

CHAPTER 25-01.3
COMMITTEE ON PROTECTION AND ADVOCACY

25-01.3-01. Definitions.

In sections 25-01.3-01 through 25-01.3-12, unless the context otherwise requires:

1. "Abuse" means:
 - a. Willful use of offensive, abusive, or demeaning language by a caretaker that causes mental anguish of any person with developmental disabilities;
 - 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;
 - c. Rape or sexual assault of a developmentally disabled or mentally ill person;
 - d. Corporal punishment or striking of a developmentally disabled or mentally ill person;
 - e. Unauthorized use or the use of excessive force in the placement of bodily restraints on a developmentally disabled or mentally ill person; and
 - f. Use of bodily or chemical restraints on a developmentally disabled or mentally ill person which is not in compliance with federal or state laws and administrative regulations.
2. "Advocacy" means action to assist or represent a person or group of persons with developmental disabilities or mental illnesses in securing their rights, obtaining needed services, investigating complaints, and removing barriers to identified needs.
3. "Advocate" means an employee of the project.
4. "Caretaker" 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, or a parent, spouse, sibling, other relative, or person who has voluntarily assumed responsibility for the person's care.
5. "Committee" means the committee on protection and advocacy.
6. "Complaint" means an allegation of a violation of human or legal rights, or a lack of needed services, which is not a report of abuse, neglect, or exploitation.
7. "Developmental disability" is a disability as defined in section 25-01.2-01.
8. "Eligibility for services" means persons eligible for services of the project, including:
 - a. An adult with developmental disabilities.
 - b. An adult suffering from a mental illness who is an inpatient or resident in a facility rendering care or treatment, even if the location of the person is unknown.
 - c. An adult suffering from a mental illness who is in the process of being admitted to a facility rendering care or treatment, including persons being transported to such a facility.
 - d. An adult suffering from a mental illness who within the last ninety days was an inpatient or resident of a facility rendering care or treatment.
 - e. A child with developmental disabilities or a child with mental illness who meets the criteria of subdivision b, c, or d is eligible for advocacy services.
 - f. A child with developmental disabilities or mental illness who is not an abused or neglected child as defined in chapter 50-25.1 is eligible for protective services.
9. "Exploitation", when committed by a caretaker or relative of, or any person in a fiduciary relationship with, a person with developmental disabilities or mental illness, means:
 - a. The taking or misuse of property or resources of a person with developmental disabilities or mental illness by means of undue influence, breach of fiduciary relationship, deception, harassment, criminal coercion, theft, or other unlawful or improper means;
 - b. The use of the services of a person with developmental disabilities or mental illness without just compensation; or
 - c. The use of a person with developmental disabilities or mental illness for the entertainment or sexual gratification of others under circumstances that cause

- degradation, humiliation, or mental anguish to the person with developmental disabilities or mental illness.
10. "Facility" means a school, residence center, group home, nursing home, foster home, boarding home, or other facility operated by any public or private agency, organization, or institution, which provides services to a person with developmental disabilities or mental illness.
 11. "Individually identifiable health information" and "personal representative" have the meaning set forth in title 45, Code of Federal Regulations, part 160, section 103 and part 164, section 5-02, subsection g, respectively.
 12. "Mental health professional" means a mental health professional as defined in section 25-03.1-02.
 13. "Mental illness" means significant mental illness or emotional impairment as determined by a mental health professional.
 14. "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;
 - e. Failure by any caretaker to provide adequate nutrition, clothing, or health care to a person with developmental disabilities or mental illness;
 - f. Failure by any caretaker to provide a safe environment for a person with developmental disabilities or mental illness; and
 - g. Failure by any caretaker to maintain adequate numbers of appropriately trained staff at a facility providing care and services for persons with developmental disabilities or mental illnesses.
 15. "Other appropriate remedies" means remedies achieved through alternative dispute resolution, such as discussion, education, conciliation, and mediation.
 16. "Project" means the protection and advocacy project.
 17. "Protective services" means actions to assist persons with developmental disabilities or mental illnesses who are unable to manage their own resources or to protect themselves from abuse, neglect, exploitation, or other hazards.
 18. "Report" means a verbal or written communication, including an anonymous communication, alleging the abuse, neglect, or exploitation of a person with developmental disabilities or mental illness.

25-01.3-02. Committee on protection and advocacy.

1. The committee on protection and advocacy in its capacity of supervising and directing the project shall operate independently of the governor and any state agency that provides treatment, services, or habilitation to persons with disabilities or mental illnesses.
2. The committee consists of seven members who:
 - a. Meet federal eligibility requirements for membership;
 - b. Do not provide direct treatment, nonadvocacy services, or habilitation to address a need related to a disability or a mental illness;
 - c. Do not hold an interest, whether as an officer, director, employee, or otherwise, in an entity that provides direct treatment, nonadvocacy services, or habilitation to address a need related to a disability or a mental illness; and

- d. (1) Broadly represent persons served by the protection and advocacy project;
or
 - (2) Are knowledgeable about the needs of persons served by the protection and advocacy project.
3. The appointments and terms of committee members are as follows:
 - a. The governor shall appoint two committee members for two-year terms, beginning on August first in each even-numbered year.
 - b. The legislative management shall appoint one member from each house of the legislative assembly for two-year terms, beginning on August first in each odd-numbered year.
 - c. The governing board of the arc of North Dakota shall appoint one committee member for a three-year term, beginning August first in each year that is evenly divisible by three.
 - d. The governing board of a North Dakota nonprofit advocacy group for people with disabilities shall appoint one committee member for a three-year term, beginning on August first in each year that is divisible by three with a remainder of one. Whenever an appointment to this position is to be made, the other members of the committee shall select a North Dakota nonprofit advocacy group for people with disabilities to make this appointment.
 - e. The governing board of the mental health association in North Dakota shall appoint one committee member for a three-year term, beginning on August first in each year that is divisible by three with a remainder of two.
 4. Each committee member appointed by a North Dakota nonprofit advocacy group for people with disabilities must be:
 - a. An individual with disabilities who is eligible for services; or
 - b. A parent, family member, guardian, advocate, or other authorized representative of an individual with disabilities who is eligible for services.
 5. A member may not serve more than six consecutive years.
 6. A member's term ends on July thirty-first in the last year of the term and a member shall serve until a successor has been appointed.
 7. If any vacancy occurs on the committee, the appointing authority shall appoint an individual to fill the vacancy for the remainder of the term. If the federal government designates a member ineligible, the appointing body shall fill the vacancy for the remainder of the term. Any vacancy on the committee must be filled within sixty days after the date on which the vacancy occurs.
 8. The committee is responsible for and shall adopt rules for the administrative supervision and direction and for the planning, design, implementation, and functioning of the project.
 9. The committee shall develop a formal process to review complaints from providers or other persons concerning protection and advocacy activities.
 10. The governor, upon compliance with federal law and regulations, may redesignate the agency responsible for carrying out the responsibilities of the project under this chapter.

25-01.3-03. Director - Administrative authority.

The committee shall appoint a director, who serves at the will of the committee. The committee shall set the salary of the director within the limits of the amount appropriated for salaries by the legislative assembly. The director shall employ necessary staff, including advocates, who must be classified under the state personnel merit system. The director and other employees of the project are entitled to reimbursement for expenses incurred in carrying out their duties at the same rate and in the same manner as other state officials and employees. The director, with the advice and consent of the committee, may adopt rules for administration of the project, the conduct of its employees, the performance of its business, and the custody, use, and preservation of the records, documents, and property pertaining to the committee. The director shall submit to the committee bimonthly reports concerning the status of revenue, expenditures, and protection or advocacy efforts engaged in by project personnel.

25-01.3-04. Reporting of abuse, neglect, or exploitation - Immunity for good-faith reports.

1. Every medical, mental health, or developmental disabilities professional, educational professional, police or law enforcement officer, or caretaker having knowledge of or reasonable cause to suspect that an adult with developmental disabilities or mental illness coming before the individual providing services in that individual's official or professional capacity is abused, neglected, or exploited shall report the circumstances of that abuse, neglect, or exploitation to the project. For the purposes of this section:
 - a. "Educational professional" means a professional providing educational services either at a school, academy, or other educational facility, or at a private facility or residence, as a teacher, professor, tutor, aide, administrator, or other education professional.
 - b. "Medical, mental health, or developmental disabilities professional" means a professional providing health care or services to persons with developmental disabilities or mental illnesses, on a full-time or part-time basis, on an individual basis or at the request of a caretaker, and includes a physician, medical examiner, coroner, dentist, optometrist, chiropractor, nurse, physical therapist, mental health professional, hospital personnel, nursing home personnel, congregate care personnel, social worker, or any other person providing medical, mental health, or developmental disabilities services.
2. An individual not listed in subsection 1 having knowledge of or reasonable cause to suspect that an adult with developmental disabilities or mental illness is abused, neglected, or exploited may report those circumstances to the committee or the project.
3. An individual other than the alleged perpetrator participating in good faith in the making of a report, assisting an investigator, furnishing information to an advocate or other employee of the committee, or in providing protective services under this section, is immune from any liability, civil or criminal, that otherwise might result from the reporting of the alleged case of abuse, neglect, or exploitation.

25-01.3-05. Retaliation - Presumptions - Penalty.

1. An employer that imposes any form of discipline or retaliation against an employee solely because the employee reported having knowledge of or reasonable cause to suspect that a person with developmental disabilities or mental illness was abused, neglected, or exploited is guilty of a class B misdemeanor.
2. A rebuttable presumption that retaliation has occurred arises when an adverse action is taken within ninety days of the report. For the purpose of this subsection, "adverse action" means any action taken against the reporter or the person with developmental disabilities or mental illness about whom the report was made by a facility or person involved in a report because of the report. Adverse action includes:
 - a. Discharge from or termination of the employment of the employee.
 - b. Demotion, negative work performance evaluation, reduction of hours worked or benefits or work privileges, or reduction in remuneration for services of the employee.
 - c. Restriction or prohibition of access by the employee to a facility or to the residents of the facility.
 - d. Discharge or transfer of the person with developmental disabilities or mental illness from or within a facility or from the supervision of a caretaker.
 - e. Failure of a facility to perform customary services for the person with developmental disabilities or mental illness.
3. It is a defense to any charge brought under this section that the good faith of the individual making the report, described in subsection 3 of section 25-01.3-04, has been rebutted, but only as to actions taken against the employee.

25-01.3-06. Authority of project - Annual report.

1. Pursuant to rules adopted by the committee, the project, within the limits of legislative appropriations, shall provide advocacy and protective services for persons with developmental disabilities and persons with mental illnesses. The rules adopted by the committee relating to the need for the consent of the client must balance the rights of persons with developmental disabilities or mental illnesses to privacy and to refuse services under section 25-01.3-11 with the committee's duties to protect the human and legal rights of persons eligible for services and to monitor facilities for compliance with federal and state laws and rules.
2. The project may:
 - a. Represent persons with developmental disabilities or mental illnesses so the persons may realize the rights and services to which they are entitled.
 - b. Investigate complaints and reports if the alleged incidents are reported to the committee or the project or if there is probable cause to believe the incidents occurred.
 - c. Monitor individual habilitation or treatment plans, program plans, educational plans, facilities and programs, and all other services and care provided to persons with developmental disabilities or mental illnesses.
 - d. Employ counsel to represent clients to pursue legal, administrative, voluntary compliance, and other appropriate remedies to ensure the protection of the rights of persons with developmental disabilities or mental illnesses, and employ counsel to represent the project or the committee when, in the opinion of the attorney general, a conflict of interest under the North Dakota Rules of Professional Conduct exists between the office of attorney general and the committee or the project, and the conflict cannot be avoided by the appointment of counsel under subsection 3 of section 54-12-01 or section 54-12-08.
 - e. Pursue legal, administrative, voluntary compliance, and other appropriate remedies to ensure the protection and the rights of persons with developmental disabilities or mental illnesses. Before instituting legal action in a federal or state court on behalf of a person with developmental disabilities or mental illnesses, the project shall exhaust in a timely manner all administrative remedies if appropriate. If, in pursuing administrative remedies, the project determines a matter with respect to that person will not be resolved within a reasonable time, the project may pursue alternative remedies, including the initiation of a legal action with the consent of the committee. However, exhaustion of administrative remedies is not a prerequisite to initiation of a legal action if that action is instituted to prevent or eliminate imminent serious harm to a person with developmental disabilities or mental illnesses.
 - f. Sign a criminal complaint necessary to protect the interests of a person with developmental disabilities or mental illness, or group of persons with developmental disabilities or mental illnesses, who appear to have been victimized by or subjected to criminal conduct.
 - g. Review each annual survey report and plan of corrections for cited deficiencies made pursuant to titles XVIII and XIX of the Social Security Act with respect to any facility rendering care or treatment to persons with developmental disabilities or mental illnesses.
 - h. Provide the public, on an annual basis, an opportunity to comment on the priorities established by, and the activities of the committee.
 - i. Establish a grievance procedure for clients or prospective clients to ensure persons with developmental disabilities or mental illnesses have full access to the services of the committee.
 - j. Prepare an annual report to the legislative assembly and the governor describing the priorities, activities, accomplishments, and expenditures of the system.
 - k. Provide information on and referral to programs and services addressing the needs of persons with developmental disabilities or mental illnesses.

- I. Accept and administer gifts, grants, or contracts with individuals or organizations, including the federal government, on such terms as may be beneficial to the state.
 - m. Contract with any person, public or private, to carry out any responsibilities of the project under this chapter and section 25-01-01.1.
3. The project shall use the report, complaint, and investigation process to assess the opportunity for voluntary compliance and other appropriate remedies.

25-01.3-07. Access to records, facilities, and persons - Rules.

A caretaker shall provide the project access to the person with developmental disabilities or mental illness and to the facility where the person resides. The committee shall adopt rules regarding access to the records of a client for the purpose of investigating complaints or reports and monitoring service delivery systems. Any rules adopted under this section must comply with subsection 4 of section 25-01.2-03, section 25-16-07, 42 U.S.C. 6042, and 42 U.S.C. 10805.

25-01.3-08. Investigation of reports and complaints.

1. Upon receipt of any report of suspected abuse, neglect, exploitation, or a complaint made pursuant to sections 25-01.3-01 through 25-01.3-12, the project shall assess the need for an investigation of the report or complaint. If the project determines the report or complaint is warranted, the project shall investigate or cause the report or complaint to be investigated. For the purpose of investigating a report or a complaint, the project may:
 - a. Interview the alleged victim who has developmental disabilities or mental illness at any time of the day or night, with or without notice.
 - b. Interview any other individual who may have knowledge of the situation.
 - c. Access all locations under the control of the caretaker where records or other information exist, including the residence of the alleged victim.
 - d. Coordinate investigations with other agencies, departments, or other entities providing services necessary or advisable for the person with developmental disabilities or mental illness.
 - e. Delegate investigatory powers to the extent necessary and appropriate to any individual or entity.
2. This section does not limit the responsibilities of law enforcement agencies to enforce the laws of this state or preclude law enforcement agencies from investigating, as appropriate, any alleged criminal conduct.
3. This section does not prohibit the project from assessing the opportunity for voluntary compliance and other appropriate remedies in the course of investigating a report or complaint.

25-01.3-09. Conflict of interest.

In any situation in which the project is representing, or has been requested to represent, two or more persons with developmental disabilities or mental illnesses, if those persons have conflicting interests in the matter for which the project is requested to act, the project may provide services to the first person making application for services for that purpose. Any additional person, with conflicting interests, may be referred to another agency or individuals for assistance.

25-01.3-10. Confidentiality and privileged information.

1. All information relating to an individual with a disability, including individually identifiable health information, that is in the possession of the committee, project, or any advocate is confidential and is not subject to disclosure, except:
 - a. If an authorization for disclosure is given in writing by each individual with a disability who may be identifiable from the information, or that individual's personal representative;
 - b. In a judicial proceeding when ordered by the presiding judge;

- c. To a law enforcement officer for a law enforcement purpose, a health oversight agency, or, at the discretion of the committee, to any other legally constituted board or agency serving the interests of an individual with a disability for any other purpose authorized by this chapter, or any other state or federal law; or
 - d. To the parents of a minor who is an eligible person under sections 25-01.3-01 through 25-01.3-12 or legal guardians of the person with a disability except that no information may be disclosed to a person with mental illness who is the subject of the information when such a disclosure is prohibited by state or federal law.
2. Unless ordered by a court of competent jurisdiction, the name of an individual who in good faith makes a report or complaint may not be disclosed by the committee or the project.

25-01.3-11. Refusal of services - Alternatives.

If a person with developmental disabilities or mental illness refuses an offer of services from the project and, in the judgment of the project, the person's life, safety, or health is seriously jeopardized, the project may petition a court of competent jurisdiction for the appointment of a guardian or conservator. The project may also refer the matter to an appropriate agency, department, or authority for possible civil action on behalf of the person with mental illness or developmental disabilities, or for criminal prosecution of any individual abusing, neglecting, or exploiting a person with mental illness or developmental disabilities.

25-01.3-12. Penalties.

1. A person who permits or allows the unauthorized disclosure of reports or complaints obtained under sections 25-01.3-01 through 25-01.3-12 is guilty of an infraction.
2. A person who willfully fails to report the abuse, neglect, or exploitation of any person with developmental disabilities or mental illness, if required to report pursuant to sections 25-01.3-01 through 25-01.3-12, is guilty of an infraction.