N.D.A.G. Letter to Braun (Feb. 8, 1985)

February 8, 1985

Ms. Barbara C. Braun
Director
Protection and Advocacy Project
State Capitol
Bismarck, North Dakota 58505

Dear Ms. Braun:

Thank you for your letter of January 9, 1985, in which you asked whether the Federal District Court through its opinion or through a series of orders that it issued in connection with the case of Association for Retarded Citizens of North Dakota, et al., vs. Allen I. Olson, et al., (hereinafter ARC v. Olson) 561 F.Supp. 470 (D.N.D. 1982), affirmed 713 F.2d 1384 (8th Cir. 1983), has granted the North Dakota Protection and Advocacy Project (hereinafter "Project") the right of access to all records and to participate in the "IHP" and "IEP" processes of plaintiff class members without first obtaining the consent of the class member or class member's parent or legal guardian, or without obtaining a court order.

As you are well aware, Judge Van Sickle in ARC v. Olson found that the state defendants had violated several of the plaintiff class members' federal and state constitutional and statutory rights, and, based on the Court's broad equitable powers, permanently enjoined the state defendants to remedy these violations. Among others, the Court's permanent injunction provided, in part, as follows:

> 8. Defendants are permanently enjoined to provide the necessary and proper inspection and response mechanisms to assure that all living arrangements and services of necessary quality and quantity are provided and maintained. 561 F.Supp. at 495.

The Court also ordered the parties to submit proposed "plan[s] of implementation, detailing a timetable for the accomplishment of the objectives of this order." Id. After consideration of the plans submitted by the parties, the Court issued a "Final Implementation Order" dated March 6, 1984, for the purpose of implementing the provisions of its permanent injunction. The Implementation Order, among others, required the defendants to implement ¶ 8 of its permanent injunction by developing a state advocacy program as follows:

> 136. Development of a state advocacy program. No later than April 1, 1984, defendants shall develop and submit to the Court through the monitor a plan for a state advocacy program that employs sufficient full-time personnel to serve all residents avd (sic) clients. . . . The purpose of a state advocacy program will be to represent residents

> and clients so they may realize the rights to which they are entitled; obtain needed services; investigate complaints, abuse, and neglect; and remove barriers to identified needs.

In order to provide independence of action, the state advocacy program shall be under the direction of the Protection and Advocacy Project (Governor's Council on Human Resources, Executive Committee), or some other organization independent of the Department of Human Services . . . See, Implementation Order, ¶ 136.

After considering the state advocacy plans submitted by the defendants and the court monitor, on July 11, 1984, the Court issued an order adopting the court monitor's state advocacy plan. See, District Court's Memorandum and Order dated July 11, 1984. Attached to the July 11, 1984, Order and incorporated into such Order by reference was the state advocacy plan submitted by the court monitor and adopted by the Court. The state advocacy plan required that the "advocacy program . . . be vested in the existing Protection and Advocacy Project under the supervision of the Executive Committee of the Governor's Council on Human Resources," and also required the defendants to guarantee the independence of the Protection and Advocacy Project. Id. at 13.

Pursuant to the Court's Order of July 11, 1984, then Governor Olson designated the Executive Committee of the Governor's Council on Human Resources as the state agency responsible for the administration of the state protection and advocacy program. See Executive Order 1984-9, p. 1. In addition, when the--Executive Committee of the Governor's Council on Human Resources exercised its responsibilities in administering the state advocacy program, Executive Order 1984-5 redesignated the Executive Committee of the Governor's Council on Human Resources as the "Executive Committee for Protection and Advocacy." Id. Further, Executive Order 1984-9 provides, in part, that:

> 3. The "Executive Committee for Protection and Advocacy," which is hereby created as a single state agency, separate from and independent of the North Dakota Department of Human Services, shall supervise and direct the state protection and advocacy project, which is hereby transferred under the exclusive jurisdiction and control of the Executive Committee for Protection and Advocacy. Id.

Thus the Executive Committee for Protection and Advocacy is an independent state agency of which its responsibilities include the supervision and direction of the Protection and Advocacy Project. For the purposes of this opinion the Executive Committee for Protection and Advocacy and the Protection and Advocacy Project will be hereinafter collectively referred to as the "Project".

Whether the Project is entitled to "non-consented to" or "non-court ordered" access to all records of the plaintiff class members depends first on whether the Federal District Court has explicitly or implicitly granted such access in its opinion or in its subsequent orders in ARC v. Olson, and, second, if the Court has not granted such access, then whether state law provides the Project with the right to such access.

Neither the District Court's Opinion, the Implementation Order, nor the July 11, 1984, Order, specifically grants the Project "non-consented to" or "non-court ordered" access to plaintiff class members' records. The Court, however, in its Implementation Order clearly recognizes the confidentiality of plaintiff class members' records, and the restrictions on the access to these records, by providing, as follows:

> 74. Confidentiality of personal records. Where appropriate each resident or client shall be allowed reasonable access to his or her personal and medical records. Where appropriate, residents and clients may consent to other persons having reasonable access to these records, including an attorney who is presently representing them. Unless otherwise specified in this Order, N.D.C.C. 25-16-07 applies as to the disclosure of all individual records of a treatment or a care center for developmentally disabled persons. Implementation Order, ¶ 74.

The terms "residents" and "clients" as used in the Implementation Order describes those individuals included within the plaintiff class which principally are persons with a "developmental disability" as defined by N.D.C.C. 25-01.2-01(1). The term "clients" "refers to all developmentally disabled persons who are recipients of community programming services and who are in or have applied for placement in community facilities or alternative living arrangements," Implementation Order, ¶ 10. The term "community facilities" connotes a non-institutional setting where services to the developmentally disabled persons are provided, including foster care, group homes, independent or semi-independent apartments, public schools, etc. See generally Implementation Order ¶s 11, 12, 17, 19, and 21. The term "resident" "refers to any developmentally disabled person . . . confined to Grafton [State School]" including those developmentally disabled persons residing at San Haven. See Implementation Order ¶s 20 and 40.

As previously indicated, Judge Van Sickle has not expressly granted "non-consented to" or "non-court ordered" access to the Project by his opinion or orders entered in ARC v. Olson, including the Court's Implementation Order. That right of access may, however, be implicit in the Court's orders. As noted above, the Court ordered the defendants "to provide the necessary and proper inspection and response mechanisms to assure that all living arrangements and services of necessary quality and quantity are provided and maintained." ARC v. Olson, 561 F.Supp. at 495. (Emphasis supplied.)

To implement this provision, the Court ordered the defendants to develop a state advocacy plan to "represent residents and clients so they may realize the rights to which they are entitled; obtain needed services, investigate complaints, abuse, and neglect, and remove barriers to identified needs." Implementation Order, ¶136. There fore, it may be implied from the Court's orders that in order for the Project to adequately represent plaintiff class members to ensure that they are "receiving the rights to which they are entitled" under the Court's orders and state law, the Project must have the ability to access class member's records without obtaining consent from the class member, or the class member's parent or legal guardian or without obtaining a court order. But it is not

necessary to answer that question because the issue can be resolved under state law. N.D.C.C. 25-16-07 provides as follows:

> 25-16-07. RECORDS OF TREATMENT OR CARE CENTER CONFIDENTIAL. No agent of the department of human services or the superintendent of the Grafton state school or the licensee or their agents or employees shall disclose the contents of the individual records of a treatment or care center for developmentally disabled persons, nor of the reports received therefrom, except:
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> 1. In a judicial proceeding when ordered by the presiding judge;
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> 2. To officers of the law or any other legally constituted boards or agencies serving the interests of the residents; or
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> 3. To the parents or legal guardians of the resident.

A "[t]reatment or care center" has been defined for purposes of N.D.C.C. Ch. 25-16 as follows:

> 25-16-01. DEFINITIONS.--In this chapter unless the context or subject matter otherwise requires
>
> 1. "Treatment or care center" means any hospital, home, or other premises, owned and operated by a charitable nonprofit corporation or association, especially to provide relief, care, custody, treatment, day activity, work activity, or extended employment services to developmentally disabled persons.

In a past Attorney General's Opinion, the definition of "treatment or care centers" as contained in N.D.C.C. 2516-01 has been interpreted to apply to the Grafton State School. 1972 N.D. Atty. Gen. Op., p. 324. Therefore, the confidentiality requirements of N.D.C.C. 25-16-07 with respect to the contents of individual records of a resident of Grafton State School or San Haven, a division of the Grafton State School, apply. This definition would, also, necessarily encompass all state and county governmental entities including Regional Human Service Centers and county social service boards or agencies that provide services to the developmentally disabled. In addition, all community facilities which are owned and operated by a charitable nonprofit corporation or association to provide treatment or care or other services listed in N.D.C.C. 25-16-01, to plaintiff class members, would also be subject to the confidentiality requirements of N.D.C.C. 25-16-07.

It is my opinion that the Project qualifies under the second exception of N.D.C.C. 25-16-07 as an "agenc[y] serving the interests of the residents" with developmental disabilities who reside in or are served by community facilities which meet the definition of "treatment or care center[s]" under N.D.C.C. 25-16-01 including those residents at Grafton and San Haven.

The Project is an independent state agency and is charged by Judge Van Sickle "to represent residents and clients so they may realize the rights to which they are entitled; obtain needed serves; investigate complaints, abuse, and neglect; and remove barriers to identified needs." See, Implementation Order, ¶ 136, and ARC v. Olson, supra, at 495. Thus, the Court imposed an affirmative obligation on the Project to represent the plaintiff class members to insure that the class members' rights granted to them under the Court's permanent injunction are fully realized. Therefore, any action taken by the Project is presumptively in the best interests of the plaintiff class members, including the inspection and examination of their records.

Therefore, since the Project is excepted from the confidentiality requirements of N.D.C.C. 25-16-07, then there is no need for the Project to obtain consent from the plaintiff class member or his or her parent or legal guardian; nor would the Project need to obtain a court order prior to accessing a class member's records.

The second question raised by you is whether the Project must obtain a written consent from a class member or his or her parent or legal guardian as a precondition to the Project's involvement in the development and implementation of a class member's "individual habilitation plan" (hereinafter "IHP") and "individual education plan" (hereinafter "IEP"). The answer depends upon whether the class member resides in or is served by the Grafton State School or a community facility.

The Grafton State School, including San Haven, has a policy that considers the Project's institutional advocates as members of a "resident's" IHP and IEP team. As a team member, the institutional advocates are authorized to participate in a class member's IHP and/or IEP process without obtaining prior consent from the class member or the class member's parent or legal guardian. Therefore, institutional advocates of the Project may participate in a resident's IHP and IEP process without receiving prior consent from the resident or the resident's parents or legal guardian.

With respect to those class members residing in community facilities or receiving community services, the Court's opinion and orders issued in ARC v. Olson do not expressly grant advocates of the Project right to participate in a class member's IHP and/or IEP process without first obtaining consent from the class member, or the class member's parent or legal guardian.

Although it may be argued, as you have done, that unless the Project is allowed to participate in a class member's IHP or IEP process free from a consent requirement, the Project will be frustrated from meeting its obligations under the July 11, 1984, Order, this argument is dispelled by the provisions of the state plan adopted by the Court in its July 11, 1984, Order. The State Plan provides, in part, as follows:

> 8. If a client or resident is represented by an advocate, the advocate shall be informed of and invited to all individual habilitation plan

meetings, staff meetings, or any other forum established which makes decisions significantly affecting the resident or client. . . .

9. The case management system staff and social work staff at Grafton and San Haven shall include as an integral part of their functions providing release of information forms to clients, residents, parents, and guardians to facilitate advocacy representation. . . . District Court's Memorandum and Order dated July 11, 1984 -- State Plan, p. 14. (Emphasis supplied.)

The clear import of the language of ¶8 of the State Plan is that only when an advocate has been engaged to represent a class member is he or she entitled to be informed of and participate in the class member's IHP process. In addition, the case management system staff which is responsible for the delivery of services to class members in the community setting and the social work staff at Grafton and San Haven are required to "provide release of information forms to clients, residents, parents, and guardians to facilitate advocacy representation."

It, therefore, appears that Judge Van Sickle conditioned an advocate's participation in a class member's IHP process to those situations where the class member is represented by an advocate which typically would involve contact between the class member and advocate with the class member's or a class member's parent's or legal guardian's consent or agreement. This conclusion is supported by the requirement in ¶9 that case management system staff and the staff at Grafton distribute "release of information forms" to clients, residents, parents and guardians in order to facilitate the representation by the advocate.

If an advocate had the authority to represent class members without their knowledge and participate in IHPs without their consent, this provision in the Court's Order would be virtually meaningless. Although the State Plan does not specifically mention IEPs, a staff meeting involving a client's or resident's IEP would constitute ". . . a forum established which makes decisions significantly affecting the resident or client" within the meaning of ¶8 of the State Plan and as such the above analysis regarding IHPs applies. Thus, unless the class member or the class member's parent or legal guardian consents, a regional advocate (non-institutional advocate) has no authority to participate in a class member's IHP or IEP process for those class members located in a community setting.

In addition, absent the specific policy adopted by the Grafton State School and San Haven, the same analysis and conclusion would apply to an institutional advocate's right to participate in IHPs and IEPs relating to class members residing at these institutions.

Sincerely,

Nicholas J. Spaeth

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