

**LETTER OPINION**  
**96-L-97**

May 9, 1996

Mr. Henry C. "Bud" Wessman  
Executive Director  
Department of Human Services  
600 E Boulevard Ave  
Bismarck, ND 58505-0250

Dear Mr. Wessman:

Thank you for your April 4, 1996, letter asking whether a failure of a "caretaker" to follow agency policies and procedures by itself constitutes "abuse" or "neglect" as those terms are defined in N.D.C.C. § 25-01.3-01.

The primary purpose of statutory construction is to determine the intent of the Legislature, which must initially be sought from the language of a statute. Kim-Go v. J.P. Furlong Enterprises, Inc., 460 N.W.2d 694, 696 (N.D. 1990); County of Stutsman v. State Historical Society, 371 N.W.2d 321 (N.D. 1985). "It must be presumed that the Legislature intended all that it said, and that it said all that it intended to say." City of Dickinson v. Thress, 290 N.W. 653, 657 (N.D. 1940). If statutory language is clear and unambiguous, that language cannot be disregarded under the pretext of pursuing the legislative intent. District One Republican Committee v. District One Democrat Committee, 466 N.W.2d 820 (N.D. 1991). "If the language of a statute is ambiguous or of doubtful meaning, extrinsic aids may be used to interpret the statute." Kim-Go, 460 N.W.2d at 696.

The statutory definitions of "abuse" and "neglect" cited in your letter appear clear:

1. "Abuse" means:

- . . . . .
- b. Knowing, reckless, or intentional acts or failures to act which cause injury or death to a developmentally disabled or mentally ill person or which placed that person at risk of injury or death;

- . . . . .
13. "Neglect" means:
- a. Inability of a person with developmental disabilities or mental illness to provide food, shelter, clothing, health care, or services necessary to maintain the mental and physical health of that person;
  - b. Failure by any caretaker of a person with developmental disabilities or mental illness to meet, either by commission or omission, any statutory obligation, court order, administrative rule or regulation, policy, procedure, or minimally accepted standard for care of persons with developmental disabilities or mental illnesses;
  - c. Negligent act or omission by any caretaker which causes injury or death to a person with developmental disabilities or mental illness or which places that person at risk of injury or death;
  - d. Failure by any caretaker, who is required by law or administrative rule, to establish or carry out an appropriate individual program or treatment plan for a person with developmental disabilities or mental illness;

. . . . .

N.D.C.C. § 25-01.3-01 (emphasis added). This section has not been amended since its enactment in 1989. See 1989 N.D. Sess. Laws ch. 333, § 1 (H. Bill 1207).

The definition of "abuse" cited above requires that an act or failure to act result in injury or death, or place a person at risk of injury or death. N.D.C.C. § 25-01.3-01(1)(b). Thus, to constitute "abuse" under this definition, a failure to follow agency policies or procedures must result in an injury or death, or create a risk of injury or death. Similarly, to constitute "exploitation," a failure to follow agency policies or procedures must involve a taking of a person's property or misuse of a person's services. N.D.C.C. § 25-01.3-01(9).

Of the alternative definitions of "neglect" in N.D.C.C. § 25-01.3-01(13), only one refers expressly to a caretaker's failure to comply with agency policies or procedures. N.D.C.C. § 25-01.3-01(13)(b). Under this definition, no result or consequence is required other than a failure to meet agency policies and

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procedures regarding "care of persons with developmental disabilities or mental illnesses." Id. This definition applies only to a "caretaker" as defined in N.D.C.C. § 25-01.3-01(4). Nothing in this definition limits its application to policies or procedures adopted by the Committee on Protection and Advocacy. See N.D.C.C. § 25-01.3-06. Rather, the policy or procedure that has not been met or followed must satisfy three requirements. First, it must apply to the caretaker. Second, under the plain meaning of the statute, the policy or procedure must pertain to "care of persons with developmental disabilities or mental illnesses." Finally, the policy or procedure must be valid. Because it has only those powers delegated to it by the Legislature, an administrative agency's policy or procedure must be a proper exercise of the agency's statutory authority for the policy or procedure to be valid. See Mullins v. North Dakota Department of Human Services, 454 N.W.2d 732 (N.D. 1990).

Even if this statute were ambiguous and use of extrinsic aids would be appropriate, reviewing the convoluted legislative history of these definitions provides little additional insight into the Legislature's intent. The final version of House Bill 1207 was the result of a "hoghouse" amendment approved by a conference committee. The source of this amendment appears to have been Senate Bill 2357, an alternative to House Bill 1207 that had previously been defeated. The legislative history of Senate Bill 2357 indicates that the definition of neglect was changed several times, but does not address the Legislature's intent regarding the definition.

In conclusion, the definition of "neglect" in N.D.C.C. § 25-01.3-01(13) expressly includes the failure of a caretaker of a person with developmental disabilities or mental illnesses to meet any agency policy or procedure for care of persons with developmental disabilities or mental illness. Therefore, subject to the three requirements stated above, it is my opinion that the failure of a "caretaker" to meet agency policies or procedures by itself constitutes "neglect" as those terms are defined in N.D.C.C. § 25-01.3-01. It is my further opinion that failure of a caretaker to meet agency policies or procedures would constitute abuse only if the failure to follow policies or procedures results in an injury or death or creates a risk of injury or death. Likewise, it is my opinion that a failure by the caretaker to follow agency policies or procedures would only constitute exploitation if the failure involves a taking or misuse of a person's property or services.

Sincerely,

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