defendants explain that if the preliminary injunction is denied, the Board would authorize participants in Occupy Columbia to protest 24 hours a day while this case is pending, provided Occupy Columbia requests authorization, but would not permit participants in Occupy Columbia to live on the State House grounds, including "setting up tents, sleeping or using sleeping bags or bed rolls, or otherwise residing on the State House grounds." Dkt. No. 13 at 10.

FN14. Board Defendants explain that Defendants M. Richbourg Roberson and Sterling L. Morrison are no longer employed with the Board and were never served. Dkt. No. 13 at 2 n. 1. Defendants Roberson and Morrison, therefore, did not file a response.

FN15. Board Defendants explain that Governor Haley's actions towards Plaintiffs on November 16, 2011, were without authorization by the State Budget and Control Board, and were without consultation with any of the individual Board members. Dkt. No. 13 at 5.

Board Defendants argue that, pursuant to S.C.Code Ann. § 10–1–30, the State Budget and Control Board is permitted to pass regulations and impose restrictions regarding use of the State House grounds to ensure the public health, safety, and welfare will be protected. Section 10–1–30 provides,

The Director of the Division of General Services of the State Budget and Control Board may authorize the use of the State House lobbies, the State House steps and grounds, and other public buildings and grounds in accordance ***555** with regulations promulgated by the board. The director shall obtain the approval of the Clerk of the Senate before authorizing any use of the Gressette Building and shall obtain the approval of the Clerk of the House of Representatives before authorizing any use of the Blatt Building. The regulations must contain provisions to insure that the public health, safety, and welfare will be protected in the use of the areas including reasonable time, place, and manner restrictions and application periods before use. If sufficient measures cannot be taken to protect the public health, safety, and welfare, the director shall deny the requested use. Other restrictions may be imposed on the use of the areas as are necessary for the conduct of business in those areas and the maintenance of the dignity, decorum, and aesthetics of

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the areas.

S.C.Code Ann. § 10–1–30. Although the Board has never passed any regulations relating to the use of the State House grounds, Board Defendants argue that § 10–1–30 allows the Board to create restrictions *or* regulations regarding use of the State House grounds, and that the Board created restrictions on the use of the State House grounds when it created the document entitled "Conditions." FN16

FN16. A bill has been introduced to, inter alia, amend S.C.Code Ann. § 10–1–30 to provide, in relevant part, that "[t]he State Budget and Control Board may authorize the use of the State House steps and grounds and other public buildings and grounds in accordance with *restrictions* set by the board." H.B. 3066, 2011 Gen. Assemb., Reg. Sess. (S.C. 2011) (emphasis added). According to counsel for Plaintiffs and Defendants, this bill has not passed.

Board Defendants also argue that camping and sleeping on the State House grounds are not protected expression under the First Amendment. Should the court find that Plaintiffs' camping and sleeping on the State House grounds is expressive conduct protected by the First Amendment, Board Defendants argue that the Conditions impose permissible time, place, and manner restrictions on Plaintiffs' right to camp and sleep on the State House grounds. Dkt. No. 13 at 14–15.

Defendants Leroy Smith, Director of the South Carolina Department of Public Safety; Zachary Wise, Chief of Police of the South Carolina Bureau of Protective Services; James Carr; Joe Hodge; Andrew Schmidt; and M.E. Harris, III ("Law Enforcement Defendants") filed a brief stating that they agreed with Governor Haley's brief. Dkt. No. 14 at 2. FN17

FN17. Defendants Harvey Peeler and the State of South Carolina each filed separate briefs arguing that the preliminary injunction should not be issued against them. *See* Dkt. Nos. 16, 18. During the hearing on Plaintiffs' motion for preliminary injunction, Plaintiffs informed the court that they had agreed to dismiss the Complaint without prejudice as to the State of South Carolina and Harvey S. Peeler. Defendants had no objection to the dismissal of either party. The court, therefore, dismissed the Complaint as to the State of South Carolina and Mr. Peeler.

On December 12, 2011, Plaintiffs filed a reply brief. Plaintiffs first argue that Governor Haley acted without authority, and without consultation with the members of the Board, when she issued the 6:00 p.m. policy and ordered the arrests of any members of Occupy Columbia remaining on the State House grounds after 6:00 p.m. Dkt. No. 19 at 1–2. Plaintiffs contend that Governor Haley has no authority to create rules governing the public use of the State House grounds. *Id.* at 1–3, 12. As to the Conditions, Plaintiffs submit that they do not have the force and effect of law because they are not regulations promulgated***556** in accordance with § 10–1–30. FN18 Plaintiffs also argue that the Conditions do not comply with an earlier court's directive to develop a licensing process for use of the State House grounds in *Grass Roots Organizing Workshop (GROW) v. Campbell,* 704 F.Supp. 650 (D.S.C.1989) (" *GROW II*"). *Id.* at 2–3, 5–7. Finally, Plaintiffs urge that the Conditions are not valid time, place, and manner restrictions because they (1) are not applied equally to all individuals or groups, (2) are vague and unpublished, and (3) give unbridled discretion to the Director of General Services. *Id.* at 10–12.

FN18. Plaintiffs argue that these Conditions do not have the force or effect of law under South Carolina's Administrative Procedures Act ("APA"). *See* S.C.Code Ann. § 1–23–10 ("Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law.").

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A. Likelihood of Success on the Merits

[10] The parties do not dispute that Plaintiffs have a First Amendment right to speak and assemble on the State House grounds. However, the parties disagree as to whether Plaintiffs have a First Amendment right to camp and sleep on the State House grounds. The court, therefore, first determines whether Plaintiffs' camping and sleeping on the State House grounds is expression protected under the First Amendment. The court then considers whether Governor Haley's and the State Budget and Control Board's 6:00 p.m. and no-camping policies infringe Plaintiffs' First Amendment rights.

Protected Activity. Plaintiffs argue that, under *Spence v. Washington,* 418 U.S. 405, 409–11, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974), camping and sleeping on the State House grounds in connection with their 24–hour occupation is protected speech as symbolic expression. Dkt. No. 19. *See Virginia v. Black,* 538 U.S. 343, 360 n. 2, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) ("[T]he First Amendment protects symbolic conduct as well as pure speech."). In *Spence,* the Supreme Court articulated two factors to examine when determining whether conduct is symbolic expression: (1) whether the actor intends to convey a particularized message, and (2) whether there is a substantial likelihood that the message will be understood by those who view the conduct. 418 U.S. at 409–11, 94 S.Ct. 2727.

Plaintiffs argue that they have shown that they intend to convey a particularized message that "a more just, democratic, and economically egalitarian society, responsive to people rather than corporations, is possible." Dkt. No. 19 at 3. According to Plaintiffs, "[t]his social and political message can only be served by a constant and physical 24–hour occupation of the State House grounds, as it symbolically communicates that just as corporations occupy the inside of the State House via campaign contributions, influence, gifts, and lobbyists, Occupy Columbia will occupy the grounds surrounding it." *Id.* at 4. Finally, Plaintiffs argue that "because the State House grounds are 'also the center for demonstrations and protests in South Carolina,' there is a substantial likelihood that this message will be understood by those who see the occupation of the State House grounds." *Id.*

Board Defendants argue that Plaintiffs cannot show that the First Amendment is implicated by Plaintiffs' decision to camp, sleep, and live indefinitely on State House grounds. Dkt. No. 13 at 14. Although Governor Haley argues in her brief that the "First Amendment does not authorize the plaintiffs to camp at the State House," her counsel would not take a position on *557 whether camping can be expressive conduct protected by the First Amendment. Dkt. No. 17 at 5. None of the Defendants attempt to distinguish the conduct of Occupy Columbia from other Occupy cases in which courts have held that camping is expressive conduct. *See infra* pp. 557–58.

The Supreme Court has assumed that overnight camping in a public park may constitute expressive conduct and, therefore, may be protected by the First Amendment. *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984).[FN19] In that case, demonstrators challenged the United States Park Service's denial of permission to sleep in tents that were erected on the Mall and Lafayette Park in Washington, D.C. as part of a demonstration intended to call attention to the plight of the homeless. The Interior Department promulgated regulations that permitted camping only in areas designated for camping, and the Mall and LaFayette Park were not designated camping areas. The Court analyzed whether the regulations were reasonable time, place, and manner restrictions and whether the conduct itself may constitutionally be regulated, the regulation was narrowly drawn to further a substantial governmental interest, and the interest was unrelated to the suppression of free speech. *Id.* at 294, 104 S.Ct. 3065 (citing *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)). The Court held that the regulation was lawful under *O'Brien* and served as a reasonable time, place, and manner

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restriction. *Id.* at 298, 104 S.Ct. 3065.

> FN19. In his dissent in *Clark,* Justice Marshall concluded that "sleeping in a highly public place, outside, in the winter for the purpose of protesting homelessness—is symbolic speech protected by the First Amendment." *Id.* at 301, 104 S.Ct. 3065.

Similarly, other courts have recognized that camping or sleeping in a public place, while not otherwise protected by the Constitution, may amount to expressive conduct under certain circumstances. *See Whiting v. Town of Westerly,* 942 F.2d 18, 21 (1st Cir.1991) (recognizing that "[t]he act of sleeping in a public place, absent expressive content, is not constitutionally-protected conducted"); *State v. Sturch,* 82 Hawai'i 269, 921 P.2d 1170, 1176 (Haw.Ct.App.1996) (noting that there is "no authority supporting a specific constitutional right to sleep in a public place" unless it is expressive conduct within the ambit of the First Amendment or is protected by other fundamental rights). Although most courts addressing this issue have assumed without deciding that camping and sleeping in public areas may be expressive conduct, two district courts have recently held that camping in a city park as part of the Occupy Movement is protected by the First Amendment. *Occupy Fort Myers v. City of Fort Myers,* No. 2:11–cv–00608, ——F.Supp.2d ——, 2011 WL 5554034 (M.D.Fla. Nov. 15, 2011) (holding that camping was symbolic conduct because "[t]he conduct of tenting and sleeping in the park 24 hours a day to simulate an 'occupation' is intended to be communicative and in context is reasonably understood by the viewer to be communicative"); *Occupy Minneapolis v. County of Hennepin,* No. 11–3412, 866 F.Supp.2d 1062, 2011 WL 5878359 (D.Minn. Nov. 23, 2011) ("The Court agrees with that well-reasoned conclusion [in Occupy Fort Myers] and, hence, Plaintiffs may challenge the ban on sleeping and erecting structures under the First Amendment.").

As in the case involving Occupy Fort Myers and Occupy Minneapolis, this court finds that Plaintiffs are likely to establish that Occupy Columbia's camping on the State House grounds is expressive conduct, as defined by *Spence.* Plaintiffs have ***558** shown that they intend to communicate a particularized message that is substantially likely to be understood by those who observe their 24–hour occupation, including camping and sleeping, on the State House grounds. The court, therefore, finds that Plaintiffs are likely to succeed in establishing that their 24–hour occupation of the State House grounds, which involves camping and sleeping, is expressive conduct protected by the First Amendment.

[11][12][13] **Restrictions.** Finding that Plaintiffs' conduct likely is protected expression, the court must consider whether the restrictions on Plaintiffs' conduct are constitutional. It is well established that government may reasonably restrict expression in public forums, such as the State House grounds.[FN20] In traditional public forums, government may restrict speech as long as restrictions "are reasonable time, place, and manner restrictions; are content-neutral; and are 'narrowly tailored' to serve a significant governmental interest." *Steinburg v. Chesterfield County Planning Comm'n,* 527 F.3d 377, 384 (4th Cir.2008) (citing *Clark,* 468 U.S. at 293, 295, 104 S.Ct. 3065). "In addition, content-based restrictions may be imposed in a traditional public forum where there is 'a clear and present danger that [the speech] will bring about the substantive evils that [government] has a right to prevent,' ... and where the restrictions are narrowly drawn to serve that compelling state interest." *Id.* (internal citations omitted). *See also Christian Legal Soc. Chapter of the Univ. of California, Hastings College of the Law v. Martinez,* —— U.S. ——, 130 S.Ct. 2971, 2984, 177 L.Ed.2d 838 (2010) (explaining that content-based restrictions are subject to strict scrutiny).

> FN20. None of the Defendants directly dispute that the State House grounds are open to the public for speech and have traditionally been used for speech. *See Perry Educ.*

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> *Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) ("In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' "). *See also Edwards,* 372 U.S. at 230, 83 S.Ct. 680.

The court recognizes that the State may properly regulate conduct on the State House grounds, including prohibiting camping and sleeping. In fact, S.C.Code Ann. § 10–1–30 specifically authorizes the State Budget and Control Board to promulgate *regulations* to restrict the use of the State House grounds. Twenty-two years ago, the Board advised a judge of this court that it was enacting regulations pursuant to this statute. *GROW II,* 704 F.Supp. at 652.[FN21] However, the Board ***559** never promulgated any regulations or created reasonable time, place, and manner restrictions establishing a 6:00 p.m. limitation on activities on the State House grounds and certainly none that address camping or sleeping. What does exist is an internal document, the "Conditions."[FN22] These Conditions serve only as guidelines for a reservation system for events after 6:00 p.m. and do not expressly address camping or sleeping.[FN23] Consequently, there is no express prohibition on camping or sleeping on the State House grounds in any law, regulation, or written policy.

> FN21. The *GROW II* plaintiffs asked an earlier court to set forth the legal requirements the State must satisfy to regulate expression on the State House grounds under § 10–1–30. 704 F.Supp. at 652. The court explained that the State could promulgate regulations restricting the time, place, and manner of expression on the State House grounds or that the State could create a licensing scheme to allocate the use of the grounds. *Id.* at 653. The court stated that any regulations of time, place, and manner must be content-neutral, narrowly tailored to serve a significant state interest, and leave open ample, alternative channels of communication. *Id.* Further, the court noted that any licensing process created by the State must be content-neutral, and narrowly tailored to serve a legitimate government interest unrelated to the content of the expression. *Id.* The court explained that, as a prior restraint, "any such [licensing] scheme must afford applicants procedural safeguards whereby (1) the State will bear the burden of instituting judicial proceedings, (2) any restraint prior to judicial review is only for a brief specified time and for the purpose of preserving the status quo and (3) a prompt and final judicial determination is assured." *Id.* The court concluded that "[a]ny constitutional regulation of expression on the State House grounds must be effected in accordance with these principles." *Id.*

> Plaintiffs argue that *GROW II* required the State of South Carolina to create a licensing scheme if the State chose to regulate the use of the State House grounds. The court does not interpret *GROW II* to require the creation of a licensing scheme to manage the use of the State House grounds. The court interprets *GROW II* as advising the State that it may create a licensing scheme to regulate the use of the State House grounds, but as a prior restraint, the State would need to create procedural safeguards in connection with the licensing scheme. The State, however, was advised that it could promulgate valid time, place, and manner regulations regarding the use of

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the State House grounds.

FN22. The parties disagree as to whether the Conditions are authorized by § 10–1–30 in the absence of regulations, and whether an agency's internal policies have the force or effect of law. The court, however, need not decide whether the Board can restrict use of the State House grounds without promulgating regulations because the only restrictions in this case, as explained below, are not valid time, place, and manner restrictions. Should the Board promulgate regulations pursuant to § 10–1–30, Plaintiffs' argument that the Board is required to promulgate regulations in order to impose time, place, and manner restrictions on protected First Amendment activity on the State House grounds would no longer apply. *See* Dkt. No. 19 at 7–8.

FN23. The Conditions expressly address the need for special provisions in writing for activities scheduled beyond 6:00 p.m. on the State House grounds. Although the Conditions may prohibit certain activities that could be involved in camping, such as "[n]o wires or stakes may be placed into the ground," no Conditions expressly prohibit camping or sleeping. In fact, the Conditions contemplate that tents may be used for events. Dkt. No. 1–5 at 29 ("Use of equipment such as tents, tables, chairs, public address systems, etc. on the State House grounds should be coordinated through General Services ....").

The Board explains that the Conditions do not restrict camping or sleeping because General Services "has never received a request from any group or individual to set up residence or sleep or camp indefinitely on the State House grounds." Dkt. No. 13 at 9. Thus, Board Defendants' position is that there was no need for such a Condition. However, "when the Occupy Columbia participants arrived at the State House grounds, the Division of General Services was observing an unwritten policy—and until that moment, an unnecessary policy—that restricted it from authorizing persons to sleep or camp indefinitely overnight on State House grounds." *Id.*

Although the court finds that the Conditions do not expressly or implicitly prohibit camping or sleeping, the court considers whether Paragraph 8 of the Conditions, which purports to establish a 6:00 p.m. restriction on events without special provisions in writing, is a valid time, place, and manner restriction. *See Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981) ("It is also common ground, however, that the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."). For the reasons below, the court ***560** finds that Paragraph 8 of the Conditions is not a valid time, place, and manner restriction.

First, as this document is not accessible on the Internet or otherwise posted or available to the public, the Conditions fail to provide notice to the public of these restrictions to expression on the State House grounds. According to Board Defendants, any group seeking authorization for an event on the State House grounds would need to inform General Services by either email or letter about the group's intended use.[FN24] Dkt. No. 13–1 at 3–4. After the event was confirmed, General Services would provide the group with the Conditions and would require that the group read and acknowledge the Conditions. *Id.* at 4. Based on Board Defendants' explanation, a group would not have access to the Conditions, and would not know it needed to request any authorization to hold an event after 6:00 p.m., until *after* it notified General Services of the planned event.[FN25] Even if the Conditions were available to the public, the Conditions do not explain the procedures an applicant must follow to receive "special provisions in writing" to hold an activity after 6:00 p.m.[FN26] The court, therefore,

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finds that there is no notice to the public of the 6:00 p.m. policy on events contained in the Conditions.

> FN24. None of the Defendants have cited any law or regulation requiring prior approval for events held on the State House grounds.
>
> FN25. The APA requires that state agencies make all formal and informal procedures available for public inspection, and that failure to do so renders an agency rule, order or decision invalid and ineffective against any person. *See* S.C.Code Ann. § 1–23–140. To the extent the Conditions are considered informal procedures, there is no evidence that the Conditions are available for public inspection unless one knows about them and requests a copy.
>
> FN26. There is no evidence of any sign on the State House grounds which explains that events after 6:00 p.m. are not allowed on the State House grounds unless permission is obtained.

Second, there is no evidence that the 6:00 p.m. policy has been applied consistently to all organizations and groups seeking to use the State House grounds. *See Ashcroft v. American Civil Liberties Union,* 535 U.S. 564, 573, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002) ("government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"). For example, when Governor Haley sought enforcement of the 6:00 p.m. policy, she only sought enforcement with respect to violators who were participants in Occupy Columbia. Her letter specifically requested that law enforcement remove any member of Occupy Columbia who remained on the State House grounds after 6:00 p.m., and no other groups or individuals who remained after 6:00 p.m. without special provisions in writing. Further, there is evidence that General Services has applied the policy inconsistently, even to Occupy Columbia. Despite remaining on the State House grounds after 6:00 p.m. since October 15, 2011, the policy was not enforced against Occupy Columbia until November 16, 2011.

Third, the Conditions do not provide clear guidance to law enforcement to ensure compliance with the 6:00 p.m. policy. There is nothing within the Conditions to suggest that violation of the 6:00 p.m. policy would constitute trespassing or any other crime. *See Hill v. Colorado,* 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) ("A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it ***561** prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.").

Finally, to the extent the Conditions create an informal licensing or permitting scheme for use of the State House grounds, the Conditions are vague and give unbridled discretion to General Services to suppress speech on the State House grounds. *See City of Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 757, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988) (explaining that lack of standards in licensing scheme allows licensing official to develop post-hoc rationalizations and make "it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression."). For example, the Conditions fail to explain what criteria General Services should use when evaluating requests to hold activities after 6:00 p.m.[FN27]

> FN27. Board Defendants describe General Services as a entity that takes reservations. Dkt. No. 13 at 9. This description suggests that General Services has no discretion to deny authorization to groups seeking to hold activities on the grounds after 6:00 p.m. so long as the activity does not interfere with a prior reservation for use of the same space.

[14][15] The court acknowledges that "[t]he

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fact that a policy is not committed to writing does not of itself constitute a First Amendment violation." *See Lebron v. National R.R. Passenger Corp.*, 69 F.3d 650, 658 (2d Cir.1995). However, to survive a First Amendment challenge, time, place, and manner restrictions must be content-neutral, narrowly-tailored to serve a significant government interest, and leave open ample, alternative channels of communication. *See Clark,* 468 U.S. at 294, 104 S.Ct. 3065; *GROW II,* 704 F.Supp. at 653. With respect to the unwritten "no-camping or sleeping" policy, the court is not convinced that this policy is content-neutral and is applied equally to all persons and groups on the State House grounds. *See Consolidated Edison Co. of N.Y. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 536, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980) (noting that a valid time, place and manner restriction "may not be based upon either the content or subject matter of speech."). Certainly the no-camping policy, as defined in Governor Haley's Stipulation and the Board Defendants' brief, is not content-neutral because it applies only to Occupy Columbia and provides no notice to other persons or groups who may wish to engage in expressive conduct involving camping or sleeping on the State House grounds. Further, the two written explanations of the unwritten no-camping policy offered to the court contain different definitions of what conduct is prohibited under the no-camping policy. Finally, there is no evidence that this policy has been applied to any person or group in the past. In fact, participants in Occupy Columbia slept on the grounds with sleeping bags and tarps for over 30 days before the State attempted to enforce this policy.

The court finds that Plaintiffs have made a clear showing they are likely to succeed on the merits in challenging the current unwritten policy prohibiting camping and sleeping on the State House grounds.[FN28] For the reasons stated above ***562** concerning the defective Conditions, Plaintiffs have also made a clear showing that they are likely to succeed on the merits in challenging the current policy restricting activities on the State House grounds after 6:00 p.m. without written authorization.

> FN28. In the event Defendants desire to create a rule prohibiting camping and sleeping on the State House grounds, Defendants could promulgate a regulation under § 10–1–30, just as they advised the court they were doing 22 years ago. *See GROW II,* 704 F.Supp. at 652. As the court explained above, the Conditions are deficient as valid time, place, and manner restrictions because they are, among other reasons, not applied consistently to all groups and organizations. Any constitutional challenge to the regulation of conduct that incidentally burdens speech would be analyzed under *United States v. O'Brien,* which requires that a court consider whether (1) the state has the power to regulate the conduct; (2) the regulation advances a substantial or important government interest; (3) the interest is unrelated to suppressing freedom of expression; and (4) the incidental burden on speech is no more than necessary to achieve the interest. 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

B. Irreparable Harm

[16] As explained earlier, "in the context of an alleged violation of First Amendment rights, a plaintiff's claimed irreparable harm is 'inseparably linked' to the likelihood of success on the merits of plaintiff's First Amendment claim." *WV Ass'n of Club Owners,* 553 F.3d at 298. *See also Newsom v. Albemarle County School Bd.,* 354 F.3d 249, 254–55 (4th Cir.2003); *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (explaining that the loss of First Amendment freedoms, even for a short period of time, constitutes an irreparable injury); *Johnson v. Bergland,* 586 F.2d 993, 995 (4th Cir.1978) ("Violations of [F]irst [A]mendment rights constitute per se irre-

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parable injury.").

[17] Both Governor Haley and the Board Defendants have stated that they plan to enforce a no-camping policy should the injunction be denied. Although Governor Haley indicates that she has no intention of enforcing the 6:00 p.m. policy against Occupy Columbia in the future, the Board Defendants state that the Board would not enforce the policy if Occupy Columbia seeks authorization to hold an event after 6:00 p.m. As explained earlier, Plaintiffs should not have to rely on representations that certain State officials will not enforce the 6:00 p.m. policy, especially when those officials are saying different things. *See City of Lakewood,* 486 U.S. at 770, 108 S.Ct. 2138 (declining to accept City's representation that "mayor will act in good faith and adhere to standards absent from the ordinance's face" and refusing to "write nonbinding limits into a silent state statute"); *Occupy Fort Myers,* —— F.Supp.2d at ——, 2011 WL 5554034 at *10 (rejecting Fort Myers' argument that its representation that it would not enforce an ordinance rendered the challenge moot).

Many of the Plaintiffs have stated that they "want to be more involved in Occupy Columbia, but ... do not desire financial burden, inconvenience, or unlawful detention for engaging in further occupation of the State House grounds." *See, e.g.,* Dkt. Nos. 1–5 at 23 (Harmon Affidavit); 1–5 at 36 (Powell Affidavit); 1–6 at 20 (Bland Affidavit). Plaintiffs argue that they "are suffering an irreparable harm right now" as a result of the "enforcement of non-existent rules" and the threat of arbitrary and capricious action against them as a result of new rules that "may be created and enforced on the spot." Dkt. No. 1–5 at 11. The fear of inconsistent application of the policies creates a risk that Plaintiffs will be silenced in violation of the First Amendment. The court, therefore, finds that Plaintiffs have established an irreparable injury.

C. Balance of the Equities

[18] Board Defendants argue that the Board has a duty to "keep, landscape, cultivate and beautify the State House and State House grounds." S.C.Code Ann. § 10–1–10. They argue that if the court grants Plaintiffs' motion for preliminary ***563** injunction, "there would be nothing to stop other groups from setting up their own 'encampments,' " and that "[a]llowing the State House to become a campground is also not consistent with the Board's charge to maintain the 'dignity, decorum, and aesthetics' of the State House grounds." Dkt. No. 13 at 11 n. 4. By granting Plaintiffs' preliminary injunction, the court is not "[a]llowing the State House to become a campground." The court is merely enjoining Defendants from making up rules that do not comport with the First Amendment as a knee-jerk response to Plaintiffs' occupation.

The State Budget and Control Board, not the court, has the ability to remedy this situation and may promulgate regulations governing use of the State House grounds under S.C.Code Ann. § 10–1–30. The Board has had this authority for over 22 years.

On the other hand, Plaintiffs have little remedy should their First Amendment rights be violated as a result of inconsistently applied and ever-changing policies regarding use of the State House grounds. The balance, therefore, tips in Plaintiffs' favor.

D. Public Interest

[19] Defendants argue that Plaintiffs' encampment is having an adverse impact on the State House grounds. Dkt. No. 13 at 10–11. Defendants suggest that there has been damage to the grass and the flower and shrubbery beds. *Id.* at 11. Defendants also cite a concern that an increase in tents may impede pedestrian traffic on the State House grounds, as well as "public safety" concerns regarding sanitation, feeding of wildlife, and security. *Id.* at 11–12. The court finds that the public has an interest in having a properly-maintained State House grounds that may be enjoyed by everyone, including those not involved with Occupy Columbia, and that the Occupy Columbia encampment is causing at least some damage to the State House grounds.

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However, the court also finds that the public has an interest in access to the State House grounds, including for the purpose of protesting. This interest, protected by the First Amendment, can only be limited by reasonable time, place, and manner restrictions. Because there are none, the public interest in the rights of its citizens under the First Amendment prevails.

CONCLUSION

It is for the above reasons that the court entered the Order of December 14, 2011 granting Plaintiffs' motion for preliminary injunction (Dkt. No. 27).

D.S.C.,2011.
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ATTACHMENT B

2011 WL 6698990
Only the Westlaw citation is currently available.
United States District Court,
D. South Carolina,
Columbia Division.

OCCUPY COLUMBIA; Walid Hakim; Melissa Harmon; Bradley Powell; Timothy Liszewski; David Bland; Ashley Blewer; and David Arroyo, Plaintiffs,

v.

Nikki HALEY, Governor of South Carolina; State of South Carolina; Leroy Smith, Director of the South Carolina Department of Public Safety; Zachery Wise, Chief of of the South Carolina Bureau of Protective Services; Nikki Haley, Chairwoman of the South Carolina Budget & Control Board; Harvey S. Peeler, Jr., Chairman of the South Carolina State House Committee; M. Richbourg Roberson, Division of General Services; Sterling L. Morrison, Division of General Services; Curtis Loftis, State Treasurer; Richard Eckstrom, Comptroller General; Hugh Leatherman, Senate Finance Committee; Brian White, House Ways and Means Committee; James Carr; Joe Hodge; Andrew Schmidt; and Marvin Harris, III, Defendants.

C/A No. 3:11–cv–03253–CMC. | Dec. 22, 2011.

Opinion

MEMORANDUM OPINION AND ORDER ON DEFENDANTS' MOTION TO AMEND ORDER GRANTING PRELIMINARY INJUNCTION OR ALTERNATIVELY TO MODIFY PRELIMINARY INJUNCTION AND PLAINTIFFS' MOTION TO AMEND PRELIMINARY INJUNCTION

CAMERON McGOWAN CURRIE, District Judge.

*1 This matter came before the court on December 22, 2011, for oral argument on competing motions to amend the preliminary injunction, which was issued by this court on December 14, 2011 ("Preliminary Injunction").[1] The Preliminary Injunction enjoined Defendants (1) "from enforcing any current policy (written or unwritten) against Plaintiffs that prohibits camping or sleeping on the State House grounds, including the 'Conditions for Use of South Carolina State House and Grounds;' " and (2) "from enforcing any current policy (written or unwritten), including Paragraph 8 of the 'Conditions for Use of South Carolina State House and Grounds,' that limits Plaintiffs' access to the State House grounds after 6:00 p.m." Dkt. No. 27 at 7.

The Preliminary Injunction was based on the absence of valid time, place, and manner restrictions prohibiting camping and sleeping on the State House grounds and limiting activities on the State House grounds after 6:00 p.m. *Id.* at 5. In its Memorandum Opinion, the court recognized that the State Budget and Control Board ("Board") has the authority to promulgate regulations to prohibit camping and sleeping on the State House grounds, but that the Board never promulgated any regulations. Dkt. No. 28 at 18–19.

On December 20, 2011, pursuant to S.C.Code Ann. § 1–23–130, the Board met and "unanimously passed an emergency regulation ... prohibiting use of the State House grounds and all buildings located on the grounds for camping, sleeping, or any living accommodation purposes" ("Regulation 19.480"). Dkt. No. 32 at 2. Defendants then filed a motion to amend, or otherwise modify, the Preliminary Injunction to lift the prohibition on the enforcement of no-camping or sleeping policies. Dkt. No. 32. Plaintiffs filed a response to Defendants' motion on December 21, 2011. Dkt. No. 35. In addition, Plaintiffs also filed a motion to amend the Preliminary Injunction to enjoin Defendants from enforcing Regulation 19.480. *Id.* On December 22, 2011, Defendants filed a reply brief (Dkt. No. 36) and the court held a hearing on both motions.

For reasons stated below, the court denies both motions.

I. Plaintiffs' Motion to Amend Preliminary Injunction

Plaintiffs seek to amend the Preliminary Injunction to further enjoin Defendants from enforcing Regulation 19.480, which they contend is an invalid, unenforceable regulation.

STANDARD

The court applies the same preliminary injunction standard delineated in the Memorandum Opinion filed December 16, 2011 (Dkt. No. 28). *Occupy Columbia,* 2011 WL 6318587 at *3–4.

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DISCUSSION

Plaintiffs ask the court to enjoin Defendants from enforcing Regulation 19.480 promulgated by the Board on December 20, 2011, which provides:

> A. "State House grounds" means the steps of the State House Building and the outside areas of the Capitol Complex which is that area bounded by Gervais, Sumter, Pendleton and Assembly Streets.
>
> B. The use of the State House grounds and all buildings located on the grounds[2] for camping, sleeping, or any living accommodation purposes is strictly prohibited. This prohibition is inclusive of sleeping, making preparations to sleep (including the laying down of bedding for the purpose of sleeping), storing personal belongings, making any fire, using any camping tents, using other structures for sleeping, doing any digging or earth breaking, and carrying on cooking activities supportive of camping and living accommodation purposes. This prohibition is strictly applicable regardless of the intent of the participants or the nature of any other activities in which they may also be engaging.
>
> *2 C. The State House Building is open to the general public Monday through Friday from 9:00 a.m. to 5:00 p.m., except for state holidays and other instances in which state government is closed. When a daily session of the General Assembly or of either house thereof convenes on Saturday or Sunday or a daily session extends beyond 5:00 p.m. or convenes after 5:00 p.m., the State House Building remains open to the general public until the session is adjourned.

Emergency Regulation 19.480. Plaintiffs argue that there was no emergency to justify promulgation of an emergency regulation under S .C.Code Ann. § 1–23–130. Section 1–23–130 permits an agency to promulgate an emergency regulation "[i]f an agency finds that an imminent peril to public health, safety, or welfare requires immediate promulgation of an emergency regulation." Plaintiffs ask that the court "find the Regulation invalid and unenforceable because it was promulgated pursuant to emergency procedures when in fact no emergency exists."[3] Dkt. No. 35 at 9.

A. Likelihood of Success on the Merits.

The court considers whether Plaintiffs are likely to succeed in establishing that Regulation 19.480 is invalid and unenforceable because there was no "imminent peril to public health, safety, or welfare requir[ing] immediate promulgation of an emergency regulation."

First, the court considers the text of § 1–23–130(A), which provides in full:

> (A) If an agency finds that an imminent peril to public health, safety, or welfare requires immediate promulgation of an emergency regulation before compliance with the procedures prescribed in this article or if a natural resources related agency finds that abnormal or unusual conditions, immediate need, or the state's best interest requires immediate promulgation of emergency regulations to protect or manage natural resources, the agency may file the regulation with the Legislative Council and a statement of the situation requiring immediate promulgation. The regulation becomes effective as of the time of filing.

S.C.Code Ann. § 1–23–130(A). Plaintiffs argue that "imminent peril" means "one that is apparent, present, immediate, and must be instantly dealt with." Dkt. No. 35 (citing *Middleton v. McNeil,* 541 U.S. 433, 435, 124 S.Ct. 1830, 158 L.Ed.2d 701 (2004)). Defendants contend that the plain and ordinary meaning of the word "imminent" is "[n]ear at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous." Dkt. No. 36 at 3 (citing BLACK'S LAW DICTIONARY 750 (6th ed.1990)). Defendants argue that "the peril to the public health, safety, or welfare need not have already occurred in order for the Board to be justified in promulgating the emergency regulation" or "need not be 'sudden' or 'unexpected.' " Dkt. No. 36 at 2–3. Defendants also note that "public welfare" is defined as follows:

> The prosperity, well-being, or convenience of the public at large, or of a whole community, as distinguished from the advantage of an individual or limited class. It embraces the primary social interests of safety, order, morals, economic interest, and other non-material and

> political interests. In the development of our civic life, the definition of "public welfare" has also developed until it has been held to bring within its purview regulations for the promotion of economic welfare and public convenience.

*3 *Id.* at 8 (citing BLACK'S LAW DICTIONARY 1233 (6th ed.1990)).

The State Budget and Control Board ("Board") found that there is an imminent peril to public health, safety, or welfare that requires promulgation of a regulation prohibiting camping and sleeping on the State House grounds. The Board filed with the Legislative Council a statement of the emergency situation along with the emergency regulation. Upon filing, an emergency regulation becomes effective.

There appear to be no cases interpreting § 1–23–130. Plaintiffs rely on the South Carolina Supreme Court's interpretation of the word "emergency" in the South Carolina Procurement Code. *Sloan v. Dept. Of Transportation,* 379 S.C. 160, 172–73, 666 S.E.2d 236, 242–43 (2008). In *Sloan,* the court considered whether there was an emergency warranting a negotiated procurement of a new contractor for a road-widening project. 379 S.C. at 164–67, 666 S.E.2d at 238–39. The original contractor had repeatedly failed to meet deadlines and was eventually deemed in default on the contract. Instead of following usual contractor-replacement procedures, which would have taken several months, the DOT utilized emergency-procurement procedures to hire another contractor. *Id.* The DOT claimed an emergency existed because "there was a five-mile construction zone which ... had safety concerns." *Id.* at 173, 666 S.E.2d at 243. The South Carolina Supreme Court held that there was not an emergency as defined in that regulation or as the word "emergency" is understood in its plain meaning. *Id.*

The difficulty in applying *Sloan* here is that *Sloan* interpreted the term "emergency" as found in the Procurement Code, not in S.C.Code Ann. § 1–23–130. In fact, § 1–23–130 does not require the finding of an "emergency" but rather a finding of "imminent peril." Moreover, the purposes of the two statutes are quite different. The aim of the pertinent provision of the Procurement Code is to prevent an end run around competitive bidding requirements of state law. In contrast, the purpose of § 1–23–130 is to empower state officials to act when there is an absence of regulations necessary to address an "imminent peril to public health, safety, or welfare." However, the court does agree that the South Carolina Supreme Court's interpretation in *Sloan* is instructive as to the plain meaning of the term "emergency" in the title of § 1–23–130, which describes the statute as one dealing with "Emergency Regulations."

The court first looks to whether the Board's statement submitted to the Legislative Council adequately describes facts and circumstances which support a finding that imminent peril exists. *See Op. Att'y Gen., 2005 WL 1983359 (S.C.A.G.2005) (citing, e.g., Premier Games, Inc. v. State,* 761 So.2d 707 (La.App. 1 Cir.2000) (declaration of emergency in rule contemplates description of facts and circumstances which justify the conclusion that imminent peril exists); *Mauzy v. Gibbs,* 44 Wash.App. 625, 723 P.2d 458 (Wash.App.1986) (emergency regulation failed to set forth sufficient specific reasons for finding of emergency situation)). In its findings, the Board indicates that this court's Order dated December 14, 2011, effectively invalidated the Board's presumed authority to regulate camping and sleeping on the State House grounds without promulgation of regulations. In light of the Order, and the fact that a group of individuals is currently camping and sleeping on the State House grounds, the Board found it necessary to promulgate an emergency regulation for the following reasons:

> *4 The Board recognizes that the presence of persons living on the State House grounds increases the opportunities for criminal conduct and that persons when asleep in tents or on the ground are more vulnerable to criminal attack as well as the commission of property crimes....
>
> The Board further recognizes that there exists a significant risk of liability arising from the use of the State House grounds and buildings for camping, sleeping, and living accommodation purposes....
>
> The Board further recognizes that the presence of persons living on the State House grounds has an impact on the public health....

Dkt. No. 32–1 at 2–3.

Faced with the Preliminary Injunction, the Board had four choices: (1) appeal; (2) begin the process of promulgating a regulation pursuant to the South Carolina Administrative Procedures Act; (3) enact an emergency regulation pursuant to § 1–23–130; or (4) permit unlimited camping and sleeping on the State House grounds by persons engaged in expressive

activities.[4] The Board elected to proceed with options two and three. It "also authorized the Division of General Services to draft permanent regulations for the use of the State House grounds, steps, and lobby areas." Dkt. No. 32 at 6. Because such a process would require approximately 120 days, the Board utilized § 1–23–130 to enact an interim "emergency" regulation, Regulation 19.480.

The Board concluded an emergency regulation was necessary because it found imminent peril due to crime, premises liability, and public health risks associated with camping and sleeping on the State House grounds. The court agrees that the result of its Order granting Preliminary Injunction was to confirm the Board lacked authority to prohibit camping and sleeping on the State House grounds without valid time, place, and manner restrictions. Because any number of groups could simultaneously seek to engage in expressive conduct involving camping and sleeping on the State House grounds, there existed a need for interim time, place, and manner restrictions pending promulgation of permanent regulations.

There is no evidence that the Board's promulgation of Regulation 19.480 was arbitrary, capricious, an abuse of discretion, or not based on substantial evidence. *See Op. Att'y Gen., 2005 WL 1983359; Philadelphia Citizens in Action v. Schweiker,* 669 F.2d 877 (3d Cir.1982) (upholding federal agency's decision that standards for emergency rule making are met unless arbitrary, capricious or abuse of discretion). The court, therefore, finds that Plaintiffs are not likely to succeed in establishing that Regulation 19.480 is invalid under state law.

Plaintiffs do not argue that Regulation 19.480 is defective as a valid time, place, and manner restriction on First Amendment expression. That is probably because Regulation 19.480 is virtually identical to the National Park Service's prohibition on camping in Lafayette Park, which was found to be a valid time, place, and manner restriction by the United States Supreme Court in *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). In *Clark,* the Court evaluated whether the regulation was a reasonable time, place, and manner restriction and whether the regulation on conduct (with an incidental burden on speech) met the four-factor standard delineated in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

***5 Time, place, manner restriction.** Regulations of time, place, and manner must be content-neutral, narrowly tailored to serve a significant state interest, and leave open ample, alternative channels of communication. *Clark,* 468 U.S. at 293–94; *Grass Roots Organizing Workshop (GROW) v. Campbell,* 704 F.Supp. 650 (D.S.C.1989) (*"GROW II"*).

Content Neutral. The court finds, and Plaintiffs concede, that Regulation 19.480 is content neutral. The text is broad and prohibits all individuals and groups from camping or sleeping on the State House grounds and in all buildings located on the grounds. The restriction is a regulation of conduct and does not target a particular message.

Plaintiffs argue that Regulation 19.480 was motivated by "Defendants' frustration with Occupy Columbia." Dkt. No. 35 at 8. Courts are not in the business of evaluating motives of legislators in evaluating time, place, and manner restrictions. *See O'Brien* ("Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."); *Wall Distributors, Inc. v. Newport News, Va.,* 782 F.2d 1165, 1170 (4th Cir.1986) ("[C]ourts must eschew altogether the guesswork of speculating about the motive of lawmakers.") (quotations omitted); *Grass Roots Organizing Workshop (GROW) v. Campbell,* 704 F.Supp. 644, 648 (D.S.C.1988) (finding that court may not consider whether Budget and Control Board may have adopted new policy regulating conduct on the State House grounds in order to prevent the plaintiff from displaying its sign).

Significant State Interest. Defendants argue that the emergency regulation serves the following significant and substantial government interests:

> Camping, sleeping, or otherwise living at the State House grounds and building raises an imminent peril based on increased opportunities for criminal conduct and public safety incidents attendant to such conduct, as well as the liability resulting from such incidents. In particular, the Board expressed concerns regarding "recent confrontations involving the group of individuals currently living on the State House grounds which has caused the group to form a 'protection unit' to stand watch and defend the group during night time hours when the individuals are sleeping." The Board stated "that the use of such a 'protection unit' raises serious public safety concerns in addition to public liability concerns that need to be addressed immediately."
>
> Camping, sleeping, or otherwise living at the State House grounds and buildings raises an imminent peril given the significant risk of liability arising from the use of the State House property for camping, sleeping, and

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> living accommodation purposes. The Board recognized that under premises liability laws, the State, as the property owner, has a duty to reasonably provide for the safety and security of those persons lawfully on its property. The habitation of the grounds for camping, sleeping, and living accommodation purposes increases the risk of liability.
>
> *6 Camping, sleeping, or otherwise living at the State House grounds and buildings raises an imminent peril based on the impact of such conduct on public health, arising from continuous storage and preparation of food, attracting wildlife, and the sanitation issues attendant to camping, sleeping, or living on the grounds.

Dkt. No. 32 at 7.

The court concludes that the Board has significant government interests in avoiding crime, potential premises liability, and public health risks associated with unlimited camping and sleeping by groups engaged in expressive activities on the State House grounds.

Narrowly Tailored. The court finds that Regulation 19.480 is narrowly tailored to prevent the risks associated with unlimited camping and sleeping by groups engaged in expressive activities on the State House grounds. Although Regulation 19.480 prohibits all camping and sleeping on the State House grounds, Plaintiffs have not shown that the state's interests would be served by a more narrow restriction on activities associated with camping and sleeping.

Alternative Channels for Communication. The court finds that Plaintiffs have ample, alternative channels to communicate their message. Should the State enforce Regulation 19.480, Plaintiffs will not be able to continue camping and sleeping on the State House grounds. Plaintiffs may, however, remain on the grounds all night and continue their 24–hour occupation. Although their expression may be limited based on difficulties associated with a 24–hour presence without certain supplies that facilitate continuous occupation, Plaintiffs have alternative channels to communicate their message that do not involve camping or sleeping on the State House grounds.

O'Brien. In *Clark,* the Supreme Court also evaluated the National Park Service's prohibition on camping under *O'Brien,* noting that the *O'Brien* standard "is little, if any different from the standard applied to time, place, or manner restrictions." 468 U.S. at 298. As a regulation of conduct that incidentally burdens speech, *O'Brien* requires that the court consider whether (1) the state has the power to regulate the conduct; (2) the regulation advances a substantial or important government interest; (3) the interest is unrelated to suppressing freedom of expression; and (4) the incidental burden on speech is no more than necessary to achieve the interest. 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

S.C.Code Ann. § 10–1–30 provides that the Budget and Control Board may promulgate regulations regarding use of State House grounds to ensure "that the public health, safety, and welfare will be protected in the use of the areas." The court finds, therefore, that state has the power to regulate camping and sleeping on the State House grounds.

For the reasons above, the court finds that Regulation 19.480 advances substantial and important government interests unrelated to suppressing freedom of expression. Although it may incidentally burden speech, Regulation 19.480 prohibits all camping and sleeping on the State House grounds, without exception. [5] Finally, the court finds that the incidental burden on speech is no more than is necessary to achieve the State's interests.

*7 The court, therefore, concludes that Plaintiffs are not likely to succeed on the merits of showing that Regulation 19.480 constitutes an invalid time, place, and manner restriction of their First Amendment rights.

B. Irreparable Harm

As explained in the court's prior Order, "in the context of an alleged violation of First Amendment rights, a plaintiff's claimed irreparable harm is 'inseparably linked' to the likelihood of success on the merits of plaintiff's First Amendment claim." *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave,* 553 F.3d 292, 298 (4th Cir.2009). Because the court finds that Plaintiffs are not likely to succeed in establishing that Regulation 19.480 violates Plaintiffs' First Amendment rights, the court finds that Plaintiffs will not be irreparably harmed if Plaintiffs' motion to amend the Preliminary Injunction is denied.

C. Balance of the Equities

The State and its agencies must be able to respond to new situations as they arise. In this case, the Board reacted to a new situation and promulgated an emergency regulation to prohibit camping and sleeping on the State House grounds. The State has a valid interest in reducing the risk of harm associated with camping and sleeping on the State

House grounds. Although Plaintiffs do not agree with the content of Regulation 19.480, or the fact that it is an emergency regulation effective immediately, the Board has directed the Division of General Services to begin drafting permanent regulations with the same effect. The end result —a prohibition on camping and sleeping on the State House grounds—appears inevitable. [6]

With the promulgation of Regulation 19.480, Plaintiffs now can be certain that activities related to camping, sleeping, and living on the State House grounds are prohibited. The balance of the equities tips in favor of Defendants.

D. Public Interest

The public interest in the right of the people to freedom of expression is protected by the First Amendment to the United State Constitution. This right may only be limited by reasonable time, place, and manner restrictions. The time, place, and manner restrictions of Regulation 19.480 have previously been approved by the United States Supreme Court in *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984).

The public has an interest in having a properly-maintained State House grounds that may be enjoyed by everyone, including those not involved with Occupy Columbia. The public also an interest in valid, publicly-available regulations governing the use of the grounds. Regulation 19.480 serves these various interests.

Accordingly, Plaintiffs' motion to amend the Preliminary Injunction to enjoin the enforcement of Regulation 19.480 is denied.

II. Defendants' Motion to Amend Preliminary Injunction

Defendants also filed a motion to amend the Preliminary Injunction. Defendants argue that the Preliminary Injunction is no longer necessary with respect to camping because the State has a valid time, place, and manner restriction that prohibits camping and sleeping on the State House grounds. Amendment of the Preliminary Injunction in light of Regulation 19.480 is unnecessary. The Preliminary Injunction enjoined the enforcement of any then "current policy" prohibiting camping and sleeping and does not apply to enforcement of a new policy or regulation.

*8 Defendants' motion to amend the Preliminary Injunction is, therefore, denied.

CONCLUSION

For the reasons stated above, the court denies Plaintiffs' motion to amend Preliminary Injunction (Dkt. No. 35) and Defendants' motion to amend order granting Preliminary Injunction or, alternatively, motion to modify Preliminary Injunction (Dkt. No. 32).

IT IS SO ORDERED.

Footnotes

1 The court assumes familiarity with the Order granting Plaintiffs' motion for preliminary injunction (Dkt. No. 27) and with the Memorandum Opinion in support of the court's Order (Dkt. No. 28). *See Occupy Columbia v. Haley,* No. 3:11–03253, 2011 WL 6318587 (D.S.C. Dec.16, 2011).

2 When the court refers to the prohibition on camping and sleeping on the State House grounds and in all buildings located on the grounds, the court will use the phrase "State House grounds."

3 Plaintiffs requested that, should the court decline to rule on the issue of whether Regulation 19.480 is valid, the court certify the issue to the South Carolina Supreme Court or stay enforcement until Plaintiffs can pursue a declaratory judgment action in state circuit court. Dkt. No. 35 at 9. However, at oral argument, both parties agreed that this court should decide the issue at least under the preliminary injunction standard due to the urgent need for a decision.

4 The court notes that the time for appeal has not run.

5 The court will not substitute its judgment for that of the Board on how to limit the adverse effects of camping and sleeping on the State House grounds. *See Clark,* 468 U.S. at 299 (refusing to substitute its judgment for that of Park Service as to "how much protection of park lands is wise and how that level of conservation is to be attained.").

6 The parties informed the court that there likely will be a period of thirty days after the expiration of Regulation 19.480 and before a non-emergency regulation can be promulgated. Defendants have not determined what, if any, remedies are available to avoid a

thirty-day period where no regulations would prohibit camping or sleeping on the State House grounds. The thirty-day period is not, however, relevant to the outcome of the motions pending before the court.

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ATTACHMENT C

C

Supreme Court of South Carolina.
Jane DOE, Appellant,
v.
SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondent.

No. 27083.
Heard Nov. 3, 2010.
Decided Dec. 28, 2011.

Background: A 28-year old woman with cognitive and adaptive deficits sought administrative review of a decision by the Department of Health and Human Services and its agent, the Department of Disabilities and Special Needs (DDSN), to cease claimant's mental retardation/related disability services. The Administrative Law Court, Richland County, Paige J. Gossett, administrative law judge (ALJ), affirmed hearing officer's determination that claimant was not mentally retarded, and she appealed.

Holdings: The Supreme Court, Kittredge, J., held that:
(1) DDSN was not bound by a Social Security Administration's (SSA) determination that claimant was mentally retarded, but
(2) DDSN was precluded from imposing an 18-year-old age-of-onset requirement for purposes of determining whether claimant was mentally retarded.

Reversed and remanded.

Hearn, J., filed separate opinion concurring in part and dissenting in part, in which Pleicones, J., concurred.

West Headnotes

[1] Administrative Law and Procedure 15A 416.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules, Regulations, and Other Policymaking
15Ak416 Effect
15Ak416.1 k. In general. Most Cited Cases

Administrative Law and Procedure 15A 417

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules, Regulations, and Other Policymaking
15Ak416 Effect
15Ak417 k. Force of law. Most Cited Cases

An agency guideline does not have the force of law, and in any event, can never trump a regulation. Code 1976, § 1–23–10(4).

[2] Social Security 356H 224(2)

356H Social Security
356HIII Proceedings
356Hk222 Decision or Determination
356Hk224 Conclusiveness and Effect
356Hk224(2) k. Need-based benefits; supplemental security income. Most Cited Cases
(Formerly 356Ak142.20 Social Security and Public Welfare)

With regard to the claimant's entitlement to continued participation in the Medicaid Home and Community–Based Services (HCBS) waiver program, the Department of Disabilities and Special Needs (DDSN) was not bound by a Social Security Administration's (SSA) determination that claimant was mentally retarded; state could impose additional criteria to the Supplemental Security Income (SSI) definition of mental retardation for purposes of waiver services eligibility. 42 C.F.R. § 441.301(b)(6); 20 C.F.R. Part 404, Subpart P, App.

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1, § 1.00 et seq.; Code 1976, § 44–20–30 (2010).

[3] Health 198H ⚖467

198H Health
198HIII Government Assistance
198HIII(B) Medical Assistance in General; Medicaid
198Hk466 Eligibility for Benefits
198Hk467 k. In general. Most Cited Cases

Department of Disabilities and Special Needs (DDSN) was precluded from imposing an 18-year-old age-of-onset requirement for purposes of determining whether claimant seeking continued entitlement to Medicaid waiver services was mentally retarded, even though state could have imposed additional criteria to the Supplemental Security Income (SSI) definition of mental retardation, where the state's waiver application only allowed it to substitute home or community based services (HCBS) for mandatory Medicaid services with respect to mentally retarded claimants, and did not include an age-of-onset requirement. 42 C.F.R. § 440.240(b); S.C. Code of Regulations R. 88–210(F).

****605** Patricia Logan Harrison, of Columbia, and Stuart M. Andrews, Jr. and Jennifer I. Cooke, Nelson Mullins Riley & Scarborough, both of Columbia, for Appellant.

William H. Davidson, II, and Kenneth P. Woodington, Davidson & Lindemann, both of Columbia, for Respondent.

Justice KITTREDGE.

***63** This appeal presents the question of whether Respondent South Carolina Department of Health and Human Services and its agent, the South Carolina Department of Disabilities and Special Needs (DDSN), "properly ceased Mental Retardation/Related ****606** Disability services to" [FN1] Appellant Jane Doe, a twenty-eight-year-old woman with undeniable cognitive and adaptive deficits. Based on a purported legal standard that the "onset of Mental Retardation must be before the age of eighteen (18) years according to accepted psychological doctrine[,]" the Hearing Officer concluded Doe was not mentally ***64** retarded. The Administrative Law Court (ALC) affirmed this legal determination, as well as the Hearing Officer's factual findings. Because the decision of the Hearing Officer and ALC is controlled by an error of law, we reverse and remand.

FN1. Final Administrative Order, June 5, 2006.

I.
BACKGROUND
A.

Medicaid is a program through which the federal government, through the Social Security Administration (SSA), provides financial assistance to states so that they may furnish medical care to needy individuals. *Wilder v. Virginia Hosp. Assoc.*, 496 U.S. 498, 502, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990). Participation in the program is voluntary; however, participating states must comply with requirements imposed by the Medicaid Act and related regulations. *Id.* To receive federal funding, a state must submit and have approved a "plan for medical assistance" that describes the nature and scope of the state's Medicaid program. *Id.* A state's plan must provide medical services for the "categorically needy" and, among other things, must provide services under any option to all Medicaid beneficiaries for whom they are medically necessary. *See* 42 U.S.C. § 1396a(a)(1), (a)(10)(A)(i), (a)(10)(B) (2006); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 651 n. 4, 123 S.Ct. 1855, 155 L.Ed.2d 889 (2003).

Supplemental Security Income (SSI), which is Title XVI of the Social Security Act, provides support for those who are aged, blind, or disabled and subsist on a limited income. 20 C.F.R. § 416.1100 (2011). To receive SSI, a recipient must have a disability such that he cannot accomplish "substantial gainful activity" for profit. 20 C.F.R. § 416.905

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(2011). Federal regulations provide that an individual found eligible for SSI is automatically enrolled in the Medicaid program and is entitled to the base level of benefits the state must provide to all Medicaid beneficiaries. 42 U.S.C. § 1396a(a)(10)(A)(i)(II) (2006); 42 C.F.R. § 435.909(b)(1) (2010); *Pharm. Research,* 538 U.S. at 651 n. 4, 123 S.Ct. 1855.

Since 1981, Medicaid has provided funding for state-run home and community based services ("HCBS") through a ***65** waiver program. For Medicaid-eligible individuals whose medical needs require an institutional level of care, the waiver program provides Medicaid funding to States to provide those individuals HCBS in lieu of institutional care.[FN2] 42 U.S.C. § 1396n(c) (2006); 42 C.F.R. § 441.300 (2010); *see Olmstead v. L.C.,* 527 U.S. 581, 601, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999). The waiver program permits an eligible recipient who is mentally retarded to receive Medicaid-funded HCBS, rather than institutional care in an Intermediate Care Facility for the Mentally Retarded (ICF/MR). Once an individual is found eligible for such waiver services, a state must conduct periodic reviews to ensure the recipient still meets the waiver program eligibility requirements. 42 C.F.R. § 441.302(c)(2) (2010).

> FN2. A showing that the average annual cost of HCBS would not exceed that of institutional services is also required. 42 U.S.C. § 1396n(c)(2)(D) (2006).

For purposes of basic Medicaid eligibility, the definition for mental retardation, in relevant part, is as follows:

> Mental retardation refers to significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested *during the developmental period; i.e., the evidence demonstrates or supports onset of impairment before age 22.*
>
> 20 C.F.R. Pt. 404, Subpt. P, App. 1 § 12.05 (2011) (emphasis added).[FN3]

> FN3. Although this particular part of the regulations concerns benefits under a different portion of the Social Security Act, this listing of impairments is the operative listing for Supplemental Security Income and Medicaid purposes. 20 C.F.R. § 416.905 (2011).

****607 B.**

For a state to participate in the Medicaid HCBS waiver program, it must submit a detailed application on a form provided by the federal government describing the group of individuals to whom the services will be offered. 42 C.F.R. § 441.301(b)(3) (2010). For the purpose of defining eligibility for waiver services, a state is free to impose in its waiver application eligibility criteria which are more restrictive than basic Medicaid eligibility requirements. 42 C.F.R. § 441.301(b)(6) (2010).

***66** Based on South Carolina's waiver application, to continue to be eligible to receive HCBS waiver services, a person must meet the following criteria:

1. The person has a confirmed diagnosis of mental retardation or a related disability.

AND

2. The person's needs are such that supervision is necessary due to at least one of the following: impaired judgment, limited capabilities, behavior problems, abusiveness, assaultiveness or because of drug effects/medical monitorship.

AND

3. The person is in need of services directed toward a) the acquisition of the behaviors necessary to function with as much self–determination and independence as possible; or b) the prevention or deceleration of regression or loss of current optimal functional status.

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