

**N.D.A.G. Letter to Schmitz (Apr. 3, 1992)**

April 3, 1992

Mr. Orell D. Schmitz  
Attorney At Law  
PO Box 2056  
Bismarck, ND 58502

RE:Your File No. 12600

Dear Mr. Schmitz:

Thank you for your December 2, 1991, letter concerning problems being encountered by the Protection and Advocacy Project (hereafter P&A) with respect to access to records pertaining to prisoners at the State Penitentiary. You advised that the Penitentiary administration has denied P&A access to records of a prisoner who has consented in writing to release of the records to P&A. The Penitentiary relies upon North Dakota Century Code (N.D.C.C.) § 12-47-36 which provides for confidentiality of certain prison records.

N.D.C.C. § 12-47-36 provides in pertinent part:

The clinical, behavioral, treatment, medical, and social records and materials of a penitentiary inmate, regardless of source, are confidential and privileged and may not be disclosed directly or indirectly to anyone other than the parole board, a public or private treatment facility, a recognized law enforcement agency, and others entitled by law to receive such information. A state or federal court may order the inspection of such confidential and privileged records and materials, or parts thereof, by individuals or organizations having shown a proper legitimate purpose and reason to inspect such records and materials.

You believe the confidentiality requirement may be waived by the inmate. You suggest the confidentiality restriction was not intended by the statutory language to apply to inmates themselves.

N.D.C.C. § 12-47-36 specifies to whom the confidential information can be disclosed. Disclosure is authorized to "the parole board, a public or private treatment facility, a recognized law enforcement agency, and others entitled by law to receive such information." *Id.* N.D.C.C. § 12-47-36 does not provide for disclosure to an inmate. The statute is clear and unambiguous. The legislative history buttresses the position taken by the Penitentiary in denying access to an inmate.

The Penitentiary "[has] many requests from inmates to get possession of their . . . files and any other files carrying . . . sensitive information." Hearing on S. 2374 before the Senate

Comm. on State and Federal Government, 50th Leg. (January 26, 1987) (Statement of Jack Paul, Director of Programs, North Dakota State Penitentiary).

"[T]here is a [confidentiality] law for the pardon board and for the parole board that covers this information. [The prison] wanted [its] information to be privileged in the same fashion as the parole and pardon boards records are, because they are actually the same records."

Hearing on S. 2374 before the Senate Comm. on State and Federal Government, 50th Leg. (January 26, 1987) (Statement of Ed Zuern, Assistant Attorney General).

"This bill basically will give us the right by law to consider the records of the inmates of the penitentiary to be confidential. [I]nmates and others want to see the records [but the penitentiary wants a] provision to keep our records confidential. [A] lot of people on one side are trying to challenge the system particularly with inmates to find out what is in their records in order to get even with people, in order to circumvent the system. . . ." Hearing on S. 2374 before the House Comm. on State and Federal Government, 50th Leg. (February 10, 1987) (Statements of Ed Zuern, Assistant Attorney General).

In my opinion, P&A is not authorized by N.D.C.C. § 12-47-36 to review a prison inmate's records by virtue of a release of information provided P&A by the inmate.

You also contend that P&A is authorized to inspect the prisoner's records because it is otherwise "entitled by law to receive such information."

N.D.C.C. § 25-01.3-06 specifies the authority and mission of P&A. It provides in part:

[T]he [Protection and Advocacy] project . . . shall provide advocacy and protective services for persons with developmental disabilities and persons with mental illnesses.

A client or person eligible for services of P&A includes: an adult with developmental disabilities, an adult suffering from a mental illness who is an inpatient or resident in a facility rendering care or treatment, an adult suffering from a mental illness who is in the process of being admitted to such a facility, or who was an inpatient or resident of a facility rendering care or treatment within the last 90 days and children with developmental disabilities or mental illness under the same circumstances as an adult and not an abused or neglected child eligible for protective services. N.D.C.C. § 25-01.3-01(8); N.D. Admin. Code § 65.5-01-02-02(3).

A caretaker is to provide P&A access to a person with developmental disabilities or mental illness and the facility where the person resides. N.D.C.C. §§ 25-01.3-07, 25-01.3-08(1)(c).

A "[c]aretaker means a person, organization, association, or facility who has assumed legal responsibility or a contractual obligation for the care of a person with developmental disabilities or mental illness. . . ." N.D.C.C. § 25-01.3-01(4). The warden of the penitentiary has custody and control of inmates. N.D.C.C. § 12-47-11. While the warden is to care for and govern inmates in conformity with their respective sentences and as prescribed by law, N.D.C.C. § 12-47-18, the warden does not serve as a caretaker for

persons with developmental disabilities or mental illness. N.D.C.C. § 25-01.3-01(4).

N.D.C.C. § 25-01.1-01(10) defines a facility as one "which provides services to a person with developmental disabilities or mental illness." See also, N.D.C.C. § 25-01.2-01(2). "[S]ervices for developmentally disabled persons' means services . . . directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of a developmentally disabled person." N.D.C.C. § 25-01.2-01(4). The Department of Corrections and Rehabilitation has general administrative supervision of the North Dakota State Penitentiary but the penitentiary is not operated to provide services to persons with developmental disabilities or mental illnesses. The purpose of the State Penitentiary is "for the punishment and reformation of offenders . . . who are sentenced to imprisonment [to] be confined securely and employed and governed in the manner provided by law." N.D.C.C. § N.D.C.C. ch. 12-47-01. Compare this with the purpose of the Developmental Center at Grafton which is to be "maintained for the relief, instruction, care, and custody of the developmentally disabled or other persons who may benefit from the services offered at the center." N.D.C.C. § 25-04-02. In similar contrast, the purpose of the state hospital is to "care for all mentally ill persons . . . and furnish to those mentally ill persons all needed food, shelter, treatment, and support that may tend to restore their mental health or to alleviate their illness or suffering." N.D.C.C. § 25-02-03.

Thus, N.D.C.C. ch. 25-01.3 does not generally give P&A access to the Penitentiary as it is by definition not a caretaker for, nor is it a facility providing services to persons with developmental disabilities or mental illness. Prison inmates who require treatment for mental illness may be transferred to the State Hospital pursuant to N.D.C.C. § 12-47-27. Developmentally disabled persons may be transferred to the Developmental Center at Grafton or other treatment facility. Id. See N.D.C.C. § 25-01.2-01(2).

This is consistent with the 1991 amendments to the Protection and Advocacy for Mentally Ill Individuals Act of 1986 (PAMII Act) which in part provides the underpinning to N.D.C.C. ch. 25-01.3. In 1991 Congress amended section 102 of the PAMII Act (42 U.S.C. § 10802) by adding a definition of "facilities." "The term 'facilities' may include, but need not be limited to, hospitals, nursing homes, community facilities for individuals with mental illness, board and care homes, homeless shelters, and jails and prisons." 42 U.S.C. 10802(3).

By including this [definition] the Committee does not intend in any way to modify the policy in the current Act that limits coverage to facilities "rendering care or treatment." Thus individuals who have significant mental illnesses or emotional impairment and who are inpatients or residents in a particular facility that does not render "care or treatment" are not protected by the PAMII Act. H.R. Rep. No. 319, 102d Cong., 1st Sess. 1, 5-6 (1991); reprinted in 1991 U.S. Code Cong. & Admin. News 777, 781-782 (Supp. 1992); S. Rep. No. 114, 102d Cong., 1st Sess. 1, 4 (1991).

While P&A does not have general access it may be entitled to access on a case-by-case basis. For example, an adult suffering from mental illness who within the last 90 days was

an inpatient at the State Hospital or other treatment facility who is the subject of a complaint (about violation of legal rights) or report of abuse or neglect and is a prisoner may be eligible for services of P&A. N.D.C.C. § 25-01.3-01(8)(d).

In your letter you also advise that P&A has been denied access to a meeting with a prison inmate and a psychiatrist. You state that it is necessary for advocates to access the psychiatrist when the inmate requests the advocate to be present.

In my opinion authority to interview an inmate with developmental disabilities or mental illness upon receipt of a report or complaint does not require that P&A be given access to a meeting of a prison inmate with a psychiatrist. Assuming for the sake of argument that as a result of a complaint or report P&A is entitled to access to the prisoner and the facility, that does not imply access to a specific prison program. This is consistent with the most recent amendments to 42 U.S.C. 10805 which make clear that monitoring or other activities which result from a complaint or other evidence must be conducted so as to not interfere with a facility's programs or scheduling. H.R. Rep. No. 319, 102d Cong., 1st Sess. 1, 6 (1991), reprinted in 1991 U.S. Code Cong. & Admin. News 777, 782 (Supp. 1992).

Sincerely,

Nicholas J. Spaeth

vkk