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.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

Cases

Statutes and Other Authorities

Petitioners Department of Disabilities and Special Needs, et al, ("DDSN") submit the following Reply in support of their Petition for Certiorari.

1. The primary issue presented by the Petition for Certiorari is whether the Court of Appeals erred in holding that the entity Protection and Advocacy for People With Disabilities, Inc. ("P&A") had standing to bring this action, when P&A did not show that the absence of DDSN regulations caused any injury to anyone, either a specific individual or, realistically speaking, to P&A itself. Most of P&A's Return to the Petition for Certiorari addresses itself to a different and unrelated issue, P&A's claim that the absence of DDSN regulations in certain areas is in some unspecified way harmful to some unspecified person or persons. That claim is manifestly without factual support in the record. P&A's argument on this point is devoid of evidence of even a single real person who has been harmed by the regulations.

P&A's argument also virtually ignores the comprehensiveness of the more than 120 DDSN Directives which are well-indexed and easily accessible on DDSN's website. R. I, 236-242; R. I, 435-439. The Directives themselves are very detailed, as illustrated by one Directive in the record at R. I, 362-373. Under no circumstances, therefore, can it be said that members of the public or P&A are in the dark about necessary information for obtaining DDSN services, appealing denials of those services, or other relevant information. Despite its many

repetitions of its own arguments, P&A has not produced any evidence that even one person has suffered even the slightest inconvenience or adverse effect as a result of DDSN's use of Directives.

2. P&A devotes only six pages of its twenty-three-page Return to the issue of standing, and even then makes only conclusory arguments which do not discuss either the opinion of the Court of Appeals or the issues presented in the Petition for Certiorari. To the extent that P&A attempts to claim that any individual persons have been injured by the absence of regulations, any such contention is procedurally barred: the Court of Appeals affirmed the circuit court's conclusion that the individual Plaintiffs lacked standing. App. 6.

P&A argues that standing was conferred on it by statute, specifically § 43-33-350(1). Return at 18. The opinion of the Court of Appeals on this point contained only a quotation of the statute itself and a single sentence: "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." App. 6. The pertinent part of the statute itself, which P&A has not quoted in the argument section of its brief, provides only that P&A "shall protect and advocate for the rights of all developmentally disabled persons . . . [and] 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).

As DDSN has previously pointed out, the cases which have addressed this issue have held that such statutes do not serve to confer standing when standing does not already exist. Pet. at 8-9. DDSN first respectfully submits that the Court of Appeals was in error in holding that P&A had standing. DDSN also submits that the Court of Appeals should not have reached that conclusion without addressing or discussing the relevant case law on the subject, all of which was to the contrary of the conclusion reached by the Court. The result reached by the Court of Appeals is anomalous, because it permits an organization with no plausible claim of standing to maintain a suit on behalf of unspecified persons to whom to no inury has been shown. This holding therefore is completely contrary to the general rule that "contingent, hypothetical or abstract dispute[s]" are not justiciable. *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).

The case law on this subject, cited by the circuit court, R. I, 6, and in the Brief of Respondent at 12-13, but not mentioned at all by the Court of Appeals, holds without exception that similar language in the federal statute providing for the creation of agencies such as P&A did "not relieve the Advocacy Center of its obligation to satisfy *Hunt's* [*Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, (1977)*] first prong by showing that <u>one of its constituents otherwise had standing to sue</u> to support the district court's grant of summary judgment and

injunctive relief. *Doe v. Stincer*, 175 F.3d 879, 886 (11th Cir. 1999)(emphasis added).[1] *Accord, Tennessee Prot. & Advocacy, Inc. v. Bd. of Educ. of Putnam Cty., Tenn.*, 24 F. Supp. 2d 808, 816 (M.D. Tenn. 1998)(no standing where P&A organization did not sue on behalf of specific, named, injured individuals, but "merely allege[d] that the defendant's conduct discriminates against all the disabled children in the Putnam County school system"); *Pennsylvania Prot. & Advocacy, Inc. v. Houston*, 136 F. Supp. 2d 353, 366 (E.D. Pa. 2001)(no standing where organization did not identify any specific individual on whose behalf it brought the action, and did not even refer to a single constituent who would have standing); *Prot. & Advocacy, Inc. v. Murphy*, 1992 WL 59100, at *12 (N.D. Ill. Mar. 1992)(P&A organization did not have standing to sue in its representative capacity when no individual had a viable claim).

Again, the Court of Appeals did not discuss these cases at all. In their Return, Plaintiffs note only that they "strongly disagree" with DDSN's analysis of those cases, Return at 19, which no doubt they do, but mere disagreement is not a substitute for reasoned argument. Plaintiffs have made none.

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[1] The federal statute provides in pertinent part that a protection and advocacy system such P&A is vested with the authority to "pursue administrative, legal, and other appropriate remedies to ensure the protection of [qualified] individuals. . . ." 42 U.S.C. § 10805(a)(1)(B). This language is virtually identical to that of § 43-33-350(1). Other federal cases cited herein involve other federal statutes with similar or identical language.

Plaintiffs also effectively argue throughout their Return that the Declaratory Judgment Act, S.C. Code Ann. § 15-53-10, eases the requirements of standing and justiciability. As the circuit court held, however, just the opposite is true:

> [P]arties seeking declaratory relief still must "demonstrate a justiciable controversy," which exists when, among other things, "a concrete issue is present." *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995). *See also, e.g.,* 26 C.J.S. Declaratory Judgments § 134 ("A court will not render a declaratory judgment for a complaint who lacks standing to maintain the claim for relief.").

R. 5 n. l. Plaintiffs also mention "public importance" standing. Return at 16-17. The Court of Appeals mentioned that principle in passing, but did not base its opinion on that ground. The circuit court, however, rejected Plaintiffs' arguments on that ground, holding that

> The principal distinction between those cases [finding public importance standing] and this one is that in most or all of them, the issue presented was primarily a legal issue, rather than one involving an intense, case-by-case, factual showing as to how specific plaintiffs are, or are not, affected by the absence of regulations in specific situations.

R. I, 8-9 (emphasis added). The circuit court further held that "the present case "require[s] the review of multiple, unproven factual situations, and the effect, or non-effect, of the absence of regulations in each situation. Such issues should be resolved only on a case-by-case basis, where the specific facts of each plaintiff's situation are fully presented." R. I, 9. DDSN submits that those conclusions of the

circuit court, which the Court of Appeals neither reversed nor affirmed, should govern this aspect of this case. There are simply no facts in the record to show how any person has been adversely affected by the absence of regulations, and as a result, this case does not resemble cases in which the facts are clear and the application of the "public importance" standing principle does not involve a detailed assessment of the facts of the case.

3. P&A also essentially fails to address DDSN's argument that P&A itself was not harmed by the absence of regulations in certain areas, given the comprehensiveness and ease of use of the online Directives. P&A's Return merely quotes the conclusory, implausible statement in the Prevost affidavit to the effect that it is time-consuming for P&A to search the Directives. Return at 15-16. Left unaddressed is DDSN's contention, Petition at 11-14, that it is at least as easy, and probably easier, for P&A or anyone else to locate an applicable Directive online as it would be to find the same substantive content if it had been embodied in a regulation. In effect, then, P&A has conceded that the opinion of the Court of Appeals is without foundation on this point.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Petition, the Petitioners respectfully request that this Court grant their petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Petitioners, does hereby certify that service of the **Reply Memorandum in Support of Petition for Writ of Certiorari** was made upon all counsel of record by placing a copy in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this 21st day of July 2016:

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