

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

Case No. 2014-000244

RECEIVED
MAR 21 2016
SC Court of Appeals

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 as 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**

**APPELLANTS' RETURN IN RESPONSE AND OPPOSITION TO
RESPONDENTS' PETITION FOR REHEARING AND MEMORANDUM**

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ATTORNEYS FOR APPELLANTS

**APPELLANTS' RETURN IN RESPONSE AND IN OPPOSITION TO
RESPONDENT'S PETITION FOR REHEARING AND MEMORANDUM**

Pursuant to Rules 221 and 240, SCACR, Appellants, 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 as guardian of S.S., hereby respectfully respond and oppose Respondents' Petition for Rehearing and Memorandum. The Respondents' assert in their petition that the Court erred in its decision and finding for the Appellants. The Court's decision correctly ruled on the issue of standing for Appellant Protection and Advocacy for the People with Disabilities, Inc. (hereinafter "P&A") and did not err in its analysis or application in finding standing. The Decision issued by the Court should remain in place and the parties should be allowed to proceed on remand to the circuit court for litigation of the issues regarding the requirements of specific statutes concerning the promulgation of regulations.

**I. THE COURT DID NOT ERR IN HOLDING THAT APPELLANT
P&A HAS STANDING PURSUANT TO SC CODE §43-33-350.**

The Court did not err in holding that Appellant "P&A has standing under section 43-33-350 and its directive that P&A is entitled to pursue remedies to insure the protection of the rights of disabled persons. Prot. & Advocacy for People with Disabilities, Inc. v. S. Carolina Dep't of Disabilities & Special Needs, No. 2014-000244,

2016 WL 732575, at *3 (S.C. Ct. App. Feb. 24, 2016). As the Court correctly stated, standing may be acquired: (1) through the rubric of “constitutional standing”; (2) under the “public importance” exception; or (3) by statute. ATC South, Inc. v. Charleston Cnty., 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008); Freemantle v. Preston, 398 S.C. 186, 192, 728 S.E.2d 40, 43 (2012). Here, in the case at hand, the Court correctly found and held that P&A has standing by statute to pursue this declaratory judgment action against the Respondents. The Court further found that:

P & A has sufficiently asserted injuries it has suffered as a result of [Respondent] DDSN's alleged failure to promulgate regulations. See Carolina All. for Fair Emp't v. S.C. Dep't of Labor, Licensing & Regulation, 337 S.C. 476, 487, 523 S.E.2d 795, 800 (Ct.App.1999) (“An 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.”).

Prot. & Advocacy for People with Disabilities, Inc. v. S. Carolina Dep't of Disabilities & Special Needs, No. 2014-000244, 2016 WL 732575, at *3 (S.C. Ct. App. Feb. 24, 2016).

The Record full supports and serves as a basis for the Court’s finding on standing for P&A. In her affidavit, Gloria M. Prevost, Executive Director of the Appellant P&A, stated what the impact and effect that the lack of properly promulgated regulations has, and has had, on Appellant P&A and the citizens that P&A is statutorily obligated and mandated to advocate and to protect:

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 disability, and that they are applied fairly.

(Affidavit, R. pp. 164-165; Transcript, R. pp. 634-648; 658-665). While the Appellants want and believe the individual Appellants also have standing, the Appellants collectively understand the Court’s decision and its finding that “P&A is the appropriate party to pursue [declaratory judgment] claims for the promulgation of regulations by DDSN.” Prot. & Advocacy for People with Disabilities, Inc. v. S. Carolina Dep’t of Disabilities & Special Needs, No. 2014-000244, 2016 WL 732575, at *4 (S.C. Ct. App. Feb. 24, 2016)

P&A does allege and show harm that it and its members suffer. To establish constitutional standing, a plaintiff must first show he has suffered an “injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” *ATC South*, 380 S.C. at 195, 669

S.E.2d at 339 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal quotations and citations omitted)). “[A] private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom.” (quoting Evins v. Richland Cnty. Historic Pres. Comm’n, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000)). Freemantle v. Preston, 398 S.C. 186, 192-93, 728 S.E.2d 40, 43 (2012).

Moreover, the South Carolina Supreme Court has often recognized the “public importance” exception to the general standing requirements. “[S]tanding is not inflexible and standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.” ATC South, Inc. v. Charleston Cnty., 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008) (quoting Davis v. Richland Cnty. Council, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007) (citation omitted)). In cases falling within the ambit of important public interest, standing is conferred “without requiring the plaintiff to show he has an interest greater than other potential plaintiffs.” Davis, 372 S.C. at 500, 642 S.E.2d at 741–42 (finding recreation commissioners have standing under the public importance exception to challenge the constitutionality of an act which authorizes their removal from office). However, a matter is deemed to be of public importance only where a resolution is needed for future guidance. Sloan v. Sanford, 357 S.C. 431, 434, 593 S.E.2d, 470, 472 (2004) (“[U]nder certain circumstances, standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.”). Thus, “[f]or a court to relax general standing rules, the matter of

importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance.” ATC South, 380 S.C. at 199, 669 S.E.2d at 341.

The traditional concepts of constitutional standing are inapplicable when standing is conferred by statute. Freemantle v. Preston, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012). The legislature has specifically conferred standing upon P&A to bring claims any citizen of South Carolina to bring a FOIA claim against anyone or any entity in order to protect the rights for all developmentally disabled and other handicapped persons. S.C. Code Ann. §43-33-350. P&A is directed by statute to pursue legal, administrative and other appropriate remedies to insure the protection of the rights of these persons. Id.

The Court’s conclusion and findings are clearly consistent with the law and case law in South Carolina. The Respondents’ analysis is flawed and does not consider the statutory authorization and directive placed upon P&A by the General Assembly, and by Congress. The assurance and protections that the Administrative Procedures Act are not meet, followed or accomplished with the placement of directives or establishment of policy by “other means”. DDSN promulgated regulations do not exist, and in fact, DDSN has made an admission of no regulations. (Answer, R. pp. 82-96; Responses to Requests for Admission, R. pp. 112-132). There are no APA compliant regulations by DDSN other than for licensing programs of certain facilities. There are no promulgated regulations from or by DDSN related to its operations concerning 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.

II. THE COURT DID NOT ERR IN VACATING THE LOWER COURT'S ORDER AND REMANDING THE MATTER.

Appellants take the classic conundrum of dealing with a state agency that rejects the application of the APA to its agency pronouncements of goals, standards and policies and instead claims that it may regulate by “other means” as subject to repetition but always evading judicial review. In its findings, the Court recognized by its findings that it is important to have clear guidance from the Court to address whether (a) DDSN must promulgate regulations in accordance with South Carolina Code Sections §44-20-220, §44-20-790, and §44-26-180, consistent with the provisions of the South Carolina Administrative Procedures Act, §§1-23-10, et. seq., or (b) whether DDSN can continue to disregard the specific protections provided by the APA and application of the underlying and founding tenants of the APA in providing fundamental due process of law under the Fourteenth Amendment of the U.S. Constitution and Article I, §3 and §22 of the South Carolina Constitution and proceed to regulate by “other means” through directives, standards, and manuals that have no force of law under rulings by the South Carolina Supreme Court. See, S.C. Code Ann. § 1-23-10 (4); David E. Shipley & Randolph R. Lowell, *South Carolina Administrative Practice & Procedure* p. 108 (2d ed. 2008). Now that the issue of standing has been addressed, the matter can return to the lower court so that underlying claims can be fully adjudicated and decided.

For these reasons, the Court correctly found standing and that the lower court's order should be vacated and matter remanded. Therefore, Respondents' Petition should be denied.

Respectfully submitted this 21st day of March, 2016.

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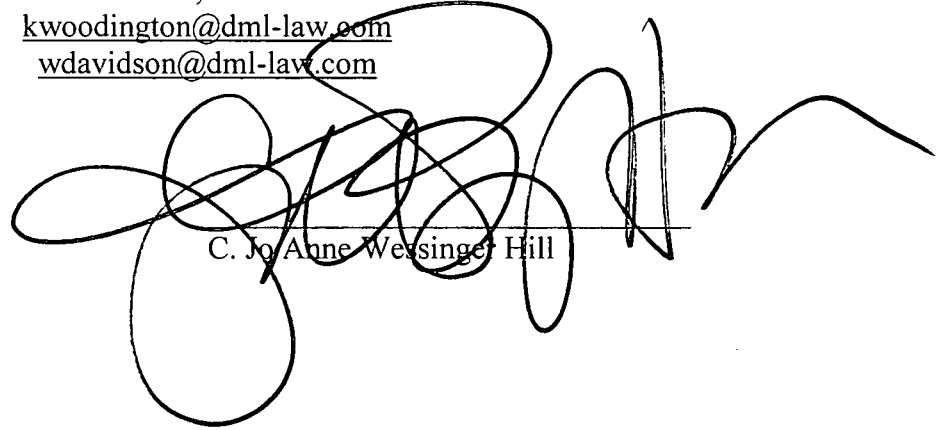
v.

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PROOF OF SERVICE

I the undersigned attorney with RICHARDSON PLOWDEN & ROBINSON, P.A., attorneys for Appellants, do hereby certify that service of the foregoing **APPELLANTS' RETURN IN RESPONSE TO RESPONDENTS' PETITION FOR REHEARING** in the above-captioned matter was made upon all counsel of record this 21st day of March, 2106, by electronic mail and by depositing a copy of same in the U.S. Mail, postage prepaid, addressed as follows:

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March 21, 2016

Via Hand Delivery

The Hon. Jenny Abbott Kitchings
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SC Court of Appeals

Re: *Protection and Advocacy for the People with Disabilities, Inc., et. al., Appellants
v. South Carolina Department of Disabilities and Special Needs, et. al.,
Respondents*
Appeal from Richland County Court of Common Pleas
Case No. 2007-CP-40-02187
Appellate Case No. 2014-000244
Our File No.: 006151.001

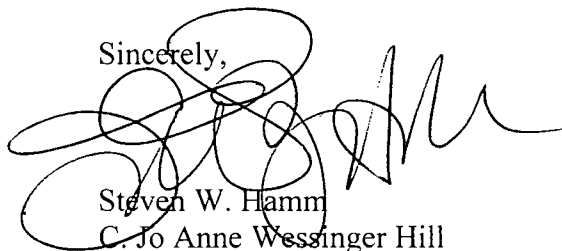
Dear Ms. Kitchings:

Please find enclosed the original and seven (7) copies of Appellants' Return in Response and in Opposition to Respondents' Petition for Rehearing and Memorandum for filing with the Court in this matter. We have also included an additional (7th) copy to be clocked and returned with our courier.

If you should have any further questions or concerns, please do not hesitate to contact Attorney Hill or Attorney Hamm directly. Thank you for your assistance in this matter.

With kindest regards, we am

Sincerely,



Steven W. Hamm
C. Jo Anne Wessinger Hill

SWH/CJWH/smh

Enclosure

cc: Kenneth P. Woodington, Esquire (via US Mail and email) (with enclosure)
William H. Davidson, III, Esquire (via US Mail and email) (with enclosure)