THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

ON CERTIORARI FROM THE COURT OF APPEALS
APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Edgar W. Dickson, Presiding Judge

Case No. 2010-CP-40-1095
Appellate Case No. 2016-001983

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, ... Respondent.

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STATEMENT OF ISSUES ON APPEAL

I. Did the General Assembly intend to grant P&A broad authority when conducting Team Advocacy Inspections?

II. Does the Court of Appeal's Opinion have a far reaching effect that has the consequence of reaching an absurd result clearly not intended by the General Assembly?

III. Is P&A's interpretation of "plans of care" entitled to *Chevron* deference?

IV. Does South Carolina public policy favor authorizing the inspection of documents by P&A to protect the State's most vulnerable citizens?

STATEMENT OF THE CASE

Appellant Protection and Advocacy for People with Disabilities, Inc. ("P&A") filed suit against Respondents 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 ("DDSN"), 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 by Complaint filed February 16, 2010.

After the close of the pleadings and discovery, both parties filed motions for summary judgment. The circuit court, Judge L. Casey Manning, denied both motions by order filed October 1, 2012.

The Honorable Edgar W. Dickson tried the case, sitting without a jury, on October 3, 2012. P&A called three witnesses and entered two exhibits into evidence. Defendants called one witness and likewise entered two exhibits into the trial record. Both parties also consented to the summary judgment filings coming into the trial record.

On November 29, 2012, Judge Dickson issued an order dismissing P&A's claims with prejudice. Subsequently, P&A filed a motion to reconsider on December 17, 2012.

On December 11, 2014, Judge Dickson denied the motion to reconsider yet slightly amended the order; the amended order also dismissed P&A's claims with prejudice.[1]

P&A timely filed a notice of appeal with the Court of Appeals. Thereafter, the Court of Appeals heard argument in this matter on April 19, 2016, and on June 8, 2016, the Court of Appeals issued an opinion affirming the trial court. (Shearouse Adv. Sh. No. 23 at 73) (the "Opinion").

[1] P&A does not have an explanation as to why the trial judge waited almost two years to adjudicate the motion to reconsider.

On June 23, 2016, P&A filed its petition for rehearing with the Court of Appeals. By order dated August 22, 2016, the Court of Appeals denied the petition for rehearing. P&A timely filed a petition for a writ of certiorari. This Court granted the petition on May 30, 2017.

STATEMENT OF THE FACTS

Background

The Developmental Disabilities Assistance and Bill of Rights Act of 2000 ("DD Act"), 42 U.S.C. § 15001 *et seq.*,[2] offers conditional federal money to States to improve community services, such as medical care and job training, for individuals with developmental disabilities. As a condition of that funding, a State must establish a protection and advocacy system "to protect and advocate the rights of individuals with developmental disabilities." *Id.* § 15043(a)(1). Every State accepts funds under the DD Act, and is free to appoint either a state agency or a private nonprofit entity as its protection and advocacy system. *Id.* § 15044(a).

The vast majority of States, including South Carolina, have elected to use a private nonprofit entity as its protection and advocacy system. P&A is a nonprofit corporation designated as South Carolina's protection and advocacy system in S.C. Code Ann. §§ 43-33-310 *et.seq.*[3]

Under the DD Act, a protection and advocacy system must have certain powers. Subject to certain statutory requirements, it must be given access to "all records" of individuals who may have been abused, *see* 42 U.S.C. § 15043(a)(2)(I)(iii)(II), as well as "other records that are relevant to conducting an investigation," *Id.* § 15043(a)(2)(J)(i). The system has authority to "pursue legal,

[2] The precursor to this act was originally codified in the 1970s.

[3] Originally the organization was known as Advocacy for the Handicapped Citizens, Inc., which began serving as South Carolina's protection and advocacy entity by an Executive Order of the Governor in 1977. A 1979 act transferred the functions to South Carolina Protection and Advocacy System for the Handicapped, Inc. The name of the organization was changed to Protection and Advocacy for People with Disabilities, Inc. by resolution of the organization's Board of Directors authorized by Senate Bill 599, effective July 1, 1996.

administrative, and other appropriate remedies or approaches to ensure the protection of" its charges, *Id.* § 15043(a)(2)(A)(i), and may "pursue administrative, legal, and other remedies on behalf of" those it protects. *Id.* § 10805(a)(1)(C); *see also Id.* § 15044(b).

P&A's Statutory Powers Under South Carolina Law

P&A has five specific and distinct powers enumerated in the South Carolina Code of Laws including the general power to "protect and advocate for the rights of all developmentally disabled persons" to the limits of federal and state law. S.C. Code Ann. § 43-33-350(1). The fourth power is the power specifically in issue in this lawsuit:

> (4) **[P&A] may conduct team advocacy inspections** of a facility providing residence to a person with a developmental or other disability. 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 system shall prepare a report based on the inspection which must be submitted to the South Carolina Department of Health and Environmental Control and State Department of Mental Health

S.C. Code Ann. § 43-33-350(4) (emphases added). This entire case revolves around what is meant by the emphasized phrase above concerning the unannounced team advocacy inspections to ". . . review the living conditions of a residential care facility, including the plans of care for individuals . . ." *Id.*

These inspections are so important that state law further provides for the Department of Health and Environmental Control to "deny, suspend, or revoke licenses or assess a monetary penalty, or both, against a person or facility for . . . failing to allow a team advocacy inspection of a community residential care facility by [P&A], as allowed by law." S.C. Code Ann. § 44-7-320(A)(1)(e); *see also SC DHEC v. Bellwood Manor*, 2010 WL 6782577, at *1, 9 (Admin.

Law Ct. Nov. 22, 2010) (upholding fine imposed by DHEC for failure to allow P&A to conduct team advocacy inspection).

P&A's Team Advocacy Inspections

Generally

As part of P&A's role protecting South Carolinians with disabilities from abuse and neglect, P&A conducts Team Advocacy inspections under § 43-33-350(4). (Tr. p. 18: 17-21; App. 123.) These inspections are of facilities that house persons with disabilities and have been ongoing since 1986 when the Team Advocacy program was created. (*Id.* at 19:1-17; App. 124.) "The purpose of Team Advocacy inspections is to ensure that those persons are being protected and cared for, to ensure that their rights are being respected in the facilities in which they reside, to check on their quality of life and living conditions within those facilities, and to protect them from abuse and neglect." *Bellwood Manor*, 2010 WL 6782577, at *1 (Admin. Law Ct. Nov. 22, 2010).

P&A is authorized to make unannounced inspections. S.C. Code Ann. § 43-33-350(4). Susan Perry, a P&A Team Advocate whose daughter has an intellectual disability and is a client of Respondent DDSN, noted the importance of the unannounced inspections by succinctly and persuasively stating "[w]e don't want people putting out the Sunday china on a Wednesday." (Tr. p. 53:20 – 54:9, 60:14-15; App. 158-59, 162.)

In an inspection, a trained P&A employee known as a Team Advocate and also a trained P&A volunteer announce their identity and enter the facility. (*Id.* at 19:18-25, 42:1-8, 56:15-20; App. 124, 147, 161.) The Team Advocate and the volunteer then do a "walk through" and determine whether there are residents willing to be interviewed. (*Id.* at 56:19-25; App. 161.) The inspectors perform a physical inspection such as a review of sleeping arrangements. (*Id.* at 20:18-23; App. 125.) Talking to residents helps to develop a list of who lives at the facility and provides

other helpful information, but there is no requirement that residents must talk to the inspectors. (*Id.* at 57:1-3, 67:9-22; App. 162, 172.) P&A does not know the identities of the residents at the commencement of the inspection. (*Id.* at 41:2-7; App. 146.)

The Team Advocate locates the files and records, including the Medication Administration Records ("MARs"), and reviews the records; the volunteer does not review any records. (*Id.* at 20:24-25, 57:8-13; App. 122, 162.) MARs show the medicine prescribed to residents of these facilities, including the dosage and frequency requirements, and include many spaces for the facility staff to initial to confirm the medications are being properly and timely administered to the residents. (*Id.* at 57:14 – 58:7; App. 162-63.) There is no other document which shows the daily plan for administration of medication other than the MAR. (*Id.* at 59:25 – 60:2; App. 164-65.) Notably, the facility staff members administering the medications are not nurses. (*Id.* at 58:1-3; App. 163.)

At the end of the inspection the Team Advocate prepares a report of findings which is submitted to multiple state agencies, including Respondent DDSN. (Tr. p. 21:1-10; p. 62:3-8; Plaintiff's Ex. 2; App. 126, 167, 201.) The report does not contain any personal identifiers. (Tr. p. 21:24 – 22:2; Pl. Ex. 2; 126-27, 201.).

There are a variety of residential rehabilitation options in South Carolina which serve as an alternative to institutional care, including supported living services, supervised living, Community Residential Care Facilities and Community Training Homes. (Tr. p. 81:7-19; App. 186.) Since the creation of the program over 30 years ago, P&A has inspected over 1,000 Community Residential Care Facilities ("CRCF"). (Prevost Aff.; App. 346.) As part of these inspections, to include CRCF facilities licensed by Respondent DDSN, P&A reviewed MARs. (Tr. p. 71:2-21; App. 176.)

Reviewing MARs in these unscheduled examinations is a critical part of P&A's "review [of] the living conditions of a residential facility, including the plans of care for individuals" because, for example, "it's unusual that [P&A inspectors] don't find medication errors . . . [w]e do find a considerable amount of medication errors." (*Id.* at 59:16-24; App. 164.) More disturbingly, Ms. Perry as Team Advocate has found falsified MARs in her CRCF inspections. (*Id.* at 60:18-21; App. 165.)

Specific to this case

Beginning in 2009, P&A expanded its Team Advocacy inspections to include Community Training Homes ("CTH") licensed by DDSN. (*Id.* at 24:8-12; App. 129.) CTHs are small, residential settings where three to four unrelated people with disabilities live together and receive twenty-four hour supervision, personal care, and training. (*Id.* at 77:15-19; App. 182.) These individuals are vulnerable; many residents who meet this level of care need significant assistance in many of the activities of daily living such as toileting, bathing, ambulating, feeding themselves, medication management, and assistance. (Prevost Aff. ¶ 12; App. 348.) About 2,500 South Carolinians rely on one of 775 CTHs for their daily existence. (Tr. p. 78:3-5; Def. Resp. to Pl. Int. No. 9; App. 183, 368.) Many residents of these facilities do not have parents or guardians and those individuals are alone and isolated. (Tr. p. 36:22-24; App. 141.)

The impetus for these CTH inspections was abuse and neglect reports made to the State Law Enforcement Division showing serious problems in CTHs. (*Id.* at 22:4 – 23:11; App. 127-28.) Initially, CTHs licensed by DDSN allowed the inspections to include a review of the residents' MARs. (*Id.* at 68:12-15; 73:5-15; Plaintiff's Ex. 2; App. 173, 177, 201.) However, at some point thereafter DDSN did not allow the Team Advocacy inspection to include a review of MARs. (Tr. p. 25:9 – 26:9, 73:5-15; App. 130-31, 178.) In addition to the problems noted above,

inspectors found expired foods, maintenance problems, accessibility problems, and expired medications at DDSN CTHs. (*Id.* at 66:3-8; Pl. Ex. 2; App. 171, 201.)

P&A brought suit seeking to require DDSN to allow P&A to inspect MARs at CTHs as part of P&A's statutory grant of unannounced inspections to ". . . review the living conditions of a residential care facility, including the plans of care for individuals . . ." P&A correctly believes that it has the right to review on-site medication administration records—and other documents documenting the living conditions of residents which are kept at the CTH—of individuals residing within such facilities, while Respondents propose to unilaterally restrict P&A's powers with a tortured reading of the statute which is neither generally in line with P&A's explicit charge under law nor specifically justifiable by Respondents' arbitrary position.

STANDARD OF REVIEW

"Questions of statutory construction are a matter of law." *Boiter v. S. Carolina Dep't of Transp.*, 393 S.C. 123, 132, 712 S.E.2d 401, 405 (2011) (citing *Charleston County Parks & Recreation Comm'n v. Somers,* 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995)). The appellate standard of review for questions of law is *de novo*. *See Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) ("We are free to decide a question of law with no particular deference to the circuit court."); *Fresmire v Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2008) ("This court reviews all questions of law *de novo*."). The appellate court will not disturb the trial court's findings of fact unless they are clearly erroneous. *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

ARGUMENT

I. The General Assembly intended to grant P&A broad authority when conducting Team Advocacy Inspections.

A. To effectuate the intent of the General Assembly, P&A must be allowed to inspect MARs.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *See Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *McClanahan v. Richland County Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002) (citation omitted).

The General Assembly's intent behind the statutory scheme which authorizes the protection and advocacy system generally, and which specifically empowers P&A to conduct Team Advocacy Inspections can be found in S.C. Code Ann. § 43-33-310:

> It is the further purpose of this act to express the desire of the General Assembly that Protection and Advocacy for People with Disabilities, Inc., 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. § 43-33-310.

In order to comply with this expressly stated intent, P&A's authority must be construed broadly. *See City of Columbia v. Bd. of Health & Envtl. Control*, 292 S.C. 199, 202, 355 S.E.2d 536, 538 (1987) ("The delegation of authority to an administrative agency is construed liberally when the agency is concerned with the protection of the health and welfare of the public."). An individual with a developmental disability requires "a combination and sequence of special, interdisciplinary or generic services, individualized supports, or other forms of assistance that are of lifelong or extended duration and are individually planned and coordinated," S.C. Code Ann. §

43-33-340(2)(e). P&A cannot protect and advocate for an individual who requires such care if P&A does not know what care those individuals receive on a day-to-day basis. Thus, the General Assembly granted P&A the authority to conduct Team Advocacy Inspections, which includes an inspection of the individual's plans of care. S.C. Code Ann. 43-33-350(4).

Only a broad interpretation of the term plans of care can effectuate the expressly stated intent of the General Assembly. Accordingly, this Court should reverse the Court of Appeals, and hold that the term plans of care encompasses MARs.

B. The plain language of the statute authorizes P&A to review MARs as part of a Team Advocacy Inspection.

P&A is authorized to conduct Team Advocacy Inspections under S.C. Code Ann. § 43-33-350(4). The statute defines Team Advocacy inspections as "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." *Id.* (emphasis added). The language of S.C. Code Ann. § 43-33-350(4) authorizes P&A to inspect MARs as part of the plans of care for residents of CTHs licensed by DDSN.

Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Id.* at 233, 509 S.E.2d at 262 (citing *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995)). "If the legislature's intent is clearly apparent from the statutory language, a court may not embark upon a search for it outside the statute." *Hodges*, 341 S.C. at 87, 533 S.E.2d at 582 (citing *Abell v. Bell,* 229 S.C. 1, 91 S.E.2d 548 (1956)). "When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which

are not in the legislature's language, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning." *Id.* (citing *Timmons v. South Carolina Tricentennial Comm'n,* 254 S.C. 378, 175 S.E.2d 805 (1970)). Furthermore, only if the language of a statute gives rise to doubt or uncertainty as to legislative intent, may the construing court search for that intent beyond the borders of the act itself. *Stephen v. Avins Constr. Co.*, 324 S.C. 334, 339, 478 S.E.2d 74, 76 (1996).

"Plans of care" is plain and unambiguous and the Court need not and cannot embark on a search for the plain meaning outside the statute. While the statute does not specifically define the phrase "plans of care," the plain meaning of the phrase "plans of care" is precisely what it says: the Team Advocacy inspector has access to all "plans," *plural*, that relate to "care," of whatever kind, for the stated residents. When a term is undefined the court must interpret the term in accordance with its usual and customary meaning. *E.g. Georgia-Carolina Bail Bonds, Inc. v. Cnty. of Aiken*, 354 S.C. 18, 23, 579 S.E.2d 334, 337 (Ct. App. 2003). According to Merriam-Webster:

- Plan—noun—"a method for achieving an end; an orderly arrangement of parts of an overall design or objective; a detailed program." Making a word plural is to "consist of more than one or more than one kind or class."
- Of—preposition—"the component material, parts, or elements or the contents; relating to; used as a function word to indicate a characteristic or distinctive quality or possession."
- Care—noun—"maintenance; charge, supervision."

A MAR is a part of a plan of care; that is, it contains a method of supervision for each resident of a CTH, with proper administration of medication on a daily basis being the end to be achieved. Specifically, the MAR shows the reader the daily plan for what medication a CTH

resident takes, when the resident should take the medicine, and how the medicine should be administered. (Tr. p. 57:18-23; App. 162.) The fact that a MAR, depending on when it is reviewed, also contains an ongoing record of compliance with that plan does not transform a plan into simply a record. The two are not mutually exclusive. A document can contain both a plan for future events and a record of past events—which a MAR does. The most logical interpretation is that the purpose of the inspection is to evaluate whether the residents are receiving proper care on an ongoing basis, including the medication as properly prescribed.

It is uncontested that DDSN knows P&A has requested to review these records in discharge of its statutory duties, and state law requires DDSN to cooperate with P&A. S.C Code § 43-33-400 ("All departments, officers, agencies and institutions of the State **shall** cooperate with [P&A] in carrying out its duties.") (emphasis added). Not only is DDSN ignoring this unequivocal mandate, it is actively opposing P&A's efforts to comply with its enabling statute and protect this State's most vulnerable citizens.

DDSN has created an internal document it refers to as the "Residential Treatment/Support Plan."[4] DDSN arbitrarily claims this document is not just a plan of care but **the** "plans of care" addressed in S.C Code § 43-33-350(4). *See* Pl. Ex. 1, App. 203 ("[w]e 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") (emphasis added).

Notably, DDSN has never provided any authority supporting its assertion that the Residential Treatment/Support Plan is the "plans of care" identified in P&A's enabling statute,

[4] The document is titled "Support Plan", (Def. Ex. 1, p. 21; App. 295.); it is unclear why it is referred to as the "Residential Treatment/Support Plan."

and has never provided any justification as to why what DDSN "considers" is relevant, much less dispositive.[5]

The Affidavit of DDSN Associate State Director Kathi Lacy dated July 7, 2011[6] is telling, admitting

> [w]hile the document in which the needs are listed and the recommendations are made has been known at times by different names, such as "Single Plan," "service of plan," or "support plan" those designations are simply different terms for the federally-required "plan of care."

(Lacy Aff.; App. 388.) First, this is not simply a federally-required form. Federal regulations relied upon by DDSN to justify their interpretation of DDSN's document as *the* plan of care do not contain a specific definition of "plan of care."[7] Nor do those regulations limit said plan to a specific document; rather, they simply state that services must be provided according to "a written plan of care." 42 USC § 1395n(c)(1), 42 C.F.R. § 441.301(b)(1)(i). 42 C.F.R. § 441.351(f), which deals only with waiver programs for people aged sixty-five and over, states that services are provided under a "written plan of care based on an assessment of the individual's **health** and welfare needs. . . . **Each** plan of care must contain **at a minimum, the medical and other services to be provided, ...**" *Id.* (emphasis added). The federal regulations merely set a minimum; they do not fully define everything that must be included in a plan of care, and they do not limit individuals to only a single defined plan of care. *See* 45 C.F.R. § 1326.21(f).

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[5] DDSN also argued in the letter that the Health Insurance Portability and Accountability Act (HIPAA) prohibited the disclosure, (Pl. Ex. 1; App. 203), but wisely abandoned that position at trial since HIPAA does not prevent P&A from receiving the information.

[6] The trial court stated 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." (Am. Order 6; App. 43.) This quotation should be limited to DDSN's internal procedures and forms and should not be read to show that P&A agrees with DDSN's position.

[7] Reliance on federal law to support the argument that DDSN's document is *the* plan of care is so specious that the Court of Appeals did not affirmatively state DDSN's document is *the* plan of care. The Court of Appeals' silence on what document constitutes *the* plan of care, however, leads to an absurd result as outlined in Part II.B herein. This is error.

Second, DDSN admits its internal form has been known by at least three separate names, none of which is "plan of care." No explanation was even attempted at how three separate documents could all be the **one** plan of care DDSN now argues is meant by the P&A enabling statute. The absurdity of this can be seen by Dr. Lacy's trial testimony on direct examination by her counsel:

> Q. . . . [Y]our affidavit previously submitted in 2011, had a document attached to that which was called a single plan. Do you recall that?
>
> A. I do.
>
> Q. And what's the relationship of Exhibit 1 right here [the Residential Treatment/Support Plan] to that single plan?
>
> A. It replaced the single plan.
>
> Q. Okay. When did that happen? I see down at the bottom that was revised February 1st, '12?
>
> A. I think there was a previous addition but very similar to this.

(Tr. p. 84:3-14; App. 189.)

Thus, DDSN's own witness admits the fluid nature of its own internal documents, the evolution of which DDSN now argues to the court is a static, monolithic, singular "plan of care"—conveniently ignoring that DDSN does not now and has never had a document titled Plan of Care.

This Residential Treatment/Support Plan also looks suspiciously like what DDSN says a MAR is exclusively—a record, not a plan. (*Id.* at 13:13-20; App. 118.) For example, it includes categories for the date the service was included in the plan and a category titled "Amount, Frequency, and Duration of Service/Intervention." (Def. Ex. 1; App. 275, 297.) It also includes a box to be checked as to whether or not the need "has been met" and a space to explain why a service is being discontinued if the need has not been met. *Id.* Each and every one of these is by

definition a record of what occurred in the past beginning with the day after it is executed and continuing thereafter.

Incredibly, considering this form relates to the most vulnerable people in our society and their daily needs, it is completed but once per year. (Tr. p. 82:20-23, 86:25-87:2; App. 189, 191-92.) DDSN thus unsurprisingly admits the Residential Treatment/Support Plan does not reflect what happens on a day-to-day basis at its CTHs. (*Id.* at 96:1-3; App. 201.) "Plans of care" are an extension of "living conditions" as referenced in the enabling statute, but apparently DDSN believes living conditions remain permanently frozen in time for periods of at least one year. Even a cursory review of the Residential Treatment/Support Plan shows it provides no information concerning "conditions in the facilities." Thus, not only are the living conditions frozen in time, the review of them is to come from a document that does not even address the matter.

Pursuant to the plain meaning Rule, the term "plans of care" plainly includes MARs. The interpretation of plans of care previously put forth by DDSN is illogical. Thus, this Court should reverse the Court of Appeals and hold that P&A may inspect MARs as part of Team Advocacy Inspections.

C. If the General Assembly intended to limit P&A's authority to review documents during Team Advocacy Inspections, then the General Assembly would have expressly done so.

The General Assembly granted P&A distinct powers that arise in separate situations. P&A has a federally designated role to *investigate* abuse and neglect and act as an advocate and a monitor under 42 U.S.C. § 15043(a). P&A also has a separate, state-created role, to *inspect* by conducting Team Advocacy Inspections under S.C. Code § 43-33-350(4).[8] These two powers—

[8] The authority to conduct Team Advocacy Inspections, which is not found in federal law, is broader than any power granted to P&A contained in federal law. *See* 45 C.F.R. § 1326.21(f) ("A Protection and Advocacy System may exercise its authority under State law where the State authority exceeds the authority required by the Developmental

the power to investigate and the power to inspect—are distinct, arise in different contexts, and under separate provisions of P&A's enabling legislation.

The General Assembly fulfilled its obligation to grant P&A its federally mandated power, by authorizing P&A to not only advocate for individuals with disabilities, but also "investigate complaints by or on behalf of any person with a developmental or other disability." S.C. Code § 43-33-350(2). P&A's power to inspect records when investigating a complaint only comes into play when P&A receives a "written request to investigate a complaint . . . or upon . . . the receipt of a complaint of abuse or threatened abuse. . . ." S.C. Code § 43-33-370. Section 43-33-370(2) expressly limits P&A's authority to inspect and copy records in response to a complaint by stating P&A cannot inspect "the individual medical, treatment or other personal records of other persons [who are not the subject of the complaint] in the program or facility." However, the inclusion of this language in Section 43-33-370(2) does not demonstrate the General Assembly's intent to restrict P&A's ability to review documents during Team Advocacy Inspections under Section 43-33-350(4). In fact, the inclusion of the express language in Section 43-33-370(2) coupled with the express exclusion of the same language in Section 43-33-350(4) demonstrates a clear legislative intent that Section 43-33-350(4) does not contain the same restrictions on P&A's authority.

South Carolina adheres to the canon of statutory construction known as the doctrine of "expressio unius est exclusio alterius" or "inclusio est exclusio alterius." *German Evangelical Lutheran Church of Charleston v. City of Charleston*, 352 S.C. 600, 576 S.E.2d 150 (2003); *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000). This canon of statutory construction holds that "to express or include one thing implies the exclusion of another." *German Evangelical*, 352

Disabilities Assistance and Bill of Rights Act of 2000. However, State law must not diminish the required authority of the Protection and Advocacy System as set by the Act.").

S.C. at 153, 576 S.E.2d at 606 (citing Black's Law Dictionary 602 (7th ed. 1999)). This canon is applicable here.

The General Assembly specifically included the restrictions on P&A's ability to inspect and copy records in response to a complaint found in Section 43-33-370(2). However, in drafting the remainder of the same chapter of the code, the General Assembly drafted Section 43-33-350(4) without this same language. The General Assembly could have very easily included this restrictive language in Section 43-33-350(4) but did not do so. Stated differently, the General Assembly specifically included restrictions on P&A's authority to review records when responding to a complaint under Section 43-33-370(2), yet they specifically excluded any such restriction on P&A's authority to review records as part of a Team Advocacy Inspection under Section 43-33-350(4). Therefore, under the doctrine of "expressio unius est exclusio alterius" or "inclusio est exclusio alterius," the General Assembly's failure to include this express restriction on P&A's authority in Section 43-33-350(4) is indicative of a legislative intent that P&A's authority to review records under Section 43-33-350(4) is not restricted in the same manner.

It is not surprising that the General Assembly did not include the restrictive language in the statute governing P&A's authority to conduct Team Advocacy Inspections, given the fact that the inspections arise in a completely separate context from investigating a complaint. The authority to investigate only arises when P&A receives a signed "written request to investigate a complaint" or "a complaint of abuse or threatened abuse" by an individual with a developmental disability. S.C. Code Ann. § 43-33-370. Conversely, P&A can conduct an "unannounced" Team Advocacy Inspection at any time and no justification is required for conducting the inspection. S.C. Code Ann. § 43-33-350(4). Thus, P&A's authority to conduct Team Advocacy Inspections

under Section 43-33-350(4) is much broader than its authority to conduct an investigation under Section 43-33-370.

Further evidencing this broad grant of authority, the General Assembly did not place restrictions on what living conditions P&A may inspect when conducting a Team Advocacy Inspection despite placing explicit restrictions on P&A's ability to investigate. This is due to the different nature of each power. The purpose of conducting an investigation under Section 43-33-370 is to determine if the specific allegations are true. In order to make that determination, P&A does not need unfettered access to every document concerning every resident contained at a facility where the complaint arises. Rather, P&A needs access to the documents regarding the individual about which the complaint is lodged, which Section 43-33-370 grants. S.C. Code Ann. § 43-33-370. On the other hand, the purpose of a Team Advocacy Inspection under Section 43-33-350(4) is to assess the living conditions for all individuals housed in the facility generally. In order to make that assessment, P&A requires much broader authority to review documents, which Section 43-33-350(4) grants by not including the explicit restrictive language of Section 43-33-370. S.C. Code Ann. § 43-33-350(4). As the General Assembly did not include that restrictive language it was error for the Court of Appeals to rewrite the statute to include such a restriction. This Court, therefore, should reverse the Court of Appeals and hold that P&A may review living conditions and records, such as MARs, as part of a Team Advocacy Inspection.

D. The authority to review MARs as part of a Team Advocacy Inspection does not render the restrictions found in S.C. Code Ann. § 43-33-370 meaningless.

Contrary to the Court of Appeals' opinion, recognizing the broader grant of authority to P&A in Section 43-33-350(4) will not render the restrictions found in Section 43-33-370 "meaningless." (Opinion at *8.) The Court of Appeals reached this conclusion by finding that during an investigation pursuant to Section 43-33-370, P&A could simply announce an

unannounced inspection pursuant to Section 43-33-350(4) and gain access to documents of other residents protected by Section 43-33-370. (*Id.*) This was error.

First, to reach that conclusion the Court of Appeals opinion operates under the assumption that when P&A conducts investigations pursuant to Section 43-33-370 it enters facilities with the improper purpose of obtaining access to as many personal documents as possible instead of the purpose to fulfill P&A's statutory obligation to conduct a proper investigation. The General Assembly demonstrated its trust in P&A by statutorily requiring P&A to conduct Team Advocacy Inspections and investigations of abuse with these powers being separate and distinct. *See* S.C. Code Ann. §§ 43-33-350(4) & 370. It is, therefore, illogical to impose such an improper purpose on P&A to force an interpretation of P&A's authority while conducting Team Advocacy Inspections to support Respondent's improper position. In fact, the General Assembly's grant of authority to conduct these two separate functions evidences that the General Assembly believes that P&A will carry out each statutory mandate in the independent manner set forth under the two statutes.

Second, "[b]ecause the statutes at issue, when given their plain and ordinary meaning, can each be given effect without doing harm to the other, the rules of statutory interpretation are not needed and the [C]ourt has no right to impose another meaning." *Anderson v. S.C. Election Comm'n*, 397 S.C. 551, 558, 725 S.E.2d 704, 707 (2012) (internal quotations and citations omitted); *see also Hodges*, 341 S.C. at 88, 533 S.E.2d at 582 ("[T]his Court should not completely disregard the text of an unambiguous statute based on an alleged conflict with an earlier statute."). As explained in Part I.C, *supra*, sections 43-33-350(4) and 43-33-370 arise in separate and distinct contexts. The Court can give effect to the plain meaning of each statute without harming the other. It was, therefore, error for the Court to impose such an improper purpose upon P&A while

conducting Team Advocacy Inspections to read a possible conflict into the statutes. Accordingly, the Court of Appeals' conclusion that allowing P&A to inspect MARs as part of Team Advocacy inspections would render the protections found in Section 43-33-370 "meaningless" is incorrect.

E. The privacy protections built into P&A's enabling statute evidence intent for P&A's access to records to be construed broadly.

There are safeguards protecting the privacy of individuals whose plans of care P&A reviews contained in the statutes creating P&A. The first safeguard is that "[o]nly the coordinator of the team advocacy project or the coordinator's designee is authorized to perform reviews of plans of care." S.C. Code Ann. § 43-33-350(4). A report based on the inspection must be submitted to select State agencies. *Id.* The report, however, does not contain personally identifiable information. (Tr. p. 21:24 – 22:2; Pl. Ex. 2; App. 126-27, 201.)

These safeguards provide strong protections for the privacy rights of all residents. Moreover, P&A takes the privacy of residents of facilities P&A inspects very seriously and ensures the statute and safeguards are followed. (*Id.* at p. 20:24 – 22:3; App. 125-26.)

These protections demonstrate that the General Assembly intended P&A to have the authority to review sensitive and private information. Otherwise, these protections would not be necessary. Since "courts must presume the legislature did not intend to do a futile act[,]" this Court must acknowledge this intention. *State v. Sweat*, 379 S.C. 367, 377, 665 S.E.2d 645, 651 (Ct. App. 2008) (citing *Proctor v. Dep't of Health and Envtl. Control,* 368 S.C. 279, 311, 628 S.E.2d 496, 513 (Ct.App.2006)). Accordingly, the protections mandated in the statutes evidence the General Assembly's intention that the Team Advocate be allowed to view sensitive and private information such as MARs as part of the inspection of "plans of care."

II. The Court of Appeals' Opinion will have a far reaching effect that has the consequence of reaching an absurd result clearly not intended by the General Assembly.

A. The Opinion substantially limits the effectiveness of the Team Advocacy Inspections.

If allowed to stand, the Court of Appeals' ruling will drastically lower the protections individuals with disabilities receive across the entire State. The Court of Appeals' interpretation of P&A's authority while conducting Team Advocacy Inspections is not limited to just Community Training Homes licensed by DDSN. (Opinion at *6.) Rather, this interpretation will apply to all facilities P&A inspects under Team Advocacy. Thus, the Opinion effectively changes the oversight P&A has exercised for the past thirty years over facilities caring for people with disabilities in South Carolina, many of whom have no one else to advocate on their behalf or who cannot speak for themselves. P&A will no longer be able to effectively ensure residents of facilities across the State receive proper medical care, as required by statute. No other entity is authorized to conduct these unannounced inspections.[9]

Without the ability to inspect records, including MARs, the usefulness and effectiveness of P&A's Team Advocacy Inspections is substantially limited. Medical care is inherently part of a person with a disability's living conditions in a facility. A person with developmental disabilities, as defined by statute, needs "a combination and sequence of special, interdisciplinary or generic services, individualized supports, or other forms of assistance that are of lifelong or

[9] The Court of Appeals' Opinion does state that other, unspecified entities inspect facilities. (Opinion at *3, n.2. (noting that DDSN "contracts with an organization designated by Medicare and Medicaid to perform quality assurance reviews.").) There is, however, no explanation as to why these entities can inspect individual's medical records given that not every individual receiving care at a facility licensed by DDSN receives care pursuant to Medicare and Medicaid. (Tr. p. 10:1-7; App. 115.) Even more puzzling is that the Court of Appeals endorses the allowance of unnamed third-parties inspecting developmentally disabled individuals' medical records, with no readily apparent statutory authority to do so, yet simultaneously holds that P&A, the entity explicitly authorized by statute to perform a review of these facilities, is not authorized to review MARs as part of a Team Advocacy Inspection. DDSN is, therefore, the arbiter of who can inspect medical records with no readily apparent statutory authority for this power. This is an absurd result not intended by the General Assembly.

extended duration and are individually planned and coordinated." S.C. Code Ann. § 43-33-340(2)(e). In order to ensure residents of facilities who have developmental disabilities receive this care, the General Assembly authorized Team Advocacy Inspections. S.C. Code Ann. §§ 43-33-310 & 350(4).

During these inspections, the Team Advocate often discovers that a facility is not following the prescribed plan of care or that records—including MARs—have been altered in order to make it appear as though the plan of care was followed. (*Id.* at p. 59:16-24, 60:18-21; App. 164-165.) Additionally, medication errors are often discovered during these inspections. (*Id.* at 59:16-24; App. 164.) As the General Assembly has noted, many residents in these facilities have critical, daily medical needs. S.C. Code Ann. § 43-33-340(2)(e). Receiving this care is part of the residents' "living conditions." Reviewing plans of care—including MARs—is the most practical and direct, indeed the only, way to fully review that aspect of the living conditions of residents.[10] Without this ability, the Team Advocate is unable to fully ensure the residents have adequate living conditions to suit their individual needs. (Tr. p. 41:2-16; App. 146.) The statute envisions the Team Advocate being allowed to review MARs as part of an inspection of living conditions. *See supra* Part I. Thus, the loss of P&A's authority to review MARs will have far reaching consequences not intended by the General Assembly.

B. If allowed to stand, the Court of Appeals opinion will effectively allow the inspected facilities to determine what constitutes the plan of care P&A is authorized to inspect, which is an absurd result not intended by the General Assembly.

When interpreting a statute "courts will reject [a] meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would

[10] DHEC defines "Activities of Daily Living" for individuals who live in a CRCF to include the "administration of medication." S.C. Code Ann. Regs. 61-84.101(a). Further evidencing that the administration of medicine is part of a developmentally disabled individual's living conditions.

defeat the plain legislative intention." *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). Rather, "the court will construe the statute so as to escape the absurdity and carry the intention into effect." *Id.*

The Court of Appeals did not take an explicit position on what constitutes the "plan of care" P&A is authorized to inspect pursuant to S.C. Code Ann. § 43-33-350(4). The Court of Appeals does, however, acknowledge P&A has the "authority to view documents setting forth the plans of care" during Team Advocacy Inspections. (Opinion at *9.) In the fact section, the Court of Appeals notes that DDSN allowed P&A to inspect a document DDSN "considered the same as the plan of care" during Team Advocacy Inspections. (*Id.* at *3-4.) Effectively, the Court of Appeals endorsed DDSN's policy of dictating what the plan of care is to P&A. The Court of Appeals opinion, therefore, authorizes the entities P&A inspects to dictate what the plan of care is to P&A.[11] This is an illogical result that surely was not intended by the General Assembly. Accordingly, this Court should reverse the Court of Appeals, and hold that the term "plans of care" encompasses MARs.

III. P&A's interpretation of "plans of care" is entitled to *Chevron* deference.

While P&A is not a state agency, the state legislature delegated authority to P&A and charged it with administering its own statutes. *See* S.C. Code Ann. §§ 43-33-310 *et seq.* Persons acting in good faith to provide information to P&A or participate in resulting judicial proceedings are given statutory immunity—both civil and criminal. S.C. Code § 43-33-390. The Governor of

[11] The Opinion can also be read to endorse the finding that the Residential Treatment Plan/ Support Plan put forth by DDSN is *the* Plan of Care that P&A is authorized to inspect. This document is only required for individuals with developmental disabilities receiving care pursuant to a Medicaid waiver. *See* 42 C.F.R. § 441.301(b)(1)(i); 42 C.F.R. §441.351(f). P&A inspects numerous facilities operated and licensed by various organizations, not just CTHs licensed by DDSN. (Tr. p. 33:10-13, 71:2-15; App. 138, 176.) Thus, not all individuals even have this document. A construction of the term "plans of care" that restricts P&A to inspecting only a single document, a document which may not even exist for many residents, is an absurd result that could not have been intended by the General Assembly. Any interpretation that reaches the result of only authorizing P&A to inspect the Residential Treatment Plan/ Support Plan, therefore, is in error.

the State of South Carolina makes appointments to P&A's Board of Directors. S.C. Code § 43-33-330. P&A receives government funding. (Prevost Aff. p. 2; R. 344.)

Moreover, prior case law grants P&A the status of an agency when interpreting P&A's statutory authority. *See SC DHEC v. Bellwood Manor*, 2010 WL 6782577, at *8 (Admin. Law Ct. Nov. 22, 2010) (holding that P&A's delegation of authority should be construed liberally like delegations of similar authorities to an administrative agency). Therefore, even if "plans of care" is found to be ambiguous, P&A is entitled to deference in its interpretation of its own enabling legislation. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984); *State v. Sweat*, 379 S.C., 367, 374, 665 S.E.2d 645, 649 (*citing Buist v. Huggins,* 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) ("The construction of a statute by the agency charged with its administration will be accorded the *most respectful consideration* and *will not* be overruled absent *compelling* reasons.") (emphasis added); *see also City of Columbia*, 292 S.C. at 202, 355 S.E.2d at 538 ("The delegation of authority to an administrative agency is construed liberally when the agency is concerned with the protection of the health and welfare of the public.")

The application of *Chevron* deference involves a two-step process. First, "[i]f the intent of [the General Assembly] is clear, . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of [the General Assembly]." *Chevron*, 467 U.S. at 843-44; *see also Sweat*, 379 S.C. at 374, 665 S.E.2d at 649 (analyzing the plain language of the statute before considering the agency's interpretation). Here, the first step of the *Chevron* formula is dispositive as to the meaning of "plans of care." *See supra* Part I.B. However, should the Court find that the General Assembly "has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . Rather, . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467

U.S. at 844; *see also Sweat*, 379 S.C. at 374, 665 S.E.2d at 649 (citations omitted) (stating that the court will only reject an agency's interpretation where there are compelling reasons and "the plain language of the statute is contrary to the agency's interpretation"); *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014) ("[O]ur deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations unless there is a compelling reason to differ."). Therefore, unless there are compelling reasons and a specific finding that P&A's interpretation is *contrary* to the plain language of the statute, the Court must give deference to P&A's reading of "plans of care."

P&A's interpretation is not contrary to the plain meaning of the statute. Rather, it is in line with the plain meaning. *See supra* Part I.B. Moreover, there are no compelling reasons to differ from P&A's interpretation. Finally, established usage in regard to the meaning and effect of a statute is a relevant and persuasive guide to its authoritative interpretation. 2B Sutherland Statutory Construction § 49:6 (7th ed.) (citing *C. I. R. v. First Sec. Bank of Utah, N. A.*, 405 U.S. 394 (1972)). In this instance, P&A has inspected records, including MARs, at private CRCFs and at facilities controlled and operated by separate state agencies, **even facilities operated by DDSN**, for over 30 years. (Tr. p. 33:10-13, 71:2 – 72:23; Prevost Aff.; App. 138, 176-177, 346.) Accordingly, because P&A's interpretation of "plans of care" is entitled to deference and such interpretation is not contrary to the plain language of the statute, this Court should apply *Chevron* deference to P&A's interpretation of the term plans of care and hold P&A has the authority to inspect MARs as part of Team Advocacy Inspections. *See Kiawah Dev. Partners, II*, at 36, 766 S.E.2d at 719 (giving deference to DHEC's interpretation of a statute); *Trident Med. Ctr. v. S.C.*

Dep't of Health & Envtl. Control, 412 S.C. 341, 360–61, 772 S.E.2d 177, 187 (Ct. App. 2015) (same).

IV. South Carolina public policy favors authorizing the inspection of documents by P&A to protect the State's most vulnerable citizens.

South Carolina, decades ago, explicitly stated by statute that the public policy in this State is to foster the protection of people with disabilities. Specifically, "[i]t is the policy of this State to encourage and enable the blind, the visually handicapped, and the otherwise physically disabled to participate fully in the social and economic life of the State and to engage in remunerative employment." S.C. Code Ann. § 43-33-10. The legislative history of this statute shows this unambiguous expression was made prior to the initial passage of the federal law pertaining to State protection and advocacy systems and prior to the establishment of P&A.

P&A was then formally established, and the General Assembly noted the "purpose of th[e] act [creating P&A and authorizing Team Advocacy inspections is] to express the desire of the General Assembly that Protection and Advocacy for People with Disabilities, Inc. exercise protection and advocacy functions not only for the citizens of South Carolina with developmental disabilities but also for all other citizens of the State with disabilities." S.C. Code Ann. § 43-33-310.

Thus, the General Assembly expressly stated the State's public policy for the protection of people with disabilities, and then implemented the policy through a comprehensive statutory scheme authorizing P&A to affirmatively "protect" and "advocate." S.C. Code Ann. §§ 43-33-310 through -400.[12]

[12] As previously noted, it is impossible for P&A to effectuate this intent without inspecting the day-to-day care a person with a developmental disability receives. *See supra*, Parts I.A. and II.A.

The appellate courts of South Carolina defer to the General Assembly on matters of public policy. *Taghivand v. Rite Aid Corp.*, 411 S.C. 240, 247, 768 S.E.2d 385, 389 (2015) ("Given our deference to the General Assembly in matters of public policy . . ."); *see also Cato v. Grendel Cotton Mills*, 132 S.C. 454, 129 S.E. 203, 204 (1925) ("Courts must refuse to sustain that which is against the public policy of the state, when such public policy is manifested by the legislative or fundamental law of the state.") (quotation omitted).

P&A is the "organization authorized by statute to serve and protect the health, welfare, and rights of developmentally disabled and handicapped persons in South Carolina[.]" *Bellwood Manor*, 2010 WL 6782577, at *8. P&A is thus vested with a formidable mechanism to defend the State's public policy—the Team Advocacy Inspection. These unannounced inspections to review the various realities of daily life in residential facilities are an essential part of South Carolina's legislative plan to implement the public policy to protect individuals with disabilities.

By providing independent, third-party oversight of the facilities that serve and house these citizens, Team Advocacy Inspections help ensure that South Carolina residents with disabilities are receiving appropriate care and living in safe environments. This confirms the State's public policy to ensure that people with disabilities are protected and that they have an advocate in P&A. By removing this power to inspect records—including MARs—from P&A's inspectors, the Court of Appeals endangered the safety and quality of life of South Carolina's most vulnerable residents.

Conclusion

For the foregoing reasons, this Court should reverse the Court of Appeals and hold that MARs are "plans of care" within the meaning of S.C. Code Ann. § 43-33-350(4).

[SIGNATURE ON FOLLOWING PAGE]

Respectfully Submitted,

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June 29, 2017.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

ON CERTIORARI FROM THE COURT OF APPEALS
APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Edgar W. Dickson, Presiding Judge

Case No. 2010-CP-40-1095
Appellate Case No. 2016-001983

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, ... Respondent.

PROOF OF SERVICE

I, the undersigned Paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, Protection and Advocacy for People with Disabilities, Inc. do hereby certify that I have served all counsel/parties in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: Brief of Petitioner

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