

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

JUL 11 2016

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

SC SUPREME COURT

Case No. 2016 -001050

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. **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**

RESPONDENTS' RETURN TO THE PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rules 242, SCACR, the now Respondents, 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., who initially appealed an Order of Summary Judgment by the circuit court, raised a question of construction regarding statutes concerning the promulgation of regulations by DDSN and asked the court to declare whether or not DDSN must promulgate regulations. DDSN admits that they are required to promulgate regulations related to the operations of the Department. *See, Defendants' Answers to Plaintiffs' Requests for Admission, Response #7. (Def. Ans. Pltfs Req. Adm. No. 7, R. pp. 114, 124-125).* DDSN does not have such regulations. Even though DDSN is charged with the care of individuals with serious disabilities, they continue to cavalierly and intentionally resist and refuse to apply their mandated duty and obligation placed upon them by the General Assembly to promulgate regulations which will give citizens the ability to learn and gain access to the services available, the process or requirements for obtaining such services, and the opportunity to participate or appeal any decision by DDSN.

The Respondents oppose DDSN's Petition for Certiorari and hereby respectfully responds to DDSN's Petition for Certiorari. DDSN asserts in their petition that the Court

of Appeals erred in its decision and finding for the Respondents. The Court of Appeals correctly ruled on the issue of standing for now Respondent Protection and Advocacy for the People with Disabilities, Inc. (hereinafter “P&A”) and did not err in its analysis or application in finding standing. There are no exceptional circumstances claimed by DDSN that would warrant the issuance of a writ for certiorari. On certiorari, this Court can only correct errors of law and will not review factual findings unless wholly unsupported by the evidence. *S.C. Bd. of Exam'rs in Optometry v. Cohen*, 256 S.C. 13, 180 S.E.2d 650 (1971); *Hollman v. Woolfson*, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009). The Decision issued by the Court of Appeals 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 that address and require the promulgation of regulations.

STATEMENT OF THE CASE

The relief provided under the Declaratory Judgment Act is remedial and its purpose is “to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations.” S.C. Code Ann. § 15-53-130 (2005). The relevant sections of the South Carolina Code requiring DDSN to promulgate regulations affecting the work of P&A and the lives of individual Respondents are as follows:

The commission ***shall determine the policy and promulgate regulations governing the operation of the department*** and the employment of professional staff and personnel. . . . The commission is authorized to promulgate regulations to carry out the provisions of this chapter and other laws related to mental retardation, related disabilities, head injuries, or spinal cord injuries.

S.C. Code Ann. § 44-20-220 (Supp. 2012) (emphasis added).

A client or his representative shall give informed consent in every case before participation in research conducted by, for, or in cooperation with the department. ***The department shall promulgate regulations to obtain informed consent and to protect the dignity of the individual.***

S.C. Code Ann. § 44-26-180 (Supp. 2012) (emphasis added).

The quintessential rule of statutory construction requires the Court to determine the intent of the Legislature. *SCANA Corp. v. South Carolina Department of Revenue*, 384 S.C. 388, 393, 683 S.E.2d 468, 470 (2009). Intent must first be determined by the plain meaning of the statute. “When a statute’s terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning.” *Sloan v. S.C. Board of Physical Therapy Examiners*, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006). “Under the rules of statutory interpretation, use of words such as ‘shall’ or ‘must’ indicates the legislature’s intent to enact a mandatory requirement.” *Bradley v. Doe*, 374 S.C. 622, 634, 649 S.E.2d 153, 160 (Ct. App. 2007). The plain meaning of S.C. Code §§ 44-20-220 and 44-26-180 is that DDSN must promulgate regulations regarding informed consent, to protect the dignity of the individual, to govern the operations of the department, and regarding employment of professional staff and personnel. DDSN has a mandatory duty to promulgate regulations because the statute uses the word “shall.”

This case began on April 5, 2007 when a group of individual plaintiffs -- who have need for services from, and use services provided by, the South Carolina Department of Disabilities and Special Needs (DDSN) -- and the Protection and Advocacy for People with Disabilities, Inc. (jointly referred to Respondents) filed an action for declaratory judgment pursuant to S.C. Code Ann. §§15-53-10, *et. seq.*, to declare certain legal rights and provide injunctive relief by ordering DDSN to comply

with the regulatory procedures and due process requirements of South Carolina Administrative Procedures Act, S.C. Ann §§1-23-10 through - 160, *et. seq.*, as mandated and required by the General Assembly for all state agencies when promulgating regulations concerning its operations and services. (Complaint, R. pp. 27-50). The Respondents are Protection and Advocacy for People with Disabilities, Inc. (P&A) together with individuals “whose rights, status, or other legal relations are affected by” DDSN’s enabling legislation and by the APA.

Together with their family members and friends, the Respondent individuals are a combination of persons who are residents in facilities for people with developmental disabilities, who reside in DDSN funded housing, who need and request (and requested) treatment and services from DDSN, who may receive some service(s), who have been placed on “waitlist”, who are denied services, who are denied their right to appeal, who are not informed of the eligibility criteria for services, who do not know the criteria for being “placed on waitlist,” who are prohibited from knowing the criteria or standards used or applied by DDSN for any type service determination or funding allotted to them (if any), in whole or in part, or that could be allotted to them, who are clients of DDSN and who remain only potential clients of DDSN due to denial for services. (Complaint at ¶¶ 2, 9, 10, 12-36, R. pp. 33-46). As the Court is aware, Respondent Protection and Advocacy for People with Disabilities, Inc. (“P&A”) is the state entity legislatively designated by the General Assembly to “exercise protection and advocacy functions not only for the developmentally disabled citizens of South Carolina but also for all other handicapped citizens of the State.” S.C. Code Ann. §44-33-310. In fact, P&A is charged with the following responsibilities:

(1) It 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.

(2) It may investigate complaints by or on behalf of any developmentally disabled or handicapped person.

(3) It may establish a priority for the delivery of protection and advocacy services according to the type, severity, and number of handicapping conditions of the person making a complaint or on whose behalf a complaint has been made.

(4) It 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 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.

S.C. Code Ann. §44-33-350 (emphasis added). Governor Edwards issued his Executive Order in 1977 ordering that P&A¹ is the State's organization to perform the function of advocate for developmentally disabled citizens as required by Section 113 of Public Law 94-103, as amended by 95-602. The General Assembly codified that Executive Order

¹ The original name for the P&A entity that exists today was Advocacy for Handicapped Citizens, Inc. in 1977. In 1979, the name changed to South Carolina Protection and Advocacy System for the Handicapped, Inc. However, the board is authorized to change its corporate name and if the board changes its corporate name, the powers and duties of the South Carolina Protection and Advocacy System for the Handicapped, Inc., are considered to be the powers and duties of the successor nonprofit corporation. S.C. Code Ann. § 44-33-330.

into statute in 1979. 1979 Act No. 48, Section 1; S.C. Code Ann. §44-33-310. Since 1977, the P&A organization has been actively performing this function receiving certain state and federal funding under Section 113 of Public Law 94-103, as amended by 95-602, of the United States Congress. S.C. Code Ann. §44-33-310.

DDSN is a state agency created by statute. S.C. Code Ann. §§ 44-20-10 to 44-20-1170 (Supp. 2012). The governing body of DDSN is the South Carolina Commission on Disabilities and Special Needs (Commission). S.C. Code Ann. § 44-20-30(3) (Supp. 2012); 44-20-210 (Supp. 2012); 44-20-220 (Supp. 2012). DDSN is not exempt from the provisions of the Administrative Procedures Act or from the mandatory requirement to promulgate regulations. For decades, DDSN has been operating without the opportunity for scrutiny from the public or subject to legislative oversight, by purporting to regulate through “other means” rather than through duly promulgated regulations as required by law pursuant to the South Carolina Administrative Procedures Act. (Lacy Dep. Tr. pp. 24-248, R. pp. 690-914). Through a filing for declaratory and injunctive relief, this lawsuit simply seeks to require DDSN to comply with established South Carolina law and integrate legislative oversight, transparency, and public access into the development of its policies through the process of promulgating public regulations. This lawsuit does not seek to control the policy itself, only to bring the agency into compliance with its own enabling statute and the requirements of the Administrative Procedures Act (APA). (Complaint, ¶¶ 6, 8, and Prayer for Relief, R. pp 34, 49).

PROCEDURAL HISTORY AND FACTS

The individual Respondents are multiple family members and friends acting on behalf of the eleven individual citizens who are the service group of affected persons

interested in the decisions and services appropriated and delegated by the General Assembly to DDSN. They are individuals with disabilities or parents or guardians of individuals with disabilities who either receive services from DDSN or have applied for services with DDSN and been denied services for reasons unknown to them. (Complaint, ¶¶ 2, R. p. 33). P&A is a private, non-profit corporation established pursuant to federal and state law to advocate for the rights of people with disabilities. (Complaint, ¶ 1, R. p. 32-33; Affidavit of Gloria Prevost, ¶¶ 2, 3, R. p. 163). All of the Respondents have an interest in the lawful operations of DDSN. On April 5, 2007, the Respondents filed their Declaratory Judgment action seeking a ruling on the law from the Court that DDSN is obligated under the current law and its enabling statutes to promulgate regulations in accordance with the Administrative Procedures Act. This case is an action under the Uniform Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10 to 140 (2005) for a declaration that DDSN must promulgate regulations regarding the important public and legislative policy matters listed in Respondents' complaint. (Complaint, ¶ 7, R. p. 34). The Respondents allege that the Defendants have continued to refuse to promulgate regulations in direct violation of DDSN's enabling legislation as well as the Administrative Procedures Act. (Complaint, ¶¶ 6-8, 44-45, R. p. 34, 48). DDSN is required to promulgate regulations because:

- (1) S.C. Code Ann. §§ 44-20-220 (Supp. 2012) and 44-26-180 (Supp. 2012) require DDSN to promulgate regulations;
- (2) The legislature has not granted DDSN authority to regulate by "other means";
and

(3) DDSN's choice to avoid official and state law mandated regulation lacks a rational basis or a substantial justification.

The Respondents are all interested persons under the Declaratory Judgment Act, and have been and are being harmed through DDSN's failure to promulgate lawful regulations. *See* S.C. Code Ann. § 15-53-30 (2005). Section 44-20-20 expressly states that each of them have an established right to receive service.

The State of South Carolina recognizes that a person with intellectual disability, a related disability, head injury, or spinal cord injury is a person who experiences the benefits of family, education, employment, and community as do all citizens. It is the purpose of this chapter [Chapter 20, Title 44 (South Carolina Intellectual Disability, Related Disabilities, Head Injuries, and Spinal Cord Injuries Act)] to assist persons with intellectual disability, related disabilities, head injuries, or spinal cord injuries by providing services to enable them to participate as valued members of their communities to the maximum extent practical and to live with their families or in family settings in the community in the least restrictive environment available. . . . It is recognized that persons with intellectual disability, related disabilities, head injuries, or spinal cord injuries *have the right* to receive services from public and other agencies that provide services to South Carolina citizens and to have those services coordinated with the services needed because of their disabilities.

S.C. Code Ann. §44-20-20 (emphasis added). Individuals with these identified disabilities are among the most vulnerable individuals in the State.

DDSN as a state agency established by the General Assembly for the specific purpose of providing services to the population of citizens with disabilities and their families. With an annual budgets of approximately ½ billion dollars² and servicing an

² DDSN's budget for Fiscal Year 2013-14 was \$580,673,704, with \$186,628,087 in general funds. *See*, Legislative Audit Council Report *S.C. Department of Disabilities and Special Needs' Process to Protect Consumers from Abuse, Neglect, and Exploitation, Administrative Issues, and a Follow Up to Our 2008 Audit*, June 2014, p. 2.

estimated 13,000 consumers,³ DDSN has only promulgated regulations regarding licensing, 26 S.C. Code Ann. Regs. §§ 88-105 to 88-140 (Supp. 2012); day programs, §§ 88-405 to 88-440 (Supp. 2012); recreational camps, §§ 88-310 to 88-395 (Supp. 2012); and unclassified facilities and programs, §§ 88-910 to 88-920 (Supp. 2012). DDSN has not promulgated regulations regarding matters of major concern to the Respondents and the public – eligibility for services, grievance procedures, hearings, appeals, waiting lists, eligibility for residential services, operation of residential services, . (Complaint, ¶ 7, R. p. 34; Defendants’ Answers to Plaintiffs’ Request for Admissions, ¶ 9 (eligibility for services) R. pp. 115, 125; ¶¶ 10, 11 (grievance procedures) R. pp. 115-116, 125-126; ¶ 12 (hearings) R. pp. 116-117, 126-127; ¶ 13 (appeals) R. pp. 117, 127; ¶ 14 (waiting lists) R. pp. 117, 127-128; ¶15 (eligibility for residential services) R. pp. 117-118, 128; ¶ 16 (operation of residential programs) R. pp. 118, 128; ¶ 17 (Human Rights Committees) R. pp. 118, 128-129; ¶ 18 (research on human subjects) R. pp. 118-119, 129; and ¶ 19 (obtaining consent) R. pp. 119, 129).

When the Respondents filed their Complaint, they also filed a Petition to Allow Named Plaintiffs to Proceed Anonymously and a Motion to Designate Petitioners Affidavits as Confidential Information Not Subject to Public Court Record on April 12, 2007, in order to protect their personal records from general public review. (Petition, R. p. 53-54; Motion, R. p. 23-24). Judge Cooper issued the Order granting the Respondents’ Motion to Proceed Anonymously, and an Order granting the Respondents’ Motion to

³ DDSN serves approximately 13,000 consumers in its residential community settings, day programs, and residential institutions. See, Legislative Audit Council Report *S.C. Department of Disabilities and Special Needs’ Process to Protect Consumers from Abuse, Neglect, and Exploitation, Administrative Issues, and a Follow Up to Our 2008 Audit*, June 2014, p.3; Legislative Audit Council Report *A Review of the Department of Disabilities and Special Needs*, December 2008, p. 5. (Both reports provide same 13,000 estimate).

Designate the Petitioners' Affidavits as Confidential on April 12, 2007. (Order, R. p. 23-24).

DDSN filed a Motion to Dismiss and for a more definite statement on May 31, 2007. (Motion, R. pp. 55-59). The parties respectively provided memorandums supporting their respective positions and arguments. (DDSN Memorandum, R. pp. 60-68; Respondants' Opposing Memorandum, R. pp. 69-81). The Motion was heard before Judge Michelle Childs on October 29, 2007. DDSN argued that they could not respond or file an answer to the Complaint without knowing the identity of the named plaintiffs who were granted permission to proceed anonymously through use of their initials; however, counsel for DDSN commented and acknowledged in Court at the hearing that they could figure out who the named plaintiffs were. After taking the matter under advisement, the Court (Judge Childs) issued an Order denying DDSN's Motion. (Order, R. pp. 25-26).

On December 14, 2007, DDSN filed an Answer for All Defendants. (Answer, R. pp. 82-96). The Respondents engaged DDSN in both written discovery through the use of interrogatories and requests for admission, as well as document production and depositions of DDSN Associate State Director Kathi M. Lacy, DDSN Commissioner Deborah McPherson and DDSN Commissioner Dr. John Vaughn. DDSN admits that they are required to promulgate regulations related to the operations of the Department. *See*, Defendants' Answers to Plaintiffs' Requests for Admission, Response #7 (Def. Ans. Pltfs. Req. Adm. No. 7, R. pp. 114, 124).

Notably, DDSN did not engage in any discovery or make any discovery requests through interrogatories, production, requests for admission, or deposition upon the

Respondents. (Respondents' First of Interrogatories to DDSN, R. pp. 133-140; Respondents' Requests for Admission, R. pp. 112-132; Respondents' First Requests for Production, R. pp. 141-162; Lacy Deposition Tr., R. pp. 667-1022; McPherson Deposition Tr., R. pp. 1290-1439; Vaughn Deposition Tr., R. pp. 1023-1289). It is an established fact that DDSN issues directives, standards, and manuals that purport to state the policies of the agency, regulate the operations of the agency, set out the standards applicable to providers and licensees of residential programs, and guide the various decision makers in the agency. *See* Dr. Kathi Lacy⁴ Deposition (Lacy), 25:21 – 26:4 (Lacy Depo, R. p. 691, line 21-p. 692, line 4). Specifically, these directives are to communicate policy to the public. *See* Lacy, p. 27:9-17. (Lacy Depo, R. p. 693, lines 9-17). The directives serve as the closest promulgation of official agency action that DDSN has regarding the issues raised in the Complaint. The directives, treated as agency policy, are posted on the website but remain subject to change at any time without notice and do change frequently assuming a person has a computer, access to the Internet and then knows how and where to specifically find where such directives are actually located without being able to confirm that if they have the correct document.⁵ *See*, Lacy, 38:15-21. (Lacy Depo, R. p. 704, lines 15-21).

DDSN does not have a regulation or a directive stating that its policy is to not promulgate regulations, nor has the issue been directly discussed by the Commission in a

⁴ Dr. Lacy was the Associate State Director, Policy at DDSN. (Lacy, 24:11-18, R. p. 690, lines 11-18).

⁵ Regulations are required to be published in the State Register and are found in the South Carolina Code of Laws Annotated. Judicial notice should be given that there are still areas of South Carolina that do not have access to broadband coverage, nor have reliable or affordable access to the Internet, per the information available from the South Carolina Public Service Commission.

public meeting setting. *See*, Lacy, 92:17- 93:17; (Lacy Depo, R. p. 758, lines 17-p. 759, line 17); *See*, Dr. John Vaughn Deposition (Vaughn), 160:18 – 161:8. (Vaughn Depo, R. p. 1182, line 18-p. 1183, lines 8). The reasoning given by Dr. Lacy for not promulgating regulations was that DDSN is not required to promulgate regulations. *See*, Lacy, 87:15-18; 89:11-12 (Lacy Depo, R. p. 753, lines 15-18, p. 755, lines 11-12). Also, Dr. Lacy testified that her experience is that it is difficult to get regulations approved by the Legislature. *See*, Lacy, 111:1-15. (Lacy Depo, R. p. 777, lines 1-15). Dr. Vaughn testified that regulations are despised by the public. *See*, Vaughn, 120:14-17 (Vaughn Depo, R. p. 1142, lines 14-17). He also testified that anything that should be in a regulation had been “covered already.” *See*, Vaughn, 149:19-25 - 150:1-3 (Vaughn Depo, R. p. 1171, line 19-p. 1172, line 3). Finally, Deborah McPherson, a Commission member and former DDSN employee, testified that it was her position that the agency should promulgate regulations. *See*, Mrs. Deborah McPherson Deposition (McPherson), 114:15-22; 119:6-11 (McPheerson Depo, R. p. 1403, lines 15-22; p. 1408, lines 6-11). Ms. McPherson noted that the Commission Policy is contrary to the State Code. Ms. McPherson would return to policies that mirror the Code; however, her understanding is that the current commission policy prevents them from complying with the State Code. *See*, McPherson, 67:18-68:14; 75:17-19; 76:6-11 (“So it’s interesting, when you look at it, when it’s saying promulgate regulations of the operation, and yet we’ve got policies, commission policies that are—have been pretty clear to say you don’t get involved in the day-to-day operations. You can’t have it both ways.”). (McPheerson Depo, R. p. 1356, line 18-p. 1357, line 14; p. 1364, lines 17-19; p. 1365, lines 6-11).

DDSN filed a motion for summary judgment on June 9, 2008 and supporting memorandum on October 8, 2008. (Motion, R. pp. 97-98; Memorandum, R. pp. 101-111; Reply Memorandum, R. pp. 224-249). Respondents' filed their memorandum in opposition to DDSN's motion for summary judgment on May 13, 2010 and the Affidavit of Gloria Prevost on May 11, 2010. (Memorandum in Opposition, R. pp. 174-223; Affidavit, R. pp. 165-166).

The Respondents filed their Motion for Summary Judgment on June 6, 2013 and supporting memorandum on August 1, 2013. (Motion, R. pp. 250-255; Memorandum, R. pp. 256-535). DDSN filed a supplemental memorandum in support of their motion for summary judgment on August 2, 2013. (Memorandum, R. pp. 536-545). The hearing on these cross motions for summary judgment was held on August 6, 2013 before Judge Cooper. (Hearing Tr., R. pp. 628-668). Following the hearing, Judge Cooper took the matter under advisement. (Form 4 Order). Judge Cooper issued the Order granting summary judgment for DDSN and denying summary judgment for the Respondents on September 24, 2013. (Order, R. pp. 1-19).

Following the receipt of the trial court's Order on October 7, 2013, the Respondents timely filed a Motion to Reconsider, Alter and Amend Judgment Pursuant to Rule 59(e) dated September 24, 2013. (Motion, R. pp. 546-609). DDSN filed a memorandum in opposition to the Respondents' Motion; however, DDSN suggested a wording change to the Court's rulings. (Memorandum, R. pp. 610-617). Respondents' filed Reply Memorandum in support of their motion to alter, amend, or reconsider judgment pursuant to Rule 59(e). (Reply, R. pp. 618-627). On December 30, 2013, Judge Cooper issued an Order denying the Respondents' motion asking for the lower

court to reconsider its rulings; however, based upon a suggestion and a wording change requested by DDSN in its responsive memorandum, the lower court issued a modified Order dated September 26, 2013. (Order, R. pp. 20-22). On February 3, 2014, the Respondents filed their Notice of Appeal from the two Orders issued by the Honorable G. Thomas Cooper, Jr. of the trial court dated September 24, 2013 and December 30, 2013.

ARGUMENT

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

The Court of Appeals did not err in holding that Respondent “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 of Appeals 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 of Appeals correctly found and held that P&A has standing by statute to pursue this declaratory judgment action against DDSN. The Court of Appeals 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.”).

The Record fully supports and serves as a basis for the Court of Appeal's finding on standing for P&A. In her affidavit, Gloria M. Prevost, Executive Director of the Respondent P&A, stated what the impact and effect that the lack of properly promulgated regulations has, and has had, on Respondent 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 Respondents assert and believe the individual Respondents also have standing, the Respondents collectively understand and accept the Court of Appeal'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, Inc. v. Charleston Cnty*, 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 v. Richland Cnty. Council*, 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 South Carolina General Assembly has specifically conferred standing upon P&A to bring claims for any citizen of South Carolina and 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.*

South Carolina law, however, not federal law, governs standing in this case. The distinction is significant. South Carolina courts are courts of general jurisdiction rather than a court of limited subject matter jurisdiction. *Limehouse v Hulsey*, 397 S.C. 49, 723 S.E. 2d 211, 218 (Ct. App. 2011). This case is distinctively different in that it is a declaratory judgment action, which raises issues concerning legislative mandates and duties upon a state agency, its tools, to perform its statutory functions in the providing of services, and the principles of due process and the opportunity to be heard as afforded by the APA and related laws. The Respondents assert that standing does exist for them under the exceptions and provisions of South Carolina law to allow them to proceed and to obtain Declaratory Judgment in their favor that DDSN is required to promulgate regulations in the areas of concern outlined by the Appellants in this action. (Complaint, R. pp. 27-50).

As found by the Court of Appeals, the Respondents do continue to assert and claim standing on behalf of Respondent P&A is conferred directly by statute. See, South Carolina Code Section 43-33-350, and related enabling legislation. (Brief, pp. 13-14). The Court of Appeals correctly agreed that standing is conferred upon P&A by the General Assembly and that P&A is entitled to pursue remedies to insure the protection of rights of the disabled. The Declaratory Judgment Act, §§15-53-10, *et. seq.*, likewise also confers statutory standing upon the Respondents together with the enabling statutes for DDSN to provide services to vulnerable South Carolina citizens and for who those services are funded by the General Assembly annually with each Appropriations Act. Section 15-53-30 states that “[a]ny person ... whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the ..., statute, ... and obtain a declaration of rights, status or other legal relations thereunder.” S. C. Code Ann. §15-53-

30. The Respondents meet the “any person” standard. Moreover, the Respondents strongly disagree with the characterization and/or misapplication of *Doe v. Stincer*, 175 F.3d 879 (11th Cir 1999), and other cases such as *Penn. Prot. & Advocacy, Inc. v. Houston*, 136 F.Supp.2d 353 (E.D.Pa. 2001), all of which were previously asserted by DDSN before the Court of Appeals.

The Court of Appeal’s conclusion and findings are clearly consistent with the law and case law in South Carolina. The Petitioners’ 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 General Assembly established under 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. These clear violations of the APA cannot withstand judicial scrutiny and must not be allowed to continue.

II. THE COURT OF APPEALS DID NOT ERR IN VACATING THE TRIAL COURT’S ORDER AND REMANDING THE MATTER TO TRIAL COURT FOR A RULING FOLLOWING A TRIAL ON THE FACTS.

Respondents face the classic conundrum of dealing with a state agency that openly 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 continuing to evade judicial review. In its findings, the Court of Appeals 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 uniform 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.

The standard for a writ of certiorari by the Court is to determine if the matter presents exceptional circumstances and then the Court is limits its review for errors of law by the Court of Appeals. In this matter, each of the Respondents, whether an individual or P&A, and any citizen are all equally held hostage to the whims of DDSN and its so-called “regulation by other means” scheme that does not comply with the South Carolina Administrative Procedures Act, §§1-23-10, et. seq. The Respondents, just like all citizens, are subject to the impact of these DDSN “other means” directives, standards

and manuals which are subject to change whenever and however DDSN wants and without notice or the opportunity to review and be heard. The specific individual facts or case-by-case analysis of each Respondent on the type of service denied does not change the fact that none of the Respondents, including any other citizen who may confront the need for DDSN services in the future, will ever know the “real” criteria for eligibility under properly promulgated regulations or the process that must be followed to appeal by promulgated regulation. Why? Such promulgated regulations do not exist, and in fact, DDSN has made an admission of establishing no regulations under the requirements of the APA. (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. (Complaint, R. p. 34); see also footnote 2, p. 6.

The underlying action pursuant to the Uniform Declaratory Judgments Act (“the DJ Act”). Section 15–53–20 of the South Carolina Code identifies the purpose of the Uniform Declaratory Judgments Act (“the DJ Act”) and provides that courts “shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed.” S.C. Code Ann. §15–53–20 (2005) ; *see* Rule 57, SCRCP (“The procedure for obtaining a declaratory judgment pursuant to 15-53-10 through 15–53–140, shall be in accordance with these rules, and ... [t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.”). The

DJ Act is to be liberally construed and administered to achieve its intended purpose “to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations.” S.C. Code Ann. §15–53–130 (2005). Therefore, the Court should deny the Petition for Writ of Certiorari so that the underlying matter can proceed to be heard and the facts related to matter determined in judgment by the trial court and then applied. One of factual determinations is the degree or amount of harm and/or injury suffered by the Respondent due to the consistent failure of DDSN to promulgate regulations as mandated by the APA.

The Respondents disagree with the Petitioner’s statements that “much has changed” since this case has been filed. A regulation remains as the agency’s statement to general public that implements or prescribes law or policy or practice requirements for the operation of the state agency with the force of law. No directive, standard, and manual (“regulation by other means”) has any effect of law and nor does it allow the opportunity for the Respondents to be heard or avail themselves of the due process protections provided the APA which flow from the Constitutions of South Carolina.

The *Stogsdill* case is distinguishable and different from the matter at hand. First, this case does not address the same matters as *Stogsdill*. *Stogsdill* is an appeal concerning changes in the Medicaid Waiver and the related action by DDSN to implement a cap on services and the failures to provide notice and due process to the affected individual of such change in the specific services that he was receiving. *Stogsdill v. S. Carolina Dep't of Health & Human Servs.*, 410 S.C. 273, 763 S.E.2d 638 (Ct. App. 2014), reh'g denied (Oct. 23, 2014), cert. granted (Apr. 9, 2015), cert. dismissed as improvidently granted, 415 S.C. 242, 781 S.E.2d 719 (2016), reh'g dismissed, 415 S.C. 568, 784 S.E.2d 669

(2016). In *Stogsdill*, there were federal regulations that set forth the manner in which Medicaid Waiver requests and renewals are made and approved which the Governor and the State of South Carolina must adhere. *Stogsdill v. S. Carolina Dep't of Health & Human Servs.*, 410 S.C. 278, 763 S.E.2d at 640. Unlike this case, there were regulations provided by federal law and state law by the SC Department of Health and Human Services promulgated Regulation – not DDSN – that were applicable and used as a basis for the Court’s decision on the specific implementation of a cap by DDSN as follows:

“The provisions of the Waiver are clear, and if “the State and the Federal regulations are not in agreement, the requirements of the Federal regulations shall prevail. S.C.Code Reg. 126–399 (2012) [A SC Department of Health and Human Services promulgated Regulation]. Based on all of the foregoing, we conclude approval by state regulation was not required to give the Waiver’s provisions the force and effect of law.” *Stogsdill v. S. Carolina Dep't of Health & Human Servs.*, 410 S.C. 281, 763 S.E.2d at 642.

For these reasons, the Court of Appeals correctly found standing and that the lower court’s order should be vacated and matter remanded. Therefore, Petitioner’s Petition for Writ of Certiorari should be denied.

Respectfully submitted this 11 day of July, 2016.

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July 11, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JUL 11 2016

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC SUPREME COURT

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

Case No. 2016-001050

Protection and Advocacy for the People with Disabilities, Inc., et. al. . **RESPONDENTS**

v.

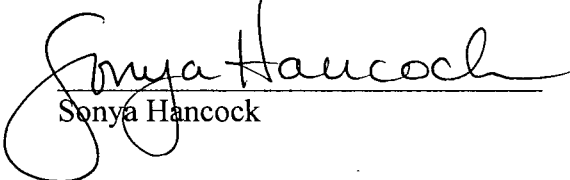
South Carolina Department of Disabilities and Special Needs, et. al. . . **PETITIONERS**

PROOF OF SERVICE

The undersigned employee of RICHARDSON PLOWDEN & ROBINSON, P.A., attorneys for Respondent, does hereby certify that service of the foregoing **RESPONDENTS' RETURN TO THE PETITION FOR WRIT OF CERTIORARI** in the above-captioned matter was made upon all counsel of record this 11th day of July, 2016, by electronic mail and by depositing a copy of same in the U.S. Mail, postage prepaid, addressed as follows:

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July 11th, 2016
Columbia, South Carolina


Sonya Hancock