THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Edgar W. Dickson, Circuit Court Judge

Case No. 2010-CP-40-1095

Protection and Advocacy for People with Disabilities, Inc., ...Appellant,

v.

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, ...Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. Whether the General Assembly did not intend for P&A, when conducting inspections of "living conditions" in residential facilities for the developmentally disabled or handicapped, to review medical information in the records of residents of those facilities, unless such information is contained in "plans of care."

2. Whether, in this context, the term "plan of care" in § 43-33-350(4) refers to a specific document with specific contents.

3. Whether other contentions of P&A regarding the interpretation of the statute are without merit.

4. Whether P&A's claims that the circuit court's interpretation would "prevent P&A from conducting the proper inspections as required by statute" involve matters of policy for the General Assembly, and are without merit in any event.

5. Whether the circuit court correctly held that P&A's construction of § 43-33-350(4) was not entitled to deference.

6. Whether P&A's vague "public policy" argument was properly rejected by the circuit court.

STATEMENT OF THE CASE

This action was filed on February 16, 2010, by the entity Protection and Advocacy for People With Disabilities, Inc. ("P&A"). The Defendants were the Department of Disabilities and Special Needs and a number of its officials, herein collectively referred to simply as DDSN. P&A sought an order requiring DDSN to provide P&A access to certain records of people with developmental and other disabilities who live in residential care facilities for such persons. P&A had sought to review the records when performing certain inspections that are not in response to complaints about the facilities.

DDSN filed an Answer on March 26, 2010, denying that P&A's enabling legislation provided P&A with authority to have access to any personal records of developmentally disabled persons living in certain group residences other than "plans of care," the term used in the applicable statute. DDSN's contention is that a "plan of care" is a specific document.

On July 8, 2011, both parties filed cross motions for summary judgment. R. 310, 370. By Order dated October 1, 2012, Judge Manning summarily denied both motions. On or about that same day, the case was set for trial later that same week before Judge Dickson.

The case was tried by Judge Dickson without a jury on October 3, 2012. P&A called three witnesses and entered two exhibits into evidence. Defendants called one witness and likewise entered two exhibits into the trial record. Both

parties also consented to the summary judgment filings coming into the trial record, and those filings were admitted into evidence.

On November 29, 2012, Judge Dickson issued an order holding that the governing statute did not authorize P&A to have access to the disabled residents' records (except for "plans of care"), and dismissing this action. R. 5-21. P&A thereafter filed a motion to reconsider on December 17, 2012. R. 471. Defendants filed a response to that motion on January 23, 2013. R. 489. Judge Dickson denied the motion to reconsider on December 11, 2014, except for one small amendment in a footnote, to which the Defendants consented and for which they provided suggested language for the amendment, which the circuit court adopted. *See* R. 499. That amendment was embodied in an Amended Order, also filed on December 11, 2014. R. 35. Except for the minor change referenced in its n.2, R. 43, the Amended Order is the same as the original Order. The Amended Order will be the one discussed in this brief.

This appeal by P&A followed.

STATEMENT OF FACTS

A. Background.

P&A is a corporation that has been given certain powers and duties under state law. S.C. Code Ann. §§ 43-33-310, *et seq*. The existence of such an entity is a prerequisite to the State receiving certain federal funding. *See* 42 U.S.C. § 15043.

As detailed in the Complaint, the basic facts of this case are that P&A has sought to review "all of the resident[s]' records, including MARs [medication administration records] and other documents which might contain health information." R. 19-20. P&A sought to review that broad, virtually all-inclusive category of records in the course of conducting "team advocacy inspections" of "living conditions" in facilities in which developmentally disabled or handicapped persons reside. These terms are found in part of P&A's enabling statute, S.C. Code Ann. § 43-33-350(4), which provides as follows:

> Team advocacy inspections are unannounced visits to review the living conditions of a residential facility, including the plans of care for individuals in a residential care facility and a community mental health center day program. Only the coordinator of the team advocacy project or the coordinator's designee is authorized to perform reviews of plans of care.

(Emphases added). As the statute specifically provides, team advocacy inspections pertain only to "living conditions," and the only records referenced in the statute are "plans of care."

In a "team advocacy" inspection, a P&A employee called a "team advocate" and a volunteer make unannounced visits to R. 121. The role of the volunteer is to

> look at the conditions, the closets, the sleeping arrangements, talking with the residents to see what it's like for them, are they getting the care that they want, would they prefer to live there, or would they rather live somewhere else?

R. 122.

For about 20 years, starting in the 1980's, P&A had limited its team advocacy inspections to Community Residential Care Facilities ("CRCFs"), which are licensed by DHEC rather than DDSN. *See http://www.state.sc.us/dmh/crcf/crcf.htm.* P&A conducted those inspections pursuant to contracts with the Department of Mental Health ("DMH").

In 2007, P&A decided that it would begin for the first time to conduct team advocacy inspections in facilities licensed by DDSN, as opposed to those licensed by DHEC, and so informed DDSN by letter. R. 88-89. P&A's 2007 letter advised DDSN that P&A was planning to start inspecting CTH IIs, but the letter made no reference to review by P&A of any particular records. *Id.*[1]

P&A decided that it would at first concentrate on the DDSN group residences called Community Training Homes (II), generally known as "CTH IIs." These residences were described at trial as "people's homes . . . in neighborhoods where typically people live in, three or four persons that are unrelated get 24-hour supervision, personal care and training." R. 179. A typical CTH II is a three-bedroom home in a neighborhood." R. 179-180.

Another year and a half elapsed before P&A advised DDSN by letter of June 11, 2009, that P&A was about to start making team advocacy inspections of the

[1] DDSN has never disputed that CTH IIs are "facilit[ies] providing residence to . . . developmentally disabled or handicapped person[s], and for which P&A "may conduct team advocacy inspections" of "living conditions." §43-33-350(4). The only issue in this case pertains to the extent that P&A can review records other than the plan of care for each resident.

DDSN-licensed CTH II facilities.[2] R. 85-86. Other than an indication that P&A would "review records" during those visits, there was no particular reference to any specific records.

Beginning in that same month, June 2009, and continuing through August 2009, P&A conducted a few team advocacy inspections in which MARs were reviewed by P&A. R. 112; R. 201-271. At some point during the summer of 2009, DDSN became aware of these reviews of MARs by P&A. *See* R. 90. This led to one or more meetings and written communications between DDSN and P&A in the middle of 2009. R. 85-92, 93.

The result of these discussions was that on August 31, 2009, Dr. Laurent, DDSN's Director, advised P&A that DDSN regarded a "plan of care" as being one specific document:

> The Agency's attorney, Ms. Tana Vanderbilt and your attorney, Ms. Anna Marie Darwin, have been in discussions since July 1, 2009, regarding the law pertaining to team advocacy inspections.
>
> S.C. Code Ann. § 43-33-350(4) gives P&A the provision to make unannounced visits to review the living conditions of residential facilities, and specifically states "including plans of care for individuals in a residential care facility." The disagreement between our attorneys is over the interpretation of "plans of care." While we appreciate P&A's efforts to conduct inspections in community training homes, our obligation is to ensure that the rights of our consumers are protected.

[2] There was apparently no additional correspondence between P&A and DDSN during this period of approximately 18 months.

* * *

> We have informed our contracted providers of our position for CTH II staff to release only the residential treatment/support plan, which we consider the same as the plan of care, to the P&A team advocacy coordinator.

R. 87. (emphasis added). P&A filed the present action several months later.

At the trial of this case, the testimony of P&A's Executive Director reiterated the broad nature of P&A's demands for broad oversight powers and broad access to residents' personal, medical and treatment records, previously set forth in the Paragraph 57 of the Complaint. Ms. Prevost testified as follows:

> Q. So is the focus of concern in reviewing these records the performance of the staff in terms of the oversight of medical care and the provision of medication to the residen[ts] of these homes?
>
> A Yes. As I understand it, the responsibility would be that the operator signs onto when they send money to keep someone in these facilities is that they will provide oversight of all the aspects of care.

R. 131-132. (emphases added). Again, however, the statute provides that team advocacy inspections extend only to "living conditions." § 43-33-350(4). The Complaint and the testimony of Ms. Prevost leave no doubt that P&A is claiming authority to conduct oversight "of all the aspects of care" at CTH IIs, rather than merely "living conditions," the term used in the statute, and in the course of such oversight, to be able to review all records pertaining to "all aspects of care," as opposed merely to "plans of care." P&A's claims about the interpretation of the

statute must therefore be read in conjunction with P&A's broader claim that every aspect of the operation of a CTH II is subject to oversight by P&A.

B. Statutory provisions pertaining to P&A.

The powers and duties of P&A are set forth in § 43-33-350. The specific power involved in the present case is the power to "conduct team advocacy inspections . . . to review living conditions" in facilities that provide residences to developmentally disabled persons. To put this specific grant of authority in context, a review of the general powers and duties of P&A, set forth in § 43-33-350, is appropriate. There are four powers in all. Only two are relevant to this action.[3] The one directly involved in this case is set forth in § 43-33-350(4), already quoted in part and discussed above. That subsection provides for the team advocacy inspections of facilities. The subsection provides in its entirety as follows:

> [P&A] may conduct team advocacy inspections of a facility providing residence to a developmentally disabled or handicapped person. Inspections must be completed by the system's staff and trained volunteers. Team advocacy inspections are unannounced visits to review the living conditions of a residential facility, including the plans of care for individuals in a residential care facility and a community mental health center day program. Only the coordinator of the team advocacy

[3] The other two powers, which do not concern the issues in this case, are set forth in §§ 43-33-350(1) (P&A "shall protect and advocate for the rights of all developmentally disabled persons . . . and for the rights of other handicapped persons by pursuing legal, administrative, and other appropriate remedies to insure the protection of the rights of these persons") and 43-33-350(3) (providing for the prioritization of the services that P&A provides to its clients).

> project or the coordinator's designee is authorized to perform reviews of plans of care. The designee must meet criteria developed by the Joint Legislative Committee on Mental Health and Mental Retardation, after consultation with the system and the South Carolina Association of Residential Care Homes. The system shall prepare a report based on the inspection which must be submitted to the Joint Legislative Committee on Mental Health and Mental Retardation, South Carolina Department of Health and Environmental Control, and State Department of Mental Health.

(Emphases added.)

The other power of P&A pertinent to this case is set forth in § 43-33-350(2). Its relevance lies in its reference to records that P&A may review in its investigations of specific complaints. By contrast, § 43-33-350(4), quoted above, provides authorization for P&A to conduct general random inspections of "living conditions" in facilities in the absence of such specific complaints.

C. Description of the document considered the "plan of care" by DDSN.

The specific document that DDSN has always regarded as the "plan of care" is in the record as Exhibit 1 to the Lacy Affidavit, and also as Defendants' Trial Exhibit 1.[4] Its title is "Service Coordination Annual Assessment." That specific document is a form containing, among things, a formal, standardized assessment of the person's needs prepared by the individual's service coordinator. The service

[4] Dr. Lacy of DDSN testified that the two documents were very similar to each other, R. 186, and that Affidavit Exhibit 1 was a previous edition of Trial Exhibit 1. For simplicity, this brief will refer only to one "Exhibit 1," the trial exhibit, which is entitled "Service Coordination Annual Assessment." R. 187. References herein to that document will be to "Def. Ex. 1."

coordinator gathers information from the person, family members, friends, service providers and medical care providers and then works with the person and the family to determine what services would best address the identified needs. The resulting document, i.e., the plan of care, "typically includes the medical and other services to be provided, their frequency, and the type of provider to furnish them." R. 40. (quoting Lacy affidavit, ¶¶3, 4). Dr. Lacy's testimony was to the same effect. R. 186-189.[5]

A review of Def. Ex. 1, R. 272-296, confirms that it contains a certain amount of medical information. DDSN has not claimed that P&A cannot review any medical information at all. Rather, DDSN contends that the statute only permits P&A to review the one document regarded as the "plan of care." To the extent that Def. Ex. 1 contains medical information, the General Assembly has obviously authorized P&A to review such information, as long as it is in that

[5] On appeal, P&A's counsel questions how the term "plan of care" can refer to the same document, even though its specific title has varied over time. Br. of Appellant at 12-13. However, the circuit court recognized that "[t]he document that performs this function has had different working names from time to time, but those names have always referred to the plan of care. Lacy testimony and Lacy Affidavit, Par. 5." R. 40. There was no suggestion or evidence that the term applied to more than one document at any given time, and accordingly, there has been no indication that anyone who works with these plans has any problem understanding the identity of the document that is the plan of care. P&A has also noted that DDSN has referenced "plans of various kinds" in its Answer. Br. of Appellant at 18. However, P&A has not shown how any of those (listed in interrogatory answer 4, amount to "plans of care" even in the generic sense, unless they are component parts of Def. Ex. 1. Nor has P&A ever shown that DDSN has ever regarded them as the equivalent of Def. Ex. 1. Most or all of them relate to other matters completely.

document. However, DDSN submits that the General Assembly did not authorize P&A to review any other documents that may contain medical information, if indeed there are any other such documents in existence that could be described as "plans," as opposed to "records."

As discussed in detail below, DDSN has at all pertinent times regarded this document (or its predecessors that had different names but the same functions), and no other document, to be the "plan of care." As the circuit court held,

> [Exhibit 1 to the Lacy Affidavit] . . . is the document generally referred to as the "plan of care." This meaning of the term is one that has had long usage. *Id.*, Par. 6. While P&A claims that the term also applies to other documents, P&A has not disputed any of these facts set forth in the Lacy affidavit, nor did P&A provide any evidence to the contrary in any respect.

R. 40. (emphasis added).

SUMMARY OF ARGUMENT

A reading of P&A's enabling legislation as a whole makes it clear that the General Assembly intended to deny P&A's "team advocacy" inspectors access to the personal records of individuals who live in residential facilities for the developmentally disabled or handicapped, with only one exception: the plan of care for each individual. (Issue 1) As a matter of common usage, the term "plan of care," in the context of a record found in the facilities in which those individuals live, refers to one specific document. There was abundant information, both factual and legal, to show that that document was the one regarded as the plan of care by

DDSN and by the federal Department of Health and Human Services, which provides Medicaid funding for virtually all of the residents in the facilities involved in this case. (Issue 2) As a result, the circuit court correctly concluded that the General Assembly, in authorizing P&A to conduct team advocacy inspections of "living conditions," only intended for P&A to have access to the document regarded by DDSN and the federal Department of Health and Human Services as the plan of care.

P&A makes several miscellaneous arguments against the above interpretation of the statute. These were rejected by the circuit court in either its original Order, or in the Order denying reconsideration, or both. (Issue 3) P&A also raises several arguments about why the circuit court order could hamper its ability to conduct the all-inclusive inspections it believes it should be able to conduct, but the terms of the statute provide no support for P&A's claim to be able to conduct inspections with virtually no limits. P&A's claims in this regard are more properly addressed to the General Assembly. (Issues 4 and 6)

Finally, P&A contends that its own interpretation of the statute is entitled to deference, but the circuit court correctly held that P&A's role pertaining to the statute is not the same as it is for those to whom this rule applies. In addition, P&A's interpretation did not extend over a very long time. As soon as P&A started to attempt to apply its own interpretation to inspections of DDSN-licensed facilities, DDSN refused to accept P&A's broad view of the statute. (Issue 5)

ARGUMENT

1. The General Assembly did not intend for P&A, when conducting inspections of "living conditions" in residential facilities for the developmentally disabled or handicapped, to review medical information in the records of residents of those facilities, unless such information is contained in "plans of care."

The circuit court rejected P&A's broad claims to be able to review virtually all records of all CTH II residents for several different reasons. One of these is that a reading of the statute as a whole makes it clear that the General Assembly intended for P&A to have only very limited access to the medical records and other personal records of persons residing in the defined facilities. R. 43-44.

Section 44-33-350(4), the subsection that authorizes P&A to conduct team advocacy inspections of "living conditions," references only one specific kind of document, that is, "plans of care for individuals in a residential care facility." P&A argues that this term includes any and all medical records of those individuals. R. 19-20. However, the language of a different section, § 43-33-370(2), provides for substantial limitations on P&A's ability to examine the "individual medical, treatment, and or other personal records" of individual residents upon receipt of a complaint. A "complaint" is defined in § 43-33-340(5) as an allegation of "injury or deprivation with regard to [a resident's] health, safety, welfare, rights or level of care." Section 43-33-370(2) provides that upon receipt of such a complaint, P&A may

> Inspect and copy <u>any</u> documents, records, files, books, charts or other writings which are maintained in the

> regular course of business by the program or facility and which bear upon the subject matter of the individual complaint, except for the individual medical, treatment or other personal records of other persons in the program or facility.

(Emphases added.)

The circuit court held that this part of the statute reflected the General Assembly's intention to afford P&A access to the records of individuals (other than plans of care) only when there had been a complaint filed against a facility by a specific patient or when there had been waiver by a patient or guardian. R. 43-44. Even then, as the circuit court held, § 43-33-370(2) permits only the records of the specific individual are to be inspected and copied. That section expressly prohibits P&A from reviewing the "individual medical, treatment or other personal records" of other persons in the same facility. *Id.* The court also cited § 43-33-400. R. 44, 50-51. That section provides as follows:

> All departments, officers, agencies and institutions of the State shall cooperate with the System in carrying out its duties. . . . Notwithstanding any other provision of law, any program or facility shall permit the System to inspect and copy any record or documents provided for in 43-33-370(2).

R. 50. (emphases in order).

As the circuit court held, these other provisions make it clear that the General Assembly could not reasonably have intended for P&A, in the course of team advocacy inspections of living conditions, to review the individual medical records of the approximately 2,500 residents of CTH IIs licensed by DDSN (*see* R.

180), when the General Assembly prohibited P&A from reviewing the records of even one more person in a facility that has been the subject of an actual complaint of potential injuries or other deprivations. R. 43-44. These conclusions were reiterated in the Order Denying Reconsideration. R. 24-30.

If the General Assembly had wanted to make the residents' "individual medical, treatment or other personal records" even slightly more available to P&A, the logical place to start would have been to permit P&A to review those records pertaining to the other two or three persons residing in the same facility that had been the subject of an actual complaint. That would have permitted P&A to see whether the records of those other residents of the same facility were experiencing injuries or deprivations similar to those allegedly experienced by the resident on whose behalf the complaint was filed. Instead, the General Assembly placed even the medical and personal records of those co-residents off limits.

On appeal, P&A's only argument on this point is to point out the various factual differences between team advocacy inspections and investigations of a specific complaint. Br. of Appellant at 23-24. P&A has not, however, made any attempt to explain why the those differences should permit review of all residents' medical and personal records, when other parts of the same statute prohibit P&A from reviewing the medical and personal records of even one more person.

In connection with this issue, the circuit court cited the familiar principle that "[i]n ascertaining the intent of the legislature, a court should not focus on any

single section or provision but should consider the language of the statute as a whole." R. 30-31. (quoting *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996)). In order to accept P&A's contention that the General Assembly intended for P&A to have access to medical and personal records other than the plan of care, it would be necessary to "consider the particular clause being construed in isolation," a practice which is frequently held to be an inappropriate way in which to construe a statute. *See, e.g.*, *Liberty Mut. Ins. Co. v. S.C. Second Injury Fund*, 363 S.C. 612, 622, 611 S.E.2d 297, 302 (Ct. App. 2005).

The circuit court also held that the plain meaning of the term "plan of care" connotes something different from a medical record, and specifically from a medication administration record. R. 44-45. As the court held, "[a] 'plan' is a document providing for guidance in the future. Thus, as typically defined in dictionaries, a "plan" is "a scheme or method of acting, doing, proceeding, making, etc., developed in advance." *Id.* (Emphasis added, footnote omitted).

The court further held that "a plan of care is a guidance document that sets forth what will be provided to the person. On the other hand, most medical records, and especially the medication administration records Plaintiff seeks, are not advance planning documents, but rather are documentations of something that occurred in the past, specifically, documentations of the previous administration of

medications." *Id.* To put it even more simply, at least with reference to MARs, those documents are actually labeled "Medication Administration Records."

The Order further concluded that by limiting the records reviewable by P&A in the course of a review of "living conditions," § 43-33-350(4), the General Assembly intended that P&A would be able to review plans of care in order to see whether the conditions in the facilities were responsive to the residents' plans of care. R. 45. However, the Order continues, "since the team advocacy inspections were to pertain only to living conditions, and not to each individual's specific situation, the line was drawn by the General Assembly at plans of care." *Id.*[6] Plaintiff's claim of a right to review documentations of past events therefore fails to satisfy the most basic definition of what a "plan of care" might be. In the Order Denying Reconsideration, the court reiterated that "[t]he 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.'" R. 23.

For the reasons set forth above, the court was clearly correct in rejecting P&A's contention that P&A could review any medical or personal records other

[6] Of course, the General Assembly could always decide to expand the nature of the documents reviewable by P&A, but that policy decision is one for the legislature, and not this Court, which is faced with the clear language of the statute, as well as the undisputed practice under that language.

than those included within the meaning of the term "plans of care" in § 43-33-350(4).

2. In this context, the term "plan of care" in § 43-33-350(4) refers to a specific document with specific contents.[7]

The circuit court also concluded that the term "plan of care" in § 43-33-350(4) refers to a specific document with specific contents. The court rejected P&A's conclusion that the term was intended to be used in a generic sense. P&A contended, as it does on appeal, that the General Assembly intended to permit P&A to review any document which might arguably be a "plan" relating to "care." The court instead concluded that in the present context, a "plan of care" was one specific document, that is, Exhibit 1. R. 22-23, 25; 39-43.

It is well settled that in construing a statute, the court should look to its context, as occurred here. *See, e.g., Lambries v. Saluda Cnty. Council,* 409 S.C. 1, 11, 760 S.E.2d 785, 790 (2014) ("[i]f a statute's terms are clear and unambiguous, they must be taken and understood in their plain, ordinary and popular sense, unless it fairly appears from the context that the Legislature intended to use such

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[7] P&A claims that the use of the plural term "plans of care," in the plural, means that the phrase must be generic and that other documents could also be regarded as "plans" of care. Br. of Appellant at 10-11. The circuit court rejected this claim, holding that "[t]he short answer to this is that each facility has more than one resident, each of whom will have a plan of care, so it is completely appropriate to refer to those specific plans, one per resident, in the plural." R. 49. This conclusion of the circuit court (which P&A has not specifically challenged on appeal) is bolstered by language of the entire phrase in which the term appears: ". . . the plans of care for individuals in a residential care facility and a community mental health center day program."

terms in a technical or peculiar sense"); *Etiwan Fertilizer Co. v. South Carolina Tax Commission*, 217 S.C. 354, 360, 60 S.E.2d 682, 684 (1950) (same); *Poole v. Saxon Mills*, 192 S.C. 339, 6 S.E.2d 761, 765 (1940) ("[t]he first and most elementary rule of construction is, that it is to be assumed that the words and phrases are used in their technical meaning if they have acquired one and in their popular meaning if they have not").[8]

In addition, as shown above in Point 1, accepting P&A's contention about the meaning of § 43-33-450(4) would lead to an absurd result, because such a reading would allow P&A full access to personal and medical records to which § 43-33-370(2) tightly restricts access in a situation (individual complaints) which logically would be the most likely situation for that section's privacy-based restrictions to be slightly loosened. *Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Defense,* 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) ("In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature."). Further, to

[8] For the first time on appeal, P&A asserts that none of the information pertaining to context should have been considered. However, to the extent that context was shown by documents and testimony, P&A did not object to it at the trial. Indeed, some of that evidence, such as the 2009 letter and e-mail, R. 85-86, 87, 90-91, 92 and 93, was placed before the court by P&A itself in the attachments to the Complaint and to the Prevost Affidavit. R. 352-358. Even if the point had been argued to the circuit court (which it never was, even at the Rule 59(e) stage), this belated objection is without merit. In addition, even if an ambiguity in the statute needed to be shown before information pertaining to context could be considered, which DDSN denies, the apparent conflict between the language of § 43-33-370(2) and § 43-33-350(4), discussed under Point 1 above, as well as the facial vagueness of the term "plans of care" sufficiently indicate a possible ambiguity.

give § 43-33-350(4) the scope proffered by P&A would render 43-33-370(2) useless because the same records -- for all residents -- would already be available to P&A under 43-33-350(4). *See State v. Graves*, 269 S.C. 356, 363 (1977) ("a statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous").

The specific context of the term "plans of care" in § 43-33-350 is to refer to a document in the possession of a residential facility such as a CTH II, and pertaining to an individual resident. P&A claims that the term should be read as applying generically to anything in the possession of the facility that might in some sense be regarded as a "plan" that in some sense might be said to involve "care." Br. of Appellant at 10-11. As shown previously, this suggested interpretation by P&A is founded in that entity's unsupported claim that it has authority to engage in "oversight of medical care and the provision of medication to the residen[ts] of these homes," a concept that includes "oversight of all the aspects of care." R. 131-132. However, as the evidence and other information summarized below indicates, DDSN has always regarded the term "plan of care" in this context as referring to a specific document.

a. Usage of the term "plan of care" by DDSN.

DDSN presented abundant and unconverted evidence and testimony that the agency has consistently used the term "plan of care" to refer to one specific document, that is, Def. Ex. 1 and its predecessors. For instance, in her affidavit, Dr.

Lacy stated that "[f]or as long as I have been employed by DDSN [i.e., since 1997], the term "plans of care," has had a very specific meaning in the context of service delivery to DDSN clients. R. 384.

Continuing, Dr. Lacy averred in her affidavit as follows:

> 5. While the document in which the needs are listed and the recommendations are made has been known at times by different names, such as "Single Plan," "service plan," or "support plan," those designations are simply different terms for the federally-required "plan of care."
>
> 6. Plans of care have never been regarded by DDSN as including the kinds of records that would be found in a physician's files for an individual, such as diagnostic and treatment notes. Nor have plans of care even been regarded as including medical records, such as medication administration records, that are maintained by the facilities in which DDSN clients reside.

R. 385. Finally, Dr. Lacy identified Exhibit 1 to her affidavit as being a sample form for a plan of care. *Id*, ¶ 7. Her trial testimony was to the same effect. R. 184,[9] 185, 191:19-22.[10] DDSN advised P&A several times in 2009 that the agency regarded documents such as Def. Ex. 1 to be the only document regarded as the plan of care. *See* R. 93. ("DDSN's position on the plan of care is that is refers only

[9] The correct title of the document is "Service Coordination and Annual Assessment," not "useful assessment," as p. 82 of the transcript reads. *See* R. 184:16-18.

[10] The transcript incorrectly reads "plan and care," but other references make clear that this is a transcribing error, and that the reference is to "plan of care."

to the residential treatment/support plan"); R. 87. (DDSN considered "the residential treatment/support plan" as "the same as the plan of care").[11]

Finally, as the circuit court observed, "[t]he term [plan of care] is also used in South Carolina's Medicaid Waiver document, excerpts of which are attached as Exhibit 2 to the Lacy Affidavit. In that document, the plan of care is described in the same manner as in the Lacy Affidavit." R. 42. Dr. Lacy's testimony regarding the same Medicaid Waiver document, Def. Ex. 2, was to the same effect. R. 193-194. Dr. Lacy also confirmed that Def. Ex. 1 was the document referenced in the cited portion of Def. Ex. 2. R. 194:5-8.

b. Usage of the term "plan of care" in federal authorities.

Because funding for virtually all CTH II residents is provided by the Medicaid Waiver program, as P&A has admitted, R. 68, the circuit court also held that the relevant context for interpreting § 43-33-350(4) also includes the use of the term "plan of care" in connection with the Medicaid program, R. 23, 29; R. 40-41. The court cited a number of references to the term in that context. These included (1) a federal statute, 42 U.S.C. § 1395n(c)(1) (referring to "home or community-based services . . . approved by the [federal DHHS Secretary] which are provided pursuant to a written plan of care"; (2) a federal regulation on the same subject, 42 C.F.R. § 441.301(b)(1)(i) (requiring "a written plan of care subject to approval by

[11] As an aside, and contrary to the statement in Br. of Appellant at 18-19, there is nothing in the use of the term "the plan of care" in the document RH5.0, that is inconsistent with DDSN's regarding Def. Ex. 1 as the plan of care referenced in the statute.

the Medicaid agency" when an individual receives Medicaid home or community-based services); (3) another federal regulation to the same effect, 42 C.F.R. § 441.351(f) (referring to "a written plan of care based on an assessment of the individual's health and welfare needs and developed by qualified individuals for each recipient under the waiver"). These references in a federal statute and in federal regulations were quoted at length at R. 40-41.

The court also cited two federal cases and a state case to the same effect: *Doe v. Kidd,* 2011 WL 1058542 (4th Cir. 2011), which characterized the "plan of care" as a specific document that was developed pursuant to 42 C.F.R. § 441.301(b), the same regulation cited above; *Boatman v. Murphy*, 2010 WL 2178821, 1 (S.D. Ind. 2010) (case manager assesses the Medicaid waiver applicant's specific needs and creates a plan of care and cost comparison budget, which are submitted to the Division of Aging for review); *McCrann v. Dep't of Health and Human Servs.*, 704 S.E.2d 899, 901 (N.C. App. 2011) (plan of care in the Medicaid waiver program is "a schedule of services to be provided to the program participant"). R. 42.

All of these references leave no doubt that in the context of Medicaid services provided to residents of CTH II facilities, virtually all of whose residents are funded under the Medicaid Waiver, R. 68, there is only one specific document, Def. Ex. 1 and its predecessors, that is recognized as the plan of care.

P&A claims that any document could be regarded as the statutorily-referenced plan of care if it was a "plan" in some broad sense that had something to do with "care," again in the broadest sense. However, the record and the cited legal authorities make it clear that any document other than Def. Ex. 1 and its predecessors would not be recognized in this context as the plan of care.

3. P&A's contentions regarding the interpretation of the statute are unavailing.

The Brief of Appellant contains a number of contentions regarding the interpretation of the statute. The circuit court rejected all that were presented to it. Each of these contentions by P&A, not otherwise already addressed above, is briefly addressed below.

a. References to federal law.

P&A also asserts that the cases, regulations and statute referenced by the circuit court were not relevant because those references were to "provisions of federal law, not South Carolina law." Br. of Appellant at 15. P&A made essentially the same point in its Rule 59(e) motion. R. 474-475.

The circuit court rejected this contention, holding that "[t]he 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." R. 22. The cited authorities showed that the term "plan of care" was not a generic phrase that could refer to anything that might arguably be called a "plan" for "care," but rather to the specific

document exemplified in Defendants' Def. Ex. 1, R. 272-294, and Lacy Affidavit Exhibit 1, R. 387-418.

P&A also makes the erroneous claim that DDSN would regard Def. Ex. 1 as being the plan of care in some context other than the one in which it is made. Br. of Appellant at 17. In other words, for instance, P&A claims that Def. Ex. 1 should not apply to CRCFs. However, P&A has not made a showing as to why this "plan of care" should not be used in CRCFs. P&A also claims that there is no reason why regarding Def. Ex. 1 as the plan of care should apply outside of the context of Medicaid-funded residential care, but as P&A has freely admitted, virtually all residents in CTH II facilities are Medicaid Waiver participants. R. 55. In any event, the point is that Def. Ex. 1 is regarded as the plan of care by DDSN, and no reason has been shown why DDSN should regard the identity of the plan of care as a different document in those very few instances in which a resident is not funded by the Medicaid Waiver. The court below rejected this claim, holding that:

> [T]he 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.

R. 29.

b. State statutes and regulation.

P&A also claims that other South Carolina statutes and regulations shed light on the meaning of the term "plan of care" in this context. Br. of Appellant at 16-17. This claim was rejected in the Order Denying Reconsideration, in which the circuit court held that "P&A does not cite to any particular definition of the term in any of those references that would support its arguments in this case." R. 23. The same is true for all of the quoted references at pp. 16 and 17 of the Brief of Appellant. Moreover, while P&A has not supplied evidence of any of the "plans of care" referenced in the instances cited at pp. 16-17 of the Brief of Appellant, none of them indicates that the term is used generically. At least some of them indicate that they also refer to one specific document as a "plan of care," and the context of some of them, that is, the references to persons at DDSN facilities and/or receiving Medicaid Waiver funding, appear to refer to the same document as Def. Ex. 1. *See, e.g.*, § 44-81-40(J) (referring to "the plan of care for the resident" (emphasis added); S.C. Code Ann. Regs. 61-13 E(3) (referring to "the individual plans of care." for CRCF residents; § 44-7-350 (referring to "an individual plan of care" for CRCF residents); S.C. Code Regs. 126-314 (specifically referring to "a written plan of care in Medicaid-contracted facilities"). P&A asserts that "[t]hese statutes refer generally to a written plan of care, encompassing all manners of care the individual is receiving -- including medical care." Brief of Appellant at 17. The three quotations from the statutes for which this bare assertion is made are simply

silent on the issue of whether medical care is to referenced in a plan of care. P&A has provided nothing that would indicate that there exists such a thing in the present context as a plan of care that is not Def. Ex. 1 or its functional equivalent.

c. P&A's claim that the statutes should be "liberally construed."

P&A asserts that its enabling legislation should be "broadly" or "liberally" construed. Br. of Appellant at 19-20. This claim was rejected by the circuit court, R. 25. This claim also was rejected on the ground that P&A's functions in this context do not trigger the rule that an agency's construction is entitled to deference. That issue is discussed in Point 5 below. For the same reasons, also discussed in Point 5 below, P&A's citation of *DHEC v. Bellwood Manor, Inc.*, 2010 WL 6782577 (S.C. Administrative Law Court 2010) does not assist P&A, because that case had no occasion to consider whether P&A could review any particular record or category of record.

d. P&A's claim regarding legislative intent when the term "plans of care" was added in 1993.

At pp. 20-21, the Brief of Appellant contends that the General Assembly added the term "plans of care" in 1993 in order to "improve medical care" and to "ensure that people with developmental disabilities received the proper medical care." Br. of Appellant at 21. In fact, however, the 1993 amendments prove just the opposite of the claim made by P&A. If the General Assembly had wanted to provide for oversight of "all the aspects of care," as P&A now claims, it could have

done so by simply authorizing P&A to review "all records," rather than only "plans of care," and to conduct inspections of "all the aspects of care," instead of only inspections of "living conditions."

On appeal, P&A argues in effect throughout its brief that any and all aspects of the operation of a CTH II (other than perhaps its financial operations) constitute "living conditions." The circuit court rejected this claim, R. 48-49, citing several South Carolina cases that equated living conditions with the physical aspect of a housing facility. P&A's all-embracing definition of "living conditions" is at odds with the term's ordinary meaning and with common parlance.

e. Use of the term "including."

At pp. 21-22 of the Brief of Appellant, P&A asserts that when the statute provided for P&A to make "unannounced visits to review the living conditions of a residential facility, including the plans of care for individuals in a residential care facility," the term "including" suggests that other records might be reviewed as well. This claim was rejected by the circuit court at pp. 13-14 of the Amended Order, R. 47-48. P&A does not challenge or even mention the reasoning of the circuit court, but in any event the circuit court's conclusion was correct. It held in part on this issue that

> The first problem with this argument is that it contradicts the well-settled rule that "to express or include one thing implies the exclusion of another," also known as "inclusio unius est exclusio alterius." *Nelson v. Ozmint*, 390 S.C. 432, 436-437, 702 S.E.2d 369, 371 (2010). [fn 5]. The fact that plans of care are referenced, but no other

> types of records, is a compelling indication that the General Assembly intended for only those records to be inspected.
>
> [Court's Fn 5] P&A references cases in which the presumption is reversed, but those involve situations where the word "including" modifies the term to be defined. In order for that rule to apply in the present case, the statute would have to say "records, including plans of care," but it does not say that. Instead, it says "living conditions . . . , including plans of care. . . ."

R. 47. P&A offers no reason why this holding should be reversed.

f. Privacy protections within the statute.

At. pp. 22-23 of the Brief of Appellant, P&A refers to portions of its enabling act that provide for privacy. The circuit court rejected that claim, holding that "the definition of the term 'plans of care' is not, as a matter of simple logic, determined by who can view the defined documents," and that this claim was therefore "not relevant to the issue before the Court." R. 38.

4. P&A's claims that the circuit court's interpretation would "prevent P&A from conducting the proper inspections as required by statute" involve matters of policy for the General Assembly, and are without merit in any event.

P&A's Issue II comprises three different arguments to the effect that the circuit court's decision regarding plans of care would adversely affect P&A's ability to conduct "proper inspections." As already shown above, P&A's view of what would constitute a "proper inspection" is all-embracing, extending well beyond what would normally be regarded as an inspection of "living conditions." P&A obviously believes that as a matter of policy, its power to inspect CTH IIs

and other similar residential facilities should be essentially unlimited. However, the only issue in this case is the proper construction of § 43-33-350(4). If P&A believes that limiting its reviews of records to "plans of care" that resemble Def. Ex. 1 is too restrictive to permit team advocacy inspections to accomplish what P&A believes they should accomplish, then the proper forum in which to present those arguments is the General Assembly.

a. P&A's claimed need to review residents' medical records.

P&A's argument on this point consists almost entirely of its views on what the law ought to be, as opposed to a discussion of the specific issue of the meaning of the term "plans of care." Br. of Appellant at 25. Nothing cited by P&A under this heading suffices to trump the circuit court's analysis of the parts of the statute that actually pertain to the records that P&A can review.

b. Effect on unannounced inspections.

On this point, P&A argues that its ability to make unannounced inspections would be hampered by the circuit court's decision. Br. of Appellant at 26. First, however, this argument is logically flawed, because it starts with the unsupported assumption that P&A is actually authorized to review records other than the plan of care. As the circuit court correctly held, however, "that result [an effect on unannounced inspections] still cannot expand the meaning of the term 'plans of care' beyond the clear meaning that the term has in this context. . . . This entire argument is therefore simply beside the point." R. 46-47; *see also,* R. 29-30. It

should also be noted that even without access to the personal and medical records P&A claims it should be able to see, its inspections of living conditions have proceeded. A review of the 12 team advocacy inspection reports that are part of the record indicates that P&A could and did inspect the kinds of conditions normally thought of as "living conditions." *See generally,* Pl. Ex. 1 (indicating inspections of numerous physical aspects of the CTH IIs, such as bathrooms, living rooms, refrigerators, cabinets, doors, windows, etc.).

c. P&A's claim that the circuit court's decision would require the plan of care represented by Def. Ex. 1 to be used in "all inspections."

In Issue II(C), Br. of Appellant at 27-28, it is argued that if the result reached by the circuit court were to be taken to its logical conclusion, P&A's inspections of other types of facilities, such as CRCFs, would be limited to the "plan of care" exemplified by Def. Ex. 1. There is nothing in the record to support this claim. If in fact the context pertaining to any other inspections is the same as for DDSN's CTH IIs, then that result would be the right result. If P&A does inspections in different contexts, there has been no factual showing of what those contexts might be, much less why Def. Ex. 1 would not be applicable in those contexts. This hypothetical claim therefore simply lacks a foundation in the record.

5. The circuit court correctly held that P&A's construction of § 43-33-350(4) was not entitled to deference.

In Issue III of the Brief of Appellant, P&A argues that the circuit court should have accorded deference to P&A's views on the construction of the statute.

This issue was comprehensively discussed at pp. 5-8 of the Order Denying Reconsideration, R. 26-29.

The primary case on which P&A relies is the leading federal administrative law case, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Chevron* has been only sparingly cited in South Carolina, where our Supreme Court has cited it only in support of the idea that "[i]f the statute or regulation 'is silent or ambiguous with respect to the specific issue,' the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference. *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 33, 766 S.E.2d 707, 717 (2014).[12]

It is well settled in South Carolina that, as the circuit court held, "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)." R. 26. The circuit court then set forth several reasons why P&A's policies or interpretations do not even fall within this rule, regardless of whether those interpretations are correct or not. R. 26-28.

[12] In federal cases, *Chevron* requires a high level of deference to regulations and other formally-adopted agency actions, but P&A has cited *Chevron* only in the sense that the case is cited in South Carolina, that is, as quoted above in *Kiawah.*

The circuit court held that there must be something in the enabling act to show 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"). R. 26-27. The court then held that there was

> [N]o 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.

R. 27. The court then cited several cases in which deference was not given to the views of agencies or entities whose roles under the applicable statutes were something other than administering it. Those cases included *Kelley v. E.P.A.*, 15 F.3d 1100, 1106 (D.C. Cir. 1994), in which it was held that a "civil prosecutor typically lacks authority to issue substantive regulations to interpret a statute establishing liability." P&A's role, as the circuit court held, is to serve investigative and advocacy functions to the extent authorized by statute. Those functions actually exclude the role of serving as a policymaker, because P&A as an

investigator or advocate is not empowered to legislate the proper subjects of its own activities. R. 27.

On appeal, P&A asserts that the General Assembly "delegated authority to P&A and charged it with administering its own statutes. Br. of Appellant at 28. However, no specific statutory authority is cited in support of this. Instead, P&A merely makes a general citation to the entire enabling act. *Id.* (citing only "*See S.C. Code Ann. §§ 43-33-310 et seq.*").

P&A next cites *DHEC v. Bellwood Manor, Inc.*, 2010 WL 6782577 (S.C. Administrative Law Court 2010). Br. of Appellant at 29, but that case did not involve the issue of giving deference to an agency construction of a statute. In addition, that case did not address the issue of records in any way. P&A cites no other case involving an investigative agency whose role in administering the statute in question was something other than governing under it. *See, e.g.*, *Buist v. Huggins*, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (counties interpreted tax statutes as permitting flat rate of interest on redeemed properties); *State v. Sweat*, 379 S.C. 367, 665 S.E.2d 645 (Ct. App. 2008) *aff'd as modified*, 386 S.C. 339, 688 S.E.2d 569 (2010) (construction of statute regulating maximum gross weight of vehicles; agency construction appears to have been that of the Department of Public Safety).

P&A also claims that "established usage" is a relevant and persuasive guide to a statute's interpretation. Br. of Appellant at 30. However, the facts of this case

actually illustrate why that rule does not apply. As already noted, P&A never even was permitted by DDSN to review documents other than Def. Ex. 1. Moreover, there was no evidence that DDSN was ever aware that P&A was obtaining MARs from CRCFs. Such unknown practices by P&A could hardly be regarded as "established usage." At most, P&A's practices amounted to an investigative body's unauthorized and unilateral attempt to expand its own authority.

Finally, since P&A's relationship to the statutes is not one that qualifies its interpretation for deference, it is not necessary to consider P&A's brief reiteration of the reasons why its "agency interpretation" should be adopted. Br. of Appellant at 30-31. In any event, and as addressed above, those reasons lack merit and were therefore properly rejected by the circuit court.

6. P&A's vague "public policy" argument was properly rejected by the circuit court.

In its Issue 4, P&A contends that its views on the specific issue of statutory construction in this case should be adopted because, P&A believes, its views on this issue would be of most benefit to the clientele it serves. Again, there is no reference at all to the portions of the circuit court Order rejecting essentially the same argument. R. 32-33. The circuit court rejected P&A's argument, holding that "[w]hile no one would disagree with the worthiness of the broad goal[s] [expressed by P&A] . . ., P&A 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." R. 32. Indeed, one

need look no further than § 43-33-370(2), discussed above, to see the substantial limitations placed on P&A's access to residents' individual medical records. As already discussed, P&A's appeal to policy considerations rather than express statutory language amounts to the quintessence of the kind of argument that should be addressed to the legislature instead of the courts.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the orders and judgment of the circuit court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondents certifies that the Final Brief of Respondents complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondents certifies that the Final Brief of Respondents complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondents, does hereby certify that service of the **Brief of Respondents** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 22nd day of September 2015:

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