

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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

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S.C. SUPREME COURT

Opinion No. 5410  
(S.C. Ct. App. filed June 8, 2016)

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

v.

Beverly A. H. Buscemi, Ph.D., in her official capacity as State Director, South Carolina Department of Disabilities and Special Needs and The South Carolina Department of Disabilities and Special Needs, and Kelly Hanson Floyd, Nancy Banov, W. Robert Harrell, Rick Huntress, Deborah McPherson and Dr. Otis Speight in their Official Capacities as Members of the Department of Disabilities and Special Needs Commission, .....Respondents.

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**RETURN TO PETITION FOR CERTIORARI**

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## STATEMENT OF THE CASE

This action was filed on February 16, 2010, by the entity Protection and Advocacy for People With Disabilities, Inc. (“P&A”). The Defendants were the Department of Disabilities and Special Needs and a number of its officials, herein collectively referred to simply as DDSN. P&A sought an order requiring DDSN to provide P&A access to certain records of people with developmental and other disabilities who live in residential care facilities for such persons. The records in issue are primarily the medical records of individual residents of the facilities, particularly the medication administration records (“MARs”). P&A’s enabling legislation provides that when there is a request that P&A investigate a complaint about a facility, P&A is authorized to inspect and copy various records which bear on the subject matter of the individual complaint, “*except for the individual medical, treatment or other personal records of other persons in the program or facility.*” S.C. Code Ann. § 43-33-370 (2015)(emphasis added).

P&A sought to review individual medical records when performing certain inspections that are not in response to individualized complaints about the facilities. P&A cited § 43-33-350(4), which provides only that P&A may conduct certain unannounced inspections of facilities, and that P&A may “review the living conditions of a residential facility, including the plans of care for individuals. . . .” DDSN filed an Answer on March 26, 2010, denying that P&A’s enabling

legislation provided P&A with authority to have access to any personal records of developmentally disabled persons living in certain group residences, other than “plans of care,” the term used in the applicable statute, and the records of any individual on whose behalf a complaint has been filed.

After cross motions for summary judgment were denied, the case was tried by Judge Dickson without a jury on October 3, 2012. On November 29, 2012, Judge Dickson issued an order holding that the governing statute did not authorize P&A to have access to the disabled residents’ records (except for “plans of care”), and dismissing this action. App. 8-24. P&A thereafter filed a motion to reconsider on December 17, 2012. App. 474. Judge Dickson denied the motion to reconsider on December 11, 2014, except for one small amendment in a footnote, to which the Defendants consented and for which they provided suggested language for the amendment, which the circuit court adopted. *See* App. 502. That amendment was embodied in an Amended Order, also filed on December 11, 2014. App. 38. Except for the minor change referenced in its n.2, App. 46, the Amended Order is the same as the original Order.

P&A appealed to the Court of Appeals. After hearing oral argument, the Court of Appeals on June 8, 2016, issued a 10-page decision affirming the Circuit Court. App. 617-626. The Court of Appeals concluded that “it is the clear intent of the General Assembly not to permit P&A to review individual medical records in

the course of unannounced inspections of the living conditions of the residential facilities. . . .” App. 624.

P&A filed a Petition for Rehearing on June 23, 2016. App. 627. The petition was denied on August 22, 2016. App. 653. P&A filed its Petition for Certiorari on September 21, 2016.

## STATEMENT OF FACTS

### A. Background.

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

As detailed in the Complaint, the basic facts of this case are that P&A has sought to review “resident[s]’ records, including those containing health information. . . .” App. 74. P&A sought to review that broad, virtually all-inclusive category of records in the course of conducting “team advocacy inspections” of “living conditions” in facilities in which developmentally disabled or handicapped persons reside. These terms are found in part of P&A’s enabling statute, S.C. Code Ann. § 43-33-350(4), which provides as follows:

Team advocacy inspections are unannounced visits to review the living conditions of a residential facility, including the plans of care for individuals in a residential care facility and a community mental health center day program. Only the coordinator of the team advocacy

project or the coordinator's designee is authorized to perform reviews of plans of care.

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

In a "team advocacy" inspection, a P&A employee called a "team advocate" and a volunteer make unannounced visits to residential facilities. App. 124. The role of the volunteer is to

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

App. 125.

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

In 2007, P&A decided that it would begin for the first time to conduct team advocacy inspections in facilities licensed by DDSN, as opposed to those licensed by DHEC, and so informed DDSN by letter. App. 91-92. P&A's 2007 letter

advised DDSN that P&A was planning to start inspecting CTH IIs, but the letter made no reference to review by P&A of any particular records. *Id.*<sup>1</sup>

P&A decided that it would at first concentrate on the DDSN group residences called Community Training Homes (II), generally known as “CTH IIs.” These residences were described at trial as “people’s homes . . . in neighborhoods where typically people live in, three or four persons that are unrelated get 24-hour supervision, personal care and training.” App. 182. A typical CTH II is a three-bedroom home in a neighborhood.” App. 182-183.

Another year and a half elapsed before P&A advised DDSN by letter of June 11, 2009, that P&A was about to start making team advocacy inspections of the DDSN-licensed CTH II facilities.<sup>2</sup> App. 88-89. Other than an indication that P&A would “review records” during those visits, there was no particular reference to any specific records.

Beginning in that same month, June 2009, and continuing through August 2009, P&A conducted a few team advocacy inspections in which MARs were reviewed by P&A. App. 115; App. 204-274. At some point during the summer of

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

<sup>2</sup> There was apparently no additional correspondence between P&A and DDSN during this period of approximately 18 months.

2009, DDSN became aware of these reviews of MARs by P&A. *See* App. 93. This led to one or more meetings and written communications between DDSN and P&A in the middle of 2009. App. 88-95, 96.

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

The Agency's attorney, Ms. Tana Vanderbilt and your attorney, Ms. Anna Marie Darwin, have been in discussions since July 1, 2009, regarding the law pertaining to team advocacy inspections.

S.C. Code Ann. § 43-33-350(4) gives P&A the provision to make unannounced visits to review the living conditions of residential facilities, and specifically states "including plans of care for individuals in a residential care facility." The disagreement between our attorneys is over the interpretation of "plans of care." While we appreciate P&A's efforts to conduct inspections in community training homes, our obligation is to ensure that the rights of our consumers are protected.

\* \* \*

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

App. 90 (emphasis added). P&A filed the present action several months later.

At the trial of this case, the testimony of P&A's Executive Director reiterated the broad nature of P&A's demands for broad oversight powers and

broad access to residents' personal, medical and treatment records, previously set forth in the Paragraph 57 of the Complaint. Ms. Prevost testified as follows:

Q. So is the focus of concern in reviewing these records the performance of the staff in terms of the oversight of medical care and the provision of medication to the residen[ts] of these homes?

A Yes. As I understand it, the responsibility would be that the operator signs onto when they send money to keep someone in these facilities is that they will provide oversight of all the aspects of care.

App. 134-135 (emphases added). Again, however, the statute provides that team advocacy inspections extend only to “living conditions.” § 43-33-350(4). The Complaint and the testimony of Ms. Prevost leave no doubt that P&A is claiming authority to conduct oversight “of all the aspects of care” at CTH IIs, rather than merely “living conditions,” the term used in the statute, and in the course of such oversight, to be able to review all records pertaining to “all aspects of care,” as opposed merely to “plans of care.” P&A’s claims about the interpretation of the statute must therefore be read in conjunction with P&A’s broader claim that every aspect of the operation of a CTH II is subject to oversight by P&A.

**B. Statutory provisions pertaining to P&A.**

The powers and duties of P&A are set forth in § 43-33-350. The specific power involved in the present case is the power to “conduct team advocacy inspections . . . to review living conditions” in facilities that provide residences to

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

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

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

Department of Health and Environmental Control, and  
State Department of Mental Health.

(Emphases added.)

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

**C. Description of the document considered the “plan of care” by DDSN.**

The specific document that DDSN has always regarded as the “plan of care” is in the record as Exhibit 1 to the Lacy Affidavit, and also as Defendants’ Trial Exhibit 1.<sup>4</sup> Its title is “Service Coordination Annual Assessment.” That specific document is a form containing, among things, a formal, standardized assessment of the person’s needs prepared by the individual’s service coordinator. The service coordinator gathers information from the person, family members, friends, service providers and medical care providers and then works with the person and the family to determine what services would best address the identified needs. The resulting document, i.e., the plan of care, “typically includes the medical and other

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<sup>4</sup> Dr. Lacy of DDSN testified that the two documents were very similar to each other, App. 189, and that Affidavit Exhibit 1 was a previous edition of Trial Exhibit 1.

services to be provided, their frequency, and the type of provider to furnish them.” App. 43 (quoting Lacy affidavit, ¶¶ 3, 4). Dr. Lacy’s testimony was to the same effect. R. 189-192.

A review of Def. Ex. 1, R. 275-299, confirms that it contains a certain amount of medical information. DDSN has not claimed that P&A cannot review any medical information at all. Rather, DDSN contends that the statute only permits P&A to review the one document regarded as the “plan of care.” To the extent that Def. Ex. 1 contains medical information, the General Assembly has obviously authorized P&A to review such information, as long as it is in that document. However, DDSN submits that the General Assembly did not authorize P&A to review any other documents that may contain medical information, if indeed there are any other such documents in existence that could be described as “plans,” as opposed to “records.”

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

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

App. 43 (emphasis added).

## THE OPINION OF THE COURT OF APPEALS

The Court of Appeals correctly held as follows:

1. “Section 43-33-370 explicitly limits the inspection of “individual medical, treatment or other personal records” by P&A to those of a resident upon whose behalf a proper complaint requesting investigation has been received. S.C. Code Ann. § 43-33-370(2) (2015).” App. 624.

2. The court rejected P&A’s argument that it had additional authority to review individual medical records as part of its general inspection power: “To accept this proposition would render the limitation of inspection of such records in section 44-33-370(2) meaningless and would lead to an absurd result, as P&A could simply announce during an investigation of a complaint pursuant to section 44-33-370 that it was making an unannounced inspection pursuant to section 44-33-350(4), thereby entitling it to review the individual medical records of non-complaining residents—which is explicitly prohibited by section 43-33-370.” *Id.*

3. For those reasons, the court concluded that “we hold section 44-33-350(4), read in conjunction with section 43-33-370(2), evinces a clear intent on the part of the General Assembly to exclude the right to review the personal medical records of developmentally disabled and handicapped persons from P&A’s

authority to view documents setting forth the plans of care of these persons during its unannounced inspections of facilities housing them.” App. 624-25.

## ARGUMENT

This case involves only an issue of statutory construction. The Court of Appeals held that “Upon examination of the relevant statutes, we find it is the clear intent of the General Assembly not to permit P&A to review individual medical records in the course of unannounced inspections of the living conditions of the residential facilities and, therefore, affirm the trial court.” App. 618. Specifically, and after a detailed review of all pertinent parts of the statutes, the Court of Appeals held that “the General Assembly has not deemed it appropriate to make the medical records of the residents in question available for review to P&A during its Team Advocacy inspections.” App. 625. In dismissing Plaintiff P&A’s claims, this Court noted that the State’s public policy regarding the issues in this case had been set forth in the statutes, and that “[a]ccordingly, P&A’s policy arguments are more properly addressed to the General Assembly.” *Id.*

As will be demonstrated below, most if not all of P&A’s arguments merely seek to argue the policy issues which the Court of Appeals correctly held to be matters for the General Assembly.

**1. P&A's objections to the decision of the Court of Appeals involve policy issues for the General Assembly.**

P&A first argues that the opinion reaches an “absurd result,” which “substantially limits the effectiveness” of team advocacy inspections. Petition at 6. This is a policy issue rather than a question of statutory construction, and P&A’s argument on this point does not even seek to address the conclusions of the Court of Appeals regarding the construction of the statutes at issue. To the extent that the Court of Appeals’ correct reading of the statutes may impact P&A’s conception of what would constitute appropriate records for it to inspect, then P&A’s remedy is to seek to have the statute amended.<sup>5</sup>

P&A next argues that the result of the Court’s opinion is that it “authorize[es] the entities P&A inspects to dictate what the plan of care is to P&A.” Petition at 7. However, P&A admits that “[t]he opinion does not take a position on what constitutes the “plan of care.” *Id.* The opinion simply holds that P&A cannot inspect MARs. P&A’s concerns about the nature of the plan of care are addressed to a conclusion which the Court of Appeals did not make.

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<sup>5</sup> In a footnote, Petition at 6 n.1, P&A argues that the Court’s conclusion might also affect quality assurance inspections which are performed on behalf of DDSN under contract with a third party organization. Aside from the fact that this issue was not raised prior to the original decision of the Court of Appeals, it also lacks merit, because any such third party in question, by performing quality assurance reviews for DDSN, merely stands in the shoes of DDSN itself. *See* R. 201. This case involves the issue of whether records may be reviewed by P&A, not by DDSN or those acting in that agency’s stead.

2. **The Court of Appeals correctly held that the General Assembly did not intend for P&A, in the course of a team inspection, to review the medical records of all individuals at a residential facility.**

P&A contends that “[t]o effectuate the intent of the General Assembly, P&A must be allowed to inspect MARs.” Petition at 8-9. This contention, however, merely assumes that which is to be proven, and does not even address the specific language of the statutes under review, that is, §§ 43-33-450(4) and 43-33-370(2). As a result, the contention is without merit.

P&A next contends that “[t]he Opinion misapprehends how P&A’s separate authorities work together.” Petition at 10-12. In this contention, P&A purports to find reasons why the General Assembly would have permitted inspections of all medical records when doing random inspections, while protecting the privacy of the medical records of individuals when P&A is investigating a specific complaint.

The short answer to these contentions is the one given by the Court of Appeals:

To accept this proposition would render the limitation of inspection of such records in section 44-33-370(2) meaningless and would lead to an absurd result, as P&A could simply announce during an investigation of a complaint pursuant to section 44-33-370 that it was making an unannounced inspection pursuant to section 44-33-350(4), thereby entitling it to review the individual medical records of non-complaining residents—which is explicitly prohibited by section 43-33-370.

App. 624. Moreover, if the General Assembly had wanted to make the residents’ “individual medical, treatment or other personal records” even slightly more

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

Next, P&A contends that “[t]he opinion overlooked the plain language of the statute.” Petition at 13-14. Specifically, P&A argues that the term “plans of care” used in § 44-33-350(4) can be read to include individual medical records. The Court of Appeals did not find it necessary to reach this issue, in light of the court’s conclusion that P&A’s contentions would lead to an absurd result for the reasons stated above. If the issue had been reached, DDSN submits that P&A’s contentions should be rejected, because the term “plan of care,” as a matter of law and administrative practice, refers to a specific document which sets forth the services to be provided to the client. The trial court so held, citing references in the trial record as well as in federal statutes and regulations, as well as in federal and state cases. App. 42-46. The trial court also cited the common meaning of the term “plan of care.” App. 47-48. For all of these reasons, P&A’s contentions regarding the

meaning of the term “plans of care” need not be reached, but are without merit even if reached.<sup>6</sup>

**3. P&A’s public policy arguments do not address the specific terms of the statutes at issue, and are matters for the General Assembly.**

P&A’s final argument is that its views on the issues in this case would, as a matter of public policy, be of most benefit to the clientele it serves. Pet. 17-18. This argument makes virtually no reference to any conclusion reached by the Court of Appeals or by the trial court. The circuit court rejected P&A’s argument, holding that “[w]hile no one would disagree with the worthiness of the broad goal[s] [expressed by P&A] . . . , P&A does not recognize that those residents, like all other residents of the state, are entitled to have their medical records remain private, absent a clear expression of intent to the contrary by the General Assembly.” App. 35. The Court of Appeals agreed, citing *Taghivand v. Rite Aid Corp.*, 411 S.C. 240, 244, 768 S.E.2d 385, 387 (2015) (holding the primary source of the declaration of public policy in this state is the General Assembly, and our courts assume this prerogative only in the absence of legislative declaration) and *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 401 n. 4, 728 S.E.2d 477, 481

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<sup>6</sup> Another issue that need not be reached is P&A’s contention that its interpretation of the term “plans of care” is entitled to *Chevron* deference. Pet. 15-16. As the trial court held, “*Chevron*-style deference is accorded only to regulations or other formally-adopted agency actions.” App. 29. The trial court order also cited several other reasons for its rejection of P&A’s *Chevron*-related arguments, such as the absence of delegation of a policymaking role to P&A in this context. App. 27.

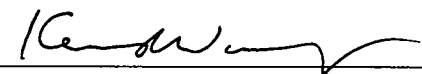
n. 4 (2012) (“If legislative intent is clear as reflected in the statutory language, any public policy as promulgated by this Court must give way because ‘[t]he primary source of the declaration of the public policy of the state is the General Assembly[, and] the courts assume this prerogative only in the absence of legislative declaration.’ ” (alteration in original) (*quoting Citizens’ Bank v. Heyward*, 135 S.C. 190, 204, 133 S.E. 709, 713 (1925))). App. 625. Accordingly, and as the Court of Appeals held, “P&A’s policy arguments are more properly addressed to the General Assembly.” *Id.*

### CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the Petition for Certiorari should be denied.

Respectfully submitted,

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October 20, 2016

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**CERTIFICATE OF SERVICE**

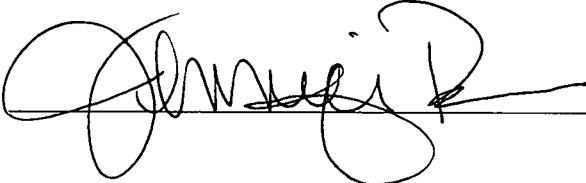
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The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondents, does hereby certify that service of the **Return to Petition for Writ of Certiorari** was made upon opposing counsel by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 20th day of October 2016:

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A handwritten signature in black ink, appearing to read 'Thornwell W. Simons', is written over a horizontal line.