

THE STATE OF SOUTH CAROLINA
In 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. 2015-000109

RECEIVED

SEP 21 2016

S.C. SUPREME COURT

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.

APPENDIX - VOLUME TWO

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FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err by not giving effect to the review of “plans of care” during Team Advocacy inspections as provided for in P&A’s enabling statute?
- II. Did the trial court err by interpreting S.C. Code Ann. § 43-33-350 to prevent P&A from conducting proper inspections as required by statute?
- III. Did the trial court err by refusing to afford *Chevron* deference to P&A’s interpretation of “plans of care”?
- IV. Did the trial court err by ignoring South Carolina public policy in preventing P&A from inspecting documents 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

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

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, administrative, and other appropriate remedies

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.

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 four specific 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 developmentally disabled or handicapped person. Inspections must be completed by the system's staff and trained volunteers. Team advocacy inspections are unannounced visits to review the living conditions of a residential facility, including the plans of care for individuals in a residential care facility and a community mental health center day program. Only the coordinator of the team advocacy project or the coordinator's designee is authorized to perform reviews of plans of care. The designee must meet criteria developed by the Joint Legislative Committee on Mental Health and Mental Retardation, after consultation with the system and the South Carolina Association of Residential Care Homes. The system shall prepare a report based on the inspection which must be submitted to the Joint Legislative Committee on Mental Health and Mental Retardation, South Carolina Department of Health and Environmental Control, and State Department of Mental Health.

S.C. Code Ann. § 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).

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; R. 120.) These inspections are of facilities that house disabled persons and have been ongoing since 1986 when the Team Advocacy program was created. (*Id.* at 19:1-17; R. 121.) “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.” *SC DHEC v. 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; R. 155-156, 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; R. 121, 144, 158.) 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; R. 158.) The inspectors perform a physical inspection such as a review of

sleeping arrangements. (*Id.* at 20:18-23; R. 122.) 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; R. 159, 169.) P&A does not know the identities of the residents at the commencement of the inspection and may never know since getting a roster is not required. (*Id.* at 41:2-7; R. 143.)

The Team Advocate locates the Medication Administration Records ("MARs") and reviews the records; the volunteer does not review any records. (*Id.* at 20:24-25, 57:8-13; R. 122, 159.) 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; R. 159-160.) There is no other document which shows the daily plan for administration of medication other than the MAR. (*Id.* at 59:25 – 60:2; R. 161-162.) Notably, the facility staff members administering the medications are not nurses. (*Id.* at 58:1-3; R. 160.)

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; R. 123, 164, 201.) The report does not contain any personal identifiers. (Tr. p. 21:24 – 22:2; Pl. Ex. 2; R. 123-124, 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; R. 183.) In the almost 30 years since the creation of the

program, P&A has inspected over 1,000 Community Residential Care Facilities ("CRCF"). (Prevost Aff.; R. 343.) As part of these inspections, to include CRCF facilities licensed by Respondent DDSN, P&A reviewed MARs. (Tr. p. 71:2-21; R. 173.)

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; R. 161.) More disturbingly, Ms. Perry as Team Advocate has found falsified MARs in her CRCF inspections. (*Id.* at 60:18-21; R. 162.)

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; R. 126.) 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; R. 179.) 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; R. 345.) 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; R. 180, 365.) Many residents of these facilities do not have parents or guardians and those individuals are alone and isolated. (Tr. p. 36:22-24; R. 138.)

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; R. 124-125.) 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; R. 170, 175, 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; R. 127-128, 175.) Inspectors found expired foods, maintenance problems, accessibility problems, and expired medications at DDSN CTHs. (*Id.* at 66:3-8; Pl. Ex. 2; R. 168, 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 concerning 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 trial court erred by not giving effect to the review of “plans of care” during Team Advocacy inspections as provided for in P&A’s enabling statute.

A. The plain language of the statute authorizing inspections by P&A allows P&A to inspect MARs as a plan of care.

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.

1. “Plans of care” is unambiguous.

The issue before the Court is one of straightforward statutory construction as to what is meant by the phrases “plans of care.”

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 legislature’s intent should be ascertained primarily from the plain language of the statute.” *Bass v. Isochem*, 365 S.C. 454, 470, 617 S.E.2d 369, 377 (Ct. App. 2005).

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 v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) (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 Medication Administration Record is a plan of care; that is, it contains a method of supervision for each resident of a Community Training Home, 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; R. 159.) 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.

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

⁴ The document is titled “Support Plan”, (Def. Ex. 1, p. 21; R. 292.); it is unclear why it is referred to as the “Residential Treatment/Support Plan.”

⁵ DDSN also argued in the letter that the Health Insurance Portability and Accountability Act (HIPAA) prohibited the disclosure, (Pl. Ex. 1; R. 200), but wisely abandoned that position at trial since HIPAA does not prevent P&A from receiving the information.

The Affidavit of DDSN Associate State Director Kathi Lacy dated July 7, 2011⁶ 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.; R. 385.) First, this is not simply a federally-required form as described herein. 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 I 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; R. 186.)

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

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; R. 40.) 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.

“plan of care”—utterly 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; R. 115.) 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; R. 272, 294.) 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; R. 184, 188-89.) 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; R. 198.) “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. The trial court not only accepted this faulty logic, but expanded it by stating the following regarding DDSN’s Residential Treatment/Support Plan:

[p]resumably, by limiting the records reviewable by P&A in the course of a review of “living conditions,” § 43-33-350(4), the General Assembly intended that P&A would be able to review plans of care in order to see whether the conditions in the facilities were responsive to the residents’ plan of care.

(Am. Order p. 11; R. 45.) 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.

Since “plans of care” plainly includes MARs, the trial court was incorrect to prevent P&A from inspecting MARs during Team Advocacy visits of CTHs.

2. Even if “plans of care” is ambiguous, the trial court improperly relied on federal law instead of state law in its interpretation.

As an initial matter, 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). As described above, there is no need to search outside the statute. However, even if there is ambiguity, the trial court still erred.

The trial court relied on the usage of the phrase “plan of care” within 42 U.S.C § 1395n(c)(1), 42 C.F.R. § 441.301(b)(1)(i), and 42 C.F.R. § 441.351(f), the federal Medicaid regulations governing the Medicaid Waiver program of the DDSN. (Am. Order p. 5-9; R. 39-43.)

First, these are provisions of federal law, not South Carolina law. South Carolina law provides a specific power to P&A by way of Team Advocacy inspections, a power which is not bottomed in federal law. Importantly, the federal protection and advocacy scheme anticipates that individual States might provide for even broader powers, stating “[a] Protection and Advocacy System may exercise its authority under State law where the authority exceeds the authority required by the [DD Act], as amended. However,

State law must not diminish the required authority of the Protection and Advocacy System.” 45 C.F.R. § 1386.21(f). This plainly provides that federal law is the floor, and a state is free to provide more powers and, if so, then P&A may utilize the expanded powers. The state also “shall provide to [P&A] . . . information about the adequacy of health care and other services, supports, and assistance that individuals with developmental disabilities who are served through home and community-based waivers . . . receive . . .” 42 U.S.C. § 15043(a)(3)(B).

Additionally, other South Carolina statutes and regulations reveal the “plans of care” refers to all plans that detail whatever care, including medical care, that individual is receiving. The South Carolina Code contains numerous references to “plans of care,” including the following:

- S.C. Code Ann. § 44-81-40(J) (“Each resident must be assured that no resident will be required to perform services for the facility that are not for therapeutic purposes as identified in the plan of care for the resident.”);
- S.C. Code Ann. § 44-7-350 (“The agency placing a client in a community residential care facility shall develop an individual plan of care in cooperation with the provider.”);
- S.C. Code Ann. § 43-35-10 (referring to a “written plan of care” in defining exploitation and physical abuse of adults).

These statutes refer generally to a written plan of care, encompassing all manners of care the individual is receiving—including medical care.

Moreover, the South Carolina regulations that refer to “plans of care” specifically refer to medical care. The regulation that provides the standard for a facility housing

people with mental disabilities to receive a license specifically refers “to the health aspects of the individual plans of care.” S.C. Code Ann. Regs. 61-13 E(3). The regulation for Medicaid Nursing Facility Services mandates that such “services shall be provided according to a written plan of care under the direction of a licensed attending physician.” S.C. Code Ann. Regs. 126-314. Both regulations obviously envision a plan of care encompassing medical care as well as other care an individual requires.

Second, these Federal provisions operate within a much narrower context than P&A’s general Team Advocacy inspection power. Admittedly, these statutes govern the Medicaid Waiver that provides funding for most residents of the facilities that P&A seeks to inspect in this case. However, that is but a fraction of the facilities that P&A inspects under its Team Advocacy program. (Tr. p. 33:10-13, 71:2-15; R. 135, 173.) It is undisputed that P&A’s Team Advocacy program inspects other facilities as well—including private facilities and facilities run by the Department of Mental Health. (*Id.*) There is no evidence that residents of those facilities are being cared for under DDSN’s Medicaid Waiver regulations. Indeed, many of the facilities inspected by the Team Advocacy program are CRCFs, which are not directly governed by any federal regulation at all, but only by state level regulatory requirements. *See* SCDHEC Reg. 61-84. The trial court, therefore, erred by relying on federal law to limit the meaning of “plans of care” in a state law.

Moreover, the federal regulations to which the trial court refers do not contain a specific definition of “plan of care,” 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). Similarly, 42 C.F.R.

§ 441.351(f), which deals only with waiver programs for people aged sixty-five and over, does not define “plans of care” as narrowly as the Court’s opinion relies upon it to do. 42 C.F.R. § 441.351 actually 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.

The trial court also relied on several cases interpreting DDSN’s federal waiver document and on testimony from Dr. Lacy as to the history of DDSN’s waiver policies in making its decision. (Am. Order p.6, 8; R. 40, 42.) Those cases and that testimony is inapposite, because the relevant question is not the meaning of the language within DDSN’s federal waiver, but the meaning of P&A’s enabling statute under state law. To the extent that it is relevant, however, DDSN admits in their Answer to Plaintiff’s Complaint, that “plans of various kind” are used for residents of CTHs. (Defs.’ Answer; R. 98.) However, DDSN contends they are only required to disclose the Residential Treatment/Support Plan to P&A during a Team Advocacy inspection; that document does not contain information about the medical care given to residents. (Def. Ex. 1; R. 272.) Again, this interpretation would limit P&A’s review to one plan and to the one plan which does not contain information about the care provided to CTH residents. Such an interpretation is contrary to the language of the statute and would destroy the intent of the General Assembly.

In responding to interrogatories, DDSN admitted the “Residential Habilitation standard (RH5.0) requires that each person receive continuous and coordinated health care. People must be evaluated by a licensed physician, physician’s assistant or nurse practitioner (and dentist) and the plan of care must be followed.” (Def. Resp. to Interrog. No. 13; R. 366.) This demonstrates that the phrase “plans of care” is a not term of art which refers only to DDSN’s Residential Treatment/Support Plan. Rather, DDSN’s actual use of the term is to refer to any “plan” which relates to general “care.” The “plan of care” under 42 USC § 1395n(c)(1), 42 C.F.R. §441.301(b)(1)(i), and 42 C.F.R. § 441.351(f) (2011) is simply a reference to any physician’s “plan” for an individual’s “care,” which follows the plain meaning as explained in Part I.A.1, *supra*. The fact that DDSN has chosen to designate a particular document as *the* “plan of care” for Medicaid Waiver participants is purely a choice on the part of DDSN, not a matter of binding law or regulation. The trial court, therefore, erred in its interpretation of “plans of care” through improper reliance on federal law.

B. P&A’s enabling statute should be construed broadly.

The General Assembly intended P&A’s authority to be broadly construed in order to fulfill “the desire of the General Assembly that South Carolina Protection and Advocacy System for the Handicapped, 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.

1. P&A’s authority to conduct Team Advocacy inspections should be liberally construed and include inspection of MARs.

As “an organization authorized by statute to serve and protect the health, welfare, and rights of developmentally disabled and handicapped persons in South Carolina,

P&A's authority to conduct Team Advocacy inspections should be liberally construed." *Bellwood Manor*, 2010 WL 6782577, at *8 (citing *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.")). In *Bellwood Manor* P&A sought to conduct Team Advocacy inspections of a community residential care facility licensed by DHEC; as part of the inspection P&A sought to inspect the resident's medical records. *Id.* at *2. The Administrative Law Court specifically found that "Team Advocacy members perform a physical inspection of the facility and its records and interview residents, in order to ensure . . . that residents have access to their finances and medications." *Id.* (emphasis added). The Administrative Law Court held that P&A had the authority to inspect any community residential care facility licensed by DHEC, implying that this inspection encompassed an inspection of the resident's medical records—including MARs. *Id.* at *8.

Similarly, P&A now seeks to conduct inspections of CTHs licensed by DDSN. As part of that inspection P&A seeks to review plans of care—including MARs. P&A's authority to conduct these inspections must be liberally construed.

2. When "plans of care" was added to the enabling statute the General Assembly was aware the purpose of P&A is to ensure the developmentally disabled receive proper medical care.

The General Assembly created P&A in response to federal legislation to implement a statewide protection and advocacy system for the disabled. PL 94-103. In response, the legislature created P&A. S.C. Code Ann. § 43-33-310. The purpose of the DD Act is "to improve community services, such as medical care . . . , for individuals

with developmental disabilities.” *Virginia Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1636 (2011) (citing 42 U.S.C. §§ 15023(a), 15024).

When ascertaining the meaning of a statute there is “a presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects.” *State v. McKnight*, 352 S.C. 635, 648, 576 S.E.2d 168, 175 (2003). The General Assembly amended P&A’s enabling statute in 1993 to add “plans of care.” The legislature was thus aware of the purpose of the DD Act to improve medical care for individuals with developmental disabilities when adding this language to the statute. Accordingly, this language was added to ensure that people with developmental disabilities received the proper medical care—to include receiving the proper medication. The legislature thus intended for MARs to be included in documents items inspected as “plans of care” during Team Advocacy inspections.

3. The term “including,” as used in the enabling statute, enlarges the scope of what P&A may inspect during Team Advocacy inspections.

Section 43-33-350(4) authorizes P&A to conduct inspections of “the living conditions of a residential facility, including the plans of care[.]” S.C. Code Ann. § 43-33-350(4) (emphasis added). Generally in statutory construction “to express or include one thing implies the exclusion of another.” *Berkeley Cnty. Sch. Dist. v. S. Carolina Dep’t of Revenue*, 383 S.C. 334, 348, 679 S.E.2d 913, 920 (2009). However, in “definitive provisions of statutes and other writings, ‘include’ is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration.” *Am. Sur. Co. of New York v. Marotta*, 287 U.S. 513, 517 (1933); *see also*

In re Grewe, 4 F.3d 299, 305 n.5 (4th Cir. 1993) (the “general rule of statutory construction” is that using the word “including” enlarges the scope of [a statute] rather than limits it.”).

The term “including” in section 43-33-350(4) enlarges the scope of the term “living conditions.” The General Assembly has not provided an exhaustive list in the statute of what can and cannot be inspected during team advocacy inspections other than generally living conditions and specifically “plans of care.” Nor did the General Assembly intend to limit the inspections of living conditions to written plans that never contain records of care already received; such an inspection would hardly constitute an inspection at all. The General Assembly, therefore, did not intend for “plans of care” to be construed narrowly. Rather, the General Assembly intended the statute to be read broadly and allow a Team Advocacy inspection to inspect all living conditions including plans for whatever care an individual receives—including MARs.

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

The statutes creating P&A encompass multiple safeguards protecting the privacy of individuals whose plans of care P&A reviews; “[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.* Additionally, section 43-33-380 prohibits the “disclos[ure of] the name or identity of any person, complainant, witness or subject of a complaint or any information or writing relating thereto unless the person or his parent or

legal guardian authorizes in writing the release of such information[.]” S.C. Code Ann. § 43-33-380.

Both of these sections provide strong protections for the privacy rights of all residents. P&A takes the privacy of residents of facilities P&A inspects very seriously and ensures these statutes are followed. (Tr. p. 20:24 – 22:3; R. 122-124.)

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)). Furthermore, this Court must take this intent into account when interpreting “plans of care.” *Ranucci v. Crain*, 409 S.C. 493, 500, 763 S.E.2d 189, 192 (2014) (A “statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect.”) (quoting *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) (internal quotation marks omitted)). 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.”

C. P&A’s additional authority to conduct investigations after receiving a complaint does not limit P&A’s authority to conduct Team Advocacy inspections.

The General Assembly designated multiple and mutually exclusive 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).

In addition to Team Advocacy inspections, P&A has a separate power allowing it to “investigate complaints by or on behalf of any developmentally disabled or handicapped person.” 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. The trial court found this investigative authority demonstrated that P&A could not review MARs during team Advocacy inspections.

P&A’s authority under the Team Advocacy provision, however, is distinct and is triggered in separate contexts. Indeed, P&A has the authority to conduct these “unannounced” inspections at any time as opposed to only in response to a complaint. S.C. Code § 43-33-350(4). Additionally, the purpose of a Team Advocacy inspection—to determine how the facility operates on a day-to-day basis—is different than the purpose of responding to a complaint—to determine if the allegations are true. Moreover, Team Advocacy inspections are administered by separate personnel—only the Team Advocate can review plans of care while there is no such restriction on reviewing medical records in section 43-33-370. The generally available Team Advocacy inspections are legally distinct from investigations of a specific complaint of abuse and/or neglect. Limitations on P&A’s authority to inspect records in one context do not apply in other legally distinct contexts. The trial court, therefore, erred by conflating these separate provisions in the enabling statute.

II. The trial court erred by interpreting S.C. Code Ann. § 43-33-350 to prevent P&A from conducting proper inspections as required by statute.

Without the ability to inspect MARs during unannounced inspections P&A cannot fulfill the statutory requirements mandated by the General Assembly. As State law requires P&A to conduct these inspections, the trial court's order prohibits P&A from fulfilling its obligations under law.

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

Medical care is a necessary part of a resident's living conditions. A developmentally disabled person as defined by statute needs "a combination and sequence of special, interdisciplinary or generic care, treatment or other services which 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; R. 121, 158-159, 173-174.) 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; R. 161-162.) 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.

B. P&A cannot conduct effective unannounced inspections as required by statute without the ability to view MARs.

Section 43-33-350 requires Team Advocacy inspections to be "unannounced," without any requirement for permission from facilities or the residents of those facilities. S.C. Code Ann. §43-33-350(4). This grant of authority would not need to exist if the General Assembly intended P&A to only be able to access records after a grant of permission. Again, as "courts must presume the legislature did not intend to do a futile act[.]" this Court should acknowledge the requirement that the inspections be unannounced. *Sweat*, 379 S.C. at 377, 665 S.E.2d at 651.

The trial court held that P&A could review medical records only if a resident or his guardian consented. However, under the trial court's interpretation, if a resident or his guardian refused permission, P&A could not review records concerning that resident during its Team Advocacy inspection. Team Advocacy inspections would, therefore, be authorized by S.C. Code § 43-33-350 but P&A would be effectively blocked from performing those inspections in any instance where an individual or his legal guardian refused permission. This interpretation fails to give effect to the entire statute as required. *Ranucci*, 409 S.C. at 500, 763 S.E.2d at 192 (A "statute must be read as a

whole and sections which are a part of the same general statutory law must be construed together and each one given effect.”)

Additionally, Team Advocacy inspectors testified that requiring advance permission would make unannounced inspections less effective and could even render the inspections impossible. (Tr. p. 41:2-16; R. 143.) That interpretation is entitled to *Chevron* deference. See *infra*, Part III.

Finally, if DDSN is correct that its internal document, updated only once a year, is the only “plans of care” P&A can review, having the inspection be unannounced is substantially reduced in efficacy since the document is the same for at least an entire year.

Accordingly, this Court should reverse the trial court and hold that P&A can review plans of care, including MARs, without the advance permission of a CTH resident or the resident’s guardian.

C. The trial court’s holding will have consequences beyond the inspection of CTHs licensed by DDSN by forcing Team Advocacy inspectors to apply the language of DDSN’s Medicaid Waiver in inspections of facilities licensed by other entities.

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.*

Taken to its logical conclusion, the trial court’s interpretation of “plans of care” reaches an absurd result not intended by the General Assembly. 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; R. 135, 173.) The trial court's order, however, forces Team Advocate inspectors to follow the court's construction of the phrase "plan of care" within 42 U.S.C § 1395n(c)(1) and 42 C.F.R. § 441.301(b)(1)(i) **for all inspections**—that is, even when not inspecting facilities licensed by DDSN that contain no Medicaid Waiver residents.⁷ This is an illogical result that surely was not intended by the General Assembly. For this very reason, P&A's enabling statute refers to "plans of care" rather than the singular "plan of care" and purposefully does not include a definition of any one plan of care.

The Team Advocacy provision does not limit P&A to a review of a single DDSN document, no more than Team Advocacy inspections are limited to only facilities governed by DDSN's Medicaid Waiver agreement. As previously discussed, P&A's statutory authorization is simply broader than that. It is uncontested that P&A has reviewed and continues to review MARs at CRCFs, and at least one South Carolina court has already affirmatively acted to enforce P&A's rights to conduction such inspections. *See Bellwood Manor*, 2010 WL 6782577.

The trial court's ruling risks forcing P&A's inspectors to apply the terms of 42 USC §1395n(c)(1), 42 C.F.R. §441.301(b)(1)(i), and 42 C.F.R. §441.351(f) to situations and facilities in which it makes no logical sense to do so and in which same has already been rejected (i.e. CRCFs). Accordingly, this Court should reverse the trial court and hold that P&A can inspect MARs during Team Advocacy inspections.

⁷ There is no telling what singular document will be put forth as the rigid "plan of care" by other entities.

III. The trial court erred by refusing to afford *Chevron* deference to P&A's interpretation of "plans of care."

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.* P&A is specifically defined as part of the "State" within the meaning of the South Carolina Tort Claims Act, and is the only entity given such explicit protection—not even DDSN can lay such a claim. S.C. Code § 15-78-30(e) ("State" means the State of South Carolina and any of its offices, agencies, authorities, departments, commissions, boards, divisions, instrumentalities, including⁸ the South Carolina Protection and Advocacy System for the Handicapped, Inc., and institutions, including state-supported governmental health care facilities, schools, colleges, universities, and technical colleges"). 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 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 *Bellwood Manor*, 2010 WL 6782577, at *8 (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); *Sweat*, 379 S.C. at 374, 665 S.E.2d at 649 (citing *Buist v. Huggins*, 367 S.C. 268, 276,

⁸ Again, use of the word "including" here represents an extension of what constitutes the State of South Carolina. See *supra* Part I.B.3.

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 v. Board of Health and Environmental 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.”)

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. 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”). 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. Moreover, 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 MARs at private CRCFs and at facilities controlled and operated by several separate state agencies, including the Department of Mental Health and even facilities operated by DDSN for over 20 years. (Tr. p. 33:10-13, 71:2 – 72:23; Provost Aff.; R. 135, 173-174, 343.) 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 reverse the trial court and hold that "plans of care" encompasses MARs.

IV. The trial court erred by ignoring South Carolina public policy in preventing P&A from inspecting documents 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 the disabled. 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 DD Act and prior to the establishment of P&A.

P&A was then formally established, and the legislature 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 South Carolina Protection and Advocacy System for the Handicapped, 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.

Thus, the General Assembly expressly stated the State’s public policy for the protection of the disabled, 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.

The appellate courts of South Carolina defer to the legislature 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*, 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 rehabilitation 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 MARs from P&A's inspectors, the trial court endangered the safety and quality of life of South Carolina's most vulnerable residents.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court and hold that "plans of care" encompasses MARs and other on-site documents regarding CTH residents.

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THE STATE OF SOUTH CAROLINA
In 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. 2015-000109

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SEP 22 2015

SC Court of Appeals

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

Appellant,

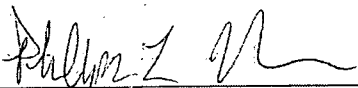
v.

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
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The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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Respondents.

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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:

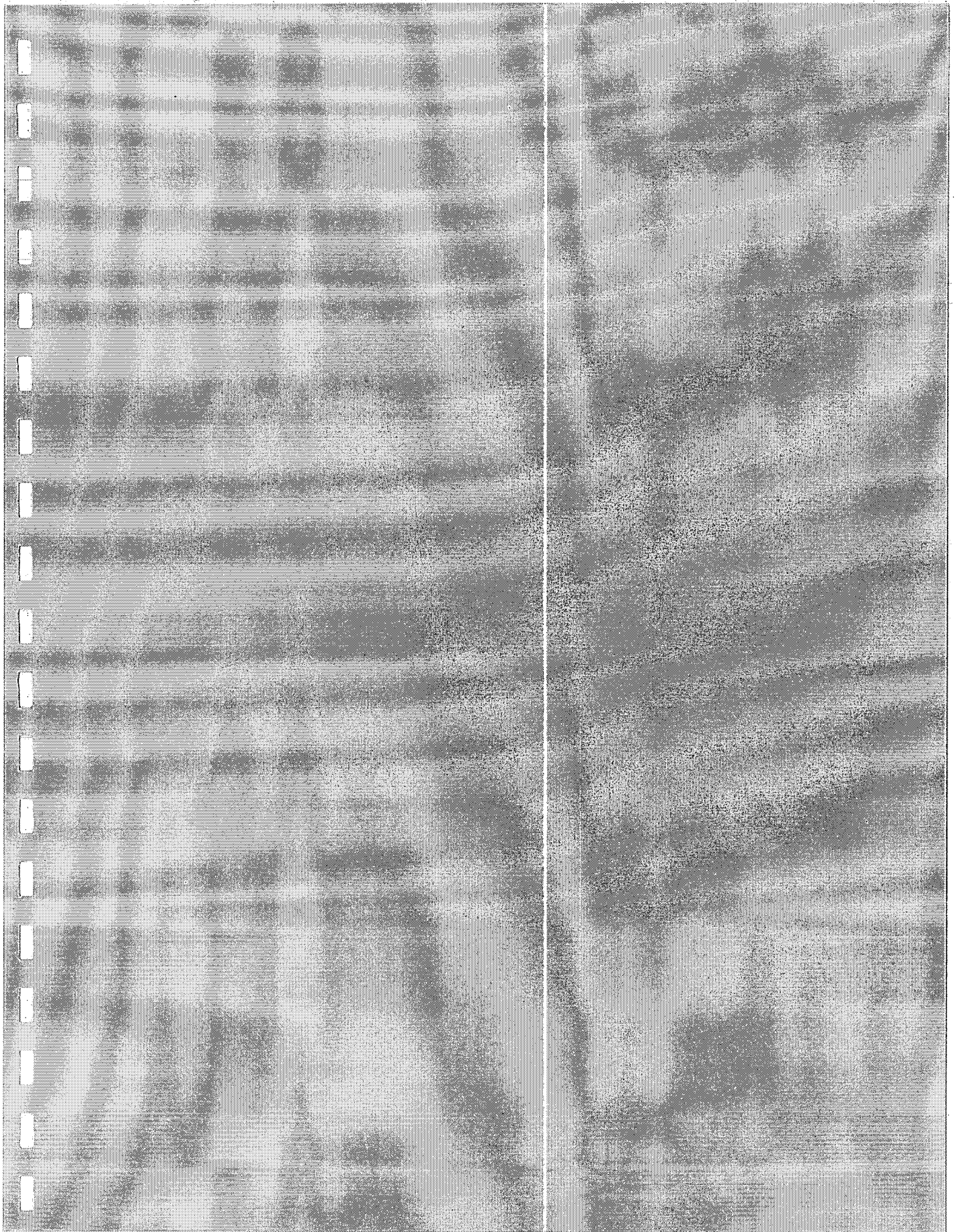
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In The Court of Appeals

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

Case No. 2010-CP-40-1093

Protection and Advocacy for People with Disabilities, Inc. Appellant

v.

Beverly A. H. Buscemi, Ph.D., in her official capacity as State
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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
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STATEMENT OF ISSUES ON APPEAL

1. Whether the General Assembly did not intend for P&A, when conducting inspections of "living conditions" in residential facilities for the developmentally disabled or handicapped, to review medical information in the records of residents of those facilities, unless such information is contained in "plans of care."
2. Whether, in this context, the term "plan of care" in § 43-33-350(4) refers to a specific document with specific contents.
3. Whether other contentions of P&A regarding the interpretation of the statute are without merit.
4. Whether P&A's claims that the circuit court's interpretation would "prevent P&A from conducting the proper inspections as required by statute" involve matters of policy for the General Assembly, and are without merit in any event.
5. Whether the circuit court correctly held that P&A's construction of § 43-33-350(4) was not entitled to deference.
6. Whether P&A's vague "public policy" argument was properly rejected by the circuit court.

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. P&A had sought to review the records when performing certain inspections that are not in response to complaints about the facilities.

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. DDSN's contention is that a "plan of care" is a specific document.

On July 8, 2011, both parties filed cross motions for summary judgment. R. 310, 370. By Order dated October 1, 2012, Judge Manning summarily denied both motions. On or about that same day, the case was set for trial later that same week before Judge Dickson.

The case was tried by Judge Dickson 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, and those filings were admitted into evidence.

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. R. 5-21. P&A thereafter filed a motion to reconsider on December 17, 2012. R. 471. Defendants filed a response to that motion on January 23, 2013. R. 489. 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* R. 499. That amendment was embodied in an Amended Order, also filed on December 11, 2014. R. 35. Except for the minor change referenced in its n.2, R. 43, the Amended Order is the same as the original Order. The Amended Order will be the one discussed in this brief.

This appeal by P&A followed.

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 "all of the resident[s]' records, including MARs [medication administration records] and other documents which might contain health information." R. 19-20. 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 R. 121. 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?

R. 122.

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. R. 88-89. 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.*¹

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." R. 179. A typical CTH II is a three-bedroom home in a neighborhood." R. 179-180.

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

¹ 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.

DDSN-licensed CTH II facilities.² R. 85-86. 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. R. 112; R. 201-271. At some point during the summer of 2009, DDSN became aware of these reviews of MARs by P&A. *See* R. 90. This led to one or more meetings and written communications between DDSN and P&A in the middle of 2009. R. 85-92, 93.

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.

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

* * *

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.

R. 87. (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.

R. 131-132. (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.³ 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

³ 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).

project or the coordinator's designee is authorized to perform reviews of plans of care. The designee must meet criteria developed by the Joint Legislative Committee on Mental Health and Mental Retardation, after consultation with the system and the South Carolina Association of Residential Care Homes. The system shall prepare a report based on the inspection which must be submitted to the Joint Legislative Committee on Mental Health and Mental Retardation, South Carolina Department of Health and Environmental Control, and State Department of Mental Health.

(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 1.⁴ 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

⁴ Dr. Lacy of DDSN testified that the two documents were very similar to each other, R. 186, and that Affidavit Exhibit 1 was a previous edition of Trial Exhibit 1. For simplicity, this brief will refer only to one "Exhibit 1," the trial exhibit, which is entitled "Service Coordination Annual Assessment." R. 187. References herein to that document will be to "Def. Ex. 1."

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 services to be provided, their frequency, and the type of provider to furnish them." R. 40. (quoting Lacy affidavit, ¶¶3, 4). Dr. Lacy's testimony was to the same effect. R. 186-189.⁵

A review of Def. Ex. 1, R. 272-296, 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

⁵ On appeal, P&A's counsel questions how the term "plan of care" can refer to the same document, even though its specific title has varied over time. Br. of Appellant at 12-13. However, the circuit court recognized that "[t]he document that performs this function has had different working names from time to time, but those names have always referred to the plan of care. Lacy testimony and Lacy Affidavit, Par. 5." R. 40. There was no suggestion or evidence that the term applied to more than one document at any given time, and accordingly, there has been no indication that anyone who works with these plans has any problem understanding the identity of the document that is the plan of care. P&A has also noted that DDSN has referenced "plans of various kinds" in its Answer. Br. of Appellant at 18. However, P&A has not shown how any of those (listed in interrogatory answer 4, amount to "plans of care" even in the generic sense, unless they are component parts of Def. Ex. 1. Nor has P&A ever shown that DDSN has ever regarded them as the equivalent of Def. Ex. 1. Most or all of them relate to other matters completely.

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."

As discussed in detail below, 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.

R. 40. (emphasis added).

SUMMARY OF ARGUMENT

A reading of P&A's enabling legislation as a whole makes it clear that the General Assembly intended to deny P&A's "team advocacy" inspectors access to the personal records of individuals who live in residential facilities for the developmentally disabled or handicapped, with only one exception: the plan of care for each individual. (Issue 1) As a matter of common usage, the term "plan of care," in the context of a record found in the facilities in which those individuals live, refers to one specific document. There was abundant information, both factual and legal, to show that that document was the one regarded as the plan of care by

DDSN and by the federal Department of Health and Human Services, which provides Medicaid funding for virtually all of the residents in the facilities involved in this case. (Issue 2) As a result, the circuit court correctly concluded that the General Assembly, in authorizing P&A to conduct team advocacy inspections of "living conditions," only intended for P&A to have access to the document regarded by DDSN and the federal Department of Health and Human Services as the plan of care.

P&A makes several miscellaneous arguments against the above interpretation of the statute. These were rejected by the circuit court in either its original Order, or in the Order denying reconsideration, or both. (Issue 3) P&A also raises several arguments about why the circuit court order could hamper its ability to conduct the all-inclusive inspections it believes it should be able to conduct, but the terms of the statute provide no support for P&A's claim to be able to conduct inspections with virtually no limits. P&A's claims in this regard are more properly addressed to the General Assembly. (Issues 4 and 6)

Finally, P&A contends that its own interpretation of the statute is entitled to deference, but the circuit court correctly held that P&A's role pertaining to the statute is not the same as it is for those to whom this rule applies. In addition, P&A's interpretation did not extend over a very long time. As soon as P&A started to attempt to apply its own interpretation to inspections of DDSN-licensed facilities, DDSN refused to accept P&A's broad view of the statute. (Issue 5)

ARGUMENT

1. **The General Assembly did not intend for P&A, when conducting inspections of "living conditions" in residential facilities for the developmentally disabled or handicapped, to review medical information in the records of residents of those facilities, unless such information is contained in "plans of care."**

The circuit court rejected P&A's broad claims to be able to review virtually all records of all CTH II residents for several different reasons. One of these is that a reading of the statute as a whole makes it clear that the General Assembly intended for P&A to have only very limited access to the medical records and other personal records of persons residing in the defined facilities. R. 43-44.

Section 44-33-350(4), the subsection that authorizes P&A to conduct team advocacy inspections of "living conditions," references only one specific kind of document, that is, "plans of care for individuals in a residential care facility." P&A argues that this term includes any and all medical records of those individuals. R. 19-20. However, the language of a different section, § 43-33-370(2), provides for substantial limitations on P&A's ability to examine the "individual medical, treatment, and or other personal records" of individual residents upon receipt of a complaint. A "complaint" is defined in § 43-33-340(5) as an allegation of "injury or deprivation with regard to [a resident's] health, safety, welfare, rights or level of care." Section 43-33-370(2) provides that upon receipt of such a complaint, P&A may

Inspect and copy any documents, records, files, books, charts or other writings which are maintained in the

regular course of business by the program or facility and which bear upon 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.

(Emphases added.)

The circuit court held that this part of the statute reflected the General Assembly's intention to afford P&A access to the records of individuals (other than plans of care) only when there had been a complaint filed against a facility by a specific patient or when there had been waiver by a patient or guardian. R. 43-44. Even then, as the circuit court held, § 43-33-370(2) permits only the records of the specific individual are to be inspected and copied. That section expressly prohibits P&A from reviewing the "individual medical, treatment or other personal records" of other persons in the same facility. *Id.* The court also cited § 43-33-400. R. 44, 50-51. That section provides as follows:

All departments, officers, agencies and institutions of the State shall cooperate with the System in carrying out its duties. . . . Notwithstanding any other provision of law, any program or facility shall permit the System to inspect and copy any record or documents provided for in 43-33-370(2).

R. 50. (emphases in order).

As the circuit court held, these other provisions make it clear that the General Assembly could not reasonably have intended for P&A, in the course of team advocacy inspections of living conditions, to review the individual medical records of the approximately 2,500 residents of CTH IIs licensed by DDSN (*see* R.

180), when the General Assembly prohibited P&A from reviewing the records of even one more person in a facility that has been the subject of an actual complaint of potential injuries or other deprivations. R. 43-44. These conclusions were reiterated in the Order Denying Reconsideration. R. 24-30.

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.

On appeal, P&A's only argument on this point is to point out the various factual differences between team advocacy inspections and investigations of a specific complaint. Br. of Appellant at 23-24. P&A has not, however, made any attempt to explain why the those differences should permit review of all residents' medical and personal records, when other parts of the same statute prohibit P&A from reviewing the medical and personal records of even one more person.

In connection with this issue, the circuit court cited the familiar principle that "[i]n ascertaining the intent of the legislature, a court should not focus on any

single section or provision but should consider the language of the statute as a whole.” R. 30-31. (quoting *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996)). In order to accept P&A’s contention that the General Assembly intended for P&A to have access to medical and personal records other than the plan of care, it would be necessary to “consider the particular clause being construed in isolation,” a practice which is frequently held to be an inappropriate way in which to construe a statute. *See, e.g., Liberty Mut. Ins. Co. v. S.C. Second Injury Fund*, 363 S.C. 612, 622, 611 S.E.2d 297, 302 (Ct. App. 2005).

The circuit court also held that the plain meaning of the term “plan of care” connotes something different from a medical record, and specifically from a medication administration record. R. 44-45. As the court held, “[a] ‘plan’ is a document providing for guidance in the future. Thus, as typically defined in dictionaries, a ‘plan’ is ‘a scheme or method of acting, doing, proceeding, making, etc., developed in advance.’” *Id.* (Emphasis added, footnote omitted).

The court further held that “a plan of care is a guidance document that sets forth what will be provided to the person. On the other hand, most medical records, and especially the medication administration records Plaintiff seeks, are not advance planning documents, but rather are documentations of something that occurred in the past, specifically, documentations of the previous administration of

medications.” *Id.* To put it even more simply, at least with reference to MARs, those documents are actually labeled “Medication Administration Records.”

The Order further concluded that by limiting the records reviewable by P&A in the course of a review of “living conditions,” § 43-33-350(4), the General Assembly intended that P&A would be able to review plans of care in order to see whether the conditions in the facilities were responsive to the residents’ plans of care. R. 45. However, the Order continues, “since the team advocacy inspections were to pertain only to living conditions, and not to each individual’s specific situation, the line was drawn by the General Assembly at plans of care.” *Id.*⁶ Plaintiff’s claim of a right to review documentations of past events therefore fails to satisfy the most basic definition of what a “plan of care” might be. In the Order Denying Reconsideration, the court reiterated that “[t]he medication administration records (MARs) sought by Plaintiff in this case, as their descriptive title would suggest, are records that serve to document past occurrences, i.e., the administration of medications, and therefore fall outside the normal definition of what is meant by a ‘plan.’” R. 23.

For the reasons set forth above, the court was clearly correct in rejecting P&A’s contention that P&A could review any medical or personal records other

⁶ Of course, the General Assembly could always decide to expand the nature of the documents reviewable by P&A, but that policy decision is one for the legislature, and not this Court, which is faced with the clear language of the statute, as well as the undisputed practice under that language.

than those included within the meaning of the term “plans of care” in § 43-33-350(4).

2. **In this context, the term “plan of care” in § 43-33-350(4) refers to a specific document with specific contents.**⁷

The circuit court also concluded that the term “plan of care” in § 43-33-350(4) refers to a specific document with specific contents. The court rejected P&A’s conclusion that the term was intended to be used in a generic sense. P&A contended, as it does on appeal, that the General Assembly intended to permit P&A to review any document which might arguably be a “plan” relating to “care.” The court instead concluded that in the present context, a “plan of care” was one specific document, that is, Exhibit 1. R. 22-23, 25; 39-43.

It is well settled that in construing a statute, the court should look to its context, as occurred here. *See, e.g., Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 11, 760 S.E.2d 785, 790 (2014) (“[i]f a statute’s terms are clear and unambiguous, they must be taken and understood in their plain, ordinary and popular sense, unless it fairly appears from the context that the Legislature intended to use such

⁷ P&A claims that the use of the plural term “plans of care,” in the plural, means that the phrase must be generic and that other documents could also be regarded as “plans” of care. Br. of Appellant at 10-11. The circuit court rejected this claim, holding that “[t]he short answer to this is that each facility has more than one resident, each of whom will have a plan of care, so it is completely appropriate to refer to those specific plans, one per resident, in the plural.” R. 49. This conclusion of the circuit court (which P&A has not specifically challenged on appeal) is bolstered by language of the entire phrase in which the term appears: “. . . the plans of care for individuals in a residential care facility and a community mental health center day program.”

terms in a technical or peculiar sense”); *Etiwan Fertilizer Co. v. South Carolina Tax Commission*, 217 S.C. 354, 360, 60 S.E.2d 682, 684 (1950) (same); *Poole v. Saxon Mills*, 192 S.C. 339, 6 S.E.2d 761, 765 (1940) (“[t]he first and most elementary rule of construction is, that it is to be assumed that the words and phrases are used in their technical meaning if they have acquired one and in their popular meaning if they have not”).⁸

In addition, as shown above in Point 1, accepting P&A’s contention about the meaning of § 43-33-450(4) would lead to an absurd result, because such a reading would allow P&A full access to personal and medical records to which § 43-33-370(2) tightly restricts access in a situation (individual complaints) which logically would be the most likely situation for that section’s privacy-based restrictions to be slightly loosened. *Lancaster Cnty. Bar Ass’n v. S.C. Comm’n on Indigent Defense*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) (“In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature.”). Further, to

⁸ For the first time on appeal, P&A asserts that none of the information pertaining to context should have been considered. However, to the extent that context was shown by documents and testimony, P&A did not object to it at the trial. Indeed, some of that evidence, such as the 2009 letter and e-mail, R. 85-86, 87, 90-91, 92 and 93, was placed before the court by P&A itself in the attachments to the Complaint and to the Prevost Affidavit. R. 352-358. Even if the point had been argued to the circuit court (which it never was, even at the Rule 59(e) stage), this belated objection is without merit. In addition, even if an ambiguity in the statute needed to be shown before information pertaining to context could be considered, which DDSN denies, the apparent conflict between the language of § 43-33-370(2) and § 43-33-350(4), discussed under Point 1 above, as well as the facial vagueness of the term “plans of care” sufficiently indicate a possible ambiguity.

give § 43-33-350(4) the scope proffered by P&A would render 43-33-370(2) useless because the same records -- for all residents -- would already be available to P&A under 43-33-350(4). *See State v. Graves*, 269 S.C. 356, 363 (1977) ("a statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous").

The specific context of the term "plans of care" in § 43-33-350 is to refer to a document in the possession of a residential facility such as a CTH II, and pertaining to an individual resident. P&A claims that the term should be read as applying generically to anything in the possession of the facility that might in some sense be regarded as a "plan" that in some sense might be said to involve "care." Br. of Appellant at 10-11. As shown previously, this suggested interpretation by P&A is founded in that entity's unsupported claim that it has authority to engage in "oversight of medical care and the provision of medication to the residen[ts] of these homes," a concept that includes "oversight of all the aspects of care." R. 131-132. However, as the evidence and other information summarized below indicates, DDSN has always regarded the term "plan of care" in this context as referring to a specific document.

a. Usage of the term "plan of care" by DDSN.

DDSN presented abundant and unconverted evidence and testimony that the agency has consistently used the term "plan of care" to refer to one specific document, that is, Def. Ex. 1 and its predecessors. For instance, in her affidavit, Dr.

Lacy stated that “[f]or as long as I have been employed by DDSN [i.e., since 1997], the term “plans of care,” has had a very specific meaning in the context of service delivery to DDSN clients. R. 384.

Continuing, Dr. Lacy averred in her affidavit as follows:

5. While 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 plan,” or “support plan,” those designations are simply different terms for the federally-required “plan of care.”

6. Plans of care have never been regarded by DDSN as including the kinds of records that would be found in a physician’s files for an individual, such as diagnostic and treatment notes. Nor have plans of care even been regarded as including medical records, such as medication administration records, that are maintained by the facilities in which DDSN clients reside.

R. 385. Finally, Dr. Lacy identified Exhibit 1 to her affidavit as being a sample form for a plan of care. *Id.*, ¶ 7. Her trial testimony was to the same effect. R. 184,⁹ 185, 191:19-22.¹⁰ 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. *See* R. 93. (“DDSN’s position on the plan of care is that is refers only

⁹ The correct title of the document is “Service Coordination and Annual Assessment,” not “useful assessment,” as p. 82 of the transcript reads. *See* R. 184:16-18.

¹⁰ The transcript incorrectly reads “plan and care,” but other references make clear that this is a transcribing error, and that the reference is to “plan of care.”

to the residential treatment/support plan”); R. 87. (DDSN considered “the residential treatment/support plan” as “the same as the plan of care”).¹¹

Finally, as the circuit court observed, “[t]he term [plan of care] is also used in South Carolina’s Medicaid Waiver document, excerpts of which are attached as Exhibit 2 to the Lacy Affidavit. In that document, the plan of care is described in the same manner as in the Lacy Affidavit.” R. 42. Dr. Lacy’s testimony regarding the same Medicaid Waiver document, Def. Ex. 2, was to the same effect. R. 193-194. Dr. Lacy also confirmed that Def. Ex. 1 was the document referenced in the cited portion of Def. Ex. 2. R. 194:5-8.

b. Usage of the term “plan of care” in federal authorities.

Because funding for virtually all CTH II residents is provided by the Medicaid Waiver program, as P&A has admitted, R. 68, the circuit court also held that the relevant context for interpreting § 43-33-350(4) also includes the use of the term “plan of care” in connection with the Medicaid program, R. 23, 29; R. 40-41. The court cited a number of references to the term in that context. These included (1) a federal statute, 42 U.S.C. § 1395n(c)(1) (referring to “home or community-based services . . . approved by the [federal DHHS Secretary] which are provided pursuant to a written plan of care”); (2) a federal regulation on the same subject, 42 C.F.R. § 441.301(b)(1)(i) (requiring “a written plan of care subject to approval by

¹¹ As an aside, and contrary to the statement in Br. of Appellant at 18-19, there is nothing in the use of the term “the plan of care” in the document RH5.0, that is inconsistent with DDSN’s regarding Def. Ex. 1 as the plan of care referenced in the statute.

the Medicaid agency” when an individual receives Medicaid home or community-based services); (3) another federal regulation to the same effect, 42 C.F.R. § 441.351(f) (referring to “a written plan of care based on an assessment of the individual’s health and welfare needs and developed by qualified individuals for each recipient under the waiver”). These references in a federal statute and in federal regulations were quoted at length at R. 40-41.

The court also cited two federal cases and a state case to the same effect: *Doe v. Kidd*, 2011 WL 1058542 (4th Cir. 2011), which characterized the “plan of care” as a specific document that was developed pursuant to 42 C.F.R. § 441.301(b), the same regulation cited above; *Boatman v. Murphy*, 2010 WL 2178821, 1 (S.D. Ind. 2010) (case manager assesses the Medicaid waiver applicant’s specific needs and creates a plan of care and cost comparison budget, which are submitted to the Division of Aging for review); *McCrann v. Dep’t of Health and Human Servs.*, 704 S.E.2d 899, 901 (N.C. App. 2011) (plan of care in the Medicaid waiver program is “a schedule of services to be provided to the program participant”). R. 42.

All of these references leave no doubt that in the context of Medicaid services provided to residents of CTH II facilities, virtually all of whose residents are funded under the Medicaid Waiver, R. 68, there is only one specific document, Def. Ex. 1 and its predecessors, that is recognized as the plan of care.

P&A claims that any document could be regarded as the statutorily-referenced plan of care if it was a "plan" in some broad sense that had something to do with "care," again in the broadest sense. However, the record and the cited legal authorities make it clear that any document other than Def. Ex. 1 and its predecessors would not be recognized in this context as the plan of care.

3. P&A's contentions regarding the interpretation of the statute are unavailing.

The Brief of Appellant contains a number of contentions regarding the interpretation of the statute. The circuit court rejected all that were presented to it. Each of these contentions by P&A, not otherwise already addressed above, is briefly addressed below.

a. References to federal law.

P&A also asserts that the cases, regulations and statute referenced by the circuit court were not relevant because those references were to "provisions of federal law, not South Carolina law." Br. of Appellant at 15. P&A made essentially the same point in its Rule 59(e) motion. R. 474-475.

The circuit court rejected this contention, holding that "[t]he Court looked to federal law as an illustration of the use of a well-defined meaning of the term 'plan of care' in a very similar, and often identical, context." R. 22. The cited authorities showed that the term "plan of care" was not a generic phrase that could refer to anything that might arguably be called a "plan" for "care," but rather to the specific

document exemplified in Defendants' Def. Ex. 1, R. 272-294, and Lacy Affidavit Exhibit 1, R. 387-418.

P&A also makes the erroneous claim that DDSN would regard Def. Ex. 1 as being the plan of care in some context other than the one in which it is made. Br. of Appellant at 17. In other words, for instance, P&A claims that Def. Ex. 1 should not apply to CRCFs. However, P&A has not made a showing as to why this "plan of care" should not be used in CRCFs. P&A also claims that there is no reason why regarding Def. Ex. 1 as the plan of care should apply outside of the context of Medicaid-funded residential care, but as P&A has freely admitted, virtually all residents in CTH II facilities are Medicaid Waiver participants. R. 55. In any event, the point is that Def. Ex. 1 is regarded as the plan of care by DDSN, and no reason has been shown why DDSN should regard the identity of the plan of care as a different document in those very few instances in which a resident is not funded by the Medicaid Waiver. The court below rejected this claim, holding that:

[T]he Order referred to Medicaid law and practice primarily for purposes of illustrating the meaning given to the term "plan of care." The Order did not hold that the Medicaid authorities were literally controlling, but only that given the clear meaning of the term in the Medicaid context, that same meaning should also apply in the present state law context as well. The Order additionally was based on the plain meaning of the term (Order at 10-11) and on other parts of the P&A statute itself (Order at 9-10). As a result, any concern that the Order might improperly extend Medicaid concepts to other contexts is misplaced.

R. 29.

b. State statutes and regulation.

P&A also claims that other South Carolina statutes and regulations shed light on the meaning of the term “plan of care” in this context. Br. of Appellant at 16-17. This claim was rejected in the Order Denying Reconsideration, in which the circuit court held that “P&A does not cite to any particular definition of the term in any of those references that would support its arguments in this case.” R. 23. The same is true for all of the quoted references at pp. 16 and 17 of the Brief of Appellant. Moreover, while P&A has not supplied evidence of any of the “plans of care” referenced in the instances cited at pp. 16-17 of the Brief of Appellant, none of them indicates that the term is used generically. At least some of them indicate that they also refer to one specific document as a “plan of care,” and the context of some of them, that is, the references to persons at DDSN facilities and/or receiving Medicaid Waiver funding, appear to refer to the same document as Def. Ex. 1. *See, e.g.*, § 44-81-40(J) (referring to “the plan of care for the resident” (emphasis added); S.C. Code Ann. Regs. 61-13 E(3) (referring to “the individual plans of care.” for CRCF residents; § 44-7-350 (referring to “an individual plan of care” for CRCF residents); S.C. Code Regs. 126-314 (specifically referring to “a written plan of care in Medicaid-contracted facilities”). P&A asserts that “[t]hese statutes refer generally to a written plan of care, encompassing all manners of care the individual is receiving -- including medical care.” Brief of Appellant at 17. The three quotations from the statutes for which this bare assertion is made are simply

silent on the issue of whether medical care is to be referenced in a plan of care. P&A has provided nothing that would indicate that there exists such a thing in the present context as a plan of care that is not Def. Ex. 1 or its functional equivalent.

c. P&A's claim that the statutes should be "liberally construed."

P&A asserts that its enabling legislation should be "broadly" or "liberally" construed. Br. of Appellant at 19-20. This claim was rejected by the circuit court, R. 25. This claim also was rejected on the ground that P&A's functions in this context do not trigger the rule that an agency's construction is entitled to deference. That issue is discussed in Point 5 below. For the same reasons, also discussed in Point 5 below, P&A's citation of *DHEC v. Bellwood Manor, Inc.*, 2010 WL 6782577 (S.C. Administrative Law Court 2010) does not assist P&A, because that case had no occasion to consider whether P&A could review any particular record or category of record.

d. P&A's claim regarding legislative intent when the term "plans of care" was added in 1993.

At pp. 20-21, the Brief of Appellant contends that the General Assembly added the term "plans of care" in 1993 in order to "improve medical care" and to "ensure that people with developmental disabilities received the proper medical care." Br. of Appellant at 21. In fact, however, the 1993 amendments prove just the opposite of the claim made by P&A. If the General Assembly had wanted to provide for oversight of "all the aspects of care," as P&A now claims, it could have

done so by simply authorizing P&A to review “all records,” rather than only “plans of care,” and to conduct inspections of “all the aspects of care,” instead of only inspections of “living conditions.”

On appeal, P&A argues in effect throughout its brief that any and all aspects of the operation of a CTH II (other than perhaps its financial operations) constitute “living conditions.” The circuit court rejected this claim, R. 48-49, citing several South Carolina cases that equated living conditions with the physical aspect of a housing facility. P&A’s all-embracing definition of “living conditions” is at odds with the term’s ordinary meaning and with common parlance.

e. Use of the term “including.”

At pp. 21-22 of the Brief of Appellant, P&A asserts that when the statute provided for P&A to make “unannounced visits to review the living conditions of a residential facility, including the plans of care for individuals in a residential care facility,” the term “including” suggests that other records might be reviewed as well. This claim was rejected by the circuit court at pp. 13-14 of the Amended Order, R. 47-48. P&A does not challenge or even mention the reasoning of the circuit court, but in any event the circuit court’s conclusion was correct. It held in part on this issue that

The first problem with this argument is that it contradicts the well-settled rule that “to express or include one thing implies the exclusion of another,” also known as “*inclusio unius est exclusio alterius*.” *Nelson v. Ozmint*, 390 S.C. 432, 436-437, 702 S.E.2d 369, 371 (2010). [fn 5]. The fact that plans of care are referenced, but no other

types of records, is a compelling indication that the General Assembly intended for only those records to be inspected.

[Court's Fn 5] P&A references cases in which the presumption is reversed, but those involve situations where the word "including" modifies the term to be defined. In order for that rule to apply in the present case, the statute would have to say "records, including plans of care," but it does not say that. Instead, it says "living conditions . . . , including plans of care. . . ."

R. 47. P&A offers no reason why this holding should be reversed.

f. Privacy protections within the statute.

At. pp. 22-23 of the Brief of Appellant, P&A refers to portions of its enabling act that provide for privacy. The circuit court rejected that claim, holding that "the definition of the term 'plans of care' is not, as a matter of simple logic, determined by who can view the defined documents," and that this claim was therefore "not relevant to the issue before the Court." R. 38.

- 4. P&A's claims that the circuit court's interpretation would "prevent P&A from conducting the proper inspections as required by statute" involve matters of policy for the General Assembly, and are without merit in any event.**

P&A's Issue II comprises three different arguments to the effect that the circuit court's decision regarding plans of care would adversely affect P&A's ability to conduct "proper inspections." As already shown above, P&A's view of what would constitute a "proper inspection" is all-embracing, extending well beyond what would normally be regarded as an inspection of "living conditions." P&A obviously believes that as a matter of policy, its power to inspect CTH IIs

and other similar residential facilities should be essentially unlimited. However, the only issue in this case is the proper construction of § 43-33-350(4). If P&A believes that limiting its reviews of records to "plans of care" that resemble Def. Ex. 1 is too restrictive to permit team advocacy inspections to accomplish what P&A believes they should accomplish, then the proper forum in which to present those arguments is the General Assembly.

a. P&A's claimed need to review residents' medical records.

P&A's argument on this point consists almost entirely of its views on what the law ought to be, as opposed to a discussion of the specific issue of the meaning of the term "plans of care." Br. of Appellant at 25. Nothing cited by P&A under this heading suffices to trump the circuit court's analysis of the parts of the statute that actually pertain to the records that P&A can review.

b. Effect on unannounced inspections.

On this point, P&A argues that its ability to make unannounced inspections would be hampered by the circuit court's decision. Br. of Appellant at 26. First, however, this argument is logically flawed, because it starts with the unsupported assumption that P&A is actually authorized to review records other than the plan of care. As the circuit court correctly held, however, "that result [an effect on unannounced inspections] still cannot expand the meaning of the term 'plans of care' beyond the clear meaning that the term has in this context. . . . This entire argument is therefore simply beside the point." R. 46-47; *see also*, R. 29-30. It

should also be noted that even without access to the personal and medical records P&A claims it should be able to see, its inspections of living conditions have proceeded. A review of the 12 team advocacy inspection reports that are part of the record indicates that P&A could and did inspect the kinds of conditions normally thought of as "living conditions." *See generally*, Pl. Ex. 1 (indicating inspections of numerous physical aspects of the CTH IIs, such as bathrooms, living rooms, refrigerators, cabinets, doors, windows, etc.).

c. P&A's claim that the circuit court's decision would require the plan of care represented by Def. Ex. 1 to be used in "all inspections."

In Issue II(C), Br. of Appellant at 27-28, it is argued that if the result reached by the circuit court were to be taken to its logical conclusion, P&A's inspections of other types of facilities, such as CRCFs, would be limited to the "plan of care" exemplified by Def. Ex. 1. There is nothing in the record to support this claim. If in fact the context pertaining to any other inspections is the same as for DDSN's CTH IIs, then that result would be the right result. If P&A does inspections in different contexts, there has been no factual showing of what those contexts might be, much less why Def. Ex. 1 would not be applicable in those contexts. This hypothetical claim therefore simply lacks a foundation in the record.

5. The circuit court correctly held that P&A's construction of § 43-33-350(4) was not entitled to deference.

In Issue III of the Brief of Appellant, P&A argues that the circuit court should have accorded deference to P&A's views on the construction of the statute.

This issue was comprehensively discussed at pp. 5-8 of the Order Denying Reconsideration, R. 26-29.

The primary case on which P&A relies is the leading federal administrative law case, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Chevron* has been only sparingly cited in South Carolina, where our Supreme Court has cited it only in support of the idea that “[i]f the statute or regulation ‘is silent or ambiguous with respect to the specific issue,’ the court then must give deference to the agency’s interpretation of the statute or regulation, assuming the interpretation is worthy of deference.” *Kiawah Dev. Partners, II v. S.C. Dep’t of Health & Envtl. Control*, 411 S.C. 16, 33, 766 S.E.2d 707, 717 (2014).¹²

It is well settled in South Carolina that, as the circuit court held, “deference is given to construction of a statute by the agency charged with its administration, at least as long as the agency’s construction is not contrary to the clear language of the statute. *See, e.g., State v. Sweat*, 379 S.C. 367, 374, 665 S.E.2d 645, 649 (Ct. App. 2008).” R. 26. The circuit court then set forth several reasons why P&A’s policies or interpretations do not even fall within this rule, regardless of whether those interpretations are correct or not. R. 26-28.

¹² In federal cases, *Chevron* requires a high level of deference to regulations and other formally-adopted agency actions, but P&A has cited *Chevron* only in the sense that the case is cited in South Carolina, that is, as quoted above in *Kiawah*.

The circuit court held that there must be something in the enabling act to show that "the applicable legislative body (Congress or a state legislature) has delegated to the agency, either explicitly or implicitly, the authority to make policy. See, e.g., *Linemaster Switch Corp. v. U.S. E.P.A.*, 938 F.2d 1299, 1303 (D.C. Cir. 1991) ("[b]efore we may defer to an agency's construction of a statute, we must find either explicit or implicit evidence of congressional intent to delegate interpretive authority"). R. 26-27. The court then held that there was

[N]o indication in P&A's enabling legislation, S.C. Code Ann. §§ 43-33-310, *et seq.*, that the General Assembly intended to delegate such authority to P&A. Instead of serving as a policymaking or regulatory agency, P&A was created to serve investigative and advocacy functions to the extent authorized by statute. Those functions actually exclude the role of serving as a policymaker, because neither an investigator nor an advocate is empowered to legislate the proper subjects of their own activities.

R. 27. The court then cited several cases in which deference was not given to the views of agencies or entities whose roles under the applicable statutes were something other than administering it. Those cases included *Kelley v. E.P.A.*, 15 F.3d 1100, 1106 (D.C. Cir. 1994), in which it was held that a "civil prosecutor typically lacks authority to issue substantive regulations to interpret a statute establishing liability." P&A's role, as the circuit court held, is to serve investigative and advocacy functions to the extent authorized by statute. Those functions actually exclude the role of serving as a policymaker, because P&A as an

investigator or advocate is not empowered to legislate the proper subjects of its own activities. R. 27.

On appeal, P&A asserts that the General Assembly “delegated authority to P&A and charged it with administering its own statutes. Br. of Appellant at 28. However, no specific statutory authority is cited in support of this. Instead, P&A merely makes a general citation to the entire enabling act. *Id.* (citing only “*See S.C. Code Ann. §§ 43-33-310 et seq.*”).

P&A next cites *DHEC v. Bellwood Manor, Inc.*, 2010 WL 6782577 (S.C. Administrative Law Court 2010). Br. of Appellant at 29, but that case did not involve the issue of giving deference to an agency construction of a statute. In addition, that case did not address the issue of records in any way. P&A cites no other case involving an investigative agency whose role in administering the statute in question was something other than governing under it. *See, e.g., Buist v. Huggins*, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (counties interpreted tax statutes as permitting flat rate of interest on redeemed properties); *State v. Sweat*, 379 S.C. 367, 665 S.E.2d 645 (Ct. App. 2008) *aff’d as modified*, 386 S.C. 339, 688 S.E.2d 569 (2010) (construction of statute regulating maximum gross weight of vehicles; agency construction appears to have been that of the Department of Public Safety).

P&A also claims that “established usage” is a relevant and persuasive guide to a statute’s interpretation. Br. of Appellant at 30. However, the facts of this case

actually illustrate why that rule does not apply. As already noted, P&A never even was permitted by DDSN to review documents other than Def. Ex. 1. Moreover, there was no evidence that DDSN was ever aware that P&A was obtaining MARs from CRCFs. Such unknown practices by P&A could hardly be regarded as "established usage." At most, P&A's practices amounted to an investigative body's unauthorized and unilateral attempt to expand its own authority.

Finally, since P&A's relationship to the statutes is not one that qualifies its interpretation for deference, it is not necessary to consider P&A's brief reiteration of the reasons why its "agency interpretation" should be adopted. Br. of Appellant at 30-31. In any event, and as addressed above, those reasons lack merit and were therefore properly rejected by the circuit court.

6. P&A's vague "public policy" argument was properly rejected by the circuit court.

In its Issue 4, P&A contends that its views on the specific issue of statutory construction in this case should be adopted because, P&A believes, its views on this issue would be of most benefit to the clientele it serves. Again, there is no reference at all to the portions of the circuit court Order rejecting essentially the same argument. R. 32-33. 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." R. 32. Indeed, one

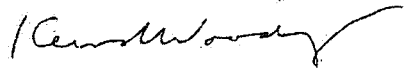
need look no further than § 43-33-370(2), discussed above, to see the substantial limitations placed on P&A's access to residents' individual medical records. As already discussed, P&A's appeal to policy considerations rather than express statutory language amounts to the quintessence of the kind of argument that should be addressed to the legislature instead of the courts.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the orders and judgment of the circuit court should be affirmed.

Respectfully submitted,

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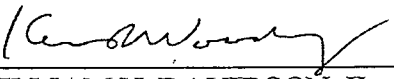
Columbia, South Carolina

September 22, 2015

CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondents certifies that the Final Brief of Respondents complies with Rule 211(b), SCACR.

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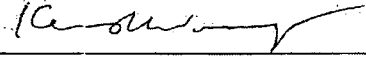
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September 22, 2015

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondents certifies that the Final Brief of Respondents complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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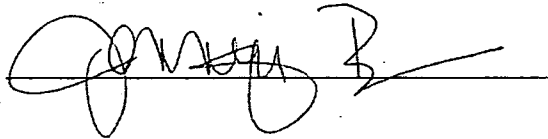
CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondents, does hereby certify that service of the **Brief of Respondents** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 22nd day of September 2015:

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THE STATE OF SOUTH CAROLINA
In 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. 2015-000109

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SC Court of Appeals

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

Appellant,

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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ARGUMENT

This Reply corrects major mistakes in Respondent's brief.

I. DDSN mischaracterizes the only authority in South Carolina to interpret P&A's authorization to conduct Team Advocacy Inspections.

DDSN wrongly characterized the only South Carolina case to address the issue of P&A's authority to conduct Team Advocacy Inspections. DDSN states that *DHEC v. Bellwood Manor*, 2010 WL 6782577 (Admin. Law Ct. Nov. 22, 2010) "did not address the issue of records in any way." (Resp. Br. p. 35.) That simply is not true. Not only did the court discuss records, the court also stated that the Team Advocacy Inspections consisted of a review of records, such as the Medication Administration Records ("MARs"), to ensure medication was properly administered. *Bellwood Manor*, 2010 WL 6782577 at *2. Specifically, in the findings of fact, the Administrative Law Court found that Team Advocacy Inspections encompasses:

a physical inspection of the facility and its records and interview residents, in order to ensure that the residence is properly maintained and staffed, supplied with sufficient food, medication is properly handled and administered, and that residents have access to their finances and medications, and are free to come and go as they wish.

Id. In *Bellwood Manor*, the Administrative Law Court held "P&A is authorized, pursuant to S.C. Code Ann. § 43-33-350(4) (Supp. 2009), to conduct a Team Advocacy inspection of [the Community Residential Care Facility that sought to prohibit Team Advocacy Inspections by P&A]. *Id.* at *9. Since the Court previously found that the Team Advocacy Inspections included a review of records—to include records of the administration of medication—the implication is that P&A is authorized, pursuant to S.C. Code Ann. § 43-33-350(4) to inspect records, including medical administration records,

during Team Advocacy Inspections. While DDSN may not like the *Bellwood Manor* case, it cannot ignore it.

II. 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.

DDSN focuses its response on the argument that the language of Section 43-33-370(2) evidences the General Assembly's intent that P&A cannot review medical records during Team Advocacy Inspections. (Resp. Br. p. 13-15.)¹ Unlike Section 43-33-350(4), Section 43-33-370(2) contains specific restrictions on what P&A may inspect.

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.

¹ The issue before the Court is one of straightforward statutory construction. Tellingly, DDSN's brief does not lead with the analysis of the plain language of Section 43-33-350(4), choosing instead to look at a completely different statute in order to justify DDSN's disregard of the General Assembly's clear intent. (Resp. Br. p. 13.) However, the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). As explained in P&A's initial brief, the plain language of the statute evidences the General Assembly's intent for P&A to have the authority to inspect MARs as part of Team Advocacy Inspections. Even if the Court finds it necessary to look beyond 43-33-350(4) in order to ascertain the intent of the General Assembly, the Court will still reach the same conclusion—the General Assembly intended for the term plans of care to include MARs.

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 S.C. at 153, 576 S.E.2d at 606 (citing Black’s Law Dictionary 602 (7th ed. 1999)). This canon is applicable here—in the opposite manner in which DDSN believes the doctrine applies.

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. Moreover, when the General Assembly revised Section 43-33-350(4) in 1993, the General Assembly again chose not to add the same restrictive language to Section 43-33-350(4).² 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

² Section 43-33-370(2) has not been revised since first enacted in 1979. S.C. Code Ann. § 43-33-370(2). Thus, the General Assembly was well aware of the restrictive language contained in Section 43-33-370(2) and its effect when the 1993 amendment to Section 43-33-350(4) occurred. *State v. McKnight*, 352 S.C. 635, 648, 576 S.E.2d 168, 175 (2003). (“There is a presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects.”).

“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.

Both the trial court and DDSN misconstrue how this doctrine applies to Section 43-33-350(4). DDSN argues that because Section 43-33-350(4) expressly allows P&A to review “plans of care,” but does not grant P&A the authority to review other records, this evidences the General Assembly’s intent to restrict P&A’s authority to review records. (Resp. Br. p. 28-29.) That argument not only misconstrues how the doctrine applies but also misses the entire point of this case: to determine what the term “plans of care” encompasses.

When the General Assembly sought to limit P&A’s authority to inspect records the General Assembly used express language restricting P&A’s authority. Thus, the General Assembly was aware of the language necessary to restrict P&A’s inspection powers. The fact that the General Assembly failed to use the similar restrictive language when granting P&A the authority to review documents during a Team Advocacy Inspection demonstrates the intent not to restrict P&A’s authority under Section 43-33-350(4). This also demonstrates that the use of the term “including” enlarges the scope of Section 43-33-350(4), contrary to DDSN and the trial court’s contention. *See In re Grewe*, 4 F.3d 299, 305 n.5 (4th Cir. 1993) (the “general rule of statutory construction” is that using the word “including” enlarges the scope of [a statute] rather than limits it.”).

DDSN also argues that had the General Assembly intended for the 1993 amendment to Section 43-33-350(4), which added the term “plans of care,” to allow P&A

to provide oversight to “all aspects of care,”³ then the General Assembly could have used different language; such as authorizing a review of “all records” or to conduct inspection of “all the aspects of care.” (Resp. Br. p. 28.)⁴ However, as previously explained, when the General Assembly sought to limit P&A’s authority concerning the inspection of records the General Assembly expressly did so. Thus, the fact that the General Assembly did not include the phrases DDSN alleges the General Assembly could have included in the 1993 amendment does not evidence intent to limit P&A’s authority when conducting Team Advocacy Inspections. Rather, had the General Assembly sought to limit P&A’s authority under Section 43-33-350(4), the General Assembly would have used the restrictive language found in Section 43-33-370(2).

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 a developmentally disabled individual. 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-

³ DDSN quotes this phrase in their brief. It is unclear where the quote is from, as the phrase is not contained in P&A’s initial brief.

⁴ Essentially, this argument asserts had the General Assembly intended for P&A to review MARs as part of a review of “plans of care,” then the General Assembly would have used more specific language. Since the General Assembly did not use specific language, P&A’s review is limited to the document that DDSN asserts is the “plan of care.” However, DDSN does not have the authority to unilaterally determine what is the “plan of care” and DDSN’s determination of what is the “plan of care” is not entitled to deference. *See infra* Part III.

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 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 every individual housed in the facility. 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 43-33-370. S.C. Code Ann. § 43-33-350(4). As the General Assembly did not include that restrictive language, this Court should reverse the trial court and hold that P&A may review living conditions, such as MARs, as part of a Team Advocacy Inspection.

III. DDSN essentially contends their unilateral interpretation of what is a "plan of care" is entitled to deference.

DDSN argues throughout their brief that DDSN "regards" a certain document as *the* plan of care and this interpretation 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’” twelve times.⁵ The brief even contains an argument section titled: “Usage of the term ‘plan of care’ by DDSN.” (*Id.* at p. 21.) Regardless of the heading the argument falls under, DDSN’s constant theme is that DDSN has already determined what is the plan of care, and that determination is entitled to deference. In an argument section titled “References to federal law” DDSN summarizes their argument—supposedly regarding why references to federal law where necessary to interpret a state statute—by stating, “the point is that Def. Ex. 1 is regarded as the plan of care by DDSN[.]” (*Id.* at p. 25.) This encapsulates the overall premise of DDSN’s brief: it 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”⁶ to a specific DDSN document that is not even titled “plan of care.”⁷ Additionally, DDSN contends that this statute was never used to inspect DDSN facilities before 2007. (Resp. Br. p. 5.) 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”

⁵ DDSN does not always use this exact phrase, but something to similar effect. The term, or something to similar effect, appears on the following pages of DDSN’s brief: once on p. 9, once on p. 10, twice on p. 11, four times on p. 21, three times on p. 22, and once on p. 25. DDSN is so adamant that their unilateral interpretation of what is “the plan of care” is entitled to deference that DDSN begins to assert this argument in the fact section of their brief. (Resp. Br. p. 9) (“The specific document that DDSN has always regarded as the ‘plan of care’ is . . . ‘Service Coordination Annual Assessment.’”)

⁶ DDSN refers to there being “only” one specific document that is the plan of care multiple times in their brief. (Resp. Br. p. 10.) (“DDSN contends that the statute only permits P&A to review the one document regarded as the ‘plan of care.’”); (Resp. Br. p. 22) (“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. 24.) (“[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.

⁷ DDSN never gives an explanation as 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; R. 272, 385.)

starting in 1993—fourteen years before DDSN unilaterally determined what the phrase “plans of care” means.

Moreover, the testimony of DDSN’s own witness demonstrates that there is not a single document that DDSN has always regarded as the “plan of care.” DDSN asserts that Defendant’s exhibit 1 and the first exhibit attached to the Lacy Affidavit are the documents that DDSN has always regarded as the “plan of care.” (*Id.* at 9-10.) However, even a quick review of both documents reveals they are vastly different. Most notably, the document attached to the Lacy Affidavit provides for quarterly reviews and is thus updated at least four times a year, while Defendant’s exhibit 1 is an annual assessment that is updated only once annually. (Lacy Aff.; Def. Ex. 1; R. 384, 272.) At trial, Dr. Lacy testified that the Defendant’s exhibit 1 replaced the document attached to the Lacy Affidavit. (Tr. p. 84:3-14; R. 186.) Thus, DDSN does not have a single document that it has always regarded as the “plan of care.” Rather, the document has changed considerably throughout the years, and what is required to be in the “plan of care” changes with each unilateral decision of DDSN as to what is the “plan of care.”

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. (Resp. Br. p. 9-10, 21-22, 25.) 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 medical records, such as MARs.⁸

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court and hold that "plans of care" encompasses MARs and other on-site documents regarding CTH residents.

SIGNATURE PAGE ATTACHED

⁸ DDSN appears to assert that P&A did not make a plain meaning argument below in the footnote on page 19 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; R. 472-479; DDSN response to Rule 59 motion p. 1-3, R. 489-491) 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.

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September 22, 2015

THE STATE OF SOUTH CAROLINA
In 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. 2015-000109

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SEP 22 2015

SC Court of Appeals

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

Appellant,

v.

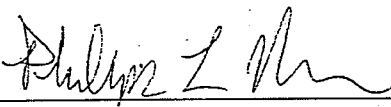
Beverly A. H. Buscemi, Ph.D., in her official capacity as
State Director, South Carolina Department of Disabilities
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of Disabilities and Special Needs, and Kelly Hanson
Floyd, Nancy Banov, W. Robert Harrell, Rick Huntress,
Deborah McPherson and Dr.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

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b),
SCACR.

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Respondents.

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):

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Re: Protection and Advocacy v. Beverly Buscemi
Appellate Case No. 2015-000109

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

V. Claire Allan, Deputy

CLERK

cc: David Curry Dill, Esquire
The Honorable Edgar W. Dickson

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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

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.

Appellate Case No. 2015-000109

Appeal From Richland County
Edgar W. Dickson, Circuit Court Judge

Opinion No. 5410
Heard April 19, 2016 – Filed June 8, 2016

AFFIRMED

Anna Maria Darwin, of Protection & Advocacy for
People with Disabilities, Inc., of Greenville; Thornwell
Simons, of Protection & Advocacy for People with
Disabilities, Inc., of Columbia; Reid T. Sherard and
David Curry Dill, both of Nelson Mullins Riley &
Scarborough, LLP, of Greenville; and Phillips Lancaster

McWilliams, of Nelson Mullins Riley & Scarborough,
LLP, of Columbia, for Appellant.

William H. Davidson, II and Kenneth P. Woodington,
both of Davidson & Lindemann, PA, of Columbia, for
Respondents.

HUFF, A.C.J.: Protection and Advocacy for People with Disabilities, Inc. (P&A) brought this declaratory judgment action against the Department of Disabilities and Special Needs, as well as the Department's Director, Beverly A. Buscemi, Ph.D., and members of the Department's Commission (collectively, DDSN) seeking an order requiring DDSN to allow P&A access to medical information and records, including Medication Administration Records (MARs), of residents of Community Training Home (CTH) facilities housing developmentally disabled persons. From an order of the trial court dismissing the action, P&A appeals, asserting the trial court erred in (1) not giving effect to the statutorily authorized review of "plans of care" during Team Advocacy inspections, (2) interpreting S.C. Code Ann. § 43-33-350 to prevent P&A from conducting proper inspections as required by statute, (3) refusing to afford deference to P&A's interpretation of the term "plans of care," and (4) ignoring South Carolina public policy in preventing P&A from inspecting documents to protect the State's most vulnerable citizens. 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.

FACTUAL/PROCEDURAL BACKGROUND

P&A is a private, nonprofit corporation designated as South Carolina's protection and advocacy system for people with disabilities. As such, the General Assembly has provided P&A with certain powers and duties. S.C. Code Ann. § 43-33-310 to-400. At issue in this matter is P&A's authority to review personal medical records—particularly MARs—of CTH residents during P&A's statutorily authorized inspections of CTHs. In particular, the question presented is whether P&A's review of "plans of care" during an inspection, as provided in section 43-33-350(4) of the South Carolina Code, includes the personal medical records of CTH residents.

As part of its function, P&A conducts team advocacy inspections of facilities housing individuals with disabilities. Initially, P&A focused its efforts on Community Residential Care Facilities (CRCFs), which are licensed by the South Carolina Department of Health and Environmental Control (SCDHEC). However, it decided it needed to expand its team advocacy inspections into CTHs, which are licensed and operated by DDSN. P&A sent DDSN notice of such in November 2007.

In 2009, P&A was ready to start inspecting CTHs and sent DDSN a letter on June 11, 2009, stating its intention to begin unannounced visits to CTH IIs.¹ In its unannounced inspections of CRCFs, P&A had not been prevented from reviewing medical records.² In an August 12, 2009 letter to P&A, DDSN stated it supported the efforts of P&A to review living conditions; however, it further stated it did not agree team advocacy inspections of living conditions could involve the review of medical records. P&A sought to look at documents in CTHs concerning medical care in general, as well as MARS,³ in part to ensure the residents were properly provided services involving food and medicine and were protected from neglectful situations. DDSN and P&A disagreed over the interpretation of the term "plans of care" as set forth in section 43-33-350(4) of the South Carolina Code, and DDSN informed its contracted providers of its position that CTH II staff were to release only the residential treatment/support plan of a resident—which it considered the

¹ There are two types of community training homes. In CTH Is, caregivers are trained private citizens who provide care in their own homes to, generally, no more than two individuals. CTH IIs have trained staff who provide 24-hour supervision, personal care, and training in a homelike environment for no more than four people.

² CRCFs are under a different licensing scheme than CTHs, and unlike CTHs, P&A is under contract with the Department of Mental Health (DMH) to inspect CRCFs. DDSN, on the other hand, contracts with an organization designated by Medicare and Medicaid to perform quality assurance reviews, and each year every provider serving individuals with disabilities has an annual review.

³ Neither P&A nor DDSN submitted any examples of MARS at trial. However, a P&A employee testified a MAR was a document that showed the names of the medications, when the medication was supposed to be administered, how it was to be taken, and boxes for staff at the home to initial when the medication was given based on the day of the week and the time of the day.

same as the plan of care—to the Team Advocacy coordinator. Thereafter, team advocates inspecting CTHs were informed they could not view medical records. P&A brought this action, seeking an order requiring DDSN to allow it access to CTH residents' medical records during inspections, including but not limited to MARs. P&A maintained it had the authority to view medical records of CTH residents during inspections, whether or not the residents or their legal guardians consented to such. It argued, under the statutory provision allowing it to review living conditions of these homes, including "plans of care," it had the right during its inspections to review the residents' medical records, in particular MARs. DDSN, on the other hand, contended the statutes do not allow P&A to view medical records of the residents during inspections, asserting that MARs and other medical records are records and not plans, the General Assembly has excluded the review of residents' private medical records during inspections, and the inability to review medical records has not stripped P&A of its ability to inspect living conditions.

The trial court, sitting without a jury, concluded P&A does not have authority to review the medical records of CTH residents during its statutorily authorized inspections of living conditions in the homes and dismissed P&A's action with prejudice. This appeal followed.

STANDARD OF REVIEW

A suit for declaratory judgment is neither legal nor equitable, and the standard of review for such action is determined by the nature of the underlying issue. *Bundy v. Shirley*, 412 S.C. 292, 301, 772 S.E.2d 163, 168 (2015). "Interpretation of a legislative enactment is a question of law." *Edwards v. State Law Enft Div.*, 395 S.C. 571, 575, 720 S.E.2d 462, 464 (2011). "In a case raising a novel question of law, [the appellate court] is free to decide the question with no particular deference to the lower court." *Id.*; see also *Sloan v. Greenville Hosp. Sys.*, 388 S.C. 152, 157, 694 S.E.2d 532, 534-35 (2010) (providing statutory interpretation is a question of law for the court, which the appellate court may decide without deference to the trial court).

LAW/ANALYSIS

Pursuant to section 43-33-310, P&A was permanently established as an eleemosynary corporation to exercise protection and advocacy functions for the developmentally disabled and all other handicapped citizens of South Carolina. S.C. Code Ann § 43-33-310 (2015). An overview of sections 43-33-310 to 400

reveals the powers and duties of P&A as authorized by the General Assembly, including the circumstances under and manner in which P&A is allowed to carry out those duties. In particular, section 43-33-350 sets forth the powers and duties of P&A, which include in pertinent part as follows:

(1) It 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.

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

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

(4) It may conduct team advocacy inspections of a facility providing residence to a developmentally disabled or handicapped person. Inspections must be completed by the system's staff and trained volunteers. *Team advocacy inspections are unannounced visits to review the living conditions of a residential facility, including the plans of care for individuals in a residential care facility and a community mental health center day program. Only the coordinator of the team advocacy project or the coordinator's designee is authorized to perform reviews of plans of care.*

S.C. Code Ann. § 43-33-350 (2015) (emphasis added).

In cases involving written requests to investigate a complaint signed by a resident, his parent, his legal guardian or a state agency, or complaints of abuse or threat of abuse involving circumstances in which the resident is not capable of giving informed consent and does not have a parent or legal guardian to sign a request on his behalf, P&A may take actions including, but not limited to, as follows:

(1) Interview any member of the staff of the program or facility which is providing or did provide treatment, services or habilitation to the person making the complaint or on whose behalf the complaint is made.

(2) Inspect and copy any documents, records, files, books, charts or other writings which are maintained in the regular course of business by the program or facility and which bear upon 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).

Finally, our statutes require that certain representatives of the state cooperate with P&A in carrying out its duties, including allowing the inspection and copying of any documents provided for in section 43-33-370(2), stating as follows:

All departments, officers, agencies and institutions of the State shall cooperate with [P&A] in carrying out its duties. Notwithstanding any other provision of law, all departments, officers, agencies and institutions of the State may, on the behalf of a developmentally disabled or handicapped person, request [P&A] to provide protection and advocacy services. Notwithstanding any other provision of law, any program or facility shall permit [P&A] to inspect and copy *any record or documents provided for in 43-33-370(2).*

S.C. Code Ann. § 43-33-400 (2015) (emphasis added).

The trial court found P&A is not authorized, pursuant to section 43-33-350(4), to review the medical records—including MARs—of CTH residents during its unannounced inspections. We agree. Specifically, we hold a review of the entire protection and advocacy statutory scheme makes it clear the General Assembly intended not to authorize P&A to review individual medical records in the course of inspecting the living conditions of the residential facilities.

"The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible." *Perry v. Bullock*, 409 S.C. 137, 140, 761 S.E.2d 251, 253 (2014) (quoting *State v. Baucom*, 340 S.C. 339, 342, 531 S.E.2d 922, 923 (2000)). "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 light of the intended purpose of the statute." *S.C. Prop. & Cas. Ins. Co. Guar. Ass'n v. Brock*, 410 S.C. 361, 367, 764 S.E.2d 920, 922 (2014) (quoting *McClanahan v. Richland Cty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002)). "The plain language of a statute is considered the best evidence of the legislature's intent." *Perry*, 409 S.C. at 140, 761 S.E.2d at 253. "When interpreting an undefined statutory term, the Court must look to its usual and customary meaning." *Id.* at 140-41, 761 S.E.2d at 253.

In interpreting a statute, [w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Further, the statute must be read as a whole and *sections which are a part of the same general statutory law must be construed together and each one given effect.* Accordingly, we read the statute as a whole and should not concentrate on isolated phrases within the statute.

Centex Int'l, Inc. v. S.C. Dep't of Revenue, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013) (alteration in original) (emphasis added) (citations omitted). "Statutes which are part of the same legislative scheme should be read together." *Great Games, Inc. v. SC Dep't of Revenue*, 339 S.C. 79, 84, 529 S.E.2d 6, 8 (2000). See also *Roche v. Young Bros., Inc., of Florence*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998) ("[S]tatutes are to be construed with reference to the whole system of law of which they form a part."). "When interpreting a statute, courts must presume the legislature did not intend to do a futile act." *State v. Sweat*, 379 S.C. 367, 377, 665 S.E.2d 645, 651 (Ct. App. 2008). "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous. . . ." *Id.* (quoting *Matter of Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995)). Our courts are constrained to avoid a statutory construction that would have the effect of reading a provision out of a statute. *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 396, 520 S.E.2d 142, 154 (1999). Further, "[i]n construing a statute, this Court is constrained to avoid an absurd result." *Roche*, 332 S.C. at 81, 504 S.E.2d at 314.

Viewing P&A's enabling statutes under these statutory rules of construction, we find it is the clear intent of the General Assembly to exclude medical records—including MARs—from Team Advocacy inspections authorized by section 43-33-350(4). "Plans of care" is an undefined term in the statute. Thus, we must interpret the term in accordance with its usual and customary meaning. *Perry*, 409 S.C. at 140-41, 761 S.E.2d at 253. Additionally, we must construe this statute in reference to other statutes that are part of the same legislative scheme. *Great Games Inc.*, 339 S.C. at 84, 529 S.E.2d at 8; *Roche*, 332 S.C. at 81, 504 S.E.2d at 314. We must read the statute as a whole, and "sections which are a part of the same general statutory law must be construed together and each one given effect." *Centex Int'l, Inc.*, 406 S.C. at 139, 750 S.E.2d at 69. Finally, we must eschew a statutory construction that would have the effect of reading a provision out of a statute, and must also avoid an absurd result in construction of the statute. *Steinke*, 336 S.C. at 396, 520 S.E.2d at 154; *Roche*, 332 S.C. at 81, 504 S.E.2d at 314.

We recognize, as P&A stresses, that the purpose behind enactment of the statutory scheme is the protection and advocacy of persons with developmental disabilities and other handicaps. *See Brock*, 410 S.C. at 367, 764 S.E.2d at 922 (2014) ("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 light of the intended purpose of the statute." (quoting *McClanahan v. Richland Cty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002))). Nonetheless, the means with which P&A has been empowered to achieve that end are not unfettered. Rather, the General Assembly placed limitations on P&A's authority in that regard. 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). We are unpersuaded by P&A's assertion that its authority under the Team Advocacy inspection provision is distinct from its authority to investigate complaints such that limitations on its authority to inspect medical records under section 43-33-370(2) should not apply to its authority to review plans of care under section 44-33-350(4). 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. Thus, 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.⁴

While we appreciate the concerns expressed by P&A regarding its ability to protect the State's most vulnerable citizens, we find the legislative intent clear that medical records—including MARs—are to be excluded from review during unannounced team advocacy inspections. As stated by the trial court, while no one would disagree with the worthiness of the broad goals expressed by P&A, these residents—like other citizens—are entitled to a level of privacy in regard to their medical records, and 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. *See 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); *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 401 n.4, 728 S.E.2d 477, 481 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))). Accordingly, P&A's policy arguments are more properly addressed to the General Assembly.⁵

⁴ We further agree with the trial court that the General Assembly apparently provided for such limited review of medical records under these statutes in recognition of the need for privacy as to medical records on the part of disabled individuals. Additionally, as noted by the trial court, though section 43-33-400 allows the inspection of medical records by P&A, this section specifically limits it to instances in which review is allowed pursuant to section 43-33-370(2).

⁵ Because we find, based upon analysis of the relevant statutes, it is the clear intent of the General Assembly to exclude from P&A's review individual medical records in the course of inspecting the living conditions of the residential facilities, we need not address the other issues raised on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues on appeal when its determination of a prior issue is dispositive).

For the foregoing reasons, the order of the trial court is

AFFIRMED.

KONDURO and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In 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. 2015-000109

RECEIVED

JUN 23 2016

SC Court of Appeals

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

Appellant,

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.

Petition for Rehearing

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Petitioner Protection and Advocacy for People with Disabilities, Inc. ("P&A") requests rehearing of *Protection and Advocacy for People with Disabilities, Inc. 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*, Op. No. 5410 (S.C. Ct. App. filed November 5, 2015) (Shearouse Adv. Sh. No. 23 at 73) ("the opinion"). P&A respectfully submits that rehearing and/or issuance of a new opinion reversing the trial court

and holding P&A is entitled to review Medical Administration Records ("MARs") as part of team advocacy inspections is warranted because the Court overlooked or misapprehended several matters of both fact and law.

Rehearing is proper in this action for several reasons. First, the Panel overlooked the practical effect of its ruling. Second, the Panel misapprehended the intent of the General Assembly to grant P&A broad authority to conduct team advocacy inspections. Accordingly, a review of the statutory scheme demonstrates the General Assembly intended to grant P&A the authority to review MARs as part of team advocacy inspections. Third, the panel overlooked that P&A's interpretation of the term "plans of care" is entitled to *Chevron* deference. Fourth, the Panel misapprehends the public policy of South Carolina, which further evidences the broad grant of authority to P&A. Rehearing and/or the issuance of a new opinion reversing the trial court, holding P&A can review MARs as part of a Team Advocacy Inspection is warranted as a result.

I. The Panel's ruling 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.

The Panel's ruling has the effect of drastically lowering the protections individuals with disabilities receive across the entire State. The Opinion is not limited to just Community Training Homes licensed by DDSN. (Opinion at *4.) Rather, the holding 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 twenty 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.¹

Without the ability to inspect MARS, the usefulness or 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 developmentally disabled person, as defined by statute, needs "a combination and sequence of special, interdisciplinary or generic care, treatment or other services which 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 facilities who have developmental disabilities receive 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; R. 121, 158-159, 173-174.) 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; R. 161-162.) Additionally, medication errors are often discovered during these inspections. (*Id.* at 59:16-24; R.

¹ The 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.")) However, no explanation is given as to how this third-party organization is authorized to review medical records while P&A, the entity explicitly authorized by statute to perform a review of these facilities is not authorized to do so. Nor was an explanation given at trial. When DDSN's Director of Policy was questioned at trial as to how these third-party entities were authorized to review medical records, she simply responded that "there is a business agreement within [the] contract [authorizing the third-party to review medical records]." (Tr. p. 93:16-23; R. 195.) Thus, the Opinion effectively endorses authorizing DDSN to be the arbiter of which entities can see the private medical information of developmentally disabled individuals, yet fails to note where this authority derives from. This is an absurd result that could not be intended by the General Assembly.

161.) 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. (Tr. p. 41:2-16; R. 143.) The statute envisions the Team Advocate being allowed to review MARs as part of an inspection of living conditions. Thus, the loss of P&A's authority to review MARs will have far reaching consequences not intended by the General Assembly.

B. The Court's Opinion effectively allows the inspected facilities to determine what constitutes the plan of care P&A is authorized to inspect, which is an absurd result clearly 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 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 opinion does not take a position on what constitutes the "plan of care" P&A is authorized to inspect pursuant to S.C. Code Ann. § 43-33-350(4). However, the opinion does state in the fact section, seemingly with approval, that DDSN allowed P&A to inspect a document DDSN "considered the same as the plan of care" during team advocacy inspections. (Opinion at *3-4.) Effectively, the Court has endorsed authorizing the entities P&A inspects to dictate what the plan of care is to P&A.² This is an illogical result that surely was not intended by the General

² 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 developmentally disabled individuals receiving care pursuant to a Medicaid waiver. Thus, not all individuals even have this document. A construction of the term plans of care that allows P&A to only inspect a document that not all individuals with

Assembly. Accordingly, this Court should grant rehearing and issue a new opinion holding the term plans of care encompasses MARs.

II. The Panel misapprehends the General Assembly's intent 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 Opinion overlooks that in order to effectuate the intent of the General Assembly, P&A's authority must be construed broadly. In S.C. Code Ann. § 43-33-310, the General Assembly expressly stated its intent behind the entire statutory scheme that not only created P&A, but also authorized P&A to conduct Team Advocacy Inspections:

It is the further purpose of this act to express the desire of the General Assembly that South Carolina Protection and Advocacy System for the Handicapped, 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

disabilities have 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.

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."). It stands to reason that P&A cannot protect and advocate for individuals with developmental disabilities, who require "a combination and sequence of special, interdisciplinary or generic care, treatment or other services which are of lifelong or extended duration and are individually planned and coordinated," S.C. Code Ann. § 43-33-340(2), 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 misapprehended the broad grant of authority the General Assembly intended to give P&A when conducting team advocacy inspections. Consequently, this Court should grant rehearing and issue a new opinion holding that the term plans of care encompasses MARs.

B. The Opinion misapprehends how P&A's separate authorities work together.

The Panel misapprehends that 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)(1). P&A also has a separate, state-created role, to conduct Team Advocacy Inspections under S.C. Code § 43-33-350(4).³

The General Assembly fulfilled its obligation to grant P&A its federally mandated power, by authorizing P&A to not only advocate for disabled individuals, but also "investigate complaints by or on behalf of any developmentally disabled or handicapped person." S.C. Code § 43-33-

³ 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. § 1386.21(f).

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." The Opinion misapprehends that the limitations found in this investigative authority demonstrated that P&A cannot review MARs during Team Advocacy Inspections.

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 S.C. at 153, 576 S.E.2d at 606 (citing Black's Law Dictionary 602 (7th ed. 1999)). This canon is applicable here—in the opposite manner in which DDSN believes the doctrine applies.

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. Moreover, when the General Assembly revised Section 43-33-350(4) in 1993, the General Assembly again chose not to add the same restrictive language to Section 43-33-350(4).⁴ The General Assembly could have very easily included this restrictive language in

⁴ Section 43-33-370(2) has not been revised since first enacted in 1979. S.C. Code Ann. § 43-33-370(2). Thus, the General Assembly was well aware of the restrictive language contained in Section 43-33-370(2) and its effect when the 1993 amendment to Section 43-33-350(4) occurred. *State v. McKnight*, 352 S.C. 635, 648, 576 S.E.2d 168, 175

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 a developmentally disabled individual. 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-

(2003). ("There is a presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects.").

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 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 every individual housed in the facility. 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 43-33-370. S.C. Code Ann. § 43-33-350(4). As the General Assembly did not include that restrictive language, this Court should grant a rehearing and issue a new opinion holding that P&A may review living conditions, such as MARs, as part of a Team Advocacy Inspection.

C. The opinion overlooked the plain language of the statute.

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 v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) (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 Medication Administration Record is a part of a plan of care; that is, it contains a method of supervision for each resident of a Community Training Home, 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; R. 159.) 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.

As the Opinion overlooks that “plans of care” plainly includes MARs, rehearing and/or issuance of a new opinion reversing the trial court and holding the term plans of care encompasses MARs is warranted.

III. The Opinion overlooked that 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.* P&A is specifically defined as part of the “State” within the meaning of the South Carolina Tort Claims Act, and is the only entity given such explicit protection—not even DDSN can lay such a claim. S.C. Code § 15-78-30(e) (“State” means the State of South Carolina and any of its offices, agencies, authorities, departments, commissions, boards, divisions, instrumentalities, including the South Carolina Protection and Advocacy System for the Handicapped, Inc., and institutions, including state-supported governmental health care facilities, schools, colleges, universities, and technical colleges”). 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 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); *Sweat*, 379 S.C. at 374, 665 S.E.2d at 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 v. Board of Health and Environmental 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.")

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 II.C. 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"). 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 II.C. Moreover, 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 MARs at private CRCFs and at facilities controlled and operated by separate state agencies, even facilities operated by DDSN for over 20 years. (Tr. p. 33:10-13, 71:2 – 72:23; Prevost Aff.; R. 135, 173-174, 343.) 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 reverse the trial court and hold that "plans of care" encompasses MARs.

IV. The opinion overlooked South Carolina public policy in preventing P&A from inspecting documents 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 DD Act and prior to the establishment of P&A.

P&A was then formally established, and the legislature 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 South Carolina Protection and Advocacy System for the Handicapped, 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.

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 -400.⁵

The appellate courts of South Carolina defer to the legislature 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*, 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.

⁵ As previously noted, it is impossible for P&A to effectuate this intent without inspecting the day-to-day care a developmentally disabled person receives. *See supra*, Parts I.A. and II.A.

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 MARs from P&A's inspectors, the trial court endangered the safety and quality of life of South Carolina's most vulnerable residents.

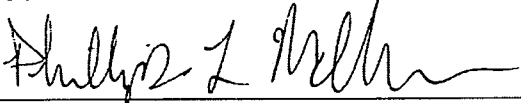
Conclusion

For the foregoing reasons, rehearing and/or issuance of a new opinion reversing the trial court and holding the term plans of care encompasses MARs is warranted.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully Submitted,

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June 23, 2016.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

JUN 23 2016

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

Edgar W. Dickson, Presiding Judge

Case No. 2010-CP-40-1095
Appellate Case No. 2015-000109

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

Appellant,

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.

PROOF OF SERVICE

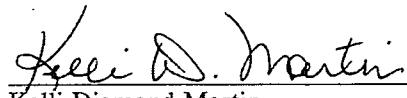
I, the undersigned Administrative Assistant of the law offices of Nelson
Mullins Riley & Scarborough LLP, attorneys for Appellant, Protection and Advocacy
for People with Disabilities, Inc. do hereby certify that I have served all counsel/parties
in this action with a copy of the pleading(s) hereinbelow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

Pleadings:

PETITION FOR REHEARING

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2010-CP-40-1095

RECEIVED

JUL 01 2016

SC Court of Appeals

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

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.

**RESPONDENTS' RETURN TO
PETITION FOR REHEARING**

Respondents Buscemi, *et al.*, submit the following by way of return to Appellant's Petition for Rehearing.

This case involves only an issue of statutory construction. This Court's opinion 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." Slip op. at 2. Specifically, and after a detailed review of all pertinent parts of the statutes, this Court 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." *Id.* at 9. 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 reargue the policy issues which this Court correctly held to be matters for the General Assembly.

1. P&A first argues that the opinion reaches an "absurd result," which "substantially limits the effectiveness" of team advocacy inspections. Petition at 2-4. 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 this Court's conclusions regarding the construction of the statutes at issue. To the extent that this Court's

correct reading of the statutes may impact P&A's conception of what would constitute an appropriate, then P&A's remedy is to seek to have the statute amended.¹

2. 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 4. 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 did not make.

3. P&A's third contention is that "[t]o effectuate the intent of the General Assembly, P&A must be allowed to inspect MARs." Petition at 5-6. This contention, however, merely assumes that which is to be proven, and does not even address the specific language of the statutes under review. As a result, the contention is without merit.

4. Fourthly, P&A contends that "[t]he Opinion misapprehends how P&A's separate authorities work together." Petition at 6-9. In this contention, P&A

¹ In a footnote, Petition at 3 n.1, P&A argues for the first time 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 previously raised, 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. 198. This case does involve the issue of whether records may be reviewed by P&A, not by DDSN or those acting in that agency's stead.

merely reasserts, in almost verbatim language, the same arguments found at pp. 2-5 of its Reply Brief. This Court has already concluded that those arguments lack merit, for the reasons set forth in the opinion.

5. Next, P&A contends that “[t]he opinion overlooked the plain language of the statute.” Petition at 9-11. As with the previous contention, this one merely tracks the language of a previous brief (Br. of Appellant at 10-11), reasserting arguments already rejected by the opinion, with only a conclusory assertion, Petition at 11, that the opinion overlooked a point that had already been asserted by P&A.

6. P&A’s Issues III and IV, Petition at 11-13 and 13-15, are also mere repetitions of prior arguments from the Brief of Appellant, in this instance, pp. 28-31 and 31-32 of that brief. Again, these are arguments that have been presented to, and rejected by, this Court, and P&A makes no effort to assert how or why the opinion misapprehended or overlooked them. As a result, neither point sets forth a valid ground for granting rehearing.

CONCLUSION

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

Respectfully submitted,

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July 1, 2016

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JUL 01 2016

SC Court of Appeals

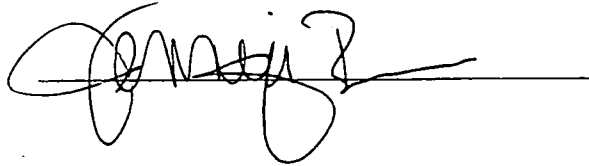
CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondents, does hereby certify that service of **Respondents' Return to Petition for Rehearing** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 1st day of July 2016:

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Writer's Email: kwoodington@dml-law.com

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RECEIVED

JUL 01 2016

SC Court of Appeals

RE: Protection and Advocacy for People with Disabilities, Inc. v.
Beverly A. H. Buscemi, Ph.D., *et al.*
Appellate Tracking Number: 2015-000109
Civil Action Number: 2010-CP-40-1095
Our File Number: 79.8338

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven copies of **Respondents' Return to Petition for Rehearing** with regard to the above referenced appeal. Please file the original and return a clocked-in copy to me by way of my courier.

By copy of this letter, I am serving copies on all counsel of record. Thank you for your assistance in this matter.

With highest regards, I am

Sincerely yours,

DAVIDSON & LINDEMANN, P.A.



Kenneth P. Woodington

KPW/jmb
Enclosures

The Honorable Jenny Abbott Kitchings
July 1, 2016
Page Two

cc: (w/ Enclosure)

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The South Carolina Court of Appeals

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

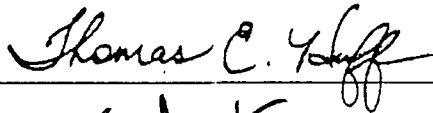
v.

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.

Appellate Case No. 2015-000109

ORDER

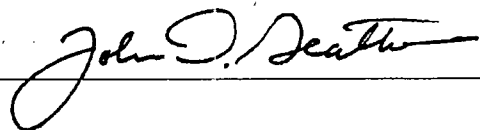
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

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David Curry Dill, Esquire

William H. Davidson, II, Esquire

Kenneth P. Woodington, Esquire

Phillips Lancaster McWilliams, Esquire

Anna Maria Darwin, Esquire

Thornwell Simons, Esquire

FILED

August 22, 2016

THE STATE OF SOUTH CAROLINA
In 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. 2015-000109

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

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.

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:

APPENDIX - VOLUMES ONE AND TWO

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Date: Sept. 21st, 2016.