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

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S.C. SUPREME COURT

Case No. 2010-CP-40-01095
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.

REPLY BRIEF OF PETITIONER

Reid T. Sherard Phillips L. McWilliams Nelson Mullins Riley & Scarborough LLP Post Office Box 10084 Greenville, SC 29603 (864) 250-2300 Anna Maria Darwin Protection and Advocacy for People with Disabilities, Inc. 545 N. Pleasantburg Drive, Suite 106 Greenville, South Carolina 29609 (864) 235-0273 Thornwell W. Simons 3710 Landmark Drive, Suite 208 Columbia, South Carolina 29204 (803) 782-0639 *Attorneys for Petitioner*	William H. Davidson, II Kenneth P. Woodington Davidson & Lindemann, P.A. 1611 Devonshire Drive- Second Fl. Post Office Box 8568 Columbia, South Carolina 29202 (803) 806-8222 *Counsel for Respondents*

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Reid T. Sherard
Phillips L. McWilliams
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 10084
Greenville, SC 29603
(864) 250-2300

Attorneys for Petitioner

Protection and Advocacy for People with Disabilities, Inc.
Anna Maria Darwin
Thornwell W. Simons
545 N. Pleasantburg Drive, Suite 106
Greenville, South Carolina 29609
(864) 235-0273

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

ARGUMENT

I. This case is about whether P&A can inspect MARs as part of a Team Advocacy Inspection.

The full spectrum of documents P&A may inspect are not at issue in this appeal. Rather, the specific issue is whether P&A may inspect Medication Administration Records ("MARs") as part of a Team Advocacy Inspection. DDSN devotes large portions of its brief to arguing that P&A's interpretation of the term "plans of care" in S.C. Code Ann. § 43-33-350(4) is overly broad. Specifically, DDSN argues that under P&A's definition P&A has access to every document imaginable located at a facility inspected by P&A. While P&A does believe its authority under section 43-33-350(4) is broad and that because of this broad authority it can inspect MARs, DDSN's argument ignores the fact that the only specific documents at issue in this case are MARs. P&A's contentions regarding its broad authority do not require this Court to delineate every document P&A may access during a Team Advocacy Inspection or hold that P&A has unfettered access to all documents located at a facility P&A inspects, because in this instance P&A is only seeking a ruling that it can inspect MARs as part of a Team Advocacy Inspection.

P&A brought this declaratory judgment action seeking a declaration that DDSN grant P&A access to "records which may provide information concerning living conditions and which may be considered within the plain meaning of the phrase 'plans of care,' including but not limited to residents MAR records." (Compl. at Prayer for Relief; App. p. 75-76.) Out of those records which P&A has sought to review as part of its Team Advocacy Inspections, the only specific documents at issue in this case—and the only specific documents to which DDSN has blocked P&A access—have been MARs. Further, there is nothing in the record that reflects DDSN, or any other entity, believes P&A Team Advocacy Inspections review any records, other

than MARs, that P&A is not authorized to inspect. Accordingly, DDSN's slippery slope argument is unfounded and is not a sufficient reason to rule the term "plans of care" does not encompass MARs. *See State v. Wade*, 306 S.C. 79, 84, 409 S.E.2d 780, 783 (1991) (rejecting argument that the Court characterized as a "slippery slope" argument). Ultimately, DDSN's argument here is speculative. If at some point in the future P&A seeks to review some other document that DDSN believes P&A should not review, DDSN retains the power to seek declaratory relief at that time.

II. In order to inspect living conditions P&A must be able to inspect records that document those conditions.

DDSN argues Team Advocacy Inspections are limited to an inspection of living conditions. The flaw in this argument is that the ongoing medical care provided in a CTH II setting is a necessary part of each resident's "living conditions." Accordingly, P&A can review MARs as part of an inspection of living conditions during a Team Advocacy Inspection.

A developmentally disabled person, 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 extended duration and are individually planned and coordinated." S.C. Code Ann. § 43-33-340(2)(e). In order to ensure residents of CTHs are receiving this care, the General Assembly authorized Team Advocacy Inspections. S.C. Code Ann. § 43-33-350(4).

During these inspections the team advocate walks through the facility, reviews the food residents eat, the sleeping conditions of residents, interviews residents, and reviews various external and internal documents relating to the facility and the individual care of each resident, including the treatment plan for each resident—which includes MARs. (Tr. p. 19: 7-13, 56:18 – 57:11, 71:18 – 72:23; App. 124, 161-62, 176-77.) The team advocate often discovers that a

facility is not following the prescribed plan of care or that records 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. 164-65.) 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 the living conditions of residents. Without this ability, the Team Advocate is unable to ensure the residents have adequate living conditions to suit their individual needs. The statute envisions the Team Advocate being allowed to review MARs as part of an inspection of living conditions.

The authorities cited by DDSN are inapposite. Neither *S.C. Dep't of Soc. Servs. v. Sims*, 359 S.C. 601, 607, 598 S.E.2d 303, 307 (Ct. App. 2004), nor *Benjamin v. Hous. Auth. of Darlington Cty.*, 198 S.C. 79, 15 S.E.2d 737, 739 (1941), interpreted the term living conditions as used in a South Carolina statute. Moreover, neither case dealt with the living conditions of a developmentally disabled individual who requires specific, daily medical care. *Id.* Accordingly, they are not useful authorities in interpreting the term living conditions in S.C. Code Ann. § 43-33-350(4).

Further, the statute cited by DDSN, S.C. Code Ann. § 31-13-180(a), actually links an individual's health to living conditions. Specifically, the statute states "the creation and persistence of substandard living conditions . . . is inimical to the health, welfare and prosperity of all residents of the State." S.C. Code Ann. § 31-13-180(a). That is because it is axiomatic that an individual's living conditions affects their health. Thus, contrary to DDSN's argument, other statutes support the argument that the term living conditions encompasses medical care.

Especially for a developmentally disabled individual who requires a specific sequence of life long care.

Accordingly, the Court should hold that medical care is part of a developmentally disabled individual's living conditions, therefore, P&A can inspect MARs as part of a Team Advocacy Inspection.

III. As written, the Court of Appeals Opinion leads to an absurd result.

The practical effect of the Court of Appeals opinion is to authorize the entities P&A inspects to dictate what the "plan of care" is to P&A. DDSN argues "this case does not involve DDSN dictating what the plan of care is[,]" therefore, the opinion does not authorize DDSN or other entities to dictate what the plan of care is to P&A. (Resp. Br. at p. 33.) Yet, throughout much of its brief DDSN "contend[s] that the statute only permits P&A to review one document regarded as the 'plan of care.'" (*Id.* at p. 11.) Conveniently for DDSN, this is their self-selected document. *See infra*, Part IV.

The Court of Appeals' Opinion notes this fact while acknowledging P&A has the "authority to view documents setting forth the plans of care" during Team Advocacy Inspections. (Opinion at *3-4, *9.) The Opinion, therefore, authorizes the entities P&A inspects to dictate what P&A is allowed to inspect. This is an absurd result.

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 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.* Since the Court of Appeals Opinion, as written, reaches the absurd result of authorizing the entities P&A inspects to dictate

what the plan of care is to P&A, this Court should not allow the Opinion to stand. Rather, this Court should look to the plain meaning of the term "plans of care" and hold the term plainly encompasses MARs.[1]

IV. DDSN's unilateral interpretation of what is a "plan of care" is not entitled to deference.

DDSN's argument is, essentially, that DDSN has a certain document it "regards" as *the* plan of care and their determination as to what is *the* plan of care is entitled to deference. In fact, DDSN refers to this document in their brief as the "specific document DDSN has always regarded as the 'plan of care'" sixteen times.[2] (Resp. Brief at p. 10.) DDSN's brief even contains an argument section titled: "Usage of the term 'plan of care' by DDSN." (*Id.* at p. 25.) Regardless of the heading the argument falls under, the overall premise of DDSN's brief is that DDSN has a document that it regards as the "plan of care" and its determination is final.

However, DDSN fails to explain how the phrase "plans of care" in a clause added to Section 43-33-350(4) in 1993 refers "only"[3] to a specific DDSN document that is not even titled

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[1] DDSN appears to assert that P&A did not make a plain meaning argument to the courts below in the footnote on page 27 of their brief. However, P&A specifically argued that the trial court unjustifiably looked beyond the plain meaning of the statute in reaching the decision below. (P&A Rule 59 Motion p. 2-9; App. 475-482; DDSN response to Rule 59 motion p. 1-3, App. 492-494; Final Brief of Appellant p. 9-15; App. 521-527; Reply Brief of Appellant p. 9 n.8, App. 608.) Thus, this Court can decide the issue on the plain meaning of the statute and does not need to look to outside sources. If DDSN is asserting a different argument in the footnote, P&A is unable to ascertain what that argument is.

[2] DDSN does not always use this exact phrase, but does use a phrase to similar effect. The term, or something to similar effect, appears on the following pages of DDSN's brief: once on p. 7, once on p. 10, once on p. 11, once on p. 12. once on p. 23, once on p. 24, once on p. 25, once on p. 26, three times on p. 28, three times on p. 29, once on p. 31, and once on p. 32.

[3] DDSN refers to there being "only" one specific document that is the plan of care multiple times in their brief. (Resp. Br. p. 11.) ("DDSN contends that the statute only permits P&A to review the one document regarded as the 'plan of care.'"); (Resp. Br. p. 29) ("DDSN advised P&A several times in 2009 that the agency regarded documents such as Def. Ex. 1 to be the only document regarded as the plan of care"); (Resp. Br. p. 31.) ("[T]here is only one specific document, Def. Ex. 1 and its predecessors, that is recognized as the plan of care."). Again, conveniently for DDSN, this is supposedly their self-selected document.

"plan of care."[4] Additionally, DDSN contends that this statute was never used to inspect DDSN facilities before 2007. (Resp. Br. p. 5-6.) Again, there is no explanation as to how the phrase "plans of care" refers to a specific document that exists only in DDSN files when the General Assembly authorized P&A to review "plans of care" starting in 1993—fourteen years before DDSN unilaterally determined what the phrase "plans of care" means.[5]

DDSN does not have the authority to unilaterally determine what the "plan of care" is. *See* S.C. Code Ann. § 44-20-250 (setting out the powers and responsibilities of DDSN). DDSN provides no support for its contention that because DDSN regards a certain document as the "plan of care" the courts and P&A should defer to that determination. Nor does DDSN cite to a single case or statute that authorizes DDSN to determine what document is the "plan of care" that P&A is authorized by the General Assembly to review during Team Advocacy Inspections. Nor could DDSN do so, because no such authority exists. Accordingly, this Court should ignore DDSN's arguments that rely on the assertion that DDSN has unilaterally determined what constitutes the "plan of care." Rather, this Court should look to the plain meaning of the term, and hold that "plans of care" includes MARs.

Moreover, DDSN's argument that their self-selected document is *the* plan of care contradicts their argument, found throughout DDSN's brief, that P&A is not authorized to review any medical records as part of a Team Advocacy Inspection. The contradiction is evident when DDSN argues "[t]o the extent Def. Ex. 1 [DDSN's self-selected plan of care] contains

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[4] DDSN never gives an explanation is to why both documents that DDSN claims have been, at one point in time, the "plan of care," are not titled "plan of care." Rather, the documents are titled "Service Coordination Annual Assessment" and "Single Plan." (Def. Ex. 1; Lacy Affidavit; App. 275, 388.)

[5] As noted in P&A's prior briefing, DDSN does not actually have a single document it has always regarded at Plan of Care. (P&A Brief at p. 12-15.) Not only has the document changed names several times but the information required in the document has changed as well. (*Id.*) For brevity, P&A will not outline the differences again in this Reply.

medical information, the General Assembly has obviously authorized P&A to review such information, as long as it is in that document." (Resp. Br. p. 11.) Thus, DDSN admits that P&A is allowed to view a document that is the plan of care. DDSN also admits that the document they argue is the plan of care contains medical information. Yet, DDSN argues the General Assembly did not intend to authorize P&A to review medical information as part of a Team Advocacy Inspection. That is an absurd result and the Court should reject such an interpretation of S.C. Code Ann. § 43-33-350(4). *Kiriakides*, 312 S.C. at 275, 440 S.E.2d at 366. The Court should, instead, look to the plain meaning of the term "plans of care" and hold it encompasses MARs.

V. The authority granted to P&A in S.C. Code Ann. §§ 43-33-350(4) and 43-33-370(2) are separate and distinct, arise in different situations, and the plain and ordinary meaning of each can each be given effect without doing harm to the other.

If the Court can give effect to the plan and ordinary meaning of two separate statues without harming either statute, then the Court does not need to utilize the rules of statutory construction, 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). The Court of Appeals improperly imposed another meaning on P&A's enabling statutes when it held that recognizing the authority of P&A in Section 43-33-350(4) to review MARs will render the restrictions found in Section 43-33-370 "meaningless."

The General Assembly designated multiple independent functions to P&A. 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)(1). P&A also has a separate, state-created role, to conduct Team Advocacy Inspections under S.C. Code § 43-33-350(4). P&A's authority to investigate and to conduct Team Advocacy Inspections, therefore, arise in different situations and P&A's goal and authority while exercising each power is different.

A Team Advocacy Inspection is an unannounced inspection that focuses on a specific facility. S.C. Code § 43-33-350(4). The Team Advocate inspects the conditions of that specific facility and the care the residents receive on the date and time of the inspection. (Tr. p. 19: 7-13, 56:18 – 57:11, 71:18 – 72:23; App. 124, 161-62, 176-77.) It is a snapshot of the inspected facility, does not focus on any one individual, and is limited to looking at documents and items that detail the living conditions within the inspected facility. S.C. Code § 43-33-350(4).

In contrast, an investigation pursuant to Section 43-33-370 cannot occur randomly, but must be in response to a complaint. S.C. Code Ann. § 43-33-370. The investigation focuses on that specific complaint and gathering information to determine whether the alleged abuse or neglect occurred. It is not a snap shot. Further, in the course of such an investigation, P&A is not only authorized to copy documents, but an investigation within the limitations of Section 43-33-370 could lead outside the bounds of a particular facility to other facilities where relevant records might be kept, because the focus of the investigation is the specific subject of the complaint, not the general living conditions within a facility.[6] An investigation, therefore, may be much broader or narrower in scope than a Team Advocacy Inspection, depending on the nature of the complaint and how the investigation progresses.

P&A can only exercise one of these authorities at a time because each authority is separate, distinct, and arises in separate contexts. P&A is not authorized to conduct a Team Advocacy Inspection in response to a complaint. Rather, P&A is statutorily obligated to conduct an investigation pursuant to S.C. Code Ann. § 43-33-370. Nothing in the record suggests P&A has misused the two powers. Because P&A can only exercise each authority in separate situations the restrictions in section 43-33-370(2) can be given effect while simultaneously

[6] By way of example: P&A receives a complaint concerning a bruise of unknown origin. A complete investigation would likely require a review of records from every facility the individual visited during the possible timeframe the injury occurred to determine if there is any documentation of the source of the injury.

allowing P&A to inspect MARs as part of a Team Advocacy Inspection. The Court of Appeals, therefore, erred by imputing an improper purpose upon P&A's conduct during Team Advocacy Inspections, and that error lead the Court of Appeals into the additional error of imagining a statutory conflict where no such conflict existed. 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. Accordingly, the Court should reverse the Court of Appeal and hold that the term "plans of care" encompasses MARs.

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeals and hold that the term "plans of care" encompasses MARs.

[SIGNATURE ON FOLLOWING PAGE

Respectfully Submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Reid T. Sherard, SC Bar No. 72536
E-Mail: reid.sherard@nelsonmullins.com
Phillips L. McWilliams, SC Bar No. 101809
E-Mail: phillips.mcwilliams@nelsonmullins.com
Post Office Box 10084
Greenville, SC 29603
(864) 250-2300

Protection and Advocacy for People with Disabilities, Inc.
Anna Maria Darwin
545 N. Pleasantburg Drive, Suite 106
Greenville, South Carolina 29609
(864) 235-0273
Thornwell W. Simons
3710 Landmark Drive, Suite 208
Columbia, South Carolina 29204
(803) 782-0639

Attorneys for Petitioner

Columbia, South Carolina

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PROOF OF SERVICE

I, the undersigned Administrative Assistant 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: **Reply Brief of Petitioner**

Counsel Served:

William H. Davidson, II
Kenneth P. Woodington
Davidson & Lindemann, P.A.
1611 Devonshire Drive- Second Fl.
Post Office Box 8568
Columbia, South Carolina 29202-8568
Counsel for Respondents

Cindy K. Hess
Sr. Administrative Assistant

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