THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

Op. No. 5383
(S.C. Ct. App. filed February 24, 2016)

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 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., ... Respondents,

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, ... Petitioners.

APPENDIX

William H. Davidson, II
Kenneth P. Woodington
DAVIDSON & LINDEMANN, P.A.
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Petitioners

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

Counsel for Respondents

INDEX

THE STATE OF SOUTH CAROLINA
In The 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 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.

Appellate Case No. 2014-000244

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5383
Heard January 7, 2016 – Filed February 24, 2016

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Steven W. Hamm and C. Jo Anne Wessinger Hill, both of Richardson Plowden & Robinson, PA, of Columbia, for Appellants.

William H. Davidson, II and Kenneth P. Woodington, both of Davidson & Lindemann, PA, of Columbia, for Respondents.

LOCKEMY, J.: Protection and Advocacy for the People with Disabilities, Inc. (P&A), et al. (collectively, Appellants), appeal the circuit court's grant of summary judgment for the South Carolina Department of Disabilities and Special Needs (DDSN), et al. (collectively, Respondents), arguing the court erred in (1) finding Appellants did not have standing; (2) failing to consider the fundamental purpose of the Declaratory Judgment Act; (3) ruling on the issue of binding norms; and (4) finding DDSN is not required to promulgate regulations. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL BACKGROUND

Appellants filed this action on April 7, 2007. Appellants include anonymous guardians/friends on behalf of eleven anonymous disabled individuals, and P&A, a private, nonprofit corporation established pursuant to federal and state law to advocate for the rights of people with disabilities.

In their complaint, Appellants asserted DDSN, a state agency established to provide services to citizens with disabilities and their families, failed to promulgate regulations as required by sections 44-20-220, 44-20-790, and 44-26-180 of the South Carolina Code. Appellants sought an order requiring DDSN to "promptly promulgate regulations governing the operation of the department and the employment of professional staff and personnel, and to obtain informed consent and to protect the dignity of the individual in research settings." In addition, Appellants asserted DDSN failed to promulgate regulations regarding "issues of critical concern to applicants and recipients of its services, including but not limited to eligibility for its services; appeal procedures; standards for the operation of its residential programs; procedures for its Human Rights Committees; and standards for research on human subjects." Appellants complained DDSN's failure to comply with the requirements of the Administrative Procedures Act (APA) resulted in citizens and entities being "unable to seek information about its policies

in the South Carolina Administrative Code, unable to determine their rights or receive or dispute []DDSN decisions, and [unable to] participate in the rule making process . . . ." Appellants asserted they have been and will continue to be harmed as a result of DDSN's deficiencies, "through denial of services, inadequate services and unequal availability and quality of services, and lack of an appropriate grievance procedure." Appellants further complained about decisions in individual cases, such as claims that an individual was not eligible for autism services and an individual was not waitlisted for residential placement. Appellants did not ask the court to order any affirmative relief in any of their cases, other than requiring DDSN to promulgate regulations.

Appellants also filed a petition to allow the named plaintiffs in the action to proceed anonymously. The circuit court granted the motion, stating "identification of the individually named Plaintiffs potentially poses a risk of retaliatory denial of needed services which may result in physical or mental harm to the individually named Plaintiffs." According to Appellants, each of the named individual Appellants presented affidavits to the circuit court, which were subsequently sealed by the court.

Thereafter, on May 31, 2007, Respondents filed a motion to dismiss and a motion for a more definite statement. The circuit court denied both motions. Respondents subsequently filed an answer, denying for lack of information the specific facts regarding each of the anonymous individual Appellants. As an affirmative defense, Respondents challenged the standing of all of the Appellants. Respondents also denied DDSN had a duty to promulgate regulations.

Thereafter, both parties filed summary judgment motions. In September 2013, the circuit court granted summary judgment for Respondents and denied Appellants' motion. In granting Respondents' motion, the circuit court held there was "no evidence whatsoever before the [c]ourt as to the facts concerning the individual [Appellants]," and as a result, no evidence was presented of actual injury to any of Appellants and they lacked standing. The court also found Appellants' claims in this case, unlike the claims in public importance standing cases, require a case-by-case factual showing as to how specific plaintiffs are, or are not, affected by the absence of regulations in specific situations. The court further noted that while Appellants relied heavily on the Declaratory Judgment Act in their argument, parties seeking declaratory relief still must demonstrate a justiciable controversy. The circuit court held that even assuming Appellants had standing, their claims lacked substantive merit. The court found no statute required the promulgation of regulations in the subject areas of the lawsuit. The court declined to consider

Appellants' argument that DDSN had improperly established binding norms because it was not pled in the complaint.

Appellants subsequently filed a Rule 59(e), SCRCP, motion to reconsider. The circuit court denied the motion but modified its order to clarify that Appellants would not be precluded from raising issues related to binding norms in subsequent administrative appeals. This appeal followed.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP, which provides summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004).

LAW/ANALYSIS

I. Standing

Appellants argue the circuit court erred in finding they did not have standing. We agree.

"To have standing, one must have a personal stake in the subject matter of the lawsuit." *Sloan v. Greenville Cty.*, 356 S.C. 531, 547, 590 S.E.2d 338, 347 (Ct. App. 2003). Here, Appellants contend they have standing to pursue their claims related to the promulgation of regulations by DDSN pursuant to statute, through the rubric of constitutional standing, and under the public importance exception. *See ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) ("Standing may be acquired: (1) by statute; (2) through the rubric of 'constitutional standing'; or (3) under the 'public importance' exception.").

A. P&A

Pursuant to section 43-33-350 of the South Carolina Code, P&A

> shall protect and advocate for the rights of all developmentally disabled persons, including the requirements of Section 113 of Public Law 94-103, Section 105 of Public Law 99-319, and Section 112 of Public Law 98-221, all as amended, 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.

S.C. Code Ann. § 43-33-350(1) (2015).

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

Gloria Prevost, Executive Director of P&A, stated in her affidavit the impact and effect the lack of properly promulgated regulations has on P&A and the citizens it is statutorily obligated and mandated to protect. According to Prevost, the lack of regulations harms the population DDSN is mandated to serve through (1) the denial of services for arbitrary and capricious reasons; (2) inadequate services and unequal availability and quality of services; and (3) a lack of an appropriate and defined grievance procedure. Due to the lack of regulations promulgated by DDSN, Prevost contends applicants for and recipients of services do not have officially published information about many aspects of DDSN services, including (1) eligibility; (2) appeal procedures; (3) standards for the operation of the residential facilities operated by DDSN; (4) procedures and standards for human rights committees; (5) standards for research on human subjects, including how consent is obtained for research to be performed; and (5) budget cut decisions and procedures. Prevost asserts P&A must expend resources and time in attempting to find and analyze the directives and standards DDSN has issued as a substitution for promulgating regulations.

We hold the circuit court erred in finding P&A lacked standing. We find 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. Further, we find P&A has sufficiently asserted injuries it has suffered as a result of 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.").

B. Individual Appellants

Like P&A, the individual Appellants are seeking the promulgation of regulations by DDSN. They are not seeking individual relief for specific alleged harms. As discussed above, P&A is authorized by statute to pursue legal, administrative, and other appropriate remedies to insure the protection of the rights of disabled persons. Thus, we find P&A is the appropriate party to pursue claims for the promulgation of regulations by DDSN. Accordingly, we hold the circuit court did not err in finding the individual Appellants lacked standing.

II. Promulgation of Regulations

In light of our reversal of the circuit court as to the standing of P&A, we vacate the portion of the circuit court's order concerning the merits of Appellants' appeal, including its findings as to the issue of binding norms. We hold the circuit court's findings in regards to the merits of P&A's appeal were not sufficiently detailed as to the specific claims raised. We remand to the circuit court for litigation of the issues regarding the requirements of the specific statutes concerning the promulgation of regulations by DDSN.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FEW, C.J., and KONDUROS, J., concur.

The South Carolina 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 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.

Appellate Case No. 2014-000244

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

J.

J.

Columbia, South Carolina

FILED
4/22/16

cc:
Kenneth P. Woodington, Esquire
William H. Davidson, II, Esquire
Steven W. Hamm, Esquire
Jo Anne Wessinger Hill, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2007-CP-40-2187

Protection and Advocacy for the People with Disabilities, Inc.; M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as 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.

PETITION FOR REHEARING

The Respondents South Carolina Department of Disabilities and Special Needs, et. al, (that is, all Respondents) petition the South Carolina Court of Appeals

for a rehearing of the Court's recent decision in *Protection and Advocacy, et al., v. South Carolina Department of Disabilities and Special Needs, et. al,* Op. No. 5383 (S.C. Ct. App. filed February 24, 2016).

The grounds for the Respondents' petition for rehearing and the specific relief requested are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

This petition for rehearing is based on the Court's decision in *Protection and Advocacy, et al., v. South Carolina Department of Disabilities and Special Needs, et. al,* Op. No. 5383 (S.C. Ct. App. filed February 24, 2016), the supporting memorandum filed herewith; the briefs and Record on Appeal and subsequent filings with this Court; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

DAVIDSON & LINDEMANN, P.A.

BY: /s/ _____

WILLIAM H. DAVIDSON, II
KENNETH P. WOODINGTON
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Respondents

Columbia, South Carolina

March 9, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2007-CP-40-2187

Protection and Advocacy for the People with Disabilities, Inc.; M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as 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.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The Respondents South Carolina Department of Disabilities and Special Needs, et. al, (that is, all Respondents, referenced herein at times as "DDSN") have

petitioned this Court for a rehearing of the recent decision in *Protection and Advocacy, et al., v. South Carolina Department of Disabilities and Special Needs, et. al,* Op. No. 5383 (S.C. Ct. App. filed February 24, 2016).

In Points 1 through 4 herein, Respondents request that this Court reconsider its opinion and affirm the decision of the circuit court. Alternatively, and without waiving the contentions set forth in Points 1 through 4, Respondents would request that if the case is to be remanded for additional consideration of the merits, as this Court has ordered, the remand order should also permit additional consideration of issues pertaining to standing and continuing justiciability, as discussed in Point 5 herein. This alternative request is based in part on changes in circumstances between 2007, the year in which this case was filed, and the present.

In support of affirmance of the circuit court, Respondents respectfully submit that the following points were overlooked or misapprehended by this Court.

1. In holding that Plaintiff Protection and Advocacy (P&A) has standing "to pursue remedies to insure the protection of the rights of disabled persons," slip op. at 5, the Court overlooked or misapprehended the fact that P&A neither showed, nor even attempted to show, that any specific individual had been injured by the absence of regulations. The case law pertaining to the standing of similar protection and advocacy agencies in other states holds that such agencies only possess standing when they can show either (a) injury either to one or more

individuals within their constituency or (b) injury to the entity itself.[1] P&A in this case has shown neither.

2. With regard to the absence of a showing of injury to any specific individual (whether referenced by name or in some other fashion that would indicate a claim of concrete injury to a specific person), the order of the circuit court, R. I, 7, cited three cases in which P&A organizations were denied standing when they could not show injury to any specific individual. *Doe v. Stincer*, 175 F.3d 879 (11th Cir. 1999); *Tenn. Prot. & Advocacy, Inc. v. Bd. of Educ.*, 24 F.Supp.2d 808, 816 (M.D.Tenn.1998); *Pa. Prot. & Advocacy, Inc. v. Houston*, 136 F.Supp.2d 353, 365-67 (E.D.Pa.2001). Plaintiffs cited no case to the contrary, and the opinion of this Court did not cite any case that specifically addressed the standing of protection and advocacy organizations.[2]

In *Doe v. Stincer, supra,* the Eleventh Circuit recognized that a protection and advocacy organization could be held to have standing to represent individuals who are its constituents, but only if there was a showing of concrete harm to at

---

[1] The lack of injury to the P&A entity itself is discussed under Point 3 below.

[2] Plaintiffs did assert that *Pa. Prot. & Advocacy, Inc. v. Houston*, 136 F.Supp.2d 353, *supra*, supported their claim that harm to the agency could establish standing Br. of Appellant at 13-14. However, that case held only that complaint's allegations pertaining to standing could survive a motion to dismiss. The court specifically held that its decision on standing might be reversed if the case had been at the summary judgment stage, instead of merely at the pleadings stage. 136 F.Supp.2d at 363. (A check of the federal PACER records indicates that the case was later dismissed with no further substantive orders having been issued.)

least one such individual. P&A never attempted to come forward with such a showing of harm to any specific individual.[3]

Doe v. Stincer involved a claim that certain hospital authorities were wrongfully denying mentally ill persons access to their medical records. In support of its claim to have standing, the plaintiff P&A agency in *Doe* provided an affidavit which was similar to the Prevost affidavit in the present case. The affidavit in *Doe* contained only general allegations to the effect that unspecified individuals were wrongfully being denied access to their medical records. No instance of harm to a specific individual was shown. 175 F.3d at 887. Nor was there a showing of causation between the denial of access to hospital records and any injury to any person. For these reasons, and as quoted in the circuit court order in the present case, the Eleventh Circuit rejected the organization's claim of standing, holding as that there was an absence of

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

[3] P&A had no right to rely on the presence in the case of the anonymous individual Plaintiffs, when those claims had been denied for lack of information by the Defendants in the Answer. R. I, 84-91. In that same Answer, Defendants asserted the affirmative defense of lack of standing. R. I, 93.

R. I, 7, quoting 175 F.3d at 887 (emphasis added).

This conclusion is consistent with case law in South Carolina, which holds that "[an] organization has standing on behalf of its members if one or more of its members will suffer an individual injury by virtue of the contested act. *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S. Carolina Dep't of Nat. Res.*, 345 S.C. 594, 600-01, 550 S.E.2d 287, 291 (2001). *Accord, Carolina All. for Fair Employment v. S. Carolina Dep't of Labor, Licensing, & Regulation,* 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999), cited at p. 6 of the opinion in this case. *Sea Pines* also holds that a plaintiff, in order to establish standing, must satisfy two other tests as well: a causal connection between the injury and the conduct complained of, and a likelihood that the injury will be redressed by a favorable decision. 345 S.C. at 601, 550 S.E.2d at 291.

Plaintiffs failed to make the showing required by these South Carolina cases. The Prevost affidavit cited by the Court, slip op. at 5, like the affidavit in *Doe,* did not mention any specific individual who was allegedly harmed. R. I, 164. The affidavit did not even refer to any of the anonymous individual Plaintiffs. In the absence of an allegedly-injured individual, there was obviously no possibility of showing the requisite causal connection. Finally, the Prevost affidavit did not specifically state how an order requiring regulations would redress even the generalized contentions set forth in Paragraphs 5 and 6 therein. *Id.* For these

reasons, DDSN respectfully submits that the portion of this Court's opinion which held that P&A had to assert the claims of individuals should be reconsidered and omitted.

3. Respondents also submit that this Court, in holding that "P&A has sufficiently asserted injuries it has suffered as a result of DDSN's alleged failure to promulgate regulations," slip op. at 5-6, overlooked the absence of a showing of injury to P&A itself, as well as the absence of a causal connection and redressability. The result, if the opinion stands in its present form, is that P&A could bring into court any number of abstract and hypothetical controversies between it and state agencies, essentially asking the courts to "to shape the institutions of government in such fashion as to comply with the laws and the Constitution," a practice held in *Lewis v. Casey*, 518 U.S. 343, 349 (1996), to be "not the role of courts."

The only factual allegation supporting P&A's claim of harm to itself was an assertion in Paragraph 7 of the Prevost affidavit that it was time-consuming for P&A to find DDSN's rules and to make sure the rules so located were still current. R. I, 165. That allegation was manifestly implausible. By the time of the Prevost affidavit (2010), DDSN had published over 120 DDSN Directives on the DDSN website, as the record shows. R. I, 236-242. The Directives contained (and still contain) agency policy and guidance on a wide range of subjects, including the

subjects for which Plaintiffs have claimed that regulations are necessary, and many other topics as well. *Id.* All of the Directives were listed by subject matter. *Id.* (Plaintiffs themselves included in the record a later (2013) online numerical index of the Directives, which is similar to the 2010 version. R. I, 435-39.[4] As a result, the assertion in the Prevost affidavit about a time-consuming need "to search for the rules themselves," R. I, 165, has been shown to be so implausible in fact that it cannot support a grant of summary judgment in favor of P&A on this issue. *See, e,g., United States v. Urbanek,* 39 F.3d 1179 (4th Cir. 1994)(nonmoving party could not overcome a summary judgment motion using only "self-serving, unsupported, and implausible affidavits").[5] South Carolina law is to the same effect, as illustrated by *Dean v. Ruscon Corp.,* 321 S.C. 360, 366, 468 S.E.2d 645, 648 (1996)(no question of fact existed when only one reasonable conclusion was supported by the evidence).

As shown by the online index to the Directives, it is at least as easy to locate an applicable Directive as it would be to find the same substantive content if it had been embodied in a regulation. Thus, even if DDSN's rules had taken the form of

---

[4] The degree of detail in the individual Directives is illustrated by one such Directive that is in the record. R. I, 362-373.

[5] Even if P&A's claim of difficulty in locating applicable provisions might have sufficed to deny summary judgment to DDSN, which DDSN does not concede, it was not sufficient to support a grant of summary judgment to P&A on the issue of injury to P&A itself, which is the effect of this Court's decision.

regulations, any such regulations would not necessarily be any easier to locate than the Directives used by DDSN. To the contrary, the Directives are probably more easy to identify and search than regulations would be. In any event, the substantive legal issue of whether regulations are required does not turn on whether agency policy is expressed in a user-friendly manner, but on whether a particular statute requires the promulgation of regulations. Accordingly, even if the assertions in the Prevost affidavit had not been implausible as a matter of fact, they still would not establish as a matter of law that a legally-protected interest of P&A has been violated by the absence of regulations.

4. Respondents also respectfully submit that in holding that the circuit court order was "insufficiently detailed as to the specific claims raised," slip op. at 6, the Court misapprehended the fact that the circuit court order reviewed and discussed all of the statutes on which Plaintiffs' claims were based. That order, in the course of seven pages, concluded that none of those statutes mandated the promulgation of regulations. R. I, 10-17.

The opinion of this Court also vacated the circuit court's "findings on the issue of binding norms." The circuit court held first, that the "binding norm" issue had not been raised by Plaintiffs and that as a result, "it should not be considered." R. I, 18. Plaintiffs argued the same thing on appeal, contending that "The lower court erred in making a ruling concerning binding norms when it was not an issue

raised in the Complaint by the Appellants." Br. of Appellants at 28. DDSN would therefore submit that in vacating that holding, this Court's opinion overlooked the fact that the circuit court and both sides to the case were in agreement that the "binding norm" issue was not properly in the case.[6] DDSN would therefore request that the "binding norm" issue should not be addressed on remand, even if the case is remanded for the consideration of other issues.

With regard to the need for a remand in general, DDSN submits that Plaintiffs' counsel was not denied the opportunity to present Plaintiffs' case on standing and the merits to the circuit court, both in briefing and in argument. *See* R. I, 174-223; R. I, 250 - II, 535; R. II, 632-649, 658-663. The circuit court in turn fully addressed the claims actually made by Plaintiffs. The claim of Plaintiffs' counsel in reply oral argument in this Court, which was to the effect that Plaintiffs were not fully heard in the circuit court, had never been previously asserted and is without foundation in any event, as shown by the citations to the record that appear earlier in this paragraph.

5. In the alternative, and without waiving any of the contentions made above, DDSN would submit that if this Court decides to adhere to its decision to

[6] The other holding of the circuit court on the "binding norm" issue was that none of the Plaintiffs had shown actual injury as a result of the alleged use of "binding norms" by DDSN. Given that the issue had not been raised by the Complaint, this alternative holding was not strictly necessary to the decision reached by the circuit court.

remand the case for "litigation of the issues regarding the requirements of the specific statutes concerning the promulgation of regulations by DDSN," slip op. at 6, the circuit court on remand should also be permitted to consider the issue of standing, that is, whether P&A or any individual has suffered any concrete harm as a result of the absence of regulations in some specific context. This request is based on the likelihood that changed circumstances in the nine-plus years since this case was filed have rendered the case no longer justiciable.

This case was filed in the latter part of 2007. Much has changed since then. For instance, as already mentioned above, the Directives are easily searchable and accessible online. The likelihood that any person has actually been prejudiced by the absence of regulations, never yet proven in any event, has become even less likely to exist in view of the published status of the Directives. In addition, this Court's decision in *Stogsdill v. S. Carolina Dep't of Health & Human Servs.*, 410 S.C. 273, 280, 763 S.E.2d 638, 642 (Ct. App. 2014), cert. dismissed as improvidently granted, 415 S.C. 242, 781 S.E.2d 719 (2016), by exempting matters contained in the Medicaid Waiver plan from the requirements of state law regarding regulations, has rendered it substantially less likely that an individual will be prejudiced by the absence of state regulations, because most recipients of DDSN services are Medicaid-eligible persons. (*Stogsdill* was decided some months after the circuit court order in the present case). The existence of the *Stogsdill*

ruling also casts considerable doubt on P&A's claim to have been harmed by the absence of regulations, again because many, if not most, of P&A's constituents are Medicaid Waiver participants for whom the presence or absence of state regulations is much less likely to matter.[7]

If no adversely affected individual is identified (not necessarily by name), and assuming that P&A has shown no plausible injury to itself (as contended above and especially in light of *Stogsdill*), then there is simply no continuing case or controversy, and the case should be dismissed. *See, e.g., Pee Dee Elec. Coop. Inc., v. Carolina Power & Light Co.,* 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983)("A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute"). Absent an actual controversy, the court lacks jurisdiction to order relief. *Tourism Expenditure Review Comm. v. City of Myrtle Beach*, 403 S.C. 76, 81, 742 S.E.2d 371, 373 (2013).

If, on the other hand, P&A can find someone who claims injury as a result of the absence of a specific regulation, then that claim of need for a regulation can be weighed in light of the facts surrounding such claimed actual injury and the effect,

[7] There is almost surely no doubt that most DDSN clients are Medicaid recipients, but if there is any controversy about this issue, it is something which could be addressed on remand. This point was not in issue in 2013 when this case was decided by the circuit court, because the *Stogsdill* decision in this Court was still some months in the future.

if any, that ordering a regulation might have in redressing any such injury. (For example, if someone could show that he or she had been denied benefits as a result of the absence of a regulation, then perhaps at least the requisite standing would have been shown—although most or all of the applicable eligibility requirements would be found in the state Medicaid Waiver document, and thus, as held in *Stogsdill,* would not need to be promulgated in a regulation. A remand which included a requirement that an individual claim be asserted would enable a reviewing court to examine the legal issues in this case in the factual context of an actual claimed injury. In addition, if the Court were to so order, a remand could also permit P&A, if it elects to do so, to see whether it can provide evidence of some real injury to itself as an entity.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court rehear its decision and issue an opinion affirming the decision of the circuit court on one or more of the bases set forth above, or in the alternative, remand for further consideration of issue of standing. If standing is established, the circuit court could then consider the issue of whether the applicable statutes require a regulation in that context.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: /Ken Woodington

WILLIAM H. DAVIDSON, II
KENNETH P. WOODINGTON
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Respondents

Columbia, South Carolina

March 9, 2016

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

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

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

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.

RICHARDSON PLOWDEN & ROBINSON, P.A.

By: _____

Steven W. Hamm
swhamm@richardsonplowden.com
C. Jo Anne Wessinger Hill
jhill@richardsonplowden.com
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
(803) 779-0016 facsimile
ATTORNEYS FOR APPELLANTS

Columbia, South Carolina

March 21, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2007-CP-40-2187

Protection and Advocacy for the People with Disabilities, Inc.; M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as 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.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The Respondents South Carolina Department of Disabilities and Special Needs, et. al, (that is, all Respondents, referenced herein at times as "DDSN")

submit the following Reply to Appellants' Return to Respondents' Petition for Rehearing.

Virtually everything argued in the Return has already been addressed by Respondents in their Petition for Rehearing. Respondents would note that Appellants' Return does not address a number of the points made by the Petition for Rehearing. For these reasons, Respondents would note only the following by way of reply:

1. Respondents in their Petition for Rehearing suggested that if the case is remanded, the circuit court should also be permitted to consider the issue of P&A's standing, given that much has changed since this action was filed in 2007. Petition for Rehearing, Point 5, pp. 9-12. Specifically, since P&A originally claimed injury to itself as a result of having to make allegedly-laborious searches for DDSN's Directives, that assertion should be re-examined in view of the present ease of finding those Directives in their current online form. Appellants' Return is completely silent with respect to this request by Respondents.

2. Appellants' Return cites *Freemantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40, (2012), a case never cited by this Court or either party, as holding that when standing is conferred by statute, it is unnecessary to consider the existence of constitutional standing. Return at 6. That may be true in the case of some statutes, but the statute creating P&A falls far short of conferring standing in the specific

manner of the Freedom of Information Act, the statute under review in *Freemantle.* The FOIA statute, S. C. Code Ann. § 30–4–100(a), provides that "Any citizen of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter in appropriate cases. . . .". On the other hand, the P&A statute, S.C. Code Ann. § 43-33-350(1), contains no language specifically permitting P&A to file an action in circuit court on its own behalf when there has been no showing of harm to itself. As a result, *Freemantle* does not apply to this case.

3. The remainder of Appellants' Return either makes arguments that have already been addressed in the Petition for Rehearing, or argues that public importance standing exists in this case, Return at 5, a rationale this Court did not adopt.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court rehear its decision and issue an opinion affirming the decision of the circuit court on one or more of the bases set forth above, or in the alternative, remand for further consideration of issue of standing. If standing is established, the circuit court could then consider the issue of whether the applicable statutes require a regulation in that context.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: /s/ _____

WILLIAM H. DAVIDSON, II
KENNETH P. WOODINGTON
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Respondents

Columbia, South Carolina

March 24, 2016