THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Circuit Court Case No. 2007-CP-40-02187

Protection and Advocacy for the People with Disabilities, Inc.; M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of and as guardian of P.B.; G.C. and L.C. on behalf of and as guardians of F.C.; D.P. on behalf of and as guardian of C.M.D.; K.F. and S.F. on behalf of and as next friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M. on behalf of and as next friend of E.M.; N.M. on behalf of and as guardian of E.J.M.; R.P. on behalf of and as Guardian of S.P.; R.R. and J.R. on behalf of and as guardians of K.D.R.; and J.K. on behalf of and guardian of S.S. . . . . **APPELLANTS**

v.

South Carolina Department of Disabilities and Special Needs; Dr. Beverly Buscemi, in her official capacity as Director of the South Carolina Department of Disabilities and Special Needs; and Nancy Banor, Deborah McPherson, Christine Sharp, Rick Huntress, Fred Lynn, Harvey Shiver and Kelly Hanson Floyd, as Commissioners of the South Carolina Department of Disabilities and Special Needs . . . . . **RESPONDENTS**

APPELLANTS' FINAL BRIEF

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INTRODUCTION

This is an appeal from an Order of Summary Judgment by the lower court. The Appellants raised a question of construction regarding statutes concerning the promulgation of regulations by DDSN and ask the court to declare whether or not DDSN must promulgate regulations. DDSN admits that they are required to promulgate regulations related to the operations of the Department. *See,* Defendants' Answers to Plaintiffs' Requests for Admission, Response #7. (Def. Ans. Pltfs Req. Adm. No. 7, R. pp. 114, 124-125). DDSN does not have such regulations. Even though DDSN is charged with the care of individuals with serious disabilities, they continue to cavalierly and intentionally resist and refuse to apply their mandated duty and obligation placed upon them by the General Assembly to promulgate regulations which will give citizens the ability to learn about the services available, the process or requirements for obtaining such services, and the opportunity to participate or appeal.

The relief provided under the Declaratory Judgment Act is remedial and its purpose is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." S.C. Code Ann. § 15-53-130 (2005). The relevant sections of the South Carolina Code requiring DDSN to promulgate regulations affecting the work of P&A and the lives of individual Appellants are as follows:

> The commission ***shall determine the policy and promulgate regulations governing the operation of the department*** and the employment of professional staff and personnel. . . . The commission is authorized to promulgate regulations to carry out the provisions of this chapter and other laws related to mental retardation, related disabilities, head injuries, or spinal cord injuries.

S.C. Code Ann. § 44-20-220 (Supp. 2012) (emphasis added).

> A client or his representative shall give informed consent in every case before participation in research conducted by, for, or in cooperation with the department. ***The department shall promulgate regulations to obtain informed consent and to protect the dignity of the individual.***

S.C. Code Ann. § 44-26-180 (Supp. 2012) (emphasis added).

The quintessential rule of statutory construction requires the Court to determine the intent of the Legislature. *SCANA Corp. v. South Carolina Department of Revenue*, 384 S.C. 388, 393, 683 S.E.2d 468, 470 (2009). Intent must first be determined by the plain meaning of the statute. "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Sloan v. S.C. Board of Physical Therapy Examiners*, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006). "Under the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement." *Bradley v. Doe*, 374 S.C. 622, 634, 649 S.E.2d 153, 160 (Ct. App. 2007). The plain meaning of S.C. Code §§ 44-20-220 and 44-26-180 is that DDSN must promulgate regulations regarding informed consent, to protect the dignity of the individual, to govern the operations of the department, and regarding employment of professional staff and personnel. DDSN has a mandatory duty to promulgate regulations because the statute uses the word "shall."

However, before the cross motions for summary judgment were filed and argued by the parties, this case began on April 5, 2007 when a group of individual plaintiffs -- who have need for services from, and use services provided by, the South Carolina Department of Disabilities and Special Needs (DDSN) -- and the Protection and Advocacy for People with Disabilities, Inc. (jointly referred to Appellants) filed an action for declaratory judgment pursuant to S.C. Code Ann. §§15-53-10, *et. seq*, to declare certain legal rights and provide injunctive relief by ordering DDSN to comply with the regulatory procedures and due

process requirements of South Carolina Administrative Procedures Act, S.C. Ann §§1-23-10 through - 160, *et. seq*, as mandated and required by the General Assembly for all state agencies when promulgating regulations concerning its operations and services. (Complaint, R. pp. 27-50). The Appellants are individuals "whose rights, status, or other legal relations are affected by" DDSN's enabling legislation and by the APA.

Together with their family members and friends, the Appellant individuals are a combination of persons who are residents in facilities for people with developmental disabilities, who reside in DDSN funded housing, who need and request (and requested) treatment and services from DDSN, who may receive some service(s), who have been placed on "waitlist", who are denied services, who are denied their right to appeal, who are not informed of the eligibility criteria for services, who do not know the criteria for being "placed on waitlist," who are prohibited from knowing the criteria or standards used or applied by DDSN for any type service determination or funding allotted to them (if any), in whole or in part, or that could be allotted to them, who are clients of DDSN and who are potential clients of DDSN due to denial for services. (Complaint at ¶¶ 2, 9, 10, 12-36, R. pp. 33-46). As the Court is aware, Appellant Protection and Advocacy for People with Disabilities, Inc. ("P&A") is the state entity legislatively designated by the General Assembly with the express purpose to "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. §44-33-310. In fact, P&A is charged with the following responsibilities:

> (1) **It shall protect and advocate for the rights of all developmentally disabled persons, including the requirements of Section 113 of Public Law 94-103, Section 105 of Public Law 99-319, and Section 112 of Public Law 98-221, all as amended, 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. 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. §44-33-350 (emphasis added). Governor Edwards issued his Executive Order in 1977 ordering that P&A[1] is the State's organization to perform the function of advocate for developmentally disabled citizens as required by Section 113 of Public Law 94-103, as amended by 95-602. The General Assembly codified that Executive Order into statute in 1979. 1979 Act No. 48, Section 1; S.C. Code Ann. §44-33-310. Since 1977, the P&A organization has been adequately performing this function receiving certain state and

[1] The original name for the P&A entity that exists today was Advocacy for Handicapped Citizens, Inc. in 1977. In 1979, the name changed to South Carolina Protection and Advocacy System for the Handicapped, Inc. However, the board is authorized to change its corporate name and if the board changes its corporate name, the powers and duties of the South Carolina Protection and Advocacy System for the Handicapped, Inc., are considered to be the powers and duties of the successor nonprofit corporation. S.C. Code Ann. § 44-33-330.

federal funding under Section 113 of Public Law 94-103, as amended by 95-602, of the United States Congress. S.C. Code Ann. §44-33-310.

DDSN is a state agency created by statute. S.C. Code Ann. §§ 44-20-10 to 44-20-1170 (Supp. 2012). The governing body of DDSN is the South Carolina Commission on Disabilities and Special Needs (Commission). S.C. Code Ann. § 44-20-30(3) (Supp. 2012); 44-20-210 (Supp. 2012); 44-20-220 (Supp. 2012). DDSN is not exempt from the provisions of the Administrative Procedures Act or from the mandatory requirement to promulgate regulations. For decades, DDSN has been operating without scrutiny from the public or subject to legislative oversight, by purporting to regulate through "other means" rather than through duly promulgated regulations as required by law pursuant to the South Carolina Administrative Procedures Act. (Lacy Dep. Tr. pp. 24-248, R. pp. 690-914). Through a filing for declaratory and injunctive relief, this lawsuit simply seeks to require DDSN to comply with established South Carolina law and integrate legislative oversight, transparency, and public access into the creation of its policies through the process of promulgating regulations. This lawsuit does not seek to control the policy itself, only to bring the agency into compliance with its own enabling statute and the Administrative Procedures Act (APA). (Complaint, ¶¶ 6, 8, and Prayer for Relief, R. pp 34, 49).

PROCEDURAL HISTORY AND FACTS

The individual Appellants are multiple family members and friends acting on behalf of the eleven individual citizens who are the service group of affected persons interested in the decisions and services appropriated and delegated by the General Assembly to DDSN. They are individuals with disabilities or parents or guardians of individuals with disabilities who either receive services from DDSN or have applied for services with DDSN and been

denied services. (Complaint, ¶¶ 2, R. p. 33). P&A is a private, non-profit corporation established pursuant to federal and state law to advocate for the rights of people with disabilities. (Complaint, ¶ 1, R. p. 32-33; Affidavit of Gloria Prevost, ¶¶ 2, 3, R. p. 163). All of the Appellants have an interest in the lawful operations of DDSN. On April 5, 2007, the Appellants filed their Declaratory Judgment action seeking a ruling on the law from the Court that DDSN is obligated under the current law and its enabling statutes to promulgate regulations in accordance with the Administrative Procedures Act. This case is an action under the Uniform Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10 to 140 (2005) for a declaration that DDSN must promulgate regulations regarding the important matters listed in Appellants' complaint. (Complaint, ¶ 7, R. p. 34). The Appellants allege that the Defendants have refused to promulgate regulations in direct violation of DDSN's enabling legislation as well as the Administrative Procedures Act. (Complaint, ¶¶ 6-8, 44-45, R. p. 34, 48). DDSN is required to promulgate regulations because:

(1) S.C. Code Ann. §§ 44-20-220 (Supp. 2012) and 44-26-180 (Supp. 2012) require DDSN to promulgate regulations;

(2) The legislature has not granted DDSN authority to regulate by "other means"; and

(3) DDSN's choice to avoid official regulation lacks a rational basis or a substantial justification.

The Appellants are all interested persons under the Declaratory Judgment Act, and have been and are being harmed through DDSN's failure to promulgate lawful regulations. *See* S.C. Code Ann. § 15-53-30 (2005). Section 44-20-20 expressly states that each of them have an established right to receive service.

> The State of South Carolina recognizes that a person with intellectual disability, a related disability, head injury, or spinal cord injury is a person

> who experiences the benefits of family, education, employment, and community as do all citizens. It is the purpose of this chapter [Chapter 20, Title 44 (South Carolina Intellectual Disability, Related Disabilities, Head Injuries, and Spinal Cord Injuries Act)] to assist persons with intellectual disability, related disabilities, head injuries, or spinal cord injuries by providing services to enable them to participate as valued members of their communities to the maximum extent practical and to live with their families or in family settings in the community in the least restrictive environment available. . . . .It is recognized that persons with intellectual disability, related disabilities, head injuries, or spinal cord injuries **have the right** to receive services from public and other agencies that provide services to South Carolina citizens and to have those services coordinated with the services needed because of their disabilities.

S.C. Code Ann. §44-20-20 (emphasis added). Individuals with these disabilities are among the most vulnerable individuals in the State.

DDSN as a state agency established by the General Assembly for the purpose of operating to provide services to the population of citizens with disabilities and their families. With an annual budgets of approximately ½ billion dollars[2] and servicing an estimated 13,000 consumers,[3] DDSN has only promulgated regulations regarding licensing, 26 S.C. Code Ann. Regs. §§ 88-105 to 88-140 (Supp. 2012); day programs, §§ 88-405 to 88-440 (Supp. 2012); recreational camps, §§ 88-310 to 88-395 (Supp. 2012); and unclassified facilities and programs, §§ 88-910 to 88-920 (Supp. 2012). DDSN has not promulgated regulations regarding matters of major concern to the Appellants and the public – eligibility for services, grievance procedures, hearings, appeals, waiting lists, eligibility for residential

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[2] DDSN's budget for Fiscal Year 2013-14 was $580,673,704, with $186,628,087 in general funds. See, Legislative Audit Council Report *S.C. Department of Disabilities and Special Needs' Process to Protect Consumers from Abuse, Neglect, and Exploitation, Administrative Issues, and a Follow Up to Our 2008 Audit,* June 2014, p. 2.

[3] DDSN serves approximately 13,000 consumers in its residential community settings, day programs, and residential institutions. See, Legislative Audit Council Report *S.C. Department of Disabilities and Special Needs' Process to Protect Consumers from Abuse, Neglect, and Exploitation, Administrative Issues, and a Follow Up to Our 2008 Audit,* June 2014, p.3; Legislative Audit Council Report *A Review of the Department of Disabilities and Special Needs,* December 2008, p. 5. (Both reports provide same 13,000 estimate).

services, operation of residential services, . (Complaint, ¶ 7, R. p. 34; Defendants' Answers to Plaintiffs' Request for Admissions, ¶ 9 (eligibility for services) R. pp. 115, 125; ¶¶ 10, 11 (grievance procedures) R. pp. 115-116, 125-126; ¶ 12 (hearings) R. pp. 116-117, 126-127; ¶ 13 (appeals) R. pp. 117, 127; ¶ 14 (waiting lists) R. pp. 117, 127-128; ¶15 (eligibility for residential services) R. pp. 117-118, 128; ¶ 16 (operation of residential programs) R. pp. 118, 128; ¶ 17 (Human Rights Committees) R. pp. 118, 128-129; ¶ 18 (research on human subjects) R. pp. 118-119, 129; and ¶ 19 (obtaining consent) R. pp. 119, 129).

When the Appellants filed their Complaint, they also filed a Petition to Allow Named Plaintiffs to Proceed Anonymously and a Motion to Designate Petitioners Affidavits as Confidential Information Not Subject to Public Court Record on April 12, 2007. (Petition, R. p. 53-54; Motion, R. p. 23-24). Judge Cooper issued the Order granting the Appellants' Motion to Proceed Anonymously, and an Order granting the Appellants' Motion to Designate the Petitioners' Affidavits as Confidential on April 12, 2007. (Order, R. p. 23-24).

DDSN filed a Motion to Dismiss and for a more definite statement on May 31, 2007. (Motion, R. pp. 55-59). The parties respectively provided memorandums supporting their respective positions and arguments. (DDSN Memorandum, R. pp. 60-68; Appellants; Opposing Memorandum, R. pp. 69-81). The Motion was heard before Judge Michelle Childs on October 29, 2007. DDSN argued that they could not respond or file an answer to the Complaint without knowing the identity of the named plaintiffs who were granted permission to proceed anonymously through their initials; however, counsel for DDSN commented in Court at the hearing that they could figure out who the name plaintiffs were. After taking the matter under advisement, the Court (Judge Childs) issued an Order denying DDSN's Motion. (Order, R. pp. 25-26).

On December 14, 2007, DDSN filed an Answer for All Defendants. (Answer, R. pp. 82-96. The Appellants engaged DDSN in both written discovery of interrogatories and requests for admission, as well as document production and depositions of Kathi M. Lacy, Commissioner Deborah McPherson and Commissioner Dr. John Vaughn. DDSN admits that they are required to promulgate regulations related to the operations of the Department. *See,* Defendants' Answers to Plaintiffs' Requests for Admission, Response #7 (Def. Ans. Pltfs. Req. Adm. No. 7, R. pp. 114, 124).

DDSN did not engage in any discovery or make any discovery request through interrogatories, production, requests for admission, or deposition upon the Appellants. (Appellants' First of Interrogatories to DDSN, R. pp. 133-140; Appellants' Requests for Admission, R. pp. 112-132; Appellants' First Requests for Production, R. pp. 141-162; Lacy Deposition Tr., R. pp. 667-1022; McPherson Deposition Tr., R. pp. 1290-1439; Vaughn Deposition Tr., R. pp. 1023-1289). It is a fact that DDSN issues directives, standards, and manuals that purport to state the policies of the agency, regulate the operations of the agency, set out the standards applicable to providers and licensees of residential programs, and guide the various decision makers in the agency. *See* Dr. Kathi Lacy[4] Deposition (Lacy), 25:21 – 26:4 (Lacy Depo, R. p. 691, line 21-p. 692, line 4). Specifically, these directives are to communicate policy to the public. *See* Lacy, p. 27:9-17. (Lacy Depo, R. p. 693, lines 9-17). The directives are the closest promulgation of official agency action that DDSN has regarding the issues raised in the Complaint. The directives are posted on the website but are subject to change at any time without notice and do change frequently assuming a person has a computer, access to the Internet and then knows how and where to specifically find where

[4] Dr. Lacy was the Associate State Director, Policy at DDSN. (Lacy, 24:11-18, R. p. 690, lines 11-18).

such directives are actually located without knowing if they have the correct document.[5] *See,* Lacy, 38:15-21. (Lacy Depo, R. p. 704, lines 15-21).

DDSN does not have a regulation or a directive stating that its policy is to not promulgate regulations, nor has the issue been directly discussed by the Commission in a public setting. *See,* Lacy, 92:17- 93:17; (Lacy Depo, R. p. 758, lines 17-p. 759, line 17); *See,* Dr. John Vaughn Deposition (Vaughn), 160:18 – 161:8. (Vaughn Depo, R. p. 1182, line 18-p. 1183, lines 8). The reasoning given by Dr. Lacy for not promulgating regulations was that DDSN is not required to promulgate regulations. *See,* Lacy, 87:15-18; 89:11-12 (Lacy Depo, R. p. 753, lines 15-18, p. 755, lines 11-12). Also, Dr. Lacy testified that her experience is that it is difficult to get regulations approved by the Legislature. *See,* Lacy, 111:1-15. (Lacy Depo, R. p. 777, lines 1-15). Dr. Vaughn testified that regulations are despised by the public. *See,* Vaughn, 120:14-17 (Vaughn Depo, R. p. 1142, lines 14-17). He also testified that anything that should be in a regulation had been "covered already." *See,* Vaughn, 149:19-25 - 150:1-3 (Vaughn Depo, R. p. 1171, line 19-p. 1172, line 3). Finally, Deborah McPherson, a Commission member and former DDSN employee, testified that she agrees that the agency should promulgate regulations. *See,* Mrs. Deborah McPherson Deposition (McPherson), 114:15-22; 119:6-11 (McPhearson Depo, R. p. 1403, lines 15-22; p. 1408, lines 6-11). Ms. McPherson noted that the Commission Policy is contrary to the State Code. She would return to policies that mirror the Code; however, her understanding is that the current commission policy prevents them from complying with the State Code. *See,* McPherson, 67:18-68:14; 75:17-19; 76:6-11 ("So it's interesting, when you look at it, when

[5] Regulations are required to be published in the State Register and are found in the South Carolina Code of Laws Annotated. Judicial notice should be given that there are still areas of South Carolina that do not have access to broadband coverage, nor have reliable or affordable access to the Internet, per the information available from the South Carolina Public Service Commission.

it's saying promulgate regulations of the operation, and yet we've got policies, commission policies that are—have been pretty clear to say you don't get involved in the day-to-day operations. You can't have it both ways."). (McPhearson Depo, R. p. 1356, line 18-p. 1357, line 14; p. 1364, lines 17-19; p. 1365, lines 6-11).

DDSN filed a motion for summary judgment on June 9, 2008 and supporting memorandum on October 8, 2008. (Motion, R. pp. 97-98; Memorandum, R. pp. 101-111; Reply Memorandum, R. pp. 224-249). Appellants' filed their memorandum in opposition to DDSN's motion for summary judgment on May 13, 2010 and the Affidavit of Gloria Prevost on May 11, 2010. (Memorandum in Opposition, R. pp. 174-223; Affidavit, R. pp. 165-166).

The Appellants filed their Motion for Summary Judgment on June 6, 2013 and supporting memorandum on August 1, 2013. (Motion, R. pp. 250-255; Memorandum, R. pp. 256-535). DDSN filed a supplemental memorandum in support of their motion for summary judgment on August 2, 2013. (Memorandum, R. pp. 536-545). The hearing on these cross motions for summary judgment was held on August 6, 2013 before Judge Cooper. (Hearing Tr., R. pp. 628-668). Following the hearing, Judge Cooper took the matter under advisement. (Form 4 Order). Judge Cooper issued the Order granting summary judgment for DDSN and denying summary judgment for the Appellants on September 24, 2013. (Order, R. pp. 1-19).

Following the receipt of the trial court's Order on October 7, 2013, the Appellants timely filed a Motion to Reconsider, Alter and Amend Judgment Pursuant to Rule 59(e) dated September 24, 2013. (Motion, R. pp. 546-609). DDSN filed a memorandum in opposition to the Appellants' Motion; however, DDSN suggested a change to the Court's rulings. (Memorandum, R. pp. 610-617). Appellants' filed Reply Memorandum in support

of their motion to alter, amend, or reconsider judgment pursuant to Rule 59(e). (Reply, R. pp. 618-627). On December 30, 2013, Judge Cooper issued an Order denying the Appellants' motion asking for the lower court to reconsider its rulings; however, based upon a suggestion and change requested by DDSN in its responsive memorandum, the lower court issued a modified Order dated September 26, 2013. (Order, R. pp. 20-22). On February 3, 2014, the Appellants filed their Notice of Appeal from the two Orders issued by the Honorable G. Thomas Cooper, Jr. of the trial court dated September 24, 2013 and December 30, 2013.

ARGUMENT

I. THE COURT ERRED IN FINDING THAT THE PLAINTIFFS/APPELLANTS (BOTH INDIVIDUAL PLAINTIFFS AND P&A) DO NOT HAVE STANDING.

The lower court clearly erred in finding that the individual Appellants and P&A each do not have standing to pursue their claim for declaratory judgment concerning the requirement that DDSN promulgate regulations. In the courts of this state, standing may be acquired in any one of three ways: 1) by statute; 2) by constitutional standing; or 3) by the public importance exception to standing requirements. *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). As asserted by the Appellants to the lower court and as discussed herein, the Appellants have constitutional standing, as well as standing through the public importance exception and by statute. See, U.S. Constitution, amend. XIV, §1; S.C. Const. Art. I, §§ 3 and 22; S.C. Code Ann. §§ 1-23-10 et. seq. (2005 and Supp. 2011) (APA provides due process). (Pltf. Memo. In. Sup. SJ, pp. 22, 26, R. pp. 277, 281; Hearing Tr., pp. 7-21, 31-35, R. pp. 634-648, 658-662). DDSN relies upon the case of *Lewis v. Casey,* 518 U.S. 343 (1996), in making the argument against Appellants'

standing and such reliance by the lower court is misplaced. South Carolina law, however, not federal law, governs standing in this case. The distinction is significant. South Carolina courts are courts of general jurisdiction rather than a court of limited subject matter jurisdiction. *Limehouse v Hulsey,* 397 S.C. 49, 723 S.E. 2d 211, 218 (Ct. App. 2011). This case is distinctively different in that it is a declaratory judgment action, which raises issues concerning mandates and duties upon a state agency, its tools, to perform its statutory functions in the providing of services, and the principles of due process and the opportunity to be heard as afforded by the APA and related laws. The Appellants assert that standing does exist for them under the exceptions and provisions of South Carolina law to allow them to proceed and obtain Declaratory Judgment in their favor that DDSN is required to promulgate regulations in the areas of concern outlined by the Appellants in this action. (Complaint, R. pp. 27-50).

a. **The lower court erred in finding and holding that P&A does not have to standing or associational standing to participate and/or bring this Declaratory Action in accordance with its statutory authority under both state and federal laws to advocate for vulnerable individuals with certain disabilities and injuries**

The lower court incorrectly holds and finds that P&A does not have standing based on its state and federal mandate to advocate for individuals with developmental disabilities. In fact, the lower court incorrectly applied the rulings in *Penn. Prot. & Advocacy, Inc. v. Houston,* 136 F. Supp.2d 353, 365-67 (E.D.Pa. 2001). In finding that P&A has no standing, the Court relied on *Penn. Prot. & Advocacy, Inc. v. Houston,* 136 F. Supp.2d 353, 365-67 (E.D.Pa. 2001). The lower court is incorrect in its application of this case to deny associational standing to the P&A. More importantly, *Penn. Prot. & Advocacy* denied

Defendant's motion to dismiss for lack of standing and found that based on the complaint and affidavit presented PP&A had standing to sue on its own behalf.

As the *Penn. Prot. & Advocacy* court stated:

> "An organization has standing to sue on its own behalf if the organization itself can satisfy the irreducible constitutional minimum requirements and prudential concerns do not point to the need for judicial restraint. [Citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)] 'There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy.' PP&A has standing to sue on its own behalf because it sufficiently alleged an injury in fact and prudential concerns do not preclude this case from going forward. [Citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1995)]."

Just as in *Penn. Prot. & Advocacy*, P&A has been explicitly by the General Assembly designated as the state protection and advocacy system to implement the Federal Developmental Disabilities Act, 42 U.S.C.A. §§ 15001 et seq. S.C. Code Ann. § 43-33-310. The Federal Developmental Disabilities Act, *supra,* requires that each State shall have in effect a system to protect and advocate the rights of individuals with developmental disabilities and that such system shall have the authority to pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals within the State who are or who may be eligible for treatment, services, or habilitation, or who are being considered for a change in living arrangements. 42 U.S.C.A. § 15043(a)(1),(2)(i). P&A fulfills this mandate by representing individuals who encounter DDSN in all parts of its system, including applications for eligibility, investigation of abuse and neglect, and advocacy for individuals to receive services in the community, rather than in an institution.

Further, S.C. Code Ann. § 43-33-350 specifically provides:

> The system has the following powers and duties:

(1) It shall protect and advocate for the rights of all developmentally disabled persons, including the requirements of Section 113 of Public Law 94-103, Section 105 of Public Law 99-319, and Section 112 of Public Law 98-221, all as amended, 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.

P&A is bringing this action for exactly the reasons it was established: to protect and to advocate for the rights of individuals entitled to services. S.C. Code Ann. §43-33-350. Many times P&A's representation of clients is affected by DDSN's lack of regulations. (Affidavit, R. pp. 163-165). As in *Penn. Prot. & Advocacy* case, the Appellants state through the affidavit of Executive Director Gloria Prevost that

> [d]ue to the lack of regulations within the developmental disabilities system, in order to adequately represent its clients P&A must spend time and money in attempting to figure out the 'other means' referred to by Dr. Lacy to formulate rules at DDSN; to search for the rules themselves and to determine what criteria and standards apply to each case since there is often no notice of a change in the rules; and to ensure that those standards/criteria are up-to-date, that procedures are designed to protect people with developmental disabilities, and that they are applied fairly.
>
> (Affidavit, ¶ 7, R. p. 165).

The language in Ms. Prevost's affidavit is very similar to the affidavit in *Penn. Prot. & Advocacy* that was found sufficient to confer standing on the Pennsylvania P&A. The *Penn. Prot. & Advocacy* court correctly stated that it must accept Plaintiff's factual allegations and draw all reasonable inferences in its favor, stating, "It is possible that the Defendant's alleged failings caused P & A to spend more on advocacy than it normally would, or that the organization had to divert significant resources to advocate for [other services]." *Penn. Prot. & Advocacy, Inc. v. Houston,* 136 F. Supp.2d 353, 361 (E.D. Pa 2001).

The lower court also incorrectly characterizes and analyzes the affidavit of Ms. Prevost in this matter. (Affidavit, R. pp. 163-165; pp. 1-22). In fact, DDSN has come

forward with nothing to refute the substance of Ms. Prevost's affidavit. Unlike the Appellants, DDSN conducted no discovery regarding the Appellants, their claims, or P&A's activities on behalf of individuals with developmental disabilities, autism, traumatic brain injury, or head and spinal cord injuries. Nor did they even attempt to depose the Appellants in this matter. The Respondent should not benefit from a claim that they cannot support and did not endeavor to challenge through discovery or otherwise. Nor did the Respondents engage any discovery to refute the Appellants' standing, injury or their valid claims asserted in their Complaint. DDSN did nothing other than adopt the approach to "don't ask and we can assert it policy." And as a result, the lower court incorrectly ruled that the Appellants have no standing. The Respondents should not be allowed to benefit from their lack of engagement in the discovery process.

b. The lower court erred in finding and holding that P&A and the individual Appellants do not have standing to participate and/or bring this declaratory action due to the public importance exception.

The lower court further erred when it did not find that P&A does have standing based upon the public importance exception. Not only is the statutory purpose of P&A to advocate and protect the rights of certain vulnerable citizens with disabilities and certain types of injuries, but to the approximately 13,000 consumers served by DDSN and an unknown amount of others who want or need services, a declaration by the court that would allow them to have same protections as others to know how to obtain services, eligibility, standards for programs and waitlist, standards and procedures to appeal and the other areas[6] outlined in this action are extremely important. (Complaint, ¶¶ 6-53; R. pp. 34-49). Right now, there is

[6] See, paragraphs 6 thru 53 of the Complaint which assert DDSN has no regulations as required by law related to its operations concerning eligibility for services; appeal procedures; standards for the operation of residential programs; procedures for DDSN's Human Rights Committees (HRCs); or standards for research on human subjects. (Complaint, R. pp. 34-49).

no public notice, no right to be heard and no review by the General Assembly to the citizens of South Carolina in the past, present or future as DDSN continues to refuse to follow or apply the APA or to promulgate regulations concerning the operations of DDSN that affect the Appellants and all citizens. (Complaint, R. pp. 34-49; Hearing Tr., R. pp. 634-648, 658-662; Lacy Depo, R. pp. 667-1022; Vaughn Depo, R. pp. 1023-1289; *see also*, S.C. Code of Regulations, Annotated, Chapter 88, *et. seq.*. Withholding information or remaining without an opportunity to be heard is not the plan envisioned by the General Assembly when it established the regulations process in the APA. The issues raised by the Appellants are important to an estimated 13,000 plus consumers who currently obtain services from DDSN or who seek services. See, Legislative Audit Council Report *S.C. Department of Disabilities and Special Needs' Process to Protect Consumers from Abuse, Neglect, and Exploitation, Administrative Issues, and a Follow Up to Our 2008 Audit,* June 2014.

South Carolina courts have long recognized the public importance exception to standing requirements. *ATC South*, 380 S.C. at 198, 669 S.E.2d at 341. "Standing is not inflexible and standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." *Id.* (quoting *Davis v. Richland County Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007). Whether an issue is of sufficient public importance requires an "appropriate balance" by the court of "competing policy concerns." *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004).

While the nature of the public importance exception "resists a formulaic approach," the "key" to the analysis is "whether a resolution is needed for future guidance." *ATC South*, 380 S.C. at 199, 669 S.E.2d at 341. "It is this concept of 'future guidance' that gives meaning

to an issue which transcends a purely private matter and rises to the level of public importance." *Id.*

Over the years, South Carolina courts have held that the public importance exception conferred standing on plaintiffs in a variety of cases. *See, e.g., Davis* (county commissioners have standing to challenge the constitutionality of legislation that authorized their removal from office); *Sloan v. Dep't of Transportation*; 365 S.C. 299, 618 S.E.2d 876 (2005) (taxpayer had standing to sue Department over alleged statutory bidding violations); *Baird*, 333 S.C. at 530, 511 S.E.2d at 75 (doctors have standing to sue county to enjoin issuance of bonds for purchase and renovation of hospital); *Thompson v. S.C. Comm'n on Alcohol and Drug Abuse*, 267 S.C. 463, 229 S.E.2d 718 (1976) (law enforcement officials have standing to challenge constitutionality of the Uniform Alcohol and Intoxication Treatment Act).

The Order incorrectly holds that DDSN's failure to comply with the Administrative Procedures Act is not a matter of public interest. The Order erroneously assumes that a case-by-case determination of applicability to a specific plaintiff is necessary to finding that DDSN has acted lawlessly. On the contrary, implementation of the public policy behind the APA is of great and ongoing importance. DDSN is not the only state agency that has failed to promulgate regulations. Dr. Lacy's scofflaw attitude to promulgation demonstrates the need for a ruling that agencies may not ignore legislative mandates. (Lacy Depo, R. pp. 667-1022). Plaintiffs are not seeking relief in "multiple, unproven fact situations." (Complaint, R. pp. 27-50; Order, R. pp. 1-22; Motion, R. pp. 546-609. Appellants are seeking the opportunity to participate in the public process established by the General Assembly to guide lawful agency actions.

The directives, standards and manuals developed by staff at DDSN are used and applied as general rules of applicability by the agency in its operations. Rather than promulgating regulations, as mandated by the statute, DDSN seeks to operate through these statements. There is extensive evidence in the record to clearly demonstrate that such DDSN policy statements (i.e., their directives, standards and manuals) are treated like general rules of applicability by the agency in its operations is wide spread and a preferred, intended practice.

- "Departmental Directive (DD) - A **mandate** requiring compliance by applicable Central Office, District Office, Regional Center, DSN Board or Contracted Provider staff. A directive may address policy and/or more specific implementation procedures." Lacy Deposition, Exhibit 7 (emphasis added) (Lacy Depo, R. pp. 315-316, 777).
- "[T]here had been the understanding that the promulgation of regulations was not something that [DDSN] did because we used other vehicles to – to issue directives and hold people accountable to what our expectations were." *See,* Lacy Deposition, 100:1-5, Exhibit 19 (Lacy Depo, R. pp. 375-376, 766).
- "[W]e were trying to get DHEC law changed and we got nowhere through the legislative process by promulgating regulations. And I explained to that subcommittee that DDSN could have handled that request instantly by changing a contract or a directive." *See*, Lacy Deposition, 111:4-9, Exhibit 20 (Lacy Depo, R. pp. 378-379, 777).
- In explaining a directive Dr. Lacy stated, "It's comparable to policy and it describes certain expectations that the department has regarding people that we support,

services that they receive, the responsibilities that providers have." *See,* Lacy Deposition, 25:22 – 26:1, Exhibit 21 (Lacy Depo, R. pp. 381-383, 691-692).

- Dr. Lacy explained that regulations were unnecessary because "we have a vehicle that accomplishes the same thing." *See*, Lacy Deposition, 164:3-4, Exhibit 22 (Lacy Depo, R. pp. 385-386, 830).
- Anything that should be in a regulation had been "covered already." *See*, Vaughn Deposition, 150:2-3, Exhibit 23 (Vaughn Depo, R. pp. 388-389, 1172).
- "The expectation is that the directive will be followed." *See,* McPherson Deposition, 103:7-8, Exhibit 24 (McPherson Depo, R. pp. 391-392, 1392). With regard to standards, "they're also supposed to follow those standards and cannot deviate from them either? Yes." *See,* McPherson Deposition, 103:10-18; *see also* pp. 102, 104 ("They're supposed to follow the directive or standard. That is the expectation."), Exhibit 25 (McPherson Depo, R. pp. 394-397, 1391-1393).
- DDSN states that "[p]laintiffs would prefer state agency action to occur by regulation rather than by other means." *See,* Memorandum in Support of Defendant's Motion for Summary Judgment, p. 1 (Memo, R. p. 60).

DDSN consistently admit that they regulate through "other means." (Lacy Depo, R. pp. 667-1022; Vaughn Depo, R. pp. 1023-1289; McPherson Depo, R. pp. 1290-1439). However, DDSN has not provided any legal support for their argument that such other means is authorized by statute or other law in this state. Regulating through "other means" is not

an alternative to regulating pursuant to the APA. DDSN cannot avoid the promulgating regulations through the use of its "other means."[7]

Dr. Lacy in her deposition questions the ability of the legislature to timely approve regulations or to wisely approve them. *See,* Lacy, 110:20-25 – 111:1-15 ("we got nowhere through the legislative process by promulgating regulations . . . . the regulatory process is ineffective, it's not time sensitive . . . .") (R. pp. 766-767). A regulation, of which she and P&A approved, failed to get through the legislative process. Her conclusion was that she is capable of doing a better job than the legislature by avoiding regulations all together. She can "do that in a day." (Lacy Depo, R. p. 766). Whether Dr. Lacy or elected officials are wiser or better stewards of the state's laws and regulations, is irrelevant to the matter before the Court. However, by avoiding official promulgation of regulations, the Plaintiffs are not afforded an opportunity to obtain the transparency and oversight provided in the promulgation of regulations under the APA. They are also denied the ability to hold their elected officials accountable if they fail to act wisely or quickly on an issue of importance to the Plaintiffs. The DDSN decision to not promulgate regulations is without a rational basis. As Dr. Lacy and Dr. Vaughn testified, DDSN does not promulgate regulations because it is "covered already." *See,* Vaughn, 150:2-3 (Vaughn Depo, R. p. 1172); Lacy, 164:3-4 (Lacy

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[7] "The court may reverse or modify the decision [of an agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are . . . arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380 (Supp. 2013). "A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985) (citing *Hatcher v. South Carolina District Council of Assemblies of God, Inc.*, 267 S.C. 107, 226 S.E.2d 253 (1976); *Turbeville v. Morris*, 203 S.C. 287, 26 S.E.2d 821 (1943)). (Motion, R. pp. 546-609).

Depo, R. p. 830). No course of reasoning or exercise of judgment has occurred, because the Commission has not even discussed the issue. *See* Lacy, p. 92:17-25 – 93:1-17 (Lacy Depo, R. pp. 758-759); Vaughn, 150:10-17, (Vaughn Depo, R. p.1172). No fixed rules or standards apply to when the agency will promulgate regulations and when it does not. The agency does not even have a process for individual consideration of situations where regulation is necessary. The only reasoning for the decision in the current record is the opinion of Dr. Lacy that promulgating regulations is "ineffective" and Dr. Vaughn's opinion that the public despises regulations. *See,* Lacy, 111:10-11 (Lacy Depo, R. p. 777); Vaughn, 120:14-15 (Vaughn Depo, R.p. 1142). Appellants have alleged that DDSN's actions are arbitrary and capricious, and DDSN has offered no contrary proof. These statements and positions taken by DDSN show why this action is extremely important to Appellant P&A and to the individual Appellants. It affects their daily lives. DDSN's only defense to the arguments of the Appellants is that they have not acted arbitrarily because promulgating regulations is not mandatory. *See,* Reply Memorandum in Support of Defendants' Motion for Summary Judgment, p. 7 (Reply Memo, R.p. 230). DDSN's argument is circular, arguing that the assumption that they have discretion means that they may exercise such discretion not to comply with the APA as they please. Even assuming DDSN is not mandated by statute to promulgate regulations, they must act rationally in their governance and any application of discretion requires a factual basis. *Hamm v. SC Public Service Commission,* 298 S.C. 309, 311, 380 S.E.2d 428, 429 (1989). A lack of a mandate does not equate to the lack of a duty to govern rationally and provide basic due process rights to Appellants. (Memo, R. p. 281).

DDSN administers hundreds of millions of dollars and serves thousands of South Carolinians. Its activities are at least as much of an importance as those in *Sloan v. Dept. of*

Transportation, 379 S.C. 160, 666 S.E.2d 236 (2008); *Baird v. Charleston Cty.,* 333 S.C. 519, 511 S.E.2d 69 (1999); *Thompson v. South Carolina Comm'n on Alcohol & Drug Abuse,* 267 S.C. 463, 229 S.E.2d 718 (1976); and *Sloan v. School Dist. of Greenville Cty.,* 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000). The affidavits submitted by Appellants, together with S.C. Code Ann §44-33-310, demonstrate the public importance for P&A and their clients. It also shows the public importance to the each of the individual Appellants. The Appellants assert that standing does exist for them and that lower court failed to apply the proper standards and erred when it did not find standing for the Appellants.

c. The lower court further erred in failing to standing based on the statutory authority of Appellant P&A, or upon the ability for the individual Appellants to enforce their rights.

The lower court incorrectly holds and finds that individual Plaintiffs do not have standing to bring an action to enforce their rights under South Carolina law, the state and federal Constitutions, and under the Administrative Procedures Act (S.C. Code Ann. §§ 1-23-10, *et. seq.*). The APA provides for advance determination by the agency of its policies and operations and then determination by the courts concerning the validity of such regulations and their applicability to particular situations so that the Appellants and others can know how DDSN implements or prescribes law, policy or practice requirements for DDSN consumers (a/k/a the Appellants) in the granting of benefits and general regulation related to its state (and federal, if any) mandates concerning certain individuals with physical and developmental disabilities without being subject to arbitrary action. The Administrative Procedures Act ("APA") was established in 1977 and requires agencies to follow uniform rulemaking procedures which give interested persons notice and an opportunity to participate in the promulgation progress to ensure that requirement of due process afford by the

Constitutions of the United States and South Carolina and related laws and statutes are met. "The APA has a very broad sweep, but its definitions limit its coverage to a degree with exemptions for specific entities and particular activities. Nevertheless, the APA should be liberally construed so that its application is as comprehensive as possible." Randolph R. Lowell, SOUTH CAROLINA ADMINISTRATIVE PRACTICE AND PROCEDURE, p. 118 (2nd ed. 2008); *Schudel v. S.C. Alcoholic Beverage Control Comm'n*, 276 S.E.2d 308 (1981) (The SC Supreme Court considered this newly enacted APA and determined that it is clear from the language of the APA and its history that the APA is meant to be all inclusive.). The findings and rulings of the lower court in its Order do not apply any all-inclusive or liberal application of the APA and its underlying and founding tenants in the fundamental due process of law provided by the Fourteenth Amendment of the U.S. Constitution and Article I, §3 and §22 of the South Carolina Constitution. The Appellants are deprived of their due process rights and have no notice concerning the subject areas raised in their Complaint. (Complaint, ¶¶ 6-53, R. pp. 34-49). Nor can Appellant P&A defend and assert the rights of the clients to fulfill their statutory duties. The Appellants assert that standing does exist for them and that lower court failed to apply the proper standards and erred when it did not find standing for the Appellants.

d. **The lower court further erred in failing to find standing based on the statutory authority of Appellant P&A, or upon the ability for the individual Appellants to enforce their constitutional rights.**

The lower court erred in its Orders in failing to find standing and in tis rulings which adversely affect the substantial constitutional rights of the Appellants, especially Appellant P&A, by limiting its access to equal protection of the laws and due process of law. The construction by the lower court in its Order(s) that each of the Appellants is or was free to

challenge the agency action on an individual basis as reason to rule against the Appellants in this matter is wrong. (Order, R. p. 11). The lower court was also incorrect to hold that if there were any regulations promulgated by the DDSN today, that it would not create any more right of review than already exists for the Appellants with the directives, standards, and manuals established by DDSN by "other means" and outside the protections of the APA. (Order, R. p. 11). However, this ignores the fundamental guarantees of due process that the General Assembly provided in adopting the APA in order to ensure that the policies of the state agencies are properly established and known in order to have the full force and effect of law. (Memo, R. pp. 256-535).

The lower court adversely affects the substantial constitutional rights of Appellant P&A to equal protection of the laws and due process of law by dismissing with prejudice all aspects of the allegations in the Complaint so that Appellant P&A if forever barred and cannot ever raise such similar issues concerning the failure of promulgation of regulations by DDSN in any other matter in accordance with its federal and state legislative duty to implement the Federal Developmental Disabilities Act, 42 U.S.C.A. §§ 15001, *et. seq.* and to "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 by these persons." S.C. Code Ann. §§43-33-310 & 350. Without any warning or notice, the lower court has directly, effectively and substantially hindered the ability of Appellant P&A to protect and advocate for and on behalf certain persons in compliance with its statutory duties and responsibilities that it "shall" carry out. (Order, R. pp. 1-22). For these reasons, the lower court erred in its ruling against the Appellants and its restriction of the future ability of Appellant P&A to defend its

clients who are consumers of DDSN (or seek to be a consumer of DDSN), and to fulfill its statutory obligations. The lower court also erred in such finding as it applies to individual Appellants in restricting their specific cases.

II. THE LOWER COURT ERRED IN FAILING TO CONSIDER THE FUNDAMENTAL PURPOSE OF THE SC DECLARATORY JUDGMENT ACT TO FIND FOR THE APPELLANTS IN ITS RULINGS

The lower court in its Orders improperly applied the law and/or failed to consider the fundamental purpose of the South Carolina Declaratory Judgments Act in consideration of standing, justiciability, and showing of injury. The lower should be reversed as the Appellants are entitled to the Court's declaration that the Respondents must promulgate regulations pursuant to state law for oversight in the operations of DDSN and for transparency so the public has the means to know what these regulations (i.e., standards, criteria, etc.) are, where to find them, and know that such regulations will have force of law and not change simply because it is Tuesday or without basis. "Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder." S.C. Code Ann. § 15-53-30 (2005). The Appellants are individuals "whose rights, status, or other legal relations are affected by" DDSN's enabling legislation and by the APA. The Appellants have raised a question of construction regarding those statutes and are asking the court to declare whether or not the agency must promulgate regulations under the plain wording of those statutes. The relief provided under the Declaratory Judgment Act is remedial and its purpose is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." S.C. Code Ann. § 15-53-130 (2005). DDSN has admitted that they are required to

promulgate regulations related to the operations of the Department. *See,* Defendants' Answers to Plaintiffs' Requests for Admission, Response #7. (Def. Ans. Pltfs Req. Adm. No. 7, R. pp. 114, 125).

Section 15–53–20 of the South Carolina Code identifies the purpose of the Uniform Declaratory Judgments Act ("the DJ Act") and provides that courts "shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." S.C. Code Ann. §15–53–20 (2005) ; *see* Rule 57, SCRCP ("The procedure for obtaining a declaratory judgment pursuant to 15-53-10 through 15–53–140, shall be in accordance with these rules, and ... [t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."). The DJ Act is to be liberally construed and administered to achieve its intended purpose "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." S.C. Code Ann. §15–53–130 (2005). However, the DJ Act does not require the courts to give purely advisory opinions as to the issues sought to be raised. *City of Columbia v. Sanders,* 231 S.C. 61, 97 S.E.2d 210 (1957). "[A]n issue that is contingent, hypothetical, or abstract is not ripe for judicial review." *Colleton County Taxpayers Ass'n v. Sch. Dist. of Colleton County,* 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006). The issues before the lower court in this case are ripe, and are an actuality in reality of instances of admitted failures by the DDSN to provide and promulgate such regulations – and that is the standing that the parties presented – plus direct reference to statutes mandating that DDSN shall promulgate regulations and the admissions by DDSN representatives that they have.[8]

[8] DDSN does not have a regulation or a directive stating a policy to not promulgate regulations, nor has the issue been directly discussed by the Commission in a public setting. *See,* Lacy, 92:17- 93:17 (Lacy Depo, R. pp. 758-759); *See,* Dr. John Vaughn Deposition (Vaughn), 160:18 – 161:8 (Vaughn Depo. R. pp. 826-827).

The Appellants are asking for the court to declare what the rights are between the parties. Do the Appellants have to continue to make do and be subject to with the "other means" DDSN uses to establish rules, or does DDSN have to formalize its rulemaking process through the promulgation of regulations? In promulgating regulations under the APA, Appellants will be able to present public comment, have access to legal remedies currently unavailable, and know that their elected officials will have to review proposed regulations, adding accountability, transparency, and oversight to the operations of DDSN. *See* S.C. Code Ann. §§ 1-23-10 to 1-23-160 (2005 and Supp. 2012).

III. THE LOWER COURT FURTHER ERRED IN RULING ON THE ISSUE OF BINDING NORMS AS IT WAS NOT AN ISSUE RAISED IN THE COMPLAINT BY THE APPELLANTS AND WAS PART OF THE ARGUMENT TO COUNTER THE STATEMENTS OF THE RESPONDENTS

The lower court erred in making a ruling concerning binding norms when it was not an issue raised in the Complaint by the Appellants. (Order, pp. 16-18 R. pp. 17-19). The Appellants did not make this an issue in the Declaratory Judgment Action, but only used "binding norms" as an example part of its arguments to counter the statements by DDSN in its filing and comments as to why DDSN knows better than the General Assembly in regulating by "other means." (Pltfs. Memo, pp. 26-31; R. pp. 281-286; Def. Memo, R. pp.

The reasoning given by Dr. Lacy for not promulgating regulations was that DDSN is not required to promulgate regulations. *See,* Lacy, 87:15-18; 89:11-12 (Lacy Depo, R. pp. 753, 755).

Also, Dr. Lacy testified that her experience is that it is difficult to get regulations approved by the Legislature. *See,* Lacy, 111:1-15 (Lacy Depo, R. p. 777).

"[T]here had been the understanding that the promulgation of regulations was not something that [DDSN] did because we used other vehicles to – to issue directives and hold people accountable to what our expectations were." *See,* Lacy Deposition, 100:1-5 (Lacy Depo, R. p. 766).

In explaining a directive Dr. Lacy stated, "It's comparable to policy and it describes certain expectations that the department has regarding people that we support, services that they receive, the responsibilities that providers have." *See,* Lacy Deposition, 25:22 – 26:1 (Lacy Depo, R. pp. 691-692).

Dr. Lacy explained that regulations were unnecessary because "we have a vehicle that accomplishes the same thing." *See*, Lacy Deposition, 164:3-4(Lacy Depo, R. p. 830).

536-537). It was also used by the Appellants as an example or analogy in its argument for summary judgment against DDSN of how difficult it is for any individual, including legal counsel with access to the Internet, to traverse the maze that DDSN has created as a substitution for promulgating regulations. (Pltfs. Memo, pp. 26-31; R. pp. 281-286). The maze of directives, manuals, and standards that an individual cannot know what applies to the consumer, medical provider or vendor of DDSN. This is yet another reason why DDSN needs to promulgate regulations related to its operations so that consumers or the Appellants know eligibility, standards, programs and related areas of concern that are specifically outlined in the Complaint. (Complaint, ¶¶ 6-53, R. pp. 34-49; Plaintiffs' Memo in Sup of Mtn Sum. Judg., R. pp. 256-535).

For an example of the maze, assuming an individual has access to the internet, the individual seeking services will probably go to DDSN's website.[9] DDSN fails to note that access to the internet varies widely around the state and is difficult to access in rural areas. (Pltfs. Memo, p. 27, R. p. 282). One of the links at the top of the page is "Applying for Services." This link has four categories under which someone may apply for services:

- FOR PEOPLE WITH INTELLECTUAL DISABILITY AND RELATED DISABILITIES
- FOR PEOPLE WITH AUTISM
- FOR PEOPLE WITH TRAUMATIC BRAIN INJURY AND/OR SPINAL CORD INJURY (HASCI) AND SIMILAR DISABILITIES
- FOR HIGH RISK INFANTS AND TODDLERS

[9] DDSN Home page, *available at* http://www.ddsn.sc.gov/Pages/default.aspx (viewed 7/31/13 as stated in filing, R. p.282).

The page "Applying for Services" does not mention "for people with PDD or Asperger's." [10] Many individuals at that point may quit, especially considering that the care of a child with a severe disability is extremely difficult and time-consuming. Some individuals may be more tenacious: they might try to find the policy related to eligibility to see if their child might fit under the "related disabilities" category or under the "autism" category. None of the links from the "Home" page mention anything about criteria for eligibility.[11] The "About DDSN" page states that DDSN "serves persons with intellectual disability, autism, traumatic brain injury and spinal cord injury and conditions related to each of these four disabilities," but does not say how to find the policy on eligibility.[12] The webpages entitled "DDSN Commission," "Service Providers," "Services," "Job Opportunities," and "Relevant Links" do not appear to give any details on who may be eligible for services and who may not be eligible for services. The page entitled "Consumers and Families" contains a link to the "Applying for Services" page that again mentions only the disabilities bulleted above.

On the "About DDSN" page, the directives and standards are listed, but the term "directive" is not defined. If an individual does go to the "Current DDSN Directives" page, this individual will find the online index of directives. Defendants' Reply Memorandum in Support of Defendants' Motion for Summary Judgment, Exhibit B (listing 128 directives). (Reply. Memo, R. pp. 235-244). The long list of directives can be found numerically or

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[10] Applying for Services, *available at* http://www.ddsn.sc.gov/consumers/Pages/ApplyingforServices.aspx (viewed 3/16/2012 as state in filing, R. p. 283).

[11] DDSN Home Page, *available at* http://www.ddsn.sc.gov/Pages/default.aspx (viewed 7/31/13 as noted filing, R. p. 282).

[12] About DDSN Page, *available at* http://www.ddsn.sc.gov/ABOUT/Pages/default.aspx (viewed 7/31/13 as noted filing, R. p. 283).

alphabetically, but is not organized between those directives as to which apply to applicants, beneficiaries, providers, or internal staff. The directives range from substantive matters like "Eligibility Diagnostic Criteria, Screening and Intake Processes for Eligibility and Appeal procedures" to minor administrative matters like "Central Office Telephone Call Coverage Backup Policy." [13] *See,* Exhibit 33 and 34 (Pltfs. Memo, R. pp. 421-439). For these reasons, DDSN should be required to promulgate regulations.

The lower court erred in making such rulings on p.16-18 of its Order about binding norms and such should be stricken and removed.

IV. THE LOWER COURT ERRED IN RULING THAT DDSN IS NOT REQUIRED TO PROMULGATE REGULATIONS AND SUCH RULING VIOLATES THE LAWS OF SOUTH CAROLINA, INCLUDING DDSN'S ENABLING LEGISLATION, THE ADMINISTRATIVE PROCEDURES ACT, AND THE DUE PROCESS CLAUSES OF THE SOUTH CAROLINA AND UNITED STATES CONSTITUTIONS.

The rulings by the lower court in its Orders impact the Appellants by denying them the opportunity to be heard and for a resolution of this issue in accordance with the Administrative Procedures Act so that the harm created by DDSN is "capable of repetition yet evading review." In fact, DDSN admits that it has a duty to promulgate regulations related to its operations per Code §44-20-220. *See,* Defendants' Answers to Plaintiffs' Requests for Admission, Response #7 (R. pp. 114, 124-125). However, even though the General Assembly did not define "operation" in the same section, DDSN asserts that this duty promulgate regulations applies only its internal operations for the protection of its

[13] Eligibility Directive, *available at* http://www.ddsn.sc.gov/about/directives-standards/Documents/currentdirectives/100-30-DD%20(090110).pdf. (viewed 7/31/13 as noted filing, R. p. 284).

employees[14] and is not for the protection of the approximate 13,000 vulnerable citizens that its serves daily. See, Legislative Audit Council Report *S.C. Department of Disabilities and Special Needs' Process to Protect Consumers from Abuse, Neglect, and Exploitation, Administrative Issues, and a Follow Up to Our 2008 Audit,* June 2014, p. 2.

Dr. Lacy, the originator of many DDSN directives, explained the purpose of directives. (Lacy Depo., R. pp. 691-912). As the Associate State Director for Policy, she has "[primary] responsibility for . . . the directives related to how the department . . . functions, responsibilities it carries out, setting forth policy . . . setting forth the service standards . . . ." *See,* Lacy, 24:13-18 (Lacy Depo, R. p. 690). In other words, she creates directives that relate to the on-going functions or operations of DDSN. Mrs. McPherson defined operations at length in her deposition testimony. *See,* McPherson, 59-67 (McPherson Depo, R. pp. 1348-1356). Essentially, she agreed that "[w]hat the director tells [staff] to do, what they do every day when they come into the office is part of the operations of the department." *Id.* at 65:7-11 (McPherson Depo, R. p. 1354). Dr. Vaughn noted that eligibility and appeals were part of the operations of DDSN, but noted, like Ms. McPherson, that the Commission did not involve itself with the day-to-day operations of DDSN. *See,* Vaughn Deposition, 151:4-152:9, (Vaughn Depo, R. p. 1173, ln 4 – p. 1174, ln. 9).

The plain meaning of S.C. Code §§44-20-220 and 44-26-180 is that the Defendants must promulgate regulations regarding informed consent, to protect the dignity of the individual, to govern the operations of the department, and regarding employment of professional staff and personnel. As argued herein below, the lower court erred by failing to provide judgment for the Appellants and finding that DDSN fails to meet its statutory

[14] Even though this is the claimed position by DDSN, DDSN has not promulgated any such internal operations regulations.

duty to promulgate regulations concerning eligibility for services; appeal procedures; standards for the operation of residential programs; procedures for DDSN's Human Rights Committees (HRCs); or standards for research on human subjects. (Order, R. pp. 1-22; Complaint, R. pp. 34-49). The lower court further erred by failing to find at least partial summary judgment in favor of the Appellants when DDSN admitted that it failed to promulgate regulations regarding informed consent concerning human subject research. (Order, R. p. 13). Respondents do not deny that DDSN is mandated to promulgate regulations "to obtain informed consent and to protect the dignity of the individual." S.C. Code Ann. § 44-26-180 (Supp. 2012); Defendants' Reply Memorandum in Support of Defendants' Motion for Summary Judgment, p. 4-5 (Def. Reply Memo, R. pp. 227-228). Likewise, the record shows that there are no "operations" regulations (neither internal nor external) promulgated by DDSN and incorporated as part of the South Code of Laws Annotated.

a. The Lower Court erred as a matter of law in finding that the mandate for DDSN to promulgate regulations governing the operation of the department as the referring to its internal functions as an agency rather than in the performance of its mission to the outside world.

The issues presented in this case are matters of great public interest. *See generally Hooper v. Ebenezer Sr. Services and Rehabilitation Ctr.,* 386 S.C. 108, 687 S.E.2d 29 (2009) (holding that an equitable tolling of the statute of limitations should apply when a nursing home has failed to designate a registered agent with the Secretary of State: "The statute of limitations' purpose of protecting defendants from stale claims must give way to the public's interest in being able to rely on public records required by law."). DDSN has been mandated to provide services to individuals with "intellectual disabilities, related disabilities [including those with autism], head injuries, or spinal cord injuries . . . ." *See* S.C. Code Ann. §§44-20-

210 (Supp. 2012); 44-20-240 (Supp. 2012) (DDSN has authority over all of the state's services and programs for the treatment and training of persons with intellectual disability, related disabilities, head injuries, and spinal cord injuries). DDSN is further mandated by the General Assembly, like other state agencies, to promulgate regulations related to its department's operations.

> The commission shall determine the policy and promulgate regulations governing the operation of the department and the employment of professional staff and personnel. . . . The commission is authorized to promulgate regulations to carry out the provisions of this chapter and other laws related to mental retardation, related disabilities, head injuries, or spinal cord injuries.
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> S.C. Code Ann. §44-20-220 (Supp. 2012).

However, DDSN has consistently claimed that the term operations "as used in § 44-20-220, relates only to the internal operations of the Department, and not to its mission to the outside world." *See,* Defendants' Answers to Plaintiffs' Requests for Admission, Response #5 (Def. Ans. Pltfs. Req. Adm. No. 5, R. pp. 114, 124). Other than this statement, DDSN does not explain how "internal" operations are distinguished from "external" operations. Presumably, DDSN has concluded that internal operations do not affect applicants, beneficiaries, or providers or do not relate to eligibility for services; appeal procedures; standards for the operation of residential programs; procedures for DDSN's Human Rights Committees (HRCs); or standards for research on human subjects. (Complaint, R. pp. 33-49). Such a definition of operations would be very narrow indeed because each topic for proposed regulation contains both internal and external aspects. DDSN does not explain how they determine or apply standards in establishing what operations are "internal" and what are "external". They do not have a policy or directive that explains that distinction to the public.

They also do not have any regulations that cover "internal" operations. *See* S.C. Code Ann Regs., § 88-105 *et seq.*

In interpreting the meaning of the term "operations," the lower court failed to intent of the Legislature in accordance with the well-established rules of statutory construction. *SCANA Corp.* 348 at 393, 683 S.E.2d 470. Legislative intent should first be determined from the plain language of the statute. Only if the statute is ambiguous would the Court look to the purpose behind the statute. "All rules of statutory construction are subservient to the one that the 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." *State v. Sweat*, 386 S.C. 339, 350-51, 688 S.E.2d 569, 575-76 (2010) (quoting *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000)). DDSN's argument regarding the interpretation of "operations" ignores the plain meaning of the word "operations" and ignores the purpose of the enabling legislation and the APA, which does not distinguish between the "inside world" and the "outside world" at DDSN.

DDSN's argument and position that "operations" in S.C. Code Ann. §44-20-220 only pertains to "internal functions" is also inconsistent with reality. Dr. Lacy, who is the originator of many DDSN directives, stated in her deposition that, as the Associate State Director for Policy, she has "[primary] responsibility for . . . the directives related to how the department . . . functions, responsibilities it carries out, setting forth policy . . . setting forth the service standards . . . ." *See,* Lacy, 24:13-18 (Lacy Depo., R. p. 690). In other words, she creates directives that relate to the on-going functions or operations of DDSN that it is required by its purposes in Chapter 20 of Title 44 to carry out which relates to and affects the public and consumers that it serves.

The plain meaning of the term "operations": When you examine the plain meaning of the word "operation" and apply the rules of statutory construction, it is further supports the arguments of the Appellants – that DDSN has a duty to promulgate regulations concerning operations of the department in providing services to public in accordance with its stated purpose. Services to the vulnerable citizens and their family is DDSN's operation. The ordinary meaning of "operations" does not indicate merely internal operations. Because the statute (§44-20-220) does not define "operations," the ordinary, dictionary definition should be given. *Estate of Nicholson v. SCDHHS*, 377 S.C. 590, 596, 660 S.E.2d 303, 305 (Ct. App. 2008) (citing *Lee v. Thermal Eng'g Corp.*, 352 S.C. 81, 91-92, 572 S.E.2d 298, 303-304 (Ct. App. 2002)). An operation is a method or way of operating; to operate is to function or to act. See, *The American Heritage Dictionary* 594 (4th Ed. Boston: Houghton Mifflin 2001). The *Merriam-Webster Dictionary* defines operation to mean the "performance of a practical work or of something involving the practical application of principles or processes" or "an activity of a business or organization." *Encarta Dictionary* defines operation as "the act of making something carry out its function." The function of DDSN is to interact with applicants, beneficiaries, and providers—the outside world. DDSN does not function to serve itself but to serve individuals with disabilities. S.C. Code Ann. § 44-20-20 (purposes of chapter); S.C. Code Ann. § 44-20-240 (Supp. 2012). Without such operation (i.e., the providing of services to these vulnerable individuals), there would be no DDSN. The function of DDSN is to interact with applicants, beneficiaries, and providers—the outside world. DDSN does not function to serve itself but to serve individuals with disabilities.

The purpose behind the enabling legislation and the APA: If the term "operations" is ambiguous, then it must be interpreted in the context of the purpose of the legislation. *State v. Sweat*, at 350-51, 688 S.E.2d at 575-76.

> "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *Browning v. Hartvigsen,* 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992). In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose.
>
> *Hitachi Data Sys. Corp. v. Leatherman,* 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) .

Id. The purpose of DDSN's enabling legislation is "to assist persons with mental retardation, related disabilities, head injuries, or spinal cord injuries by providing services to enable them to participate as valued members of their communities." S.C. Code Ann. § 44-20-20 (Supp. 2012) (Purpose of Chapter). DDSN's interpretation of the term "operations" as referring only to internal matters of DDSN is inconsistent with the purpose of the legislation, namely to assist individuals with disabilities to be valued members of their communities. DDSN seeks and continues to avoid the transparency and oversight of its operations by ignoring the need for regulations that relate to its purpose, which is to help and assist individuals live in the "outside world."

DDSN's position concerning the meaning of "operation," which was adopted by the lower court and held as a rule of law in its Order, is inherently wrong and contradicts the specific provisions the South Carolina Administrative Procedures Act, S.C. Code Ann. §§1-23-10 to 1-23-160 (2005 and Supp. 2013) (APA) The APA specifically and clearly **excludes** from the definition of "regulation" and prohibits the promulgation of regulations related to

internal agency procedures applicable to the agency personnel as found by the lower court and as asserted by DDSN.

Section 1-23-10(4) defines a "regulation" as

> "each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency. ***Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law.*** The term "regulation" includes general licensing criteria and conditions and the amendment or repeal of a prior regulation, ***but does not include descriptions of agency procedures applicable only to agency personnel;*** opinions of the Attorney General; decisions or orders in rate making, price fixing, or licensing matters; awards of money to individuals; policy statements or rules of local school boards; regulations of the National Guard; decisions, orders, or rules of the Board of Probation, Parole, and Pardon Services; orders of the supervisory or administrative agency of a penal, mental, or medical institution, in respect to the institutional supervision, custody, control, care, or treatment of inmates, prisoners, or patients; decisions of the governing board of a university, college, technical college, school, or other educational institution with regard to curriculum, qualifications for admission, dismissal and readmission, fees and charges for students, conferring degrees and diplomas, employment tenure and promotion of faculty and disciplinary proceedings; decisions of the Human Affairs Commission relating to firms or individuals; advisory opinions of agencies; and other agency actions relating only to specified individuals."

S.C. Code Ann. §1-23-10(4) (emphasis added).

The Appellants further argue that the lower court's interpretation of "operation" (as well as that of DDSN) is also inconsistent with the purpose behind the enactment of the APA. Regulations are a method of formalizing rules governing a regulatory agency, like DDSN. *See* S.C. Code Ann. § 1-23-10 (1), 10 (4) (2005). In South Carolina, the APA sets forth the process for creating regulations. S.C. Code Ann. §§ 1-23-10 to 1-23-160 (2005 and Supp. 2011). The process must be public and it requires formal comment procedures and approval by the General Assembly. S.C. Code Ann. §§ 1-23-110 to 1-23-126 (2005 and Supp. 2011). For example, when an agency is establishing procedural requirements, internal procedures do not have to be promulgated as a regulation, but "procedural requirements

dealing with the public, such as permit applications, filing of petitions and complaints, conduct of hearings and so forth, prescribe the practice requirements of an agency and **require formal rulemaking**." David E. Shipley & Randolph R. Lowell, *South Carolina Administrative Practice & Procedure* p. 108 (2d ed. 2008)(emphasis added). A purely internal policy that has no effect on applicants, beneficiaries, or the public does not need to be vetted through public promulgation. Interpreting "operations" in §44-20-220 to mean internal policy of DDSN ignores the basic purpose of both DDSN's enabling legislation and the APA. (Order(s), R. pp. 10-17).

Based upon well-established rules of statutory construction, it is clear that the General Assembly did not draft or enact the APA and promulgation of regulations process to provide greater protection and rights to agency personnel than that which is provided and given to the public served by the agency or to deny public access to process whereby agencies carry out their functions. The quintessential rule of statutory construction requires the Court to determine the intent of the Legislature. *SCANA Corp. v. South Carolina Department of Revenue*, 348 S.C. 388, 393, 683 S.E.2d 468, 470 (2009). Intent must first be determined by the plain meaning of the statute. "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Sloan v. S.C. Board of Physical Therapy Examiners*, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006). "Under the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement." *Bradley v. Doe*, 374 S.C. 622, 634, 649 S.E.2d 153, 160 (S.C. App. 2007).

DDSN's interpretation and argument that "operations only referred to internal matters" are also inconsistent with the express purpose behind the enactment of the APA.

Regulations are a method of formalizing rules governing a regulatory agency, like DDSN. *See* S.C. Code Ann. § 1-23-10 (1), 10 (4) (2005). In South Carolina, the APA sets forth the process for creating regulations. S.C. Code Ann. §§ 1-23-10 to 1-23-160 (2005 and Supp. 2012). The process must be public and it requires formal comment procedures and approval by the General Assembly. S.C. Code Ann. §§ 1-23-110 to 1-23-126 (2005 and Supp. 2012). The Defendants' argument is that the legislature intended such formal procedures only for internal agency matters and not how the agency "relates to the outside world." *See* Defendants' Answers to Plaintiffs' Requests for Admission, #7 (Def. Ans. Req. Adm. No. 7, R. pp. 114, 124-125). The argument is unsupported by the purpose of the APA, which by definition involves the public and the outside world. As stated above, the definition of "regulation" specifically excludes "procedures applicable only to agency personnel." S.C. Code Ann. § 1-23-10 (4) (2005).

The purpose of the APA and the reason for regulations is to allow the agency to make statements "of general public applicability that implements or prescribes law or policy or practice requirements of [the] agency." *Id.* By definition, a regulation is public, not private; external, not internal. *See id.* Regulations are related to the way an agency acts pursuant to its legislative authority and how it relates to the "general public." For example, when an agency is establishing procedural requirements, internal procedures do not have to be promulgated as a regulation, but "procedural requirements dealing with the public, such as permit applications, filing of petitions and complaints, conduct of hearings and so forth, prescribe the practice requirements of an agency and **require formal rulemaking**." David E. Shipley & Randolph R. Lowell, *South Carolina Administrative Practice & Procedure* p. 108 (2d ed. 2008) (emphasis added). A purely internal policy that has no effect on

applicants, beneficiaries, or the public does not need to be vetted through public promulgation. Defendants' definition of "operations" ignores the basic purpose of both DDSN's enabling legislation and the APA.

Applying well-established principles of statutory construction, the lower court erred in its findings which are inconsistent with the principles of statutory construction and contradictory to the APA itself, as well as the enabling statutes of DDSN. The effect of these rulings by the lower court seek only to protect and provide protection to DDSN employees (which is specifically and explicitly excluded from the definition of a regulation) and does not serve to protect the children and adults with disabilities intended to be served by DDSN. (Order, R. pp. 1-22). A regulation is the agency's statement to general public that implements or prescribes law or policy or practice requirements for the operation of the state agency with the force of law. No directive, standard, and manual has any effect of law and nor does it allow the opportunity for the Appellants to be heard or avail themselves of the due process protections provided by the Constitutions of South Carolina and the United States and which are part of the APA. For these reasons, Court should find that the lower court erred in its ruling, reversing its Order and remanding the matter.

b. The Lower Court erred in finding that there is no statutory requirement for the promulgation of regulations in the areas raised by the Appellants in this matter or regarding matter other than the internal operations of the agency for its employees.

The lower court found that despite the broad provisions of Sections 44-20-220, 44-20-790, and 44-26-180 requiring that DDSN promulgate regulations, there was no specific requirement for "DDSN to promulgate regulations in the subject areas of this lawsuit, that is, eligibility for services, appeal procedures, standards for operation of residential programs, procedures for its Human Rights Committees, and standards for research on human subjects."

Order, p. 12 and generally pp. 9-16. (Order, p. 12, R p. 13; pp.9-16, R. pp. 10-17. The Court is completely wrong in its analysis or misinterpretation in relying on *Pulido v. Heckler*, 758 F.2d 503 (10th Cir. 1985), to support its conclusion that DDSN is not required to promulgate regulations concerning the areas of concern set forth by the Appellants.

In *Pulido v. Heckler*, the Secretary of the Department Health and Human Services is sued in class action for her failure to promulgate regulations regarding the payment of travel expenses to enable disability claimants to attend administrative hearings on their claims. The Secretary was authorized – but not commanded -- by Section 401(j) of the Social Security Act to reimburse disability claimants for their travel expenses. She was further commanded to pay travel expenses for claimants in Title XVI proceedings in Section 1383(h) of the Social Security Act. "The Secretary has not engaged in rulemaking to establish criteria for reimbursement of travel expenses under either statute." *Id*, at 506. However, the 10th Circuit held that the statue does more than empower the Secretary with the authority to promulgate regulations that are not inconsistent with the Social Security Act, that are necessary or appropriate to implement the program, but it commanded the Secretary " ' to regulate and provide for the nature and extent of the proofs and evidence' " and to cover " ' the method of taking and furnishing the same [in order to establish the right to benefits hereunder].' " *Id.* The Court determined that the payment of travel expenses – even though not expressly stated – was an integral part of the "method of taking and furnishing" proof as you cannot determine a claimant eligibility for benefits if the claimant cannot attend the hearing in the first place. *Id.* The Court determined that the general rule making requirements and the language of the statutory provisions imposed a duty promulgate regulation regarding the payment of the travel expenses because it was a logical conclusion and extension of the

Secretary's authority which was needed in order for a claimant to obtain the benefit. The 10th Circuit did not review or look at the various provisions of the Social Security Act in a vacuum. The 10th Circuit read and interpreted the provisions to determine the intent of the Congress by reviewing the statutes as a whole so that they can receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the Act enacted by the Congress.

Likewise, in the case at hand, DDSN is authorized to promulgate regulations to carry out the provisions of Chapter 20[15], Title 44, and other laws related to disabilities, mental retardation, head injuries or spinal cord injuries and it is required and has a "duty" to "determine policy and [to] promulgate regulations governing the operation of the department." S.C. Code Ann. § 44-20-220 (Supp. 2012). As argued above, the Appellants assert that "operation" is not internal agency procedures for employees at DDSN, but that "operation" means the requirements, functions, and manner in which DDSN provides its services. Furthermore, the general authorization for DDSN to promulgate regulations to carry out the provisions of Chapter 20, Title 44, would include hearings, appeals, eligibility for services, standards for operations of DDSN programs, procedures for committee and regional operations, and related matters needed to "carry out" its purpose.

As seen in the case of *Pulido v. Heckler*,[16] when an agency is empowered to promulgate regulations (including that necessary to carry out its purpose) and also

[15] S.C. Code Section 44-20-10 states that "[t]he purpose of this chapter [20 is] to assist persons with intellectual disability, related disabilities, head injuries, or spinal cord injuries by providing services to enable them to participate as valued members of their communities to the maximum extent practical and to live with their families or in family settings in the community in the least restrictive environment available. S.C. Code Ann. § 44-20-20 (purposes of chapter).

[16] The Secretary of the US Department of Health and Human Services was also criticized by the 10th Circuit in her delay of four years to promulgate regulations and her delay was found to be an impermissible abuse of discretion. Excuses of uncertainty about Congressional intent over that time period were not accepted by the

commanded (i.e., "shall") to promulgate regulations in certain areas, the mandatory duty to promulgate regulations in other unnamed areas or matters exists when the such named and unnamed areas rely upon each other or connected so that each are part of the overall purpose of the agency. The absence of regulations does not inform the public. Even in *Pulido v. Heckler*, the Secretary issued an agency guide (similar to a directive, standard or manual issued by DDSN) about travel expenses that did not inform the public. It was not published in the Federal Register, no legal force of law, and did not bind the agency. Nor was there any evidence that such SSA guide was available to the public.[17]

The South Carolina General Assembly typically mandates that an agency shall promulgate regulations without listing each and every possible, logical and related area that needs to be addressed by regulation. Depending on the matter, the General Assembly will get to review the proposed regulation as part of the APA process to determine if the regulation exceeds or contradicts the agency's enabling statutes and purpose. The subject areas of this lawsuit (i.e., "eligibility for services, appeal procedures, standards for operation of residential programs, procedures for its Human Rights Committees, and standards for research on human subjects." Order, p. 12 (Order, R. p. 13) are all part of, and necessary to, the operation, purpose, responsibilities, services, and duties of DDSN. How can any consumer or any Appellant obtain any service from DDSN if he/she does not know eligibility, does know how to appeal, does not know standards of operation for DDSN programs and the like. How is the consumer or an Appellant going to know if he or she is a

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Court, as the Secretary could have promulgated regulation to address various options concerning the payment of travel expenses. In the case at hand, DDSN was established following the original or first restructuring of state government in 1994, approximately 20 years ago and still no regulations addressing these areas.

[17] There is no evidence in this case to suggest that all DDSN directives, standards and manuals are available to the public or that the public has access to them. (Hearing Tr., R. pp. 628-666).

part of any research on human subjects if they did not know the standards. And then how can these same vulnerable individuals protect themselves or have someone protect them if you do not have procedures for Human Rights Committees (i.e, functions, how to obtain help, complaints, etc.).

The lower court erred in finding that there is no authority in S.C. Code §§ 44-20-220, 44-20-790, or 44-26-180 to "require DDSN to promulgate regulations in the subject areas of this lawsuit, that is, eligibility for services, appeal procedures, standards for operation of residential programs, procedures for its Human Rights Committees, and standards for research on human subjects." Order, p. 12 (Order, R.p. 13). The core of this matter is the ongoing and continuing failure by DDSN to ignore the mandate that DDSN "shall promulgate regulations." S.C. Code Ann. § 44-20-220 (Supp. 2012). The lower court's rulings that South Carolina Code Sections 44-20-220, 44-20-790, and 44-26-180 do not require DDSN to promulgate regulations in the subject areas of this lawsuit incorrectly state the Appellants' claims and incorrectly analyze these statutes and the process established by the General Assembly. The subject areas of this lawsuit are about the operations of DDSN. The lower court also erred in finding not duty or mandate that DDSN shall promulgate regulations and that "shall" does not impose a mandatory duty on DDSN. Order, p. 12-16 (Order, R. pp.13-17). For these reasons, Court should find that the lower court erred in its ruling, reversing its Order and remanding the matter.

c. The Lower Court erred when it did not grant partial summary judgment to the Appellants due to the admission by DDSN that it has not promulgated certain regulations regarding informed consent for human subject research.

The lower court erred when it failed to at least grant partial summary judgment to the Appellants on issue of standards for human subject research. (Order, R. p. 13 ("each one of

these statutes [§§ 44-20-220, 44-20-790, & 44-26-180] reveal that none of them require DDSN to promulgate regulations in the subject areas of this lawsuit."). These subject areas do include the procedures for the Human Rights Committees and standards for research on human subjects. The critical areas of concern to the Appellants are:

> That SCDDSN has never promulgated regulations regarding issues of critical concern to applicants and recipients of its services, including but not limited to eligibility for its services; appeal procedures; standards for the operation of its residential programs; procedures for its Human Rights Committees; and standards for research on human subjects.
>
> See, ¶ 7 of the Complaint. (Complaint , ¶ 7, R. p. 34).

S.C. Code §44-26-180 clearly states that "the department **shall** promulgate regulations to obtain information consent [before participation in research conducted by, for, or in cooperation with the department] and to protect the dignity of the individual." S.C. Code §44-26-180 (emphasis added). "Under the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement." *Bradley v. Doe*, 374 S.C. 622, 634, 649 S.E.2d 153, 160 (S.C. App. 2007).

DDSN does not deny that it is mandated to promulgate regulations "to obtain informed consent and to protect the dignity of the individual." S.C. Code Ann. § 44-26-180 (Supp. 2011). See, Defendants' Reply Memorandum in Support of Defendants' Motion for Summary Judgment, p. 4-5 (DDSN Reply Memo, R. pp. 227-228). DDSN admits that they have not promulgated a regulation on informed consent or a regulation to protect the dignity of the individual. *See,* Defendants' Response to Plaintiffs' Request to Admit, Resp. 18, 19. (DDSN Request to Admit Ans., R. pp. 118-119, 129). The Complaint alleges that the issue of "research on human subjects" is of "critical concern" to the plaintiffs. (Complaint, ¶ 7, R. p. 34). The complaint asserts that the lack of regulations will affect the health and safety of

the Appellants and requires P&A to expend resources and time on attempting to figure out the "other means" being used to formulate rules at DDSN. (Complaint, ¶ ¶ 9, 10, R. pp. 34-35). The complaint also alleges that Appellants have been denied an opportunity to participate in the rule-making process, as intended by the General Assembly when it enacted the APA. (Complaint, ¶ 8, R. p. 34). For these reasons, the Court should find that the lower court erred in its ruling that there was no requirement for DDSN to promulgate such regulation and that "shall" does not make the requirement mandatory upon DDSN, reverse its Order and remand the matter.

Furthermore, the lower court errs by failing to distinguish between the nature of a regulation and the regulation of individuals on a case-by-case, fact-specific basis when finding that the Plaintiffs have no standing, that there is no public importance in this matter to provide standing, that there is not actual controversy or case, and that there is no statutory requirement for the promulgation of regulations in the situations described in the Complaint. First, the existing case decisions of the courts advise that the regulation process is preferred to be undertaken as opposed to the individual enforcement action context that each and every individual is, and would be, required to pursue – especially without any regulation on how to administratively appeal any agency decision. "If an agency follows guidance or rules that have not been formally promulgated as a regulation under the APA but nonetheless 'has significant impact upon the existing rights and obligations of regulated parties' and 'gives the agency no discretion in its application,' this the guidance or rule is an invalidly enacted regulation." Randolph R. Lowell, SOUTH CAROLINA ADMINISTRATIVE PRACTICE AND PROCEDURE, p. 111 (2nd ed. 2008) quoting *Sloan v. S.C. Bd. Of Physical Therapy Exam'rs*, 636 S,E.2d 598 (2006); *Home Health Serv., Inc. v. S.C. Tax Comm'n*, 440 S.E.2d 375 (1994);

Crooks v. S.C. Budget & Control Bd, 05-ALFJ-30-0059-CC (Oct. 31, 2005) (other cites omitted). In the matter at hand, the lower court's rulings result in a purpose contrary to the express goal and purpose of the APA which is to rulemake or regulate by a state agency via adjudication instead of promulgating regulations. The nature of a regulation is to provide a set of ground rules upon which regulated individuals and companies can rely, and that would have general applicability. Adjudication focuses on one person or company at a time, and then only resolves disputes between specific individuals and the state agency if the individual even knows what action might be taken. Rulemaking or regulation "affects the rights of broad classes of unspecified individuals, and adjudications have an immediate effect on specific individuals while rulemaking [or regulation] is prospective and has a definite effect on individuals only after the rule subsequently is applied...." *Id.*

CONCLUSION

Do the Appellants have to continue to make do and be subject to the "other means" used by DDSN to establish rules, or does DDSN have to formalize its rulemaking process through the promulgation of regulations? In promulgating regulations under the APA, the Appellants will be able to present public comment, have access to legal remedies currently unavailable, and know that their elected officials will have to review proposed regulations, adding accountability, transparency, and oversight to the operations of DDSN. For the reasons stated above, the Court should reverse the lower court's Order for Summary Judgment in favor of the Respondents and remanded the matter.

Respectfully submitted this 14 day of October, 2014,

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CERTIFICATE OF COUNSEL

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Appellants' Final Brief complies with the Supreme Court's Order of August 13, 2007, regarding personal identifiers and sensitive information.

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