STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2007-CP-40-2187

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 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 as 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.

BRIEF OF RESPONDENTS

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INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This action was filed on April 5, 2007 by a number of anonymous guardians of anonymous disabled individuals and by the entity Protection and Advocacy for People With Disabilities, Inc. ("P & A"). Plaintiffs sought an order requiring the Department of Disabilities and Special Needs ("DDSN") to promulgate regulations in areas where Plaintiffs would prefer state agency action to occur by regulation. The Defendants are DDSN and a number of its officials, hereinafter collectively referenced simply as DDSN.

DDSN originally moved to dismiss this action on May 31, 2007, but Judge Childs denied that motion by Order dated December 13, 2007. R. 25. DDSN also had filed a motion for a more definite statement, noting that the names of the individual Plaintiffs were not set forth in the Complaint, but Judge Childs denied that motion as well. R. 26.

DDSN then filed an Answer on December 21, 2007. In their Answer, Defendants denied, for lack of information, the specific facts regarding each of the anonymous individual Plaintiffs. R. 82-94. As an affirmative defense, DDSN challenged the standing of all Plaintiffs to bring this action. R. 93. DDSN also denied that there was a duty to promulgate regulations. *Id.*

DDSN moved for summary judgment on June 9, 2008. R. 97. The motion was scheduled to be heard in May 2010, but at DDSN's request, Judge Manning

took the motion under advisement in order to permit DDSN to file a reply to a brief filed by Plaintiffs on the day of the hearing.

While the case was under advisement, Plaintiffs asked that DDSN's summary judgment motion be held in abeyance in order for Plaintiffs to take several depositions. Judge Manning allowed the depositions to be taken. Eventually, on June 6, 2013, Plaintiffs filed their own summary judgment motion. Additional briefs were filed by both parties in early August 2013. Plaintiffs had initially claimed that the case involves contested issues of fact and that it should not be resolved on summary judgment. However, when Plaintiffs filed their own motion for summary judgment in 2013, they effectively agreed that the issues in the case were solely legal issues. R. 250.

Both sides' Motions for Summary Judgment were reassigned to Judge G. Thomas Cooper, and were heard by him on August 6, 2013. By Order dated September 24, 2103, Judge Cooper granted summary judgment for Defendants, and denied Plaintiffs' motion. R. 1-19.

Plaintiffs sought reconsideration of Judge Cooper's Order. R. 546. Judge Cooper denied that motion by Order dated December 30, 2013, but made one modification to the Order at DDSN's request. R. 21-22. That modification made clear that the dismissal of this action would not preclude P & A or any individual Plaintiff from raising, in subsequent administrative appeals involving specific individuals, the issues discussed in § 3(b) of the Order, R. 17-19, so long as such

subsequent appeals involve matters that could not have been raised in the present case. *Id.* This appeal by Plaintiffs followed.

STATEMENT OF FACTS

In the Complaint, filed in 2007, the eleven individual Plaintiffs alleged certain facts pertaining to their individual situations as of that time, and further claimed that they were injured in some way as a result of the absence of regulations. Because Plaintiffs elected to file anonymously, and indeed opposed DDSN's motion to have Plaintiffs' identities disclosed, DDSN in its Answer denied for lack of information Plaintiffs' specific allegations about their individual situations. The individual Plaintiffs did not thereafter file affidavits or other documents in support of their respective claims. As a result, there is no need to discuss the details of the claims of the individuals, because the record contains no evidence whatsoever to support those claims. Indeed, when the case was heard, nearly six years after the filing of the Complaint, there was not only an absence of evidence of Plaintiffs' respective situations in 2007, there was also no evidence as to their situations in 2013, by which time there could have been considerable changes to their situations.

Plaintiffs' allegations in their 2007 Complaint pertained to several different subjects, ranging from alleged failure to recognize certain diagnosed conditions as eligible for DDSN services, to the methods for computing rents for DDSN facilities. Plaintiffs also complained about a number of decisions in individual

cases, such as claims that an individual was not eligible for autism services, R. 44, or that an individual was not waitlisted for residential placement. R. 42. Again, however, Plaintiffs produced no evidence that some or all of these fact situations existed in 2007, and they likewise produced no evidence that the conditions giving rise to the claims were still in existence in 2013. There is not even any evidence that all of the eleven individual Plaintiffs, or the persons for whom they serve as guardians, are still alive in 2013.

The only evidence presented by P & A of injury to itself was a paragraph in an affidavit to the effect that it was time-consuming for P & A to search DDSN's comprehensive online policies and directives, R. 165, but there was no indication that the promulgation of regulations would have caused P & A's searches to have proceeded any more quickly.

SUMMARY OF ARGUMENT

The 18-page Order of Judge Cooper comprehensively addressed the issues that were before him. This Summary of Argument is therefore largely a summary of the Order.

As the circuit court held, no evidence was presented by the individual Plaintiffs to show how, if at all, they were adversely affected by the absence of regulations covering the various subjects pertaining to each of them. As a result, they failed to prove injury in fact to themselves, and as a result were properly held

to lack standing. There was also no evidence of a case or controversy. Plaintiff P & A was also held not to have shown harm to itself, and therefore to lack standing.

Plaintiffs have tried to characterize this case as one in which the "public importance" standing doctrine, sometimes applied in South Carolina, might apply. The circuit court held, however, that the claims of the Plaintiffs in this case, unlike the claims in "public importance" standing cases, require a case-by-case factual showing as to how specific plaintiffs are, or are not, affected by the absence of regulations in specific situations. R. 8.

Plaintiffs' final basis for asserting that they have standing is a claim that in effect, standing requirements are relaxed in declaratory judgment actions such as this one. However, they cite no authority for that claim, and in fact, the pertinent authority is to the contrary, as the court below held. R. 5 n.1.

Even if any of the Plaintiffs were held to have standing, the court below held that their claims lacked substantive merit. The statute on which their claims are primarily based, § 44-20-220, contains two separate provisions: a mandatory requirement for the promulgation of regulations for "the operation of the department [DDSN], and a permissive provision that merely authorizes, but does not require, the promulgation of regulations for "carry[ing] out the provisions of this chapter and other laws related to mental retardation, related disabilities, head injuries, or spinal cord injuries." The Order below recognized this distinction between the mandatory and the permissive parts of the statute, and as an alternative

holding, the court concluded that Plaintiffs' claims failed on the merits even if they has shown that they had standing to sue. Plaintiffs' argument would require the Court to ignore the permissive part of the statute entirely by making everything in the statute the subject of a mandatory duty. The terms of the statute, however, clearly provide otherwise.

ARGUMENT

1. The circuit court correctly held that the Plaintiffs, who have not shown the existence of injury in fact or an actual case or controversy, lack standing.

a. Individual Plaintiffs.

As pointed out in the Order of the circuit court, R. 6, the 2007 Complaint made certain allegations regarding the claims of the anonymous individual Plaintiffs, but the Answer of the Defendants denied all of those allegations for lack of information, noting that the Defendants did not know the identities of the individual Plaintiffs. *See, e.g.,* R. 85. Indeed, Defendants in 2007 filed a Motion for More Definite Statement, seeking to learn the names of the anonymous Plaintiffs, but Plaintiffs successfully opposed that motion. *See* R. 26. Plaintiffs have accordingly not only failed to supply the Court with facts pertaining to their particular situations, but have actually obtained an Order making it impossible for the Defendants to obtain any confirmed information about any of the individual Plaintiffs. In addition, Plaintiffs never thereafter sought to prove the allegations of the Complaint, such as by providing the Court with information such as affidavits

that would serve as evidence of their claims. The result is that there was simply no evidence before the circuit court about the facts concerning the individual Plaintiffs other than the unadmitted allegations of the Complaint. Accordingly, the circuit court correctly held as follows:

> Because the Defendants have denied the factual allegations of the Complaint pertaining to the individual Plaintiffs, and because there has been no subsequent showing regarding the factual situations of the individual Plaintiffs, there is no evidence whatsoever before the Court as to the facts concerning the individual Plaintiffs. As a result of this absence of a factual showing, there is nothing before the Court that shows actual injury in fact to any of the individual Plaintiffs.

R. 6.

The Order of the circuit court correctly summarized the law in South Carolina pertaining to justiciability and standing as follows at R. 4:

> A threshold inquiry for any court is a determination of justiciability, *i.e.,* whether the litigation presents an active case or controversy." *Lennon v. S.C. Coastal Council,* 330 S.C. 414, 415, 498 S.E.2d 906, 906 (Ct.App.1998). "A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Byrd v. Irmo High Sch.,* 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996). "To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." *Graham v. State Farm Mut. Auto. Ins. Co.,* 319 S.C. 69, 71, 459 S.E.2d 844, 845-46 (1995) (holding that ruling was not advisory but was imperative to preserve rights and necessary to determine whether insurance coverage existed and carrier was required to be served); *see also Brown v. Wingard,* 285 S.C. 478, 330 S.E.2d 301 (1985). The concept of

> justiciability encompasses the doctrines of ripeness, mootness, and standing. *Jackson v. State,* 331 S.C. 486, 490 n. 2, 489 S.E.2d 915, 917 n. 2 (1997).

Holden v. Cribb, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002)(emphases added). The court below also quoted *Lewis v. Casey*, 518 U.S. 343 (1996), which holds as follows:

> It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution. In the context of the present case: It is for the courts to remedy past or imminent official interference with individual inmates' presentation of claims to the courts; it is for the political branches of the State and Federal Governments to manage prisons in such fashion that official interference with the presentation of claims will not occur.
>
> 518 U.S. at 349 (emphases added).

R. 4.

As the Order below further held, the Supreme Court of South Carolina has cited *Lewis* with reference to standing and the need to show actual injury to the plaintiff. *Howard v. South Carolina Dept. of Corrections*, 399 S.C. 618, 633-634, 733 S.E.2d 211, 219-220 (2012)(Plaintiff's "claim is barred by the doctrine of standing as he has not demonstrated that the alleged inadequacy . . . caused him 'actual injury,' i.e., hindered him in pursuing his own legal claims")(emphasis in original); *Hendricks v. South Carolina Dept. of Corrections*, 385 S.C. 625, 629, 686 S.E.2d 191, 193 (2009)(same).

By coming into court without a showing of actual injury to themselves, Plaintiffs are asking the court not to order relief for Plaintiffs, but rather "to shape the institutions of government in such fashion as to comply with the laws and the Constitution. . . ." *Lewis*, 518 U.S. at 349. However, as *Lewis* holds, this is "not the role of courts, but that of the political branches. . . ." *Id.* The only role of the courts is "to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm. . . ." *Id.* Plaintiffs simply have shown no actual harm to themselves that requires a court-ordered remedy.

The circuit court also noted that "Plaintiffs' lack of a showing of injury in fact, while fatal to their claims in and of itself, also has the practical effect of making it impossible to evaluate the effect of the absence of a regulation." R. 9. The court cited the example of a claim that eligibility requirements need to be spelled out in a regulation. *Id.* The validity of such a claim can only be measured in terms of whether some specific person was harmed thereby. *See, e.g., Goldberg v. Insurance Dept. of State of Conn.* 207 Conn. 77, 83-84, 540 A.2d 365, 368 (1988), and cases cited therein ("where as here, a party challenges the failure of an administrative agency either to adopt or publish sufficient procedural rules, that party [must] demonstrate some prejudice as a result of the agency's alleged failure"). A further reason for there to be a plaintiff with standing is that the specific facts of each individual's situation would need to be examined in order to

determine whether such individual's case has become moot at some point since 2007, when this case was filed. R. 10 n.2.

On appeal, the individual Plaintiffs cite neither facts nor law to show that they have the necessary standing. Br. of Appellant at 23-25. The point has therefore effectively been conceded.[1]

Plaintiffs also argue at several places in their brief on appeal that they have due process and equal protection rights that are subject to protection. Br. of Appellants at 24, 25 (equal protection); 13, 22, 23, 24, 25, 31, 41 (due process). The first problem with these claims is that neither of them were pled in the Complaint. These claims were later mentioned by Plaintiffs in argument, but even then only in passing. The Order of the circuit court did not mention these constitutional claims, and Plaintiffs' Rule 59(e) motion does not specifically point out the absence of mention of these claims in the Order. R. 546-609. Finally, the due process and equal protection claims are similar to Plaintiffs' other claims in that there has been no showing of injury in fact under these theories. Plaintiffs have not made the necessary showing of a liberty or property interest that is subject to due process protection. *See, e.g., South Carolina Ambulatory Surgery Center Ass'n v. South Carolina Workers' Compensation Com'n,* 389 S.C. 380, 392, 699 S.E.2d

[1] Plaintiffs assert in passing that their claims are "capable of repetition, yet evading review." Br. of Appellants at 31. This is simply not true. There is no reason judicial relief would be barred for an individual who could actually show an adverse effect from the absence of a regulation.

146, 153 (2010).[2] Moreover, the court below specifically held that "[i]t has long been held that there is no constitutional duty to promulgate regulations. *American Power & Light Co. v. Securities and Exchange Commission*, 329 U.S. 90, 106 (1946)." R. 11 n. 3(emphasis in Order). It should also be noted that to the extent Plaintiffs seek to base their claim on alleged arbitrary action by DDNS, that theory was also not pled. The sole legal basis for Plaintiffs' claims, as set forth in the Complaint, is the alleged failure to comply with certain listed statutes. R. 47, ¶¶ 39-42].

b. Plaintiff Protection and Advocacy, Inc.

As the circuit court order held, there are two ways in which an organization such as P & A can establish standing.[3] The first is by showing that one or more of its constituents suffered a concrete injury. *See, e.g., Doe v. Stincer*, 175 F.3d 879 (11th Cir. 1999). However, as already shown and as the circuit court held, R. 7, there is nothing in the record which shows injury to any individual Plaintiff, and P & A has simply not even attempted to make such a showing. This case therefore resembles *Doe v. Stincer, supra,* where there was no

> evidence that any of the Advocacy Center's constituents have been denied access to mental health records based

[2] In connection with this same argument, Plaintiffs also erroneously contend that the Order "forever barred" certain claims. Br. of Appellants at 25. In fact, the Order denying reconsideration contained language that preserved certain future claims, both for P & A and for the individual Plaintiffs. R. 21-22.

[3] At pp. 14-15 of the Brief of Appellants, P & A cites its enabling legislation, § 43-33-350, in support of its claim of standing. However, that section merely provides that P & A may, among other things, "pursu[e] legal, administrative and other appropriate remedies. . . ." It does not purport to confer standing where P & A would not otherwise have it.

> on the Florida statute at issue here. Without such allegations, the Advocacy Center cannot show that any of its clients suffered a concrete injury that is traceable to the challenged statute and could be redressed by a favorable decision in this action-as it must to establish standing. . . .

175 F.3d at 887. *See also, Tenn. Prot. & Advocacy, Inc. v. Bd. of Educ.,* 24 F.Supp.2d 808, 816 (M.D.Tenn.1998)(holding that the protection and advocacy group did not establish that it had standing to sue where it failed to name specific individuals who had suffered concrete harm); *Pennsylvania. Prot. & Advocacy, Inc. v. Houston*, 136 F.Supp.2d 353, 365-67 (E.D.Pa.2001)(denying standing to the protection and advocacy system because it had failed to "identify a specific constituent who is being harmed by the [d]efendant's actions"). Accordingly, this first method of establishing standing does not avail P & A.

The second way for an entity to establish standing is to show some harm to the entity itself, as the Order below held. R. 7-8. South Carolina law holds that in order for an organization to have standing, it must allege "that it or its members will suffer an individualized injury; a mere interest in a problem is not enough." *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 300-301, 551 S.E.2d 588, 589 (Ct. App. 2001)(emphasis added).

As the circuit court found, Plaintiffs' showing in this regard consists only of the Prevost Affidavit of May 11, 2010. R. 8. The court held that "the assertion in Paragraph 8 of that affidavit that 'P&A has been injured by DDSN's failure to promulgate regulations' is completely conclusory," as it obviously is. R. 8. The

Order further held that this conclusory statement was "no substitute for the factual showing that is necessary to establish both the existence of a claim, as well as standing to sue."

Plaintiffs also referred the Court to Paragraph 7 of the Prevost Affidavit, but the only claim in that paragraph is that it is allegedly time-consuming for P & A to search DDSN's comprehensive online policies and directives in order for P & A "to adequately represent its clients." R. 165, Par. 7. As the circuit court held,

> This does not support Plaintiffs' claim that there is a legal duty to promulgate regulations. That duty turns on factors other than the issue of ease of use. To cite a familiar example, no one would argue that the Code of Federal Regulations is anything other than time-consuming to sift through. In contrast, the list of current DDSN Directives (Plaintiffs' Exhibit 34) clearly sets forth the content of those directives. P & A, which deals with DDSN regularly, cannot validly claim that the DDSN Directives are too difficult for P & A officials to understand. But even if that were the case, it still would not establish a valid claim for failure to promulgate regulations. P & A has simply not made the requisite showing of harm to itself.

R. 8. In other words, P & A's contention that it is time-consuming to search through DDSN's current online Directives and Standards is unavailing, because those documents are at least as publicly available to P & A as regulations would be. In addition, the topics set forth in the online Directives and Standards are listed on DDSN's website, much as is the case for online statutes and regulations. *See* Plaintiffs' Exhibit 34, R. 435-439, the list of Directives and Standards. P & A has not made any kind of a realistic showing that the amount of time it takes to search

the Directives and Standards is any different from the amount of time it would take to search the same documents if they had been promulgated as regulations. Nor, other than this failing effort, has P & A identified any other practical reason why regulations would make P & A' s job easier.[4]

On appeal, P & A first argues that one federal district court case, *Pennsylvania Protection and Advocacy, Inc. v. Houston*, 136 F.Supp.2d 353 (E.D.Pa. 2001), supports Plaintiffs' claim that the entity P & A has standing in this case. Plaintiffs further argue that the Order "incorrectly applied" the rulings in that case. Brief of Appellant at 13-14.

Plaintiffs are simply incorrect in arguing that the Order's denial of standing to P & A as an entity was based on *Pennsylvania Protection and Advocacy*. The Order did cite that case, but only in support of the circuit court's conclusion that P & A did not have standing to sue on behalf of one or more of its constituents, as opposed to suing on behalf of the entity itself. R. 7. The standing of P & A based on alleged injury to itself was discussed in subsequent paragraphs. R. 7-8. In those paragraphs, the Order held, without reference to *Pennsylvania Protection and Advocacy*, that P & A has failed to show injury to itself, noting that the Prevost affidavit makes only a conclusory statement that P & A has been injured. Further,

[4] Paragraph 7 of the Prevost Affidavit contains an erroneous reference to "the 'other means' referred to by Dr. Lacy to formulate rules at DDSN. . . ." R. 165. However, the phrase "other means" was not used by Dr. Lacy, a DDSN official. It was used by DDSN's counsel, noting in a 2008 brief that "Plaintiffs would prefer state agency action to occur by regulation rather than by other means." R. 101. The phrase appears frequently in the Brief of Appellants, but again, DDSN itself has never used that phrase to describe any of its practices.

the Order held that standing to sue is not established by P & A's claim that it is allegedly time-consuming for P & A to search DDSN's online directives. R. 8. Plaintiffs argue that Defendants should have conducted discovery about P & A's activities, Brief of Appellants at 15-16, but Plaintiffs simply did not make a factual showing that would have required the Defendants to make a factual showing in response.[5] It is well settled that the party seeking to establish standing carries the burden of demonstrating that standing exists. *See, e.g., Commander Health Care Facilities, Inc. v. South Carolina Dept. of Health and Environmental Control*, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App. 2006). Plaintiffs did not meet that burden.

Finally, to the extent that the *Pennsylvania Protection and Advocacy* case held that the organization in that case had standing, the decision involved only a motion to dismiss, and was based on the factual allegations made by the organization in that case in its Complaint. The court in the case specifically held that its decision on standing might be reversed if the case had been at the summary judgment stage, instead of merely at the pleadings stage. 136 F.Supp.2d at 363. (A check of the federal PACER records indicates that the case was later dismissed with no further substantive orders having been issued.)

[5] After the Order of the circuit court had been issued, Plaintiffs sought to file the affidavit of one Larrye Hyde. There is no Plaintiff with the initials L.H., and no other indication as to the relevance of this affidavit to the claims of any of the individual Plaintiffs. Moreover, this affidavit, even if it had been timely filed, was not cited by Plaintiffs in any brief. As a result, the existence of this affidavit does not contradict Defendants' statements about the absence of evidence pertaining to the individual Plaintiffs.

c. Public importance standing.

Plaintiffs also argue on appeal, as they did in the circuit court, that normal principles of standing should not apply in this case, and that the rule of "public importance" standing, sometimes applied by the Supreme Court of South Carolina, should govern. The circuit court correctly rejected those contentions, holding that

> The principal distinction between those cases [finding public importance standing] and this one is that in most or all of them, the issue presented was primarily a legal issue, rather than one involving an intense, case-by-case, factual showing as to how specific plaintiffs are, or are not, affected by the absence of regulations in specific situations. *Cf., e.g., Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004) (whether Governor could hold a commission in the Air Force Reserve); *Davis v. Richland County Council*, 372 S.C. 497, 642 S.E.2d 740 (2007) (method of appointment of the members of county recreation commission); *Sloan v. Department of Transp.*, 365 S.C. 299, 618 S.E.2d 876 (2005) (interpretation of highway construction bidding statutes); *Thompson v. South Carolina Commission on Alcohol and Drug Abuse.* 267 S.C. 463, 229 S.E.2d 718 (1976) (constitutionality of Uniform Alcohol and Intoxication Treatment Act); *Sloan v. School Dist. of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000)(applicability of emergency exception to its competitive sealed bid procedure).

R. 8-9 (emphasis added). The circuit court further held that the present case "require[s] the review of multiple, unproven factual situations, and the effect, or non-effect, of the absence of regulations in each situation. Such issues should be resolved only on a case-by-case basis, where the specific facts of each plaintiff's situation are fully presented." *Id.* at 9.

It should also be noted that Justice Pleicones has recognized that "[p]ublic importance standing should be invoked only where the challenge cannot be otherwise raised, and should not be used to evade the application of other well-established standards." *Bodman v. State of South Carolina*, 403 S.C. 60, 742 S.E.2d 363, 371 (2013) (Pleicones, J., concurring). Plaintiffs, however, rely on public importance standing only because they failed to present evidence that would show standing on the part of either the individual Plaintiffs or of P & A. Had they proven any such facts, they could have established standing in themselves without having to invoke the public importance doctrine. Their failure to present evidence of standing of their clients does not make reliance on the public importance standing appropriate.

2. The circuit court correctly held that plaintiffs in a declaratory judgment action must prove the existence of a justiciable controversy, as well as standing.

Plaintiffs argue in effect on appeal, as they did in the circuit court, that a plaintiff in a declaratory judgment action need not satisfy the normal requirements for a case or controversy, standing to sue, and injury in fact. Br. of Appellants 25-28. However, and as the circuit court held,

> [P]arties seeking declaratory relief still must "demonstrate a justiciable controversy," which exists when, among other things, "a concrete issue is present." *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995). *See also, e.g.,* 26 C.J.S. Declaratory Judgments § 134 ("A court will not render a declaratory judgment for a complaint who lacks standing to maintain the claim for relief.").

R. 5 n.1. To the same effect is 22A Am. Jur. 2d Declaratory Judgments § 203 ("Since a declaratory judgment statute generally does not expand the interests of the parties, it does not relieve a party from showing that it has standing to bring a declaratory judgment action based on the underlying action.")

Plaintiffs' brief on appeal cites no authority to the contrary. Plaintiffs note that the Declaratory Judgment Act, S.C. Code Ann. § 15-53-30, provides that a declaratory judgment may be sought by "[a]ny person . . . whose rights, status or other legal relations are affected by a statute. . . ." However, this provision of the Declaratory Judgment Act actually confirms the need for standing. Plaintiffs have not shown that their rights are affected by the subject matter of this case, so they are not aided by the fact that this action was brought under the Declaratory Judgment Act.

3. Plaintiffs' argument on appeal that the Order should not have addressed the "binding norm" issue was not brought to the circuit court's attention, and in any event is immaterial.

Plaintiffs contend on appeal that the Order should not have ruled on an issue relating to "binding norm" jurisprudence that Plaintiffs may have injected into the case at pp. 19-21 of their May 13, 2010, Memorandum in Opposition to Defendants' Motion for Summary Judgment. R. 192-194. There, in an effort to defeat Defendants' Motion for Summary Judgment, Plaintiffs asserted that "Whether the agency has established a binding norm with regard to some of its

policies is a question of fact." R. 194. Defendants noted in reply that the "binding norm" issue had not been pled. R. 229-230.

Subsequently, as the circuit court has noted, Plaintiffs did not seek to amend the Complaint to raise the "binding norm" issue. R. 18. Instead, their July 31, 2013, Memorandum expanded that unpled claim. R. 267-68, 273-77. The Order held that as a result, that claim should not be considered. R. 18.

The Order went on to hold that even if the "binding norm" argument were to be considered, Plaintiffs could not prevail on it, because they had failed to show how they had been injured in fact by the absence of regulations. R. 18-19. The court noted that "In order to determine whether any Plaintiff was injured by the alleged imposition of a binding norm without a regulation, it would be necessary for such an individual to show the specific agency action taken, the harm to that individual as a result, and the extent, if any, to which binding effect was given to an unpromulgated statement by the agency. None of these are present." *Id.* In other words, Plaintiffs lacked standing to raise issues about any "binding norm" effect of DDSN's actions for the same reasons that they lacked standing to make any other claims. The circuit court did not rule on the issue of whether any of DDSN's actions created binding norms, because there were no facts in the record to show how any specific DDSN action adversely affected any specific Plaintiff by operating as a binding norm.

Plaintiffs now argue on appeal that the circuit court "erred in ruling on the issue of binding norms," noting that Plaintiffs themselves did not raise the issue in the Complaint. Br. of Appellants at 28-31. The short answer to this contention is that it was not preserved for review, since it was not raised in Plaintiffs' Rule 59(e) motion. However, even if the issue had been preserved, the circuit court's ruling on this issue was no different from its ruling on all other claims of Plaintiffs that regulations were required. Plaintiffs had no standing to challenge the absence of regulations on any basis, including the ground that DDSN's actions constituted impermissible binding norms, and the Order below was correct in so holding.

4. The circuit court correctly held that the terms of S.C. Code § 44-20-220 did not create a duty on the part of DDSN to promulgate regulations in the subject areas listed by Plaintiffs.

While any issue pertaining to the merits needs to be addressed only if it is concluded that Plaintiffs have standing, Plaintiffs' primary claim about the merits, found at pp. 31-45 of the Brief of Appellants, is without merit in any event. Plaintiffs have argued that a duty to promulgate regulations for certain subject areas can be found in § 44-20-220. That section provides in pertinent part as follows:

> **SECTION 44-20-220. Duties of Commission; per diem; appointment of Director of Disabilities and Special Needs; advisory committees.**
>
> 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.[6]

As the circuit court noted, R. 14, the statute contains two discrete provisions for the promulgation of regulations. The first is at the beginning of the statute. It provides that the DDSN Commission

> shall determine the policy and promulgate regulations governing the operation of the department and the employment of professional staff and personnel.

§ 44-20-220 (emphasis added). The second provision occurs later in the statute. In contrast to the mandatory "shall" used in the portion quoted above, this latter provision uses the permissive language "is authorized to." The provision reads as follows:

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[6] The omitted portions, which concern other matters entirely, are quoted below:

". . . . The members of the commission shall receive subsistence, mileage, and per diem as may be provided by law for members of state boards, committees, and commissions. The commission shall appoint and in its discretion remove a South Carolina Director of Disabilities and Special Needs who is the chief executive officer of the department.. . . The commission may appoint advisory committees it considers necessary to assist in the effective conduct of its responsibilities. The commission may educate the public and state and local officials as to the need for the funding, development, and coordination of services for persons with mental retardation, related disabilities, head injuries, and spinal cord injuries and promote the best interest of persons with mental retardation, related disabilities, head injuries, and spinal cord injuries.. . . In promulgating these regulations, the commission must consult with the advisory committee of the division for which the regulations shall apply."

> 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.

The circuit court first held that the language "is authorized to" does not create a mandatory duty. R. 15-16 (citing cases, including *Scalise v. Thornburgh*, 891 F.2d 640, 644 (7th Cir. 1989)(language "is authorized . . . to make regulations" is permissive, rather than mandatory). Secondly, the court held that the two portions of the statute, one of which uses mandatory language and the other of which uses permissive language, pertained to two different subject matters. R. 14-15. This conclusion flows from the language of the statute itself. The part of the statute providing that the agency "shall promulgate regulations" is limited to regulations

> governing the operation of the department and the employment of professional staff and personnel.

§ 44-20-220 (emphasis added). The part of the statute providing that the agency "is authorized to promulgate regulations" pertains to regulations

> to carry out the provisions of this chapter and other laws related to mental retardation, related disabilities, head injuries, or spinal cord injuries.

Id. (emphasis added). The circuit court held that these areas were distinct:

> In plain and ordinary parlance, a phrase such as "the operation of the department" refers to the internal functions of the agency, rather than its actions in the performance of its mission to the outside world. This meaning is confirmed by the next phrase in the statute, which is "and the employment of professional staff and

> personnel." This is likewise a phrase that refers to the internal operations of the agency.

R. 14. The court below further held that the second part of the statute pertained to "the agency's mission to the outside world, that is, 'carry[ing] out the provisions of this chapter and other laws related to mental retardation, related disabilities, head injuries, or spinal cord injuries.'" R. 14-15. Again, this conclusion was based on the language of the statute itself.

Plaintiffs, in their brief on appeal, cite numerous general definitions of the term "operations" (or more accurately, "operation," the term actually used in the statute), as well as numerous general principles of statutory construction. Br. of Appellants at 31-41. However, Plaintiffs simply do not discuss the obvious fact that the statute itself creates two categories of DDSN activity, one requiring regulations, and the other not requiring them. In ignoring this distinction, Plaintiffs also ignore the core statutory construction principle that "[i]n construing statutory language, the statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect." *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002). When the entire statute is read, its plain language makes it clear that the delineation is between "the operation of the department" on the one hand, and "carry[ing] out the provisions of this chapter and other laws related to mental retardation, related disabilities, head injuries, or spinal cord injuries" on the other. If, as Plaintiffs argue, regulations are mandatory for both subject areas as they claim (which

includes carrying out the laws pertaining to the listed disabilities), then the second part of the statute, which authorizes but does not mandate regulations in that subject area, becomes meaningless. Under Plaintiffs' construction, nothing would fall within the category of being the subject of non-mandatory regulations.

Plaintiffs' construction would therefore violate the standard principle that "[t]he Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something." *Denene, supra,* 352 S.C. at 212, 574 S.E.2d at 198. Another principle to the same effect was stated, for instance, in *Breeden v. TCW, Inc./Tennessee Exp.,* 355 S.C. 112, 120, 584 S.E.2d 379, 383 n,1 (2003)("[e]very word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction"). This principle also would be violated if Plaintiffs' contentions were adopted, because they make no suggestion about what would be accomplished by the permissive portion of the statute if their position were to be accepted. Instead, their argument would render meaningless the permissive part of the statute. Finally, DDSN would point out that § 44-20-220 does not refer to "operations of the department," a phrase frequently used by Plaintiffs, but rather to "**operation** [singular] of the department." This further indicates that this language pertains to the way the department is run internally, and not to all functions of the department.[7]

[7] Plaintiff imply throughout their brief on appeal that the Administrative Procedures Act, in and of itself, creates a mandate to promulgate regulations. However, the Supreme Court has made it plain that the purpose of the APA is to provide for procedures and processes for the promulgation of regulations that are required by some other provision of law, or of regulations

Plaintiffs also note that the APA definition of a "regulation" does not include "descriptions of agency procedures applicable only to agency personnel. . . ." Br. of Appellants at 37, citing § 1-23-10(4). While this is true as a general rule, the specific statute pertaining to DDSN mandates a certain amount of promulgation of regulations concerning the internal operation of the agency. Accordingly, the specific language of § 44-20-220 to that effect prevails over the more general language of § 1-23-10(4). *See, e.g., Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp., 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995)*(when a general statute and a specific statute conflict, the specific statute prevails). In addition, the language of § 1-23-10(4) is more properly read as allowing most agencies the option of not promulgating regulations pertaining to agency procedures applicable only to agency personnel. That statute certainly does not prohibit regulations in such instances, and especially here, where a more specific statute mandates regulations covering internal operations to a certain degree.[8]

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that an agency elects, in its discretion, to promulgate. *South Carolina Ambulatory Surgery Center Ass'n v. South Carolina Workers' Compensation Com'n.*, 389 S.C. 380, 390, 699 S.E.2d 146, 152 (2010)(APA, § 1-23-110, "merely provides for the procedures that must be followed whenever a regulation is otherwise mandated"). The circuit court in this case echoed that conclusion. R. 16-17.

[8] Plaintiffs also quote David E. Shipley & Randolph R. Lowell, *South Carolina Administrative Practice & Procedure* p. 108 (2d ed. 2008) as noting that certain matters "require formal rulemaking," Br. of Appellants at 38, 40, but that treatise does not cite any authority for that general statement. Plaintiffs also take issue with the Order's citation of *Pulido v. Heckler*, 758 F.2d 503 (10th Cir. 1985), Br. of Appellants at 41-44, citing R. 11, but *Pulido* was cited only for the general principle that an administrative agency is not required to promulgate detailed rules interpreting every statutory provision that may be relevant to its actions, although a statute may impose a duty to do so.

Finally, DDSN's interpretation of § 44-20-220 is supported by longstanding administrative practice. Dr. Kathi Lacy, who at the time was the person at DDSN normally responsible for policy directives, testified in her deposition that the portion of § 44-20-220 that contains the mandatory "shall . . . promulgate regulations governing the operation of the department and the employment of professional staff and personnel" refers to "how we operate internally as an organization and the employment of professional staff and personnel." R. 900, lines 15-18. Dr. Lacy also testified that the part of the same statute which provides that commission is authorized to promulgate regulations to carry out the provisions of this chapter and other laws related to mental retardation," etc., was "permissive language." R. 901, lines 8-12. Dr. Lacy also testified that since at least the mid-1990's, when she was employed by the agency at a policymaking level, the practice had been not to promulgate regulations in the areas covered by the language "is authorized to" in § 44-20-220. Specifically, she testified that "Since I've been at DDSN [i.e., since the early 1990's], the practice has been and the interpretation of the state statue has been that the issuance or promulgation of regulations is permissible but not required." R. 753, lines 15-18; see also, R. 766-67, 771, 859. As this testimony indicates, the agency has regarded the subject language as permissive, but not mandatory, ever since the statute was enacted in the early 1990's. It is well settled, of course, that the construction of a statute by the agency charged with its administration will be accorded the most respectful

consideration and will not be overruled absent compelling reasons. See, e.g., *Bursey v. South Carolina Dept. of Health and Environmental Control*, 369 S.C. 176, 186, 631 S.E.2d 899, 905 (2006).

5. The circuit court correctly held that no Plaintiff has shown that either § 44-20-790 or 44-26-180 has any applicability to their situations.

Finally, Plaintiffs persist in arguing that they are entitled to a ruling on the merits of their claims that DDSN has not complied with §§ 44-20-790 and 44-26-180. Br. of Appellants at 44-48. Those sections arguably mandate that DDSN promulgate regulations in two very specific areas of activity. Neither P & A nor any of the individual Plaintiffs have alleged or proven anything even remotely indicating that they were in a position to be affected by an absence of regulations in those areas. The circuit court therefore specifically held that none of the Plaintiffs had standing to raise issues arising under those two code sections. R. 12-14.

The first of these two statutes, § 44-20-790, provides as follows:

> **SECTION 44-20-790. Promulgation of regulations governing hearings.**
>
> The procedures governing hearings authorized by "Notice of Deficiencies . . ." must be in accordance with regulations promulgated by the department. The director may appoint a review team, including consumers, to assist in the collection of information pertinent to the hearing.[9]

As can be seen, and as the court below held, this section pertains to regulations governing hearings that may be requested after notices of deficiencies in a program or operation. This section relates back to the preceding section, § 44-20-780, which establishes a right to written notice and a hearing before a program operator's license is suspended, denied or revoked. As the court below held, "None of the Plaintiffs, including P & A, is a program operator or licensee, so there is obviously no standing in any of them to complain of alleged absence of regulations under § 44-20-790.[10]" R. 13.

On appeal, Plaintiffs mention § 44-20-790 several times in passing, Br. of Appellants at 44-45, but do not even contend that any Plaintiff is a program operator or licensee. As a result, this claim has been effectively abandoned, in addition to its lacking merit.

The second of the two statutes is § 44-26-180, which provides as follows:

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[9] The language "Notice of Deficiencies . . ." is set forth above exactly as it appears in the statutes. It pertains to written notices given by DDSN to governing boards of programs or operators or licensees of programs or facilities. § 44-20-780.

[10] Operators and licensees are not disabled or handicapped persons for whom P & A may advocate. *See* § 43-33-35.

> **SECTION 44-26-180. Informed consent required for participation in research; promulgation of regulations.**
>
> 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.

The circuit court dismissed this claim for lack of standing, holding as follows:

> [T]here is nothing in the Complaint to indicate that any individual Plaintiff has ever been the subject of "research conducted by, for, or in cooperation with the department." § 44-26-180. Indeed, the Complaint alleges no facts at all with reference to research on human subjects. As a result, in addition to lacking standing generally, Plaintiffs clearly lack standing to complain with regard to § 44-26-180.

R. 13. On appeal, Plaintiffs do not offer any suggestion that the court below was incorrect on these points. As a result, the court's holding is effectively unchallenged and should be affirmed.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

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CERTIFICATE OF COMPLIANCE

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

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