

**LETTER OPINION**  
**95-L-94**

April 17, 1995

Lt. Governor Rosemarie Myrdal  
State Capitol  
600 East Boulevard Avenue  
Bismarck, ND 58505

Dear Lieutenant Governor Myrdal:

Thank you for your March 16, 1995, letter concerning the North Dakota Protection and Advocacy Project (P&A).

P&A provides advocacy and protective services for persons with development disabilities or mental illnesses. N.D.C.C. ? 25-01.3-06. P&A receives federal funds under the Developmental Disabilities Assistance and Bill of Rights Act Amendments of 1994 and the Protection and Advocacy for Mentally Ill Individuals Amendments Act of 1991. 42 U.S.C. ?? 6043, 10822, 10823, 10827. The State Auditor's office recently conducted a performance audit of P&A. See Performance Audit Report of the North Dakota Protection and Advocacy Project (March 7, 1995) (Report). Included in this audit was a review of P&A's annual program performance reports (PPRs), which describe the activities and accomplishments of P&A and which is submitted to the Department of Health and Human Services (Department). See 42 U.S.C. ?? 6006(b), 10805(a)(7). PPRs are also provided to the legislative assembly and the governor. N.D.C.C. ? 25-01.3-06(10).

Monthly case status forms are key documents supporting these annual PPRs, but were only maintained by the state office for a one-year period. Report at 31. The State Auditor has concluded that the lack of these forms for years prior to 1994 imposed a scope limitation in calculating case loads and conducting trend analysis. Report at 35. Consequently, the State Auditor completed certain tests for all of fiscal year 1994, but could only partially test three prior fiscal years based on some case status forms retained by P&A regional offices. Report at 35-36. The Report advised that:

"[I]t is [P&A's] responsibility to adhere to all federal rules and regulations which pertain to their federal funding. Since the monthly case status form supports a required federal report, [P&A] should maintain these reports in accordance with Section 42 of the Common Rule. The Common Rule requires a record retention period of three years plus the current year."

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Report at 35. "Common Rule" refers to uniform federal regulations pertaining to grants and agreements with state and local governments. See 45 C.F.R. pt. 92 (1994).

P&A responded that it kept the monthly case status reports for a period of one year pursuant to a records retention schedule developed by the Records Management Section of the Office of Management and Budget in 1989. Report at 38.

On behalf of the Legislative Audit and Fiscal Review Committee, you have requested my opinion on "whether the Protection and Advocacy Project violated state law or federal law" when it disposed of these monthly case status forms after retaining them for only one year.

Section 10 of N.D.C.C. ch. 25-01.3 provides for confidentiality of all P&A documents, records, and information subject to certain exceptions, but that chapter does not address the retention of records. State law authorizes the disposal of certain records pursuant to a records retention schedule established by the Records Management Section of the Office of Management and Budget. N.D.C.C. ?? 54-46-03 (records management program); 54-46-04(3) (preparation of retention schedules and disposal of records no longer possessing administrative, legal, or fiscal value). Each agency head is to submit schedules proposing a length of time a type of record warrants retention. N.D.C.C. ? 54-46-05(3).

In this case, P&A established a one-year retention schedule for the monthly case status forms. This schedule was approved by the Records Management Task Force, which assigns archival, fiscal, and legal values to the records. See Records Retention Schedule Form SFN-2043 (September 18, 1989). No other retention period for these records was required by the task force, which consists of the State Archivist, State Auditor, Attorney General, and State Records Manager. See Records Inventory Form SFN-2042 (September 22, 1988), North Dakota Records Management Systems Manual ? II(A)(4),(7) at 6, 9 (March 1992) (Manual). This retention schedule also indicates that the State Auditor's office required P&A's PPRs to be retained three years after the current fiscal year.

Once its retention schedule is established, an agency submits an initial records disposition request to the Records Management Section for approval. Manual, ? II(A)(8) at 9-11. P&A made its initial disposition of records, including case status forms, on April 8, 1994. See Records Disposal Authorization form approved March 15, 1994. If a record "has no further administrative, legal, or fiscal value" the records are either transferred to the State Archivist for preservation or, if not of archival value, destroyed. N.D.C.C. ?? 54-46-08, 54-46-08.1, 54-46-09. Thus, disposal of the case status forms was in accordance with the records management system established for P&A by the Records Management Section under N.D.C.C. ch. 54-46 and acquiesced in by the Records Management Task Force, which included representatives of this office and the State Auditor's office.

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Federal law requires P&A to keep and transmit annually to the Department sufficient records to disclose the amount and disposition of federal assistance and to facilitate an effective audit. 42 U.S.C. ? 6003, 45 C.F.R. pt. 92. Financial and programmatic records, supporting documents, statistical records and other records generally must "be retained for three years from [the day the grantee submits its last expenditure report or, if the grant is made quarterly, the date of the expenditure report for the last quarter of the federal fiscal year]." 45 C.F.R. ? 92.42(b)(1). If income must be reported after the period of grant support, the retention period starts from the end of the grantee's fiscal year in which income is earned. 45 C.F.R. ? 92.42(c)(3).

The Department may apply certain sanctions, including temporarily withholding cash payments pending correction of a deficiency and withholding further awards for the program, "[i]f a grantee . . . materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere. . . ." 45 C.F.R. ? 92.43(a). Whether P&A materially failed to comply with these regulations because it did not retain the case status forms for the same length of time it retained the PPRs supported by these forms is a question of fact to be determined by the Department. The State Auditor was able to obtain some case status forms from regional P&A offices and conduct certain tests for part of the three fiscal years prior to 1994. Report at 35-36. Arguably, there were enough case status report forms retained by the regional offices, if not the state office, to materially comply with 45 C.F.R. ? 92.42.

Sincerely,

Heidi Heitkamp  
ATTORNEY GENERAL

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