

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

**SC Court of Appeals**

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

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

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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**

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**APPELLANTS' FINAL REPLY BRIEF**

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## TABLE OF CONTENTS

<b>Table of Authorities</b> .....	iii
<b>Argument</b> .....	1
I. THE LOWER COURT COMMITTED REVERSIBLE ERROR IN RULING APPELLANTS, WHICH INCLUDES INDIVIDUAL SUBJECT TO BEING SERVED BY DDSN, HAD NO AUTHORITY TO SEEK A JUDICIAL DECLARATION OF THEIR RIGHTS UNDER STATUTES THAT CONFER AUTHORITY UPON DDSN TO PROVIDE SERVICE TO VULNERABLE SOUTH CAROLINA CITIZENS .....	1
a. Although The Lower Court Failed To Find Standing Based On Statute Or Constitution, The Lower Court Further Failed To Find Standing For The Appellants Based Upon Public Importance Of A Judicial Ruling.....	2
II. THE COURT ERRED WHEN IT RULED THAT DDSN HAD NO MANDATE TO PROMULGATE REGULATIONS AND WHEN IT RULED THAT “OPERATIONS” OF DDSN IS RESTRICTED ONLY TO INTERNAL OPERATIONS TO PROTECTS ITS EMPLOYEES WITH REGARD TO THEIR RIGHTS TO EMPLOYMENT AND GRIEVANCE AGAINST DDSN BUT DOES NOT INCLUDE OR PROVIDE PROTECTION TO THE PUBLIC FOR THE DEPARTMENT’S MISSION TO THE OUTSIDE WORLD .....	9
a. There Is No Rational Or Lawful Basis For The Lower Court To Have Adopted DDSN’s Limited View For The Meaning Of Operations In SC Code § 44-20-220 Within Title 44 Of The SC Code Of Laws .....	9
b. The DDSN Board Has Not Adopted A Policy That The APA Does Not Apply To Its Governing Statutes .....	14
c. DDSN’s Position Concerning The Meaning Of “Operation” Is Inherently Wrong And Contradicts The Specific Provisions Of The South Carolina Administrative Procedures Act And Generally Accepted Principles Of Statutory Construction .....	15
III. THE LOWER COURT ERRED IN PROHIBITING OR RESTRICTING THE ABILITY OF ANY OF THE APPELLANTS FROM ASSERTING THE NEED FOR PROMULGATED REGULATIONS AND SHOULD BE REVERSED .....	19
IV. THE LOWER COURT ERRED IN FAILING TO FIND PARTIAL JUDGMENT IN FAVOR OF THE APPELLANTS RELATED TO SECTIONS 44-20-790 AND 44-26-180 .....	21
<b>Conclusion</b> .....	22

## TABLE OF AUTHORITIES

### **Cases**

<i>ATC S., Inc. v. Charleston Cnty.</i> , 380 S.C. 191, 669 S.E.2d 337(2008).....	6
<i>Bradley v. Doe</i> , 374 S.C. 622, 634, 649 S.E.2d 153, 160 (S.C. App. 2007) .....	17
<i>Penn. Prot. &amp; Advocacy, Inc. v. Houston</i> , 136 F.Supp.2d 353 (E.D.Pa. 2001),.....	1
<i>SCANA Corp. v. South Carolina Department of Revenue</i> , 348 S.C. 388, 393, 683 S.E.2d 468, 470 (2009).....	17
<i>Sloan v. S.C. Board of Physical Therapy Examiners</i> , 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006).....	17
<i>Sloan v. Wilkins</i> , 362 S.C. 430, 436, 608 S.E.2d 579, 583 (2005) .....	6
<i>South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank</i> , 403 S.C. 640, 645-646, 744 S.E.2D 521, 524 (2013).....	6

### **Statutes**

Chapter 20, Title 44 .....	11
Federal Developmental Disabilities Act, 42 U.S.C.A. §§ 15001 <u>et. seq</u> .....	1, 20
S.C. Code Ann. § 1-23-10 (1).....	15
S.C. Code Ann. § 1-23-10 (4).....	5, 9, 14, 16, 18, 19
S.C. Code Ann. § 15-53-10 <u>et. seq</u> .....	1
S.C. Code Ann. § 15-53-30.....	2, 23
S.C. Code Ann. § 15-53-130.....	23
S.C. Code Ann. § 43-33-350.....	1, 20
S.C. Code Ann. § 44-20-220.....	passim
S.C. Code Ann. § 44-20-370.....	12
S.C. Code Ann. § 44-20-720.....	12
S.C. Code Ann. § 44-20-790.....	passim
S.C. Code Ann. § 44-26-180.....	passim
S.C. Code Ann. §§ 1-23-110 to 1-23-126 (2005 and Supp. 2011) .....	passim

### **Regulations**

26 S.C. Code Ann. Regs. §§88-105 to 88-140 (licensing) .....	6
26 S.C. Code Ann. Regs. §§88-310 to 88-395 (recreational camp licensing) .....	6
26 S.C. Code Ann. Regs. §§88-405 to 88-440 (day program licensing) .....	6
26 S.C. Code Ann. Regs. §§88-910 to 88-920 (unclassified facilities licensing) .....	6

**Other Authorities**

David E. Shipley & Randolph R. Lowell, *South Carolina Administrative Practice & Procedure* p. 108 (2d ed. 2008) ..... 5, 17, 18, 19

Legislative Audit Council Report *A Review of the Department of Disabilities and Special Needs*, December 2008 ..... 11

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 ..... 11

**Constitutional Provisions**

Article I, §3 and §22 of the South Carolina Constitution ..... 5

U.S. Constitution, amend. XIV, §1 ..... 5

## ARGUMENT

**I. THE LOWER COURT COMMITTED REVERSIBLE ERROR IN RULING APPELLANTS, WHICH INCLUDES INDIVIDUAL SUBJECT TO BEING SERVED BY DDSN, HAD NO AUTHORITY TO SEEK A JUDICIAL DECLARATION OF THEIR RIGHTS UNDER STATUTES THAT CONFER AUTHORITY UPON DDSN TO PROVIDE SERVICE TO VULNERABLE SOUTH CAROLINA CITIZENS.**

This is an appeal of a declaratory judgment action brought by the Appellants concerning the construction of the statutes requiring the DDSN to promulgate regulations pursuant to the express requirement of the APA and asking the court to declare whether or not DDSN must promulgate regulations. Appellants have standing to proceed to obtain a declaration of statutory requirements. In their own written statement, the Respondents' brief is "largely a summary of the [18-page] Order" of Judge Cooper dated September 25, 2013. (Respondents' Initial Brief, p. 5). Thus, the arguments and analysis of the Appellants in its Brief equally apply in response to Respondents in addition to those added or supplemented in this Reply with regard to the lower court's reversible errors in its rulings, findings, interpretation and application of the law which are the subject of this appeal. The Appellants respectfully reassert their arguments on standing as presented in their Brief which analyzes the three ways in which standing can be acquired, including the misapplication by the lower court of the *Penn. Prot. & Advocacy, Inc. v. Houston*, 136 F.Supp.2d 353 (E.D.Pa. 2001) case. (Brief, pp. 12-25). Without waiving their arguments that the lower court erred in failing to find that standing was acquired by the Appellants by statute<sup>1</sup> and/or by

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<sup>1</sup> The Appellants do continue to assert and claim the standing on behalf of Appellant P&A is conferred directly by statute in the Federal Developmental Disabilities Act, 42 U.S.C.A. §§ 15001 et. seq. and SC Code Section 43-33-350 and related enabling legislation for Appellant P&A. (Brief, pp. 13-14). It is further asserted by the Appellants that the Declaratory Judgment Act, §§15-53-10, et. seq., likewise confers statutory standing upon the Appellants together with the enabling statutes for DDSN to provide services to vulnerable South Carolina citizens and for who those services are

constitutional standing, the Appellants seek to provide the Court with additional arguments in this Reply concerning the public importance exception to standing. Appellants also reassert their arguments for standing on the basis of statute, of constitutional standing and of public importance as if such arguments are repeated verbatim due to the summarization of the lower court's Order by the Respondents in their appellate brief.

**a. Although The Lower Court Failed To Find Standing Based On Statute Or Constitution, The Lower Court Further Failed To Find Standing For The Appellants Based Upon Public Importance of a Judicial Ruling.**

Gloria M. Prevost, Executive Director of the Appellant Protection and Advocacy for the People with Disabilities, Inc. (hereinafter Appellant P&A or collectively Appellants), stated clearly in her affidavit the impact and effect that the lack of properly promulgated regulations has on Appellant P&A and the citizens that P&A is statutorily obligated and mandated to advocate and to protect:

5. However, the lack of regulations within the developmental disability system in South Carolina harms the population DDSN is mandated to serve. P&A, and its clients, have been, are being, and will continue to be harmed as the direct result of those deficiencies, through denial of services for arbitrary and capricious reasons, inadequate services and unequal availability and quality of services, and lack of an appropriate and defined grievance procedure. All these matters affect the individual Plaintiffs' health, safety, well-being, their right to live and participate in their communities, and their ability to enjoy appropriate lifestyles.

6. Due to the lack of regulations in the developmental disabilities system administered by DDSN, applicants for or recipients of services do not have officially published information about many aspects of DDSN services, including:

- a. eligibility for DDSN services;
- b. When or how to appeal a denial of eligibility or services;

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funded by the General Assembly annually with each Appropriations Act. Section 15-53-30 states that "[a]ny person ... whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise 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. The individual Appellants meet the "any person" standard.

- c. the standards for operation of the residential facilities within the developmental disabilities system operated by DDSN;
- d. procedures and standards for human rights committees;
- e. standards for research on human subjects, including how consent is obtained for research to be performed; and
- f. how decisions about budget cuts are being made and whether those decisions are being made by the Commission or DDSN staff; whether those decisions are uniformly being applied; whether some groups of individuals with developmental disabilities are being impacted more than others; and whether the decisions are being uniformly applied.

7. Due to the lack of regulations within the developmental disabilities system, in order to adequately represent its clients P&A must expend resources and time 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 disability, and that they are applied fairly.

(Affidavit, R. pp. 164-165; Transcript, R. pp. 634-648; 658-665).

The individual Appellants are a group of vulnerable minors and/or adults who are all equally subject to issues, harm, and uncertainties due to the lack of promulgated regulations and the ongoing and intentional disregard by DDSN to comply with the mandates placed upon DDSN by the General Assembly in South Carolina Code Section §44-20-220, §44-20-790, and §44-26-180 and in the South Carolina Administrative Procedures Act, §§1-23-10, et. seq. which is faced by every citizen in South Carolina. As provided to the lower court, Larrye Hyde confirms the interest of her vulnerable daughter in this action:

- 15. Due to the lack of regulations in the developmental disabilities system administered by DDSN, I do not have reliable information about many aspects of DDSN services, including but not limited to:
  - a. eligibility for DDSN services;
  - b. when or how to appeal a denial of eligibility or services;
  - c. how decisions about budget cuts are being made and whether those decisions are being made by the Commission or DDSN staff; whether those decisions are uniformly being applied; whether some groups of individuals with developmental disabilities are being

impacted more than others; and whether the decisions are being uniformly applied.

16. Our daughter has been injured by DDSN's failure to promulgate regulations.

(Affidavit, R. p. 171).

Each of the Appellants, whether an individual or P&A, and any citizen are equally held hostage to the whims of DDSN and its so-called "regulation by other means" scheme that does not comply with the South Carolina Administrative Procedures Act, §§1-23-10, et. seq. Each Appellant, just like all citizens, are subject to these DDSN "other means" directives, standards and manuals which are subject to change whenever and however DDSN wants and without notice or the opportunity to review and be heard. The specific individual facts or case-by-case analysis of each Appellant on the type of service denied does not change the fact that none of the Appellants, including no other citizen who may confront the need for DDSN services in the future, will ever know the "real" criteria for eligibility under properly promulgated regulations or the process that must be followed to appeal by promulgated regulation. Why? Such promulgated regulations do not exist, and in fact, DDSN has made an admission of no regulations. (Answer, R. pp. 82-96; Responses to Requests for Admission, R. pp. 112-132). There are no APA compliant regulations by DDSN other than for licensing programs of certain facilities. There are no promulgated regulations from or by DDSN 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. p. 34); see also footnote 2, p. 6.

The Respondents mistakenly assert in their brief, like the lower court analyzed, that it is necessary to show an individualized specific harm based upon the specific case by case review of the particular circumstances of each Appellant to establish any standing. However, in this case, all South Carolina citizens potentially subject to receiving DDSN services are “in the same boat forever and ever” as we are seeking that DDSN go through the process of the APA and establish promulgated regulations. Appellants take the classic conundrum of dealing with a state agency that rejects the application of the APA to its agency pronouncements of goals, standards and policies and instead claims that it may regulate by “other means”. Under the lower court ruling, Appellants face state agency action subject to repetition but always evading judicial review. Everyone faces the same problems and perils due to the absence of any promulgated regulations and at the hands of “other means” regulation by DDSN. It is important not only to the Appellants, but also to all citizens, to have clear guidance from the Court to address whether (a) DDSN must promulgate regulations in accordance with South Carolina Code Sections §44-20-220, §44-20-790, and §44-26-180, consistent with the provisions of the South Carolina Administrative Procedures Act, §§1-23-10, et. seq., or (b) whether DDSN can continue to disregard the specific protections provided by the APA and application of the underlying and founding tenants of the APA in providing fundamental due process of law under the Fourteenth Amendment of the U.S. Constitution and Article I, §3 and §22 of the South Carolina Constitution and proceed to regulate by “other means” through directives, standards, and manuals that have no force of law under rulings by the South Carolina Supreme Court. See, S.C. Code Ann. § 1-23-10 (4); David E. Shipley & Randolph R. Lowell, *South Carolina Administrative Practice & Procedure* p. 108 (2d ed. 2008).

The application of standing is not inflexible and standing may be conferred where the issue is one of public importance. *Sloan v. Wilkins*, 362 S.C. 430, 436, 608 S.E.2d 579, 583 (2005). The public importance exception grants standing to a party who has not suffered a particularized injury where the issue involved is of such public importance that its resolution is required for future guidance. *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008). “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.* at 199, 669 S.E.2d at 341. See, also *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 645-646, 744 S.E.2D 521, 524 (2013). The Appellants have supported their claims of standing, and have shown that a declaration by the lower court that would afford the Appellants the same protections as others citizens have been afforded when dealing with other state agencies through promulgated regulations. With promulgated regulations, the Appellants, and others like them and in the future, will know exactly how to obtain services, claim eligibility, comply with standards for programs and waitlists, what standards and procedures apply in order to appeal and the many other areas<sup>2</sup> outlined in this action are extremely important to all South Carolina citizens.

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<sup>2</sup> The Complaint asserts that 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. p. 34). DDSN has **admitted** that it does not have such regulations and the Court can also take judicial notice that 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 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,

(Complaint, ¶¶ 6-53; R. pp. 34-49). As a result of the lower court ruling, there is 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 and to promulgate regulations concerning the operations of DDSN that affect the Appellants and all citizens. (Complaint, R. pp. 27-50; Hearing Tr., R. pp. 634-648, 658-665; Lacy Depo, R. pp. 667-1022; Vaughn Depo, R. pp. 1023-1289; *see also*, S.C. Code of Regulations, Annotated, Chapter 88, *et. seq.*. State agencies withholding information or having citizens without an opportunity to be heard on state agency actions under their statutes is not the plan envisioned by the General Assembly when it enacted the regulations process in the APA. The issues raised by the Appellants are important to an estimated 13,000 plus South Carolina citizens who currently obtain services from DDSN or who seek to obtain services in addition to the countless unknown citizens that sought services but were denied without APA established standards. 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. In addition to failing to find that standing existed on other grounds as argued by the Appellants, the lower court further erred by not finding that standing existed based upon the public importance exception. For these reasons herein this Reply and the prior appellate Brief, and as may be argued orally, the lower court should be reversed in order for all citizens to vindicate their rights under the APA and applicable statutes. The question about whether or not DDSN is mandated to promulgate regulations – rather than by “other means” – must be addressed so that not only the Appellants, but other citizens (approximately 13,000 currently

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128-129; ¶ 18 (research on human subjects) R. pp. 118-119, 129; and ¶ 19 (obtaining consent) R. pp. 119, 129).

served by DDSN) and an unknown number of others who are not yet served by DDSN but denied services or access to services, will know their rights, how and when to appeal, what are the criteria for the eligibility for services, the grievance procedures, the hearings process, the appeals process, the criteria and process for waiting lists, the eligibility for residential services, and the operation of residential services. Appellants assert that guidance from the Court is needed for the present and the future.

It is interesting that the Respondents also focus in their Respondents' brief on the fact that individual Appellants sought to proceed anonymously – which happened to have been granted by the Honorable G. Thomas Cooper on April 4, 2007 because the “*identification of the individually named Plaintiff potentially poses a risk of retaliatory denial of needed services which may result in physical or mental harm to the individually named Plaintiffs.*” (Order, R. p. 24) (emphasis added). The Judge Cooper found that it was “*appropriate to proceed anonymously and not to disclose the identity of the individually named Plaintiffs who are minors and/or incompetent adults potentially at risk of retaliatory conduct.*” (Order, R. p. 24) (emphasis added). DDSN's counsel represented before Judge Childs at the motions hearing held on October 29, 2007 that DDSN could figure out who the individual Appellants were based upon the specific allegations and their individual initials. DDSN chose not to pursue any discovery from the Appellants. Each of the named individual plaintiffs had presented affidavits sealed by the Court, but available to the Court to review and therefore, Judge Cooper determined on April 9, 2007 that the harm and/or threat of harm existed for the Appellants. (Order, R. pp. 23-24; Petition, R. pp. 51-54). In addition to the arguments presented in the Appellants' Brief, the lower court had made an initial determination concerning the existence of harm and injury when it allowed the Appellants to

proceed anonymously; therefore, the lower court committed reversible error in failing to find standing for the individually named Appellants or to consider its prior Order in support of the Appellants' arguments and claims that standing existed by statute, by constitutional claim and by public importance to provide guidance in the future. (Order, R. pp. 1-22, 23-24).

**II. THE COURT ERRED WHEN IT RULED THAT DDSN HAD NO MANDATE TO PROMULGATE REGULATIONS AND WHEN IT RULED THAT "OPERATIONS" OF DDSN IS RESTRICTED ONLY TO INTERNAL OPERATIONS TO PROTECTS ITS EMPLOYEES WITH REGARD TO THEIR RIGHTS TO EMPLOYMENT AND GRIEVANCE AGAINST DDSN BUT DOES NOT INCLUDE OR PROVIDE PROTECTION TO THE PUBLIC FOR THE DEPARTMENT'S MISSION TO THE OUTSIDE WORLD.**

**a. There Is No Rational Or Lawful Basis For The Lower Court To Have Adopted DDSN's Limited View For The Meaning Of Operations In SC Code § 44-20-220 Within Title 44 Of The SC Code Of Laws**

The Court erred in holding that DDSN has no mandated duty to promulgate regulations in accordance with the South Carolina Administrative Procedures Act, §§1-23-10, *et. seq.* ("APA") and in compliance with DDSN's statutory requirements in §§44-20-220, 44-20-790, and 44-26-180. The lower court's ruling is illogical, ill-reasoned and without justification or merit to construe §§44-20-220, 44-20-790, and 44-26-180 as not mandating the promulgation of regulations under the APA. (Order, R. pp. 1-22). DDSN's argument disregards well-established principles of statutory construction to claim that it does not have to comply with the mandates of the General Assembly in South Carolina Code Section §44-20-220, §44-20-790, and §44-26-180, or in the South Carolina Administrative Procedures Act, §§1-23-10, *et. seq.*, to promulgate regulations so that all citizens in the South Carolina who seek to avail themselves of DDSN services shall know how, when and what the standards and criteria applicable to everyone – rather than for a limited few – and that such

standards, criteria and information is not subject to change on a whim and without notice or basis. As argued by DDSN, “shall” is not mandatory when Section 44-20-220 of the Code later adds that DDSN is broadly “authorized to” promulgate regulations for other areas. Respondents’ Brief, p. 22. Contrary to generally acceptable principles of statutory construction, DDSN claims that this creates a “confusion” and that it is the internal operations its own agency personnel that are solely deserving of protection under the APA rather than promulgating regulations related to its mission to the outside world of citizens in need of assistance. While it is notable that there are no such “internal” DDSN promulgated regulations, it is actually of a function that the APA specifically prohibits such types of agency personnel regulations being promulgated. S. C. Code Ann. §1-23-10(4) (Regulation, as defined by the APA, does not include agency procedures applicable only to agency personal. A regulation is the agency statement to the public that implements or prescribes law or policy or practice requirements for that agency).

DDSN admits that they are required to promulgate regulations pursuant to the Administrative Procedures Act. *See*, Defendants’ Answers to Plaintiffs’ Requests for Admission, Response #7. (Def. Ans. Pltfs Req. Adm. No. 7, R. pp. 114; 124-125). The Request to Admit Number 7 by the Appellants states “*that the South Carolina Department of Disabilities and Special Needs is statutorily required to promulgate regulations related to the operations of the Department.*” The DDSN’s answer is “*Admitted, but it is denied that this broad legal proposition creates the rights to which Plaintiffs claim they are entitled in their pleadings in this case. Specifically, ..., the term “operations,” as used in § 44-20-220, related only to the internal operations of the Department, and not to its mission to the outside world.*” DDSN’s qualifies its own admission that it is required to promulgate certain

regulations by stating that operations of the Department means only to protect its own employees and is not directed to mean the operations of the Department as it relates to the outside world in which approximately 13,000<sup>3</sup> vulnerable citizens are served by DDSN. DDSN does not cite to any definition for “operations” added by the General Assembly to mean only its own internal operations, as no such definition is provided to define “operations”. Amazingly, DDSN does not even have such “regulations” regarding the internal operations of the department that it now claims are required despite approximately two decades since DDSN was first established in 1994.

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).

There is no definition of “operations” in Title 44, Chapter 20 or Chapter 26 of the South Carolina Code of Laws regarding DDSN to suggest or instruct such an agency

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<sup>3</sup> 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. 2; 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).

imposed limitation to “internal” only. However, DDSN does not have regulations to protect its own employees. As argued in its pleadings and Initial Appellants’ Brief, 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 to citizens in need of DDSN services. Furthermore, the general authorization for DDSN to promulgate regulations to carry out the provisions of Chapter 20, Title 44, would necessarily 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. A review of Chapter 20, Title 44, of the South Carolina Code for other references to “operation” or “operations,” two other statutory provisions emerge: §§ 44-20-370 (Requires notification of applicant qualifying for services; establishment of county programs; training programs) and 44-20-720 (Requirement that DDSN establish minimum standards of operation and license programs for Facilities, Programs or Day Programs or Treatment Programs). Neither statute defines “operation” or suggests that the term “operation” must be limited to the internal procedures of DDSN; instead, these two statutes (§§ 44-20-370 and 44-20-720) must be read to provide that “operations” means or carries out the functions of DDSN to provide certain services to the eligible South Carolina citizens in support of DDSN’s mission to the outside world.

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. As the record

demonstrates through the sworn testimony of DDSN representatives, Dr. Kathi Lacy<sup>4</sup>, Dr. John Vaughn, and Mrs. Deborah McPherson, and DDSN's response to the discovery of the Appellants,<sup>5</sup> DDSN simply uses its internal directives, standards, and manuals that purport to state the policies of the agency governing "its mission to the outside world", regulating the operations of the agency, setting out the standards applicable to providers and licensees of residential programs, and to guide the various decision makers in the agency. *See* Dr. Kathi Lacy<sup>6</sup> Deposition (Lacy), 25:21 – 26:4 (Lacy Depo, R. pp. 691-692). Specifically, these directives, standards and manuals were established outside the state law framework and due process requirements afforded individuals as provided by the South Carolina Administrative Procedures Act, §§1-23-10 *et. seq.*, are DDSN's means to communicate policy to the public. *See* Lacy, p. 27:9-17. (Lacy Depo, R. p. 693). The so-called "directives" are the closest statement of official state agency action that DDSN has regarding the issues raised in the Appellants' Complaint. (Complaint, R. pp. 34-49). The directives are posted on the website but remain subject to change at any time without notice and change frequently even assuming a citizen has a computer, access to the Internet and then knows how and where to specifically find where such directives are actually located and without knowing if they have the actual correct document.<sup>7</sup> *See*, Lacy, 38:15-21. (Lacy Depo, R. p. 704).

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<sup>4</sup> Dr. Lacy was the Associate State Director, Policy at DDSN. (Lacy, 24:11-18, R. p. 690).

<sup>5</sup> DDSN did not engage or initiate any discovery under the South Carolina Rules of Civil Procedure upon the Plaintiffs-Appellants during the course of this declaratory judgment action. DDSN only responded to the discovery initiated by the Plaintiffs, but failed to make or seek any inquiries of the Plaintiffs/Appellants.

<sup>6</sup> Dr. Lacy was the Associate State Director, Policy at DDSN. (Lacy, 24:11-18, R. p. 690).

<sup>7</sup> 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

**b. THE DDSN BOARD HAS NOT ADOPTED A POLICY THAT THE APA DOES NOT APPLY TO ITS GOVERNING STATUTES.**

DDSN does not have a regulation or a directive stating that its policy is to not promulgate regulations, nor has the issue EVER been directly discussed by the Commission in a public setting. *See*, Lacy, 92:17- 93:17; (Lacy Depo, R. p.p. 758, ln 17 – p. 759, ln. 17); *See*, Dr. John Vaughn Deposition (Vaughn), 160:18 – 161:8. (Vaughn Depo, R. p. 1182, ln. 18 – p. 1183, ln. 18). The reasoning given by Dr. Lacy for not promulgating regulations was simply that DDSN is not required to promulgate regulations. *See*, Lacy, 87:15-18; 89:11-12 (Lacy Depo, R. p. 753, ln. 15-18; p. 755, ln. 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). Dr. Vaughn testified that regulations are despised by the public. *See*, Vaughn, 120:14-17 (Vaughn Depo, R. p.1142). 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, ln. 19 – p. 1172, ln. 3). Finally, Deborah McPherson, a Commission member and former DDSN employee, testified that she agrees that the agency should promulgate regulations. *See*, Ms. Deborah McPherson Deposition (McPherson), 119:6-11; 114:15-22 (McPhearnson Depo, R. p. 1403, ln. 15-22; p. 1408, ln. 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 urrent 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 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 [the Commission members] don’t get involved in the day-to-day

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or the means to travel to an area with Internet access, per the information available from the South Carolina Public Service Commission.

operations. You can't have it both ways." (McPhearson Depo, R. p. 1356, ln. 18; p. 1357, ln. 14, p. 1364, ln. 17-19; p. 1365, ln. 6-11).

The lower court ruling allows DDSN to continue to ignore the mandates of the General Assembly requiring it to promulgate regulations. The lower court ruling should be reversed to allow 13,000 vulnerable persons, plus their families, to know what are the state law standards and criteria for services, and how to be informed about their right to appeal a decision by DDSN which denies needed services. For these reasons and for those set forth in its prior Appellants' Brief, the Court should find that the lower court committed reversible error in its rulings and reverse its Order and remand the matter for further proceeding.

**c. DDSN'S POSITION CONCERNING THE MEANING OF "OPERATION" IS INHERENTLY WRONG AND CONTRADICTS THE SPECIFIC PROVISIONS OF THE SOUTH CAROLINA ADMINISTRATIVE PROCEDURES ACT AND GENERALLY ACCEPTED PRINCIPLES OF STATUTORY CONSTRUCTION**

It is unequivocal that DDSN's position concerning the meaning of "operation," which is internal operations and not any operations related to "its mission to the outside world (a/k/a the approximate 13,000 vulnerable citizens that it serves and uncountable number of others who seek services but are denied), 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") and generally accepted principles of statutory construction. Therefore, the lower court erred in its findings and should be reversed.

The South Carolina Administrative Procedures Act, S.C. Code Ann. §§1-23-10 to 1-23-160 (2005 and Supp. 2013), 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 plainly 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 include promulgation of a 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 the 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” and not to “its mission to the outside world” are also inconsistent with the express

purpose behind the enactment of the APA. 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). That argument is unsupported by the purpose of the APA, which by definition serves 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; it is 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.

The lower court failed to apply well-established principles of statutory construction and erred in its findings which are inconsistent with the basic principles of statutory

construction and contradictory to the APA itself, as well as the enabling statutes of DDSN. The resulting 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. S. C. Code Ann. §1-23-10(4). 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. See, S.C. Code Ann. § 1-23-10 (4); David E. Shipley & Randolph R. Lowell, *South Carolina Administrative Practice & Procedure* p. 108 (2d ed. 2008). For these reasons, Court should find that the lower court erred in its ruling, reversing its Order and remanding the matter.

**III. THE LOWER COURT ERRED IN PROHIBITING OR RESTRICTING THE ABILITY OF ANY OF THE APPELLANTS FROM ASSERTING THE NEED FOR PROMULGATED REGULATIONS AND SHOULD BE REVERSED**

If the lower court's order becomes final, then the each of the individual Appellants and Appellant P&A are then barred by the principles of res judicata from raising or asserting their rights by declaratory action or otherwise in an appeal from denied, reduced or eliminated services from claiming any matter raised in this action, including the need for the promulgation of regulations unless the subsequent administrative appeal involves matters that could not be raised in this present action. With regard to Appellant P&A, Section 3(b) of the lower court's Order can seriously impede the ability for Appellant P&A to carry out its

federal and state statutory duties and responsibilities in protecting and advocating the rights of vulnerable individuals in accordance with the Federal Developmental Disabilities Act, 42 U.S.C.A. §§ 15001 et. seq. and as provided by S.C. Code § 43-33-350. Following the Appellants' Motion for Reconsideration, the lower court sought to make a change to its original Order dated September 25, 2013 per the request of DDSN as part its Return to the Appellants' Motion for Reconsideration. (Order, R. pp. 1-22; Motion, R. pp. 546-609; Return R. pp. 610-617.). On December 30, 2013, the lower court made the following change to Section 3(b) of the Order dated September 25, 2013 as requested by DDSN within its Return in Opposition to the Appellants' Motion for Reconsideration. (Return, R. p. 613).

After careful consideration of the submissions of the parties, the Court hereby **AMENDS** its September 24, 2013 Order for clarification purposes as follows:

The paragraph on page 18 which currently reads

“For the foregoing reasons, the Court concludes that Plaintiff’s Motion for Summary Judgment should be denied, Defendants’ Motion for Summary Judgment should be granted, and that this action should be, and hereby is, dismissed with prejudice in all respects.”

Is amended to read

“For the foregoing reasons, the Court concludes that Plaintiff’s Motion for Summary Judgment should be denied, Defendants’ Motion for Summary Judgment should be granted, and that this action should be, and hereby is, dismissed with prejudice with respect to the merits issues discussed in §3(a) of the Order, pp. 9-16. This dismissal, however, shall 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, pp. 16-18, so long as such subsequent appeals involve matters that could not have been raised in the present case.”

(Order, R. pp. 21-22).

For these reasons, the lower court's Order should be reversed and the matter remanded so that the rights of the Appellants are not hindered. At present, the Order's revised language is nothing more than another way to prevent the Appellants from ever raising this issue or claims again related to regulations in their individual claims or in cases when there has been no individual review for each Appellant in this case by the lower court.

**IV. THE LOWER COURT ERRED IN FAILING TO FIND PARTIAL JUDGMENT IN FAVOR OF THE APPELLANTS RELATED TO SECTIONS 44-20-790 AND 44-26-180**

It is admitted by DDSN that they are mandated by SC Code Sections 44-20-790 and 44-26-180 to promulgate these specific regulations. 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. The lower

court further 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.”).

### CONCLUSION

The Appellants, and the more than 13,000 vulnerable persons currently served by DDSN and the uncountable others who seek, but have been denied services, should not continue to be subject to DDSN regulation by “other means” used to establish rules, criteria and standards. DDSN should be required, in accordance with its enabling legislation, to formalize its rulemaking process through the promulgation of regulations in accordance with processes and procedures created by the General Assembly in the South Carolina Administrative Procedures Act, §§ 1-23-10, et. seq. In promulgating regulations under the South Carolina Administrative Procedures Act, the Appellants will be able to review agency proposals and present public comment, have access to legal remedies currently unavailable, and know that their elected officials will have the opportunity to review proposed regulations, adding accountability, transparency, and oversight to the operations of DDSN.

The lower court’s Orders should be reversed as the Appellants are entitled to the Court’s declaration that the Respondents must promulgate regulations pursuant to state law (APA) 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, but that they did not.

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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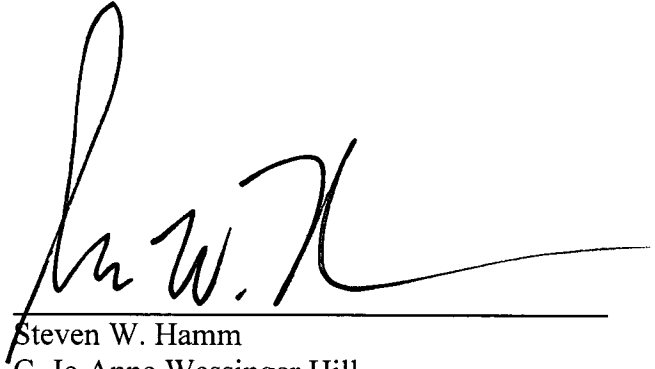
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October 14, 2014.

**CERTIFICATE OF COUNSEL**

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



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OCT 14 2014

**SC Court of Appeals**

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CERTIFICATE OF COMPLIANCE

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



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