# Exhibit B

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| **STATE OF SOUTH CAROLINA**<br><br>**COUNTY OF RICHLAND** | **IN THE COURT OF COMMON PLEAS**<br><br>Civil Action Number: 10-CP-40-1095 |
| Protection and Advocacy for People with Disabilities, Inc.,<br><br>Plaintiff,<br><br>v.<br><br>Beverly A. H. Buscemi, Ph.D., in her official capacity as State Director, South Carolina Department of Disabilities and Special Needs and The South Carolina Department of Disabilities and Special Needs, and Kelly Hanson Floyd, Nancy Banov, W. Robert Harrell, Rick Huntress, Deborah McPherson and Dr. Otis Speight in their Official Capacities as Members of the Department of Disabilities and Special Needs Commission,<br><br>Defendants. | **ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION** |



By Order filed December 4, 2012, the Court dismissed this action. On December 17, 2012, Plaintiff served a Motion for Reconsideration. For the reasons set forth below, the motion is denied. with one exception as noted herein.

**I. Plaintiff's claims concerning the language of the statute (Heading I of Plaintiff's motion).**

Plaintiff initially contends that the Order ignores the plain meaning of the term "plans of care" as used in S.C. Code Ann. § 43-33-350(4). However, the Order did not rely solely on the use of the term "plan of care" in federal law, as Plaintiff seems to suggest (Motion at 2-3). The Court looked to federal law as an illustration of the use of a well-defined meaning of the term "plan of care" in a very similar, and often identical, context. Order 5-9. In addition, the Court

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addressed the plain meaning of the term "plan" at pp. 10-11 of the Order. Specifically, the Court noted that the term "plan" plainly connotes the idea of guidance for the future. The medication administration records (MARs) sought by Plaintiff in this case, as their descriptive title would suggest, are records that serve to document past occurrences, i.e., the administration of medications, and therefore fall outside the normal definition of what is meant by a "plan."

Plaintiff also argues that the Order did not make adequate reference to other state statutes and regulations. Motion at 3-4. In that part of the motion, Plaintiff reiterates its reference in prior filings to various state law provisions that mention the term "plan of care" in some fashion. The Order, however, noted (p. 16, n. 6) that those state law references were generally similar to § 43-33-350(4) in referencing an advance plan. In addition, Plaintiff does not cite to any particular definition of the term in any of those references that would support its arguments in this case.

Plaintiff notes (Motion at 4-5) that the Court's reference in the Order to Medicaid usages and authorities would not strictly apply to those situations in which team inspections would be conducted in facilities whose clients are not Medicaid Waiver clients. Again, however, Plaintiff misperceives the nature of the Court's reliance on Medicaid authorities, as already mentioned above. The Medicaid authorities simply provide a detailed illustration of the meaning of the term in contexts that are the same as that in the present case, regardless of whether or not a particular individual is a Medicaid Waiver client. It should also be noted that in its Complaint, Plaintiff asserted its belief that with respect to the types of residences whose inspection is sought in this action, "the great majority of people with developmental disabilities in CTHs are recipients of Medicaid services under the Medicaid Mental Retardation/Related Disabilities Waiver." Complaint, Par. 49.

Plaintiff makes several other arguments (Motion at 5-7) regarding the interpretation of the statute. Most of these deal with the specific terms of the federal authorities referenced in the Order, and have already been discussed in the Order at pp. 5-9. Plaintiff also refers (Motion at 6) to an interrogatory response by Defendants, but as Defendants have pointed out, Defendants' Memorandum in Response to Plaintiffs' Motion for Summary Judgment at p. 7, n. 4, the language of the DDSN standard itself (as opposed to the interrogatory response) is that there must be "documentation that the physician's [or dentist's] recommendations are being followed" (emphasis added). The term "plan of care" is not actually used in that standard.

On pp. 7-8 of its motion, Plaintiff reasserts certain contentions about the use of the phrase "living conditions, including plans of care" in § 43-33-350(4). These contentions were considered and addressed at pp. 13-15 of the Order.

Finally, with respect to interpretation of the statute, Plaintiff puts forth its own unsupported allegation that medical care and treatment are so much a part of the "living conditions" of the residents of the facilities that a review of the residents' medical records must necessarily be a part of an inspection of their living conditions. The short answer to this is found at pp. 9-10 of the Order, in which the Court referenced the language of § 43-33-370(2). In that subsection, the General Assembly referenced "the individual medical, treatment or other personal records" of residents of inspected facilities, but only in order to exempt such records from review by P&A except where an individual complaint has occurred. In other words, the General Assembly was well aware of how to describe the kinds of records sought by Plaintiff in this case, but simply chose not to make such records available to Plaintiff in the course of conducting team inspections of living conditions at residential facilities.

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## II. Plaintiff's claims concerning broad construction of the statute (Heading II of Plaintiff's motion).

Plaintiff next contends that its position on the definition of the term "plans of care" is supported by the presence of limitations on who can see team inspection reports. Motion at 10-11. However, the definition of the term "plans of care" is not, as a matter of simple logic, determined by who can view the defined documents. Moreover, "plans of care," as that term is used by DDSN, are sufficiently private documents in themselves to warrant the limitations on who may see them. This claim is accordingly not relevant to the issue before the Court.

## III. Plaintiff's claims concerning the nature of medication administration records as constituting "plans of care." (Heading III of Plaintiff's motion).

In this section of its motion (Motion at 11), Plaintiff contends that a medication administration record is a "plan of care" in and of itself. Plaintiff claims that such records "set forth the medications each resident is to receive, the planned dosage and the time it is to be given, then it tracks staff's actual administration of the medication." *Id.*

A significant problem with this argument is that Plaintiff did not introduce any medication administration records into evidence. As a result, there is nothing in the record that would permit the Court to review the merits of this contention. Even if one or more MARs had been placed in evidence by Plaintiff, however, the contents of those documents would still not necessarily contain everything that Plaintiff claims such documents contain. Moreover, such documents would at most normally only provide evidence of compliance with certain doctors' orders. Neither the physicians' orders themselves nor the records showing the extent of compliance with the orders can fairly be said to meet the definition of a "plan of care" in this context, for the reasons already set forth in the Order.

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## IV. Deference to P&A's construction of its enabling statute (Headings IV and V of Plaintiff's motion).

Plaintiff next argues that its own interpretation of the subsection in issue is entitled to deference as a construction by the agency charged with its administration. Plaintiff initially relies on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). That reliance is misplaced, however, because *Chevron*-style deference is accorded only to regulations or other formally-adopted agency actions. *See, e.g., Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Any agency action short of the described degree of formality does not receive such a high level of deference. *Id.* (no *Chevron* deference given to "interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law").

Plaintiff also claims that its interpretation of the statute is entitled to deference under the principle that such deference is given to construction of a statute by the agency charged with its administration, at least as long as the agency's construction is not contrary to the clear language of the statute. *See, e.g., State v. Sweat*, 379 S.C. 367, 374, 665 S.E.2d 645, 649 (Ct. App. 2008). However, as will be shown, that rule does not apply to an agency such as P&A, which is not charged with the administration of the statute in the sense used by courts in applying this rule of construction.

The rule of construction cited by Plaintiff is founded on the idea that the applicable legislative body (Congress or a state legislature) has delegated to the agency, either explicitly or implicitly, the authority to make policy. *See, e.g., Linemaster Switch Corp. v. U.S. E.P.A.*, 938 F.2d 1299, 1303 (D.C. Cir. 1991)("[b]efore we may defer to an agency's construction of a statute, we must find either explicit or implicit evidence of congressional intent to delegate interpretive authority"). This includes the filling in of gaps in the enabling legislation.

There is no indication in P&A's enabling legislation, S.C. Code Ann. §§ 43-33-310, et seq., that the General Assembly intended to delegate such authority to P&A. Instead of serving as a policymaking or regulatory agency, P&A was created to serve investigative and advocacy functions to the extent authorized by statute. Those functions actually exclude the role of serving as a policymaker, because neither an investigator nor an advocate is empowered to legislate the proper subjects of their own activities. In an analogous context, it has been held, for example, that a "civil prosecutor typically lacks authority to issue substantive regulations to interpret a statute establishing liability." *Kelley v. E.P.A.*, 15 F.3d 1100, 1106 (D.C. Cir. 1994). Here, P&A, as an investigator, lacks authority to decide what the General Assembly intended for it to be able to investigate. That decision is one for the courts, and specifically, for the Court in the present case.

It is regularly held that no deference should be given to the views of agencies to which policymaking authority has not been delegated. *See also, e.g., Pittston Stevedoring Corp. v. Dellaventura,* 544 F.2d 35, 49 (2d Cir. 1976)(no deference to an adjudicatory agency that was "not a policy making but entirely an umpiring agency"); *State of Fla., Dept. of Ins. v. National Amusement Purchasing Group, Inc.*, 905 F.2d 361, 366 (5th Cir. 1990)(no deference where agency was "not charged with administering the Act, but merely has responsibility under the Act to report on its implementation"); *Air North America v. Department of Transp.*, 937 F.2d 1427 (9th Cir. 1991)(deference to agency's construction of the Administration Procedure Act inappropriate as Congress did not direct the Department to implement the Act).[1] The duties

[1] While no South Carolina case has been located which has had the need to address the issue for some kind of legislative delegation of authority to interpret, state courts have reached the same conclusion as the federal cases cited above. *See, e.g., Committee of Consumer Services v. Public Service Com'n of Utah,* 75 P.3d 481, 484 (Utah 2003)(no deference to agency construction "[u]nless the legislature has granted discretion to an agency to interpret statutory language").

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conferred on P&A simply are not the kinds of duties that carry with them the authority to make policy regarding the proper construction of P&A's enabling legislation.

In its Heading V, Plaintiff argues that DDSN had knowledge of Plaintiff's investigatory practices and should be "prevented, by estoppels or otherwise," from objecting to Plaintiff's efforts to review personal medical records. Motion at 13. This contention is not supported by the record. Plaintiff may have introduced evidence that it managed to inspect those records at a few facilities that serve DDSN clients, but there is nothing in the record to indicate that the DDSN Director or anyone with statewide authority at the agency was aware of such inspections. Indeed, the attachments to the Affidavit of Gloria Prevost indicate that DDSN's supervisory officials objected to P&A's plan to inspect individual medical records as part of team advocacy inspections as soon as those officials were made aware of P&A's plans. In fact, it was those objections by DDSN's highest-ranking officials that led to the filing of this lawsuit.

Plaintiff also argue that other agencies, such as the Department of Mental Health and perhaps DHEC, have permitted P&A to review the kinds of records sought to be reviewed in the present case. Motion at 12-13. However, Ms. Prevost testified that P&A was acting pursuant to contract with DMH, which means in effect that P&A was an agent of DMH. *See* Order at 9, n.2. As for DHEC, the evidence of what DHEC would permit to be inspected was limited, at best.[2] Plaintiff has certainly made no showing of the precise nature of the other agencies' interpretations, or that DDSN actually knew of these interpretations, even assuming that such interpretations would apply in the present context. Plaintiff likewise has not cited any legal authority to show why DDSN should be bound by a interpretation given a statute by other

[2] Plaintiff cites *DHEC vs. Bellwood Manor, Inc.*, 2010 WL 6782577 (S.C. Administrative Law Court 2010), but the issue of which records could be reviewed was not the subject of that case.

agencies, probably in other contexts, and of which DDSN has not been shown to have been aware of. As a result, any claim based on alleged interpretations by other agencies is unmeritorious, both because of inadequate proof of the nature of the interpretations and DDSN's knowledge thereof, and also because no authority has been cited to support this claim as a matter of law.

### V. Application of the Order to non-Medicaid settings (Heading VI of Plaintiff's motion).

Under Heading VI of its motion, Plaintiff asserts that some of the facilities that it inspects do not house persons who are Medicaid clients. Motion at 14. As noted above, however, the Order referred to Medicaid law and practice primarily for purposes of illustrating the meaning given to the term "plan of care." The Order did not hold that the Medicaid authorities were literally controlling, but only that given the clear meaning of the term in the Medicaid context, that same meaning should also apply in the present state law context as well. The Order additionally was based on the plain meaning of the term (Order at 10-11) and on other parts of the P&A statute itself (Order at 9-10). As a result, any concern that the Order might improperly extend Medicaid concepts to other contexts is misplaced.

### VI. Effect of the Order on unannounced inspections (Heading VII of Plaintiff's motion).

In this part of its motion (pp. 14015), Plaintiff addresses the Order's discussion of a suggestion by DDSN that one way for P&A to review medical records would be to obtain prior consent from the residents or their representatives. As the Order points out, however,

> [T]his argument [by Plaintiff] is merely addressed to an alternative approach that had been suggested by DDSN. Even if this approach were to have the effect of advising the facility in advance that an inspection of living conditions might be forthcoming, that result still cannot expand the meaning of the term "plans of care" beyond the clear meaning that the term has in this context, as DDSN has

already argued. This entire argument is therefore simply beside the point.

Order at 12-13. In other words, if the statute did not grant to P&A the right to review medical records, as opposed to plans of care, then team advocacy inspections of medical records would be blocked, not because of the refusal of consent, but because the statute did not permit such records to be reviewed in the course of an inspection, as the Order has held. There was no suggestion in the Order that the review by P&A of plans of care, as defined in the Order, could be blocked by the nonconsent of the client or the client's representatives.

## VII. Alleged conflation of different parts of the P&A statute (Heading VIII of Plaintiff's motion).

In Plaintiff's Issue VIII, it is contended that the Order was in error by holding, according to Plaintiff, that "[l]imitations on P&A's authority to inspect records in one context do not apply in other legally distinct contexts; . . ." Motion at 16. As with several other arguments made by Plaintiff, this misperceives the nature of what was held in the Order. The Order held that § 43-33-370(2) placed substantial limitations on the ability of P&A to review individual medical records, permitting such review only in response to a specific complaint by or on behalf of an individual, and even then, P&A's document review was not to include "the individual medical, treatment or other personal records of other persons in the program or facility." §43-33-370(2)(emphasis added). In other words, given the clearly-expressed desire of the General Assembly to protect individual medical records of facility residents even in situations where complaints have been made, it is not reasonable to think that the General Assembly would have intended to permit unrestricted access by P&A to those same protected records in the course of an inspection that was not necessarily even made in response to a complaint.

This holding by the Court was an application of the very familiar principle that "In ascertaining the intent of the legislature, a court should not focus on any single section or

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provision but should consider the language of the statute as a whole." *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). Taking the statute as a whole, there can be no question that the General Assembly intended to make individual medical records available to P&A only in very limited circumstances, and not in the wholesale fashion for which P&A presently contends.

**VIIII. Arguments pertaining to the trial record (Heading IX of Plaintiff's motion).**

In this heading of its motion, Plaintiff cites two instances in which it contends that the Order went beyond the trial record. The first of the two is the following provision of the Order:

> The Court therefore finds that, although the term was not defined in the statute by the Legislature, it nonetheless was meant to have a specific meaning and not an expansive, all-inclusive definition that would include any and all of the CTH patients' medical records.

Order at 9. Plaintiff asserts that this holding constitutes a statement that Plaintiff was seeking "any and all of the CTH patients' medical records." Motion at 16. Actually, it does not constitute a statement about what Plaintiff was seeking at all. In the context of this case, this statement clearly meant that Plaintiff should not have access to any and all CTH patients' medical records at the facility.

Plaintiff's second and other argument about matters in the record is directed toward footnote 2 on p. 9 of the Order. That footnote provides as follows:

> Plaintiff argues that it has inspected another kind of facility, Community Residential Care Facilities (CRCF's) and has not been prevented by another agency, the Department of Mental Health, from reviewing medical records in that context. However, those facilities are mostly small, private, and probably unaware of which records they should produce and should not produce. In addition, as Ms. Prevost testified, Plaintiff was conducting those inspections as a contractor with the Department of Mental Health. In any event, that other context, which does not involve DDSN, is not before the Court, and cannot govern the present situation, where the matter is being contested.

Plaintiff argues that the reference to certain CRCF's as "mostly small, private, and probably unaware of which records they should produce and should not produce" is unsupported by the record. The Court concludes that this language to which Plaintiff objects is not necessarily material, but in any event, the Court concludes that the footnote can properly be amended slightly to resolve this issue raised by Plaintiff. The Court is accordingly filing an Amended Order that differs from the original with the changes as shown below:

> Plaintiff argues that it has inspected another kind of facility, Community Residential Care Facilities (CRCF's) and has not been prevented by another agency, the Department of Mental Health, from reviewing medical records in that context. However, ~~those facilities are mostly small, private, and probably unaware of which records they should produce and should not produce. In addition,~~ as Ms. Prevost testified, Plaintiff was conducting those inspections as a contractor with the Department of Mental Health. In any event, that other context, which does not involve DDSN, is not before the Court, and cannot govern the present situation, where the matter is being contested.

**IX. Public policy arguments (Heading X of Plaintiff's motion).**

Finally, Plaintiff argues that the result reached in the Order is "contrary to South Carolina public policy, general principles of equity, and the needs of South Carolina citizens." Motion at 17. Plaintiff here asserts that having medical records subject to review is something that "helps ensure that South Carolina residents with disabilities are receiving appropriate care and living in safe environments." While no one would disagree with the worthiness of the broad goal quoted immediately above, Plaintiff does not recognize that those residents, like all other residents of the state, are entitled to have their medical records remain private, absent a clear expression of intent to the contrary by the General Assembly. That clear expression of intent is lacking in this case; indeed, the statute's plain meaning makes it very clear that the only records to be made available during team advocacy inspections would be plans of care, as that term is defined in the Order. Plaintiff's policy arguments are properly addressed to the General Assembly, which defines

policy in this area, rather than to the courts, whose role is to effectuate the expressed intent of the legislature.

For the foregoing reasons, the Court concludes that Plaintiff's Motion for Reconsideration should be denied, except for striking the language referenced above. Accordingly, the Court will enter the Amended Order that deletes that language.

AND IT IS SO ORDERED.

Edgar W. Dickson
Presiding Judge

Orangeburg, South Carolina

December 5, 2014

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