2017 SENATE HUMAN SERVICES

SB 2116

2017 SENATE STANDING COMMITTEE MINUTES

Human Services Committee
Red River Room, State Capitol

SB 2116
1/11/2017
Job Number 26788

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature	Mara Johnson

Explanation or reason for introduction of bill/resolution:

A bill relating to the disclosure of patient records relevant to an assessment of reported child abuse or neglect.

Minutes: Attachment: 1

Chair Senator J. Lee: Opened the hearing on SB 2116.

Marlys Baker, Department of Human Services: Testified in support of SB 2116 (See Attachment #1).

Senator Piepkorn: What is the problem that caused you to draft this bill to change the law?

Marlys Baker: There have been several cases brought to our attention where county social service agencies are conducting an assessment and are unable to access the records that would provide evidence whether the child's condition is the result of child abuse or neglect.

Senator Piepkorn: Has this led to child endangerment?

Senator J. Lee: No but it makes their work harder. Although the law allows them to release information, providers don't release anything because they don't want to violate privacy or HIPPA regulations.

Senator Anderson: If the county social services receive the information, when does the information become public record if the case goes to court?

Marlys Baker: Once the records are received, they're confidential but the law allows for release of confidential records under certain exceptions in the current law.

Senator Anderson: But how would the records be kept confidential once the court proceeding begins?

Marlys Baker: The court proceedings in child abuse or neglect situations are closed proceedings. However, they follow the rules of evidence and the parties are entitled to have any information upon which the department based a decision.

Senator Larsen: Who will see the records?

Marlys Baker: When a report of suspected child abuse or neglect is received by county social services, it is generally assigned to a child protection services worker. That worker is responsible for collecting information about that report. The record is shared as necessary for determining child abuse and neglect and appropriate services for the family. That includes the regional supervisor and can also include the court, the state's attorney, the office of administrative hearings, and the attorney general's office.

Senator Anderson: Sometimes in cases where there is contention between spouses with a child, it is not uncommon for the health care provider to receive an administrative subpoena from an attorney. They can look like legitimate requests but that attorney has no right to the records until the judge issues an order for the records. If the law is clarified, it will make it easier for them to issue the records appropriately.

Senator J. Lee: We have children advocacy centers in ND that deal with sexually abused children and do forensic interviews and then the child does not have to appear in court.

Senator Piepkorn: Is it a dangerous job for the interviewer?

Marlys Baker: Yes, it can be. We have instructed the county workers that if they know in advance that their safety could be threatened, they should contact law enforcement to accompany them.

Senator J. Lee: Could you share with the committee what has happened to the foster care load with the continued problems with substance abuse?

Marlys Baker: The child abuse and neglect numbers continue to climb. There has been a 40% increase over the last five years and the numbers of children placed in foster care is growing with the largest number of children being infants and toddlers.

Senator Kreun: These records we're potentially utilizing in litigation; after the litigation is finished, who is in control of those records?

Marlys Baker: Following the conduct of an assessment, the records that support the work of the assessment are attached to that assessment in the electronic data system where they're maintained according to the records retention schedule. If there is not abuse or neglect found, then the paper record is destroyed after three years. If there is abuse or neglect found, the paper record is destroyed after ten years. Currently our data system does not purge the records.

Committee Discussion: The committee discussed the medical records of children in abuse situations and the process by which the records were handled and processed. Senator Kreun asked if the parents would have access to the records. Miss Baker said there were exceptions

that allowed parents to access the records pertaining to their child but records pertaining to the other parent are confidential. Miss Baker confirmed each assessment was separate and an additional report require additional records. If the records remain relevant, records can be accessed from past reports.

(19:28) **Kim Jacobson, County Director, Trail County Social Services:** Testified in support of SB 2116. Miss Jacobsen offered to answer any questions the committee had about county administration of child protective services.

Chair Senator J. Lee: Closed the hearing on SB 2116.

Senator Anderson: Moved Do Pass.

Senator Larsen: Seconded the motion.
A bill to provide for suspension of certain provisions of the North Dakota Century Code; provide a contingent expiration date; and to declare an emergency.
Vote held for Senator Heckaman. Her vote is recorded on Job Number 26813, meter mark 45:22, voted yes.

A Roll Call Vote Was Taken: 7 yeas, 0 nays, 0 absent.

Motion Carried.

Senator Piepkorn will carry the bill.
Chair J. Lee: closed the hearing.

Date: 1/11 2017
Roll Call Vote #: 1

2017 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2116

Senate Human Services Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Sen. Anderson Seconded By Sen. Larsen

Senators	Yes	No	Senators	Yes	No
Senator Judy Lee (Chairman)	X		Senator Joan Heckaman	X	
Senator Oley Larsen (Vice-Chair)	X		Senator Merrill Piepkorn	X	
Senator Howard C. Anderson, Jr.	X				
Senator David A. Clemens	X				
Senator Curt Kreun	X				

Total (Yes) 7 No 0

Absent 0

Floor Assignment Sen. Piepkorn

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2116: Human Services Committee (Sen. J. Lee, Chairman) recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2116 was placed on the Eleventh order on the calendar.

2017 HOUSE HUMAN SERVICES

SB 2116

2017 HOUSE STANDING COMMITTEE MINUTES

Human Services Committee
Fort Union Room, State Capitol

SB 2116
2/15/2017
28397

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Judy Kepple

Explanation or reason for introduction of bill/resolution:

Relating to the disclosure of patient records relevant to an assessment of reported child abuse or neglect.

Minutes: 1, 2,

Chairman Weisz: called the committee to order and opened the hearing on SB 2116.
Is there testimony in support of SB 2116?

Marlys Baker, Child Protection Services Administrator
(Attachment 1)
3:09
Chairman Weisz: Are there questions from the committee?

Vice Chairman Rohr: Can you define for me who are the authorized agents?

M. Baker: Yes, under current code the department's authorized agent is county social services unless otherwise deemed by the department.

Representative Devlin: What option do you have now? Do you go to court to get these records? This is a very broad request. Do you go to court to force one of these providers to release this information?

M. Baker: We typically start low key and offer up the attorney general's opinion from 1994. When the response is negative then we explore with the local state's attorney the option of trying to subpoena the record or get a court order to release it.

Chairman Weisz: Further questions from the committee?

Representative Skroch: Are you experiencing a problem with this that you feel it has to be addressed in law? Do you have cases where you feel a medical facility is hiding something that occurred and the information is being withheld and you feel it is relevant to a case?

M. Baker: That is what is being related to me by the county social sevice offices. Not that they are hiding something, but the facilities are uncomfortable with releasing the record unless there is clarity that covers their liability should they do so.

Representative Skroch: Do you have numbers to support this? How many cases where you have had difficulty getting this information?

M. Baker: I do not have data in terms of numbers as to how often that is happening state wide. What I do understand is that it is a stance taken by one particular hospital and the other hospitals are now following suit.

Vice Chairman Rohr: So if this goes into law you wouldn't have to go to court to get permission to get these records. Is that what this is saying?

M. Baker: Yes, that is what it is saying.

Representative McWilliams: If a child goes to the ER and someone says there is a possible case of abuse or neglect the social services automatically have the right to go in and get those medical records? Does there have to be a previous court action to be able to do that?

M. Baker: When a child is seen in the ER and there is a suspicion of child abuse or neglect, the medical personnel are mandated by law to make a report of that suspicion to the county social service office. The office is then mandated by law to conduct an assessment of that suspicion of abuse or neglect. The information can often be obtained verbally from the physician at the time of the initial report. The problem comes in later when the record is requested and the hospital is reluctant to release it.

Representative McWilliams: Once you obtain those record, who evaluates that medical record and to what end is used?

M. Baker: The medical record is often used as evidence whether abuse or neglect has occurred or not. The interpretation of medical records is left to physicians and those with that expertise. For instance, the county worker would receive the record, review it, would go back to the medical provider with questions that would assist the child protection teams and the regional supervisors to make a correct determination on whether a child had been abused or neglected under the definitions in the statute.

Representative Skroch: Do you ever have cases where an outsider, outside of the medical facility, report suspected abuse. Does that give you the right to get the medical records?

M. Baker: Yes, under statute we much accept all reports of child abuse or neglect no matter who files them. The necessity of requesting a medical record is mostly determined by the type of abuse or neglect that is being discovered in the assessment process. Let's say that a neighbor reported that their neighbor is not supervising their child. Unless there is some condition of the child that is impacting that situation, there would not be a major request for that child's medical records.

Vice Chairman Rohr: Do you have any numbers of cases reported in the last year and how many were substantiated as true?

M. Baker: I don't have statistics about false reports. Typically, we differentiate between whether a report was made in bad faith with some motive other than concern for the child. This would be like an unsupported report after an assessment the evidence just doesn't rise to the level of meeting the definition of abuse or neglect. I do have some numbers that I can give you. In 2015 there we 13,700 reports of suspected abuse or neglect. Of those, there were 3,790 that were assigned to a county worker and full assessments were done. A full assessment means that there was a decision made at the end as to whether abuse or neglect occurred. The percentage of those reports that resulted in a finding that services were required due to abuse or neglect, is 25.5%. The number being 965 that were confirmed abuse or neglect.

Representative McWilliams: Suspected abuse. If a child is playing outside and he has a couple of bruises and the neighbor called the department and you do a bit of investigating. Does that automatically give you the right to look at the medical record based on that? What I am getting at is that it seems like the threshold is getting really blurred in this bill. It seems like in a case where a child was playing outside and had a couple bruises on his back may indicate that he had a bike accident or fell out of a tree. Would such an incident trigger for one of the 13,000 people across the state the possibility of social services come and take a look at their medical records just to check up on them.

M. Baker: I don't believe it would result in the obtaining of medical records for 13,000 people. The bill specifies that the records must be relevant. There would be many steps taken in the assessment of that type of report before it could be determined whether medical records were truly relevant. Certainly children receive bruises on a regular basis from normal play, so part of the assessment process would be to determine how those bruises occurred. Often with simply asking the child how the bruises happened. Children who say fell off my bike and the neighbor may say yes, I saw him fall off the bike or the sibling may say yes he fell off his bike and Mom may say he fell off of his bike. That would not prompt a request for medical records.

Representative McWilliams: At the age of 8 some stranger showed up at my door and my mother always told me to go inside and lock the door. I can just imagine a social worker coming up and that leading to an escalation. It seems like in this bill there are no steps outlined to get to these medical records. I understand the practical application, but it seems that this bill is a little odd to me.

M. Baker: The bill in and of itself would seem broad, however, within the statutes there are other definitions of abuse, neglect, assessment, and then in addition to that we have administrative rules and also program policies. They outline for the county workers the step by step process that would be expected of an assessment and the relevancy of the medical record.

Representative Kiefert: One thing I don't like about this whole process is that there doesn't have to be any evidence. Someone can just cause trouble for someone by saying they suspect abuse or neglect and start an investigation. Some people going through a divorce

and the other party reported a suspected child abuse. There doesn't have to be evidence. It just takes a phone call and off they go. It seems like it is kind of too easy to get things rolling when there is no evidence at all.
16:56
Chairman Weisz: questions?

Chairman Weisz: Further testimony in support of SB 2116?

Kim Jacobson, Director of Traill County Social Services
(Attachment 2)

21:22
Chairman Weisz: Questions for Ms. Jacobson?

Representative Porter: On page 2 of the bill, since it is your agency that is the authorized agent, give me an example of where you think this authorization is deemed relevant.

K. Jacobson: As I interpret that section, we would receive a report, we would initiate the assessment process. We would talk to several individuals. If there was an indication that there was something that needed to be examined to help with the assessment process that indicates that a child has been harmed in some way medically or psychologically and if the medical record would be helpful in substantiating that, then that information would be gathered. It would only be after other steps were taken and then it was deemed necessary to substantiate. It certainly wouldn't be with every assessment.

Representative Porter: Would you view it as at a level of probable cause?

K. Jacobson: Probable cause is a legal term that is reserved for the courts, but in our eyes it would be determined to be absolutely relevant. If could there be a natural cause or a concern. We need to depend on the medical provider to indicate really what is the severity of that injury and could it have been caused by a bike accident, or by something biological or was it really abuse or neglect.

Representative Porter: Inside of that reporting process, are they not already required to tell you why they suspect neglect or abuse on that report form?

K. Jacobson: Yes they are mandatory reporters, but that is a written report and sometimes it doesn't answer all of the questions that we may have. We may need to gather additional information to provide clarity to make sure we have an accurate understanding of the concerns that are being raised. We may learn more through those collateral contacts that were made that prompt further questions. Also with the services required decision, that is something that can be appealed. If that decision would be appealed, we would need documentation on file to substantiate the decision that would be made.

Representative Porter: Inside of innocent until proven guilty doesn't apply. It is my child, it is my medical record, but you can seem to want to skip the steps and go directly to the ability to access what is mine and I would not have any rights to say that you are not proving yourself and inside of the whole due process you are skipping steps that are currently kind

of protected. We have the whole mandatory reporting, we have given you as the agent the ability to investigate and look at any claim and now we're kind of taking that next big step in giving you access to things that are currently protected under due process. You are wanting to take a short cut to that rather than doing it legally. You are asking us to give you a short cut. I am having a hard time agreeing with your short cut.

K. Jacobson: We are not asking for a new step; we are just asking for clarification. There has been an attorney general's opinion on the matter that says those records are assessable. There has been previous practice for many years allowing that. It is just at this time medical providers are just asking for clarification to be sure they are protected if they provide that information. It has been a longstanding practice, so it is not meant to be a shortcut. It is to be in the child's best interest, because if a parent did cause harm, they may want to hide records and that would hinder the process of the investigation and trying to protect that child.

Representative Porter: That is part of the risk you take when you open up a section of the Code that we may or may not have ever had testimony on or may or may not have ever looked at on how it was being utilized and how it was being implemented. Inside of the mandatory reporting requirements, if there was enough evidence to need those records, you could go to a judge to get a subpoena or a search warrant for those records and allow the individual to have some rights rather than bypass somebody's rights to get those records. I am not sure I am understanding why you deserve this shortcut.

Vice Chairman Rohr: How long does it take to get a court order to get those records?

K. Jacobson: That would depend on the jurisdiction. In Traill County we share judicial referees with Cass County so the wait can be significant for us. Which depends on the scheduling and how they would prioritize it. Typically, we haven't had to subpoena for the particular items, so it would take the time of the state's attorney to prepare the document, forward it to the court, the court to hear it, make a ruling, issue an order and the result to be able to attain the records and then to be able to assess them. We are time limited as to how long an assessment can be open as well.

Representative Seibel: In your testimony you go through the information gathering and do the risk assessment and determine that a services required recommendation is rendered. Then you stated at that time a referral is made and the name of the subject is placed on the child abuse index which is used for background checks. Is that done immediately or after the court has found this person guilty?

K. Jacobson: There are two components of that testimony. One is for potential court intervention, like the court would intervene to protect the child. That doesn't happen in all situations. Sometime the referral is just made to juvenile court, so that it is on record and then if there would be a continued pattern of abuse and neglect the court may use that to intervene. The name of a subject placed on the services required child protection index happens in every services required case. That name is forwarded. If that person was from Traill County and it was determined services required that name would go on an index and that name would remain there for 10 years. If they applied for a job and needed background checks done it may impact them. That is why it is important that we have accurate

information because there is consequence for that.

Representative Seibel: So it is you that is placing that name on the list, not the court.

K. Jacobson: The name is forwarded to the court and from that point the name is forwarded to the index. It is through the assistance of the county social services, the regional supervisor, and the court.

Representative McWilliams: In Ms. Baker's testimony she gave us some numbers as to how many child abuse cases there were and it seems to be about 947. Do we know how many of those cases involved physical abuse.

M. Baker: I do not have those numbers, but I can provide them.

Representative Skroch: In cases of SIDS death I know of stories where people were put in prison and not even get to go the funeral? In these cases, when someone might have their name put on a list that would show up in a background check, is there a way to get your name off that list? I am guessing it would be a difficult process. Do you have that process in place so they can have their name removed from that list? Is it a direct court order to put that name on that child abuse list?

K. Jacobson: There is an appeal process that would be available to that individual if they felt the determination was inaccurate. That appeals process is overseen by the department and it includes an administrative law judge in rendering that decision. So there is that process available to individuals who choose to appeal. The second part of your question was whether it was a direct court order to have the name placed on the list.

Representative Skroch: So there is that process. What would be the process of clearing their name after it has been out there in public?

K. Jacobson: The index is held confidential, but is used for background purposes. The details related to that is not public information. There would just be a finding of abuse and neglect on the background check. I don't know if there is a process to get your name off of the list outside of the department.

Chairman Weisz: Further testimony in support of SB 2116

Jonathan Alm, Attorney with the Dept. of Human Services
This is an administrative process it is not criminal action or proceeding, so we are not looking at all of the criminal code and the protection that is needed for the criminal defendant because of the threat of jail or prison terms. This is strictly administrative. They still have their ability to appeal the decision, go up to the administrative law judge, go up to the district courts and you could even go to the ND Supreme Court. The current law as to how we have been interpreting it and how the attorney general's office has been interpreting is that it allows healthcare providers to disclose information to us upon request. There is current statute and it talks about any privilege regarding a professional relationship is waived in child abuse and neglect situations. That is what those two opinions from the attorney general's office address. Just recently one healthcare provider has taken a different look at it. I have reached out to that

provider in the last 2 years and we have worked with that healthcare provider, talked to legal counsel, some of the risk management individuals and even a local executive here. We have shared disclosed information to them and they have not objected to what we are presenting today. They provided some feedback and it appeared that they were all good. They wanted to be clear that the law says that it is required to make that disclosure.
As far as adding "deemed relevant", that was based on a review. The attorney general's office added that. They thought it was better to have that in there instead of just relevant.

Vice Chairman Rohr: They don't have any criteria that would make it deemed relevant.

J. Alm: Correct. We don't have in this statute what is deemed relevant. We could look at administrative rules and add that and clarify what "deemed relevant" is or we could set forth in our policy what it would be.

Chairman Weisz: Further testimony in support? Any opposition?
Seeing none, we will close the hearing on SB 2116.

Closed the hearing on SB 2116.

2017 HOUSE STANDING COMMITTEE MINUTES

Human Services Committee
Fort Union Room, State Capitol

SB 2116
3/6/2017
28759

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Judy Kepple

Explanation or reason for introduction of bill/resolution:

Relating to the disclosure of patient records relevant to an assessment of reported child abuse or neglect.

Minutes:

Chairman Weisz: This is the one that has to do with the CPS to get a hold of the medical records to investigate a child abuse claim. There was some concern. There are a couple of counties that are not cooperative. There certainly are some issues about how much information should be available.

Representative Porter: I had asked Jon Alm to put some amendment language to limiter in place. The way this reads not only can they get the medical records of the child, but they can get the medical records of anyone else too. That was not their intent. There other component was relevant medical records that have to do with a specific incident rather than a blanket release of medical information. He was working on something, but I have not seen it yet.

Chairman Weisz: I was hoping you had something from him.

Vice Chairman Rohr: I also shared the email from a psychiatrist in Dickinson that thinks this is over reach in terms of the various entities that they had put in this bill.

Chairman Weisz: Ok, committee. If anyone has anything on this bill let us know.

Representative Skroch: One of the concerns that I had was that if there was an appeal process and challenged it, it was their department that handled the appeal. If got put on that list falsely you couldn't get your name off for 10 years.

Chairman Weisz: I guess I am missing something here about a background list.

Representative Skroch: "The subject is placed on a child abuse index that is used for background check purposes for 10 years". I asked how you could get your name off of it and it was only through an internal appeals process that they oversee.

Chairman Weisz: If you want to follow up on that with Kim, go ahead.

Chairman Weisz: Hopefully the amendments from J. Alm will address some of the open endedness of this bill.

Representative Skroch: So we are not going to be able to kill this bill?

Chairman Weisz: We can always kill it.

Chairman Weisz: We will hold this aside until we see the amendments and then the committee can decide what it wants to do.

2017 HOUSE STANDING COMMITTEE MINUTES

Human Services Committee
Fort Union Room, State Capitol

SB 2116
3/7/2017
28832

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Judy Kepple

Explanation or reason for introduction of bill/resolution:

Relating to the disclosure of patient records relevant to an assessment of reported child abuse or neglect.

Minutes: 1,

Chairman Weisz: Opened the discussion on SB 2116. (Attachment 1)
Ok, everyone has a copy of the amendments now. There were concerns about the language being extremely broad. They would be able to pull any records they wanted. This does narrow it down. It eliminates the language "deemed". It wouldn't be deemed relevant, it would have to be relevant. It inserts "The request for records must be limited to the minimum amount necessary to enable a determination to be made or to support a determination of whether services are required to provide for the protection and treatment of an abused or neglected child".

Representative Skroch: I must have asked this question, but the medical personnel are already required to report suspected abuse or neglect, right? Where does that report go? Does that go into the court system or where?

Chairman Weisz: There is a long list of providers that are required to report. They have to report anything that they feel is suspicious or may be indicative of abuse or neglect.

Representative Skroch: Where are all of those reports channeled? Social services?

Chairman Weisz: Social services are the ones that get the report and then they determine if it should go on. Then they would do the investigation.

Representative Skroch: Then the question that I have is that if they decide to have an investigation, are they then able to obtain these same records through the subpoena or the court system now?

Chairman Weisz: Currently they are able to get those records. Current law says, "they shall disclose to the department upon request the records of a patient or client which are

relevant to an assessment of child abuse or neglect". That is current law. The issue is that some of the providers wanted clarification on whether they can or should be providing that information, because it is protected information. They were afraid of getting sued. The point is that it has to be reported and they have to investigate. Most of them are not substantiated. Out of 13,700 only 3700 go on to be considered investigated. But they are saying that without those records they can't really determine whether there was abuse or neglect or if the person was needing to be exonerated. It's fine line between being on a witch hunt or do you really need those records. Do 5 missing teeth go with a bicycle accident or was it someone smashing their face against the countertop? I certainly struggle with this, because it is a fine line between intruding on parents, but if you can't get the information how can you investigate possible child abuse or neglect?

Representative Skroch: Is there any other way for them to get that information if we don't pass this bill?

Chairman Weisz: They would have to go through the state's attorney. Many of them don't reach the level of criminal they go to the level of services required. If they go through the courts then it becomes criminal.

Representative Skroch: The state's attorney is on that team and they can operate through that channel.

Chairman Weisz: Yes, but they want the access so they can see if it really rises to that level or not. Many of these are just services required. They never go to court. They don't get law enforcement involved.

Representative Schneider: It is better for the parent to not have the state's attorney involved. They might be able to settle with family services in a way that would keep them from a criminal charge. If they can get the records and fix it with services instead of getting the law involved. I would take out the word "minimum" on line 3 of page 2. We need to take care of the children who are not able to speak for themselves. Sometimes it is easy to cover up abuse and neglect. We need to err on the side of the vulnerable. The only problem I have with this amendment is on page 2 line 3 I would take out the word, "minimum". When you don't know what's in there how do you know what is minimum or maximum? Putting in that minimum puts in the fear of liability and other things that come with that word. Just to keep in mind too, the child protective services already start with a disadvantage when you are comparing the rights of a parent and a child, because children are not usually good advocates for themselves or natural advocates against their abuser. They are subject to fear and threat that you can't really determine by talking to them or having a police officer talk to them. We should be erring on the side of protecting the children, especially when we look at the statistics. It doesn't look like there are very many witch hunts getting through here. We had 13, 700 allegations and 3700 of them get full assessments and then only a quarter of those that get full assessment are confirmed abuse or neglect. A lot of times that is because abuse and neglect cases are easy to cover up and there aren't a lot of records. They don't take them to someone that is a mandatory reporter.

Vice Chairman Rohr: In the testimony we received from social services she says that the medical records are not relevant in every assessment, they are extremely valuable in some cases. So my thought is that these providers that aren't releasing this information is because there have been cases where it was not needed and they have been sued. This is shifting the accountability over to the social services department.

Chairman Weisz: I don't know if I am understanding you. The medical provider doesn't have any idea what happens to that case. They just report it are they're done. How would they even know what happens to the case?

Vice Chairman Rohr: If the social service determines that they need the records to investigate the case, they would have to contact the medical records department of that facility. So they release that information and then it goes through an investigation and the parents don't know about this right away. So they determine that there are no services required. It is a false report. Can the hospital get sued then for releasing that information?

Chairman Weisz: That is kind of the intent of this bill. To protect facilities. We have to be clear. The department has to investigate a report. No matter how bogus it might be or if it is vindictive or anything else. The department has to initially investigate it. If they find some grounds they are going to go forward. The question is did the facility have the authority to provide the records. This bill says the department has the authority to request the records, so that takes the provider off the hook. The question here for the committee seems to be discussion is should the department have access to the records. If we say the shouldn't, then how do they investigate?

Representative Damschen: If there was not enough evidence in the medical records as they exist, how are the records going to help. If there wasn't evidence there for the doctor to report it previously.

Chairman Weisz: Here is an example. Johnny seems to be showing up at school with a lot of bruises and the teacher sees all of that. Then he shows up with a broken arm. The doctor doesn't see anything except the broken arm, so that doesn't trigger any report. Then the department gets the report and investigates and realizes that Johnny has a broken arm. They will want the medical records to see how that arm was broken to see if it shows what happened. That doesn't mean the doctor would report anything, but even If he does, that it doesn't mean that the records of that person are automatically turned over. He is just a reporter just like everyone else. The department still has to come in and request the records. The doctor doesn't just turn over the records because he thinks there is a change of abuse. It only depends on what the charges or suspicions might be. If the kids are cold and don't have coats, etc. That would not necessarily be relevant.

Representative McWilliams: If a teacher and maybe a doctor and a football coach are all reporting back. Is there a system now that track those reports and develops a care? Does it have a cumulative effect that and eventually adds up or is each report separate?

Chairman Weisz: Each report requires an investigation. Maybe they just need to substantiate the facts before they can make a decision. What it comes down to is whether

or not you think the department should have access to the records to do their investigation if it is needed.

Representative McWilliams: I guess I like the amendment then.

Vice Chairman Rohr: I want to read to you what I received from a psychologist. "SB 2116 requires all medical, mental health professionals, hospital or medical healthcare clinic to release upon request any records to the social services if there is an abuse or neglect investigation occurring. However, the disclosure is not limited to just abuse or neglect info since the social services gets to determine what is relevant from the records. They can only do this after reviewing the contents of the records. This bill should be killed as it would be harmful to the privacy of patients. This requirement is open records to the social services is in addition to and far beyond the requirements to report suspected abuse or neglect."

Chairman Weisz: That is what the amendment does. It limits it to information pertinent to the investigation. Committee what do you want to do?

Representative Skroch: I direct this to Representative Schneider. Can you as an attorney define allegations? For example, "sufficient allegations to determine that there should be an investigation and reason to seek medical records etc.

Representative Schneider: Are you looking at particular language? Allegations are just statements that content a certain thing. They don't rise to the level of proof and they are not sufficient on their own to do anything except trigger an inquiry really. The testimony said there were 13,700 abuse allegations and there it would mean a reporting of an abuse that is not proven. It is a statement without support of proof. I guess I think that abuse is under reported and under assessed. Some of that comes from a cautiousness that I am hearing in this room which is a good thing in many ways, but when there are allegations of abuse against vulnerable people that can't fight for themselves like children, I found that there should be more inquiry and more assessment. Many times that doesn't happen because you hit dead ends.

Vice Chairman Rohr: They said there were 13,700 reports of abuse or neglect. Of those 3790 were assigned to a caseworker to investigate, so when are the records be accessed? At the 13, 700 level or the 3,790 level? Of those 3,790 only 965 of those were actual abuse cases.

Chairman Weisz: They would be looking at the medical records of the 3,790. That is when they are going to do it. The 13,700 are received. They make a couple of phone calls and they find there is nothing to it and they let it go. They get a lot of different kinds of reporters.

Representative Damschen: Is there going to be a temptation to go beyond the two phone calls and abuse this power?

Chairman Weisz: I think that if that was going to occur it would be happening now. I don't see this bill changing that. I guess it would depend on the social worker that has it. Also on the other side is where were they and why didn't they protect that child.

Representative McWilliams: Is there any way to determine how many individuals or cases this bill would have effected? How many child abuse cases this bill would have solved or had evidence toward? Do we have any statistics on that?

Chairman Weisz: I think it would be very hard to determine that if you had gotten more information the outcome would have been different.

Representative McWilliams: Do we have anything that says this is the number of times someone has been turned away from the hospital or whatever when they wanted to get information?

Chairman Weisz: That would be up to the individual counties, because it is the county that makes the request.

Representative McWilliams: I think it would be important to know how big the problem is that we are trying to solve with this bill.

Representative Skroch: I believe that in the testimony the representative from a county social services said that they were having a problem with a couple of facilities that were unwilling to share the information.

Vice Chairman Rohr: What did they do then if they wouldn't give them the information.

Chairman Weisz: Probably if they didn't have enough information for a criminal case they would just have to drop it.

Chairman Weisz: I suppose that is possible, but then there are other instances where they don't do anything and we wonder why.

Representative McWilliams: Is there a way to determine how many times this was justified

Chairman Weisz: I know there are a couple of hospitals that have had problems. That information comes from the individual counties.

Representative Skroch: I think one of the people that testified said they had trouble with two providers about giving out the information.

Chairman Weisz: If they can't get the information then they would drop it. They can't do it if they don't have information.

Representative Skroch: Can they come in and do something that requires them to do something even if they don't have any charges.

Chairman Weisz: Yes, they can do that. The social services can say that here are the things that you need to do. Maybe the kids aren't getting fed or whatever and they can make a plan and say this is what you have to do. Like A, B, and C. If you don't do that then we will go to court.

Representative Porter: I think it is safe to say that there has been a difference of opinion of providers as to whether the records should be given out. Our action is going to determine what those providers will do going forward. The hospitals were refusing will continue to do that and the ones that were giving it out will stop. It is now in our court and we need to make this work. We were told that most hospitals were ok with giving out the records. I think that everyone's concerns are relevant but the ones that are vulnerable are still our responsibility. I went to Mr. Alm after the hearing and I told him it would not work. I told him that they would have to put some limits on this that gives the committee the assurance that you aren't going to just walk in with a blanket medical release and ask for a whole bunch of records that aren't relevant or that you are going to abuse this power on those hospitals who haven't cooperated up to this point. I feel that we have reached compromise now. Everyone seems to be able to find something inside this amendment to like and to not like. If we don't act, we will take a step backward.

Chairman Weisz: Representative Porter is correct. We have to do something besides killing the bill. Yes, our action or inaction will set the bar for everybody. If we kill the bill, it does tell the other providers that they shouldn't be providing the records and that is what they are going to do, because they will have liability issues.

Representative Damschen: I agree that we have to do something. I wouldn't support this bill without the amendment. We make a big step either way, by killing it or passing it. If we pass it, we will see the requests go up. If we don't, then they will have to do more court actions.

Chairman Weisz: I think the majority of facilities are already doing this why do you think the number will go up?

Representative Damschen: If you know they are not going to give you those records, you may not even try. Maybe they will take advantage of the opportunity to get records.

Chairman Weisz: I don't think we are going further than the law permits now.

Representative Damschen: If you think you aren't going to get the records, you may not ask, but if you think you will get them you may request them with less information.

Chairman Weisz: Ok, but we do have an amendment before us.

Representative Damschen: I move the amendment.

Representative D. Anderson: seconded

Chairman Weisz: Ok committee we have a motion and a second before us to adopt the amendment.
Voice vote taken and passed to adopt the amendment.

Chairman Weisz: Motion carried.

Chairman Weisz: Now we have an amended bill before us.

Representative Porter: I move a do pass as amended.

Representative D. Anderson: Seconded it.

Chairman Weisz: Discussion committee? We are really balancing the rights of the child against the rights of the parents.

Representative P. Anderson: This information has to be kept confidential, so I am on the side of accepting this. If we find a couple of kids that are protected from abuse, good for us.

Representative Damschen: I have heard horror stories of false accusations can do as much damage to the family as the real abuse.

Chairman Weisz: I have had experience with false accusations and it can be awful, but there are also cases where nothing happens and it should.

Representative Skroch: Is there a way to require feedback as to what this really does. Would there be any proof that there were abuses to seeking the information or that we found this abuse because of the records.

Chairman Weisz: It would be very difficult to do pinpoint what actually tipped it.

Representative Seibel: I think if there is any abuse of the records, we will hear about it.

Representative McWilliams: How many people are required to make a request for these records. Can it be one or a group of people or the entire department?

Chairman Weisz: The person who is investigating has a wide range of latitude. What are we afraid of this if they have a confidential record? They still have to be kept confidential.

Representative McWilliams: I would support this bill if there was more than one person that needs to sign off in order to get the records. Like the caseworker and the head of the department. It has to go to two people to get the records. I would support that.

Chairman Weisz: In some small counties they don't even have more than one person.

Representative Westlind: Who makes the determination as to what records are given? Who decides how much of the file they receive?

Chairman Weisz: I think that sometimes they need to have the whole file in order to see if there is a pattern. I think the language of this bill limits that. If the provider feels that there is nothing other than the part of the record that applies they can refuse to give it all. Then the court would have to step in.

Representative Westlind: Then would it be a collaborated effort between the caseworker requesting the records and the provider giving the records to decide how much of it is given out?

Chairman Weisz: The person requesting is the one that determines. They need to know if there is a history, so they probably would request the whole file.

Representative Damschen: I would feel better if the provider could determine what information is pertinent to this case.

Chairman Weisz: I don't think that we can put that on the provider. It would then make the provider be the investigator and be the one to decide if he should turn it over.
Chairman Weisz: Ok committee. We have an amended bill in front of us. What are the wishes of the committee? Is there more discussion? Seeing none, the clerk will call the roll for a do pass as amended on SB 2116.

Roll call vote taken. Yes 9 No 3 Absent 2
Motion carried.

Chairman Weisz: Do I have a volunteer to care this one?

Representative D. Anderson, thank you.

Adjourned.

3/7/17 DA

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Adopted by the Human Services Committee

March 7, 2017

PROPOSED AMENDMENTS TO SENATE BILL NO. 2116

Page 2, line 2, remove "deemed"

Page 2, line 2, remove ", by the department or the department's authorized agent,"

Page 2, line 3, after the period insert "The department, or the department's authorized agent, shall limit the request for records to the minimum amount of records necessary to enable a determination to be made or to support a determination of whether services are required to provide for the protection and treatment of an abused or neglected child."

Renumber accordingly

Date: 3/7/17
Roll Call Vote #: 1

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2116

House Human Services Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☑ Adopt Amendment
☐ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Rep. Damschen Seconded By Rep. D. Anderson

Representatives	Yes	No	Representatives	Yes	No
Chairman Weisz			Rep. P. Anderson		
Vice Chairman Rohr			Rep. Schneider		
Rep. B. Anderson					
Rep. D. Anderson					
Rep. Damschen					
Rep. Devlin					
Rep. Kiefert					
Rep. McWilliams					
Rep. Porter					
Rep. Seibel					
Rep. Skroch					
Rep. Westlind					

Voice vote to adopt the amendment - motion carried

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date: 3/7/17
Roll Call Vote #: 2

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2116

House Human Services Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☑ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☑ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Rep. Porter Seconded By Rep. D. Anderson

Representatives	Yes	No	Representatives	Yes	No
Chairman Weisz	✓		Rep. P. Anderson	✓	
Vice Chairman Rohr		✓	Rep. Schneider	✓	
Rep. B. Anderson	absent				
Rep. D. Anderson	✓				
Rep. Damschen		✓			
Rep. Devlin	absent				
Rep. Kiefert	✓				
Rep. McWilliams		✓			
Rep. Porter	✓				
Rep. Seibel	✓				
Rep. Skroch	✓				
Rep. Westlind	✓				

Total (Yes) 9 No 3

Absent 2

Floor Assignment Rep. D. Anderson

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2116: Human Services Committee (Rep. Weisz, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (9 YEAS, 3 NAYS, 2 ABSENT AND NOT VOTING). SB 2116 was placed on the Sixth order on the calendar.

Page 2, line 2, remove "deemed"

Page 2, line 2, remove ", by the department or the department's authorized agent,"

Page 2, line 3, after the period insert "The department, or the department's authorized agent, shall limit the request for records to the minimum amount of records necessary to enable a determination to be made or to support a determination of whether services are required to provide for the protection and treatment of an abused or neglected child."

Renumber accordingly

2017 CONFERENCE COMMITTEE

SB 2116

2017 SENATE STANDING COMMITTEE MINUTES

Human Services Committee
Red River Room, State Capitol

SB 2116
4/10/2017
Job Number 30006

☐ Subcommittee
☒ Conference Committee

Committee Clerk Signature Marie Johnson

Explanation or reason for introduction of bill/resolution:

Assessment of child abuse patient records disclosure.

Minutes: No attachments

Chairman Larsen: Opened the conference committee hearing on SB 2116. All members were present: Senator Larsen, Senator Kreun, Senator Piepkorn; Representative Seibel, Representative Westlind, Representative Skroch.

Representative Skroch: As we took testimony on this bill and talked about the mechanisms currently in place as far as reporting of child abuse; we felt that there were many things in the law already that allowed social services access to data. We though those were good things to protect child and at the same time, we felt there were overreaches, e.g. There were 13,700 reports given, of those complaints only 3,790 were assigned to a social services worker for investigation, there were 965 determined as services required. We felt there was a lot of opportunity in there for false accusation. We felt there should be a limit to how much information social services can access before continuing to law enforcement for charges, and the action that follows a suspected child abuse case. We felt that the additional wording was necessary here. When there was a report of abuse or neglect the Department shall limit the request for records to the minimum amount of records necessary to enable a determination. We felt that was a limiting but necessary requirement to access that data.

Representative Seibel: The language came from Mr. Alm and the Department.

Chairman Larsen: I see 66-22 final vote, was there any floor debate?

Representative Seibel: The votes against were because they felt being able to get any of these records with more of a court order situation, I think any way the bill came forward we would have had descending votes.

Senator Piepkorn: Really, the crux of the amendment is that the requests be kept to a minimum to proceed.
Senator Kreun: These are the beginning stages of any activity that may take place, in other words the 13,000 are reported, at what stage do you feel this should kick in? We have other

bills that require to hold that information, especially when there is legal or criminal investigation going on, where does this start? Right from day one? So we have 13,700 reports, that would cover the reports right out of the box?

Representative Seibel: I believe under administrative rule; they have that ability to request them whenever they deem necessary. I don't know how far into that process they decide to do that, in regards to the word deemed, we felt that the language we added replaced that word.

Senator Kreun: Would it make more sense to indicate when a caseworker was assigned if there's a report out there, and it's just a report, why is that so confidential? If a caseworker is assigned, which reduces it down to 3,790, either side of situation, I'd like to see who made a report on me and whether it's valid, if we keep it confidential, then that's always hanging out there. Is it important that we don't have any information on just reports that are out there, rather than starting it when a caseworker is assigned?

Representative Seibel: I'm not sure that this actually deals with that part, this deals with what can be released, if there is an abuse case started and they request records, we feel they should be limited to that portion of that person's records, not just wide open, anything in the record would be released. We see this as limiting what can be released. As far as the timing, I'm not sure.

Senator Kreun: Isn't that what I'm getting at? Does this indicate that 13,000 are kept more confidential or not at that stage if there's a report?

Representative Skroch: The process that takes place, is that when these reports come in, they have to sift through all of them and determine which are false reports. Then when they are down to the number that they feel are legitimate complaints, then they can seek further information. They can do that by seeing if there are some records on a child that's been suspected; so they access information from a hospital but that information is also protected by HIPAA, we felt by this wording that they would be able to access that information to tell them to go deeper, then they can petition the courts and subpoena for records. Once they have these reports, if we're looking at 3,790 investigated, they have access to these reports, they're made part of a database and tracked for a long time. In the testimony we received, those records are supposed to be destroyed after three years. On someone who was suspected and maybe some charges filed, and services provided for the child, that information is kept 10 years in case there is further data collection. But in their testimony they said their system doesn't purge the records. There's a risk that someone who has been falsely accused could have a false charge on their record for a long time. I don't know if that's accessible if they did a background check on you.

Senator Kreun: It's not accessible unless you go through a court order in a criminal case.

Representative Skroch: They can go further and access more information if they need. I think what would be provided in the minimum necessary would be reported because hospitals and emergency rooms are already required to report to law enforcement any suspect case of child abuse. I think we would get the truth out there with this amendment, without going too deep.

Senator Kreun: My concern is the 10,000 reports out there that are really non-issues. I don't want to hold those records when they're non-issue. My point is at some point in time if a case worker is assigned or if there's further investigation, then yes, but I don't agree with 13,000 reports and making those confidential.

Representative Skroch: I know that in those 10,000 cases they have a legitimate right to seek information. That 10,000 would be the cases that they would say this is a frivolous charge and we're not going to investigate those.

Senator Kreun: That's my thing, in many cases, 10,000, are frivolous I would like to know if I was being accused I'd have access to those records if it was frivolous. The determination would be when a case worker was assigned, then there shouldn't be that availability until later on through a court order.

Chairman Larsen: These are medical records we're talking about, not statements and reports.

Representative Seibel: I believe this pertains only to patient records.

Senator Kreun: That's a whole different story.

Mr. Alm addressed the previous confusion over the word deemed. (15:50-18:30)

Senator Piepkorn: I move to accede to House.
Senator Kreun: Second.
A roll call vote was taken.
Motion passes 6-0-0.
Representative Seibel and Senator Larsen will carry.
Chairman Larsen: Closed the hearing.

Date: 4/10
Roll Call Vote #: 1

2017 SENATE CONFERENCE COMMITTEE
ROLL CALL VOTES

BILL/RESOLUTION NO. SB 2116 as (re) engrossed

Senate Human Service Conference Committee

Action Taken

- ☒ **SENATE accede to House Amendments**
- ☐ **SENATE accede to House Amendments and further amend**
- ☐ **HOUSE recede from House amendments**
- ☐ **HOUSE recede from House amendments and amend as follows**

- ☐ **Unable to agree**, recommends that the committee be discharged and a new committee be appointed

Motion Made by: Sen. Piepkorn Seconded by: Sen. Kreun

Senators	4/10			Yes	No	Representatives	4/10			Yes	No
Senator Larsen	X			X		Rep. Seibel	X			X	
Senator Kreun	X			X		Rep. Westlind	X			X	
Senator Piepkorn	X			X		Rep. Skroch	X			X	
Total Senate Vote						Total Rep. Vote					

Vote Count Yes: 6 No: 0 Absent: 0

Senate Carrier Sen. Larsen House Carrier Rep. Seibel

LC Number _____ . _____ of amendment

LC Number _____ . _____ of engrossment

Emergency clause added or deleted

Statement of purpose of amendment

REPORT OF CONFERENCE COMMITTEE

SB 2116: Your conference committee (Sens. O. Larsen, Kreun, Piepkorn and Reps. Seibel, Westlind, Skroch) recommends that the **SENATE ACCEDE** to the House amendments as printed on SJ page 743 and place SB 2116 on the Seventh order.

SB 2116 was placed on the Seventh order of business on the calendar.

2017 TESTIMONY

SB 2116

SB 2116
Attach
#1
1/11

Testimony
Senate Bill Number 2116 - Department of Human Services
Senate Human Services Committee
Senator Judy Lee, Chairman
January 11, 2017

Chairman Lee, and members of the Senate Human Services Committee, I am Marlys Baker, Child Protection Services Administrator with the Department of Human Services (Department). I appear before you to support Senate Bill 2116, which was introduced at the request of the Department.

The proposed changes in Section 1 of the Bill remove redundant language regarding medical records being provided to the Department or the Department's authorized agent as the proposed changes in Section 2 address the disclosure of medical records.

The proposed changes in Section 2 of the Bill clarify that certain health professionals and facilities shall disclose to the Department or the Department's authorized agent, records of a patient or client that are deemed relevant for a child abuse or neglect assessment or a services required decision. In the past and without any recent change in the law, the Department or the Department's authorized agent have been able to obtain relevant medical information from health professionals and facilities. The Department has received information from its authorized agents, some State's Attorneys, and the Attorney General's Office over the last couple of years that some health professionals and facilities have recently changed their practice of disclosing relevant medical records despite the Health Insurance Portability and Accountability Act (HIPAA) of 1996 permitting the disclosure of medical records for child abuse and neglect purposes. The Attorney General's Office also issued pre-HIPAA

opinions supporting the Department's or its authorized agent's ability to obtain medical records for child abuse and neglect purposes. The proposed change will ensure that the Department or its authorized agent will be able to obtain all relevant medical records, when necessary, to conduct a thorough child abuse and neglect assessment.

This concludes my testimony. I would be happy to answer any questions the committee may have. Thank you.

SB 2116
#1
1/11

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 94-F-21

Date issued: July 28, 1994

Requested by: Henry C. "Bud" Wessman, Executive Director
Department of Human Services

- QUESTION PRESENTED -

Whether otherwise privileged medical information concerning the treatment of a child at a medical facility is available for review to determine if there exists probable cause to believe child abuse or neglect is indicated.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that otherwise privileged medical information concerning the treatment of a child at a medical facility is available for review to determine if there is probable cause to believe child abuse or neglect is indicated.

- ANALYSIS -

As a general rule a physician may not disclose medical information acquired in treating a patient. Tehven v. Job Service North Dakota, 488 N.W.2d 48, 51 (N.D. 1992). The patient's privilege against disclosure of medical information generally extends to hospital records. Id. This general rule, however, is abrogated by N.D.C.C. § 50-25.1-10. Section 50-25.1-10 provides:

> Any privilege of communication between husband and wife or between any professional person and his patient or client, except between attorney and client, is abrogated and does not constitute grounds for preventing a report to be made or for excluding evidence in any proceeding regarding child abuse or neglect resulting from a report made under this chapter.

The above language plainly abrogates any privilege of communication between a physician and the physician's patient. This abrogation necessarily includes any privileged information that a medical facility may also possess. Thus, a physician or medical facility

Pg.3

cannot withhold otherwise privileged information to the extent it is to be used as evidence in any proceeding regarding child abuse or neglect resulting from a report made under N.D.C.C. ch. 50-25.1.

"Proceeding" as used in N.D.C.C. § 50-25.1-10 is not defined. When words used in a statute are not defined they are to be given their plain, ordinary, and commonly understood meaning. N.D.C.C. § 1-02-02; Reed v. Hillsboro Pub. Sch. Dist. No. 9, 477 N.W.2d 237 (N.D. 1991); Kim-Go v. J.P. Furlong Enter., Inc., 460 N.W.2d 694 (N.D. 1990). Furthermore, a statute must be read as a whole when it is being interpreted and a remedial statute must be liberally construed with a view to effecting its objectives. N.D.C.C. § 1-02-01; Madler v. McKenzie Co., 496 N.W.2d 17 (N.D. 1993); In re C.J.A., 473 N.W.2d 439 (N.D. 1991).

As commonly understood "proceeding" means a "course of action; procedure." The American Heritage Dictionary 987 (2d. coll. ed. 1991). It is also commonly understood to mean legal action or litigation. Id. In order to understand what the Legislature intended by the term "proceeding" in N.D.C.C. § 50-25.1-10, it is necessary to examine the purpose of that section and the purposes of N.D.C.C. ch. 50-25.1.

N.D.C.C. ch. 50-25.1 was enacted to protect the health and welfare of children by encouraging the reporting of known or suspected child abuse or neglect and to protect the children from further harm. N.D.C.C. § 50-25.1-01. If N.D.C.C. § 50-25.1-10 is to effectuate the substantive goals of chapter 50-25.1, social service staff must have access to relevant information to determine whether probable cause exists to believe child abuse or neglect has occurred. Section 50-25.1-10's abrogation of privileged communication would be largely hollow if it were restricted to actual judicial proceedings which do not occur until after a finding of probable cause is made. As noted by former Attorney General Robert O. Wefald, "[t]he entire statutory scheme surrounding the reporting and investigation of child abuse or neglect reveals the legislative intent that notions of confidentiality or privacy should not be obstacles to the discovery of abuse and neglect, and to the protection of children." 1984 N.D. Op. Att'y Gen. 11, 12. Thus, as used in N.D.C.C. § 50-25.1-10, "proceeding" should be understood to mean a course of action or procedure and to include all actions which arise out of and are required by the provisions of the Child Abuse and Neglect Recording Act, i.e., the initial report, the required investigation, the determination of probable cause, the report to the court, the provision of protective and other services, and such other activities

implicitly or explicitly required to discharge the Department of Human Service's responsibilities under the law.

That the Legislature intended "proceeding" as used in N.D.C.C. § 50-25.1-10 to apply to more than legal actions in a court of law is evidenced by other sections of N.D.C.C. ch. 50-25.1. For example, in N.D.C.C. §§ 50-25.1-02(5.1) and (8) the Legislature used the term "court proceeding," and in N.D.C.C. § 50-25.1-08, the term "judicial proceeding." Had the Legislature intended N.D.C.C. § 50-25.1-10's abrogation of privileged communication to be limited to court proceedings it could have limited the scope of the term "proceeding" by qualifying it with the word "court" or "judicial" as it did in the other sections. However, the Legislature did not do so, indicating it intended the term "proceeding" as used in section 50-25.1-10 to encompass more than just judicial or court proceedings.

That the term "proceeding" as used in N.D.C.C. § 50-25.1-10 includes investigations by the Department of Human Services is also supported by decisions of the North Dakota Supreme Court. For example, in In re J.Z., 190 N.W.2d 27 (N.D. 1971), the court addressed whether an initial interview with parents was a stage of a proceeding under the North Dakota Juvenile Court Act, N.D.C.C. ch. 27-20. The court noted that the juvenile supervisor had statutory authority to make an investigation to determine whether there would be court proceedings to terminate parental rights. Id. at 32. Despite the fact that no court proceeding had been initiated, the court concluded that the initial interview was a critical stage of the proceedings under N.D.C.C. ch. 27-20. Id. See also In re D.S., 263 N.W.2d 114 (N.D. 1978) (custodial interrogation of a juvenile is a stage of the proceedings under N.D.C.C. ch. 27-20); United States v. Browning, Inc., 572 F.2d 720 (10th Cir.) (the term "proceeding" is not limited to something in the nature of a trial), cert. denied, 439 U.S. 822 (1978); Banach v. State Comm'n on Human Relations, 356 A.2d 242, 247 (Md. 1976) (administrative investigations are commonly referred to as "proceedings"); cf. Emo v. Milbank Mutual Ins. Co., 183 N.W.2d 508, 514 (N.D. 1971) (the word "proceeding" includes some form of governmental process).

In conclusion, the term "proceeding" as used in N.D.C.C. § 50-25.1-10 includes the investigation required by N.D.C.C. § 50-25.1-05. Accordingly, a request made by an authorized social service staff person, in the conduct of an investigation pursuant to section 50-25.1-05, for information concerning the subject child's medical records cannot be denied by a physician, hospital, or medical facility on the basis that the information is privileged information.

SB 2116
#1
1/11

ATTORNEY GENERAL'S OPINION 94-21
July 28, 1994

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

Heidi Heitkamp
ATTORNEY GENERAL

Assisted by: Douglas A. Bahr
Assistant Attorney General

mh

SB 2116
#1
1/11

Date Issued: January 19, 1984 (AGO 84-5)

Requested by: James F. Twomey
Cass County Assistant State's Attorney

- QUESTION PRESENTED -

Whether otherwise privileged information concerning the treatment of a child at a medical facility is available for review to determine if there exists probable cause to believe child abuse or neglect is indicated.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that otherwise privileged information concerning the treatment of a child at a medical facility is available for review to determine if there exists probable cause to believe child abuse or neglect is indicated.

- ANALYSIS -

Section 50-25.1-01 of the North Dakota Century Code states in part:

> 50-25.1-01. PURPOSE. It is the purpose of this chapter to protect the health and welfare of children by encouraging the reporting of children who are known to be or suspected of being abused or neglected . . . .

The contents of this remedial chapter "are to be construed liberally, with a view to effecting its objects and to promoting justice." Section 1-02-01, N.D.C.C.

Section 50-25.1-10, N.D.C.C., provides:

> 50-25.1-10. ABROGATION OF PRIVILEGED COMMUNICATIONS. Any privilege of communication between husband and wife or between any professional person and his patient or client, except between attorney and client, is abrogated and does not constitute grounds for preventing a report to be made or for excluding evidence in any proceeding regarding child abuse or neglect resulting from a report made under this chapter.

There are two types of reports which are made under chapter 50-25.1, N.D.C.C. The first type of report is identified in section 50-25.1-04, N.D.C.C. This is the initial report of known or suspected child abuse or neglect which brings the matter to the attention of proper authorities. Section 50-25.1-05.2, N.D.C.C., contemplates a second type of report. This second type of report, to the juvenile court, cannot be made unless probable cause exists to believe that child abuse or neglect is indicated. A medical facility may possess otherwise privileged information which, although insufficient to require the reporting of known or suspected abuse or neglect, is corroborative of reported abuse or neglect. A failure to reveal this information may prevent the filing of a report with the juvenile court.

Still further, the character of that information may change as soon as the facility learns that the information may be corroborative of other abuse or neglect information. At the point the information takes on that corroborative character, staff of the medical facility may well be required to report the information under the provisions of section 50-25.1-03, N.D.C.C.

So long as the medical facility reports the information in its records in good faith, it "is immune from any liability, civil or criminal, that otherwise might result." Section 50-25.1-09, N.D.C.C. Conversely, a failure to furnish the information may well make the medical professionals involved liable to criminal penalties.

Section 50-25.1-13, N.D.C.C., provides:

> 50-25.1-13. PENALTY FOR FAILURE TO REPORT. Any person required by this chapter to report a case of known or suspected child abuse who willfully fails to do so is guilty of a class B misdemeanor.

The entire statutory scheme surrounding the reporting and investigation of child abuse or neglect reveals the legislative intent that notions of confidentiality or privacy should not be obstacles to the discovery of abuse and neglect, and to the protection of children.

- EFFECT -

This opinion is issued pursuant to section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

ROBERT O. WEFALD
Attorney General

Prepared by: Blaine L. Nordwall
Assistant Attorney General

Att. 1
SB 2116
2/15/17

Testimony
Senate Bill Number 2116 - Department of Human Services
House Human Services Committee
Representative Robin Weisz, Chairman
February 15, 2017

Chairman Weisz, and members of the House Human Services Committee, I am Marlys Baker, Child Protection Services Administrator with the Department of Human Services (Department). I appear before you to support Senate Bill 2116, which was introduced at the request of the Department.

The proposed changes in Section 1 of the Bill remove redundant language regarding medical records being provided to the Department or the Department's authorized agent as the proposed changes in Section 2 address the disclosure of medical records.

The proposed changes in Section 2 of the Bill clarify that certain health professionals and facilities shall disclose to the Department or the Department's authorized agent, records of a patient or client that are deemed relevant for a child abuse or neglect assessment or a services required decision. In the past and without any recent change in the law, the Department or the Department's authorized agent have been able to obtain relevant medical information from health professionals and facilities. The Department has received information from its authorized agents, some State's Attorneys, and the Attorney General's Office over the last couple of years that some health professionals and facilities have recently changed their practice of disclosing relevant medical records despite the Health Insurance Portability and Accountability Act (HIPAA) of 1996 permitting the disclosure of medical records for child abuse and neglect purposes. The Attorney General's Office also issued pre-HIPAA

opinions supporting the Department's or its authorized agent's ability to obtain medical records for child abuse and neglect purposes. The proposed change will ensure that the Department or its authorized agent will be able to obtain all relevant medical records, when necessary, to conduct a thorough child abuse and neglect assessment.

This concludes my testimony. I would be happy to answer any questions the committee may have. Thank you.

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 94-F-21

Date issued: July 28, 1994

Requested by: Henry C. "Bud" Wessman, Executive Director
Department of Human Services

- QUESTION PRESENTED -

Whether otherwise privileged medical information concerning the treatment of a child at a medical facility is available for review to determine if there exists probable cause to believe child abuse or neglect is indicated.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that otherwise privileged medical information concerning the treatment of a child at a medical facility is available for review to determine if there is probable cause to believe child abuse or neglect is indicated.

- ANALYSIS -

As a general rule a physician may not disclose medical information acquired in treating a patient. Tehven v. Job Service North Dakota, 488 N.W.2d 48, 51 (N.D. 1992). The patient's privilege against disclosure of medical information generally extends to hospital records. Id. This general rule, however, is abrogated by N.D.C.C. § 50-25.1-10. Section 50-25.1-10 provides:

> Any privilege of communication between husband and wife or between any professional person and his patient or client, except between attorney and client, is abrogated and does not constitute grounds for preventing a report to be made or for excluding evidence in any proceeding regarding child abuse or neglect resulting from a report made under this chapter.

The above language plainly abrogates any privilege of communication between a physician and the physician's patient. This abrogation necessarily includes any privileged information that a medical facility may also possess. Thus, a physician or medical facility

cannot withhold otherwise privileged information to the extent it is to be used as evidence in any proceeding regarding child abuse or neglect resulting from a report made under N.D.C.C. ch. 50-25.1.

"Proceeding" as used in N.D.C.C. § 50-25.1-10 is not defined. When words used in a statute are not defined they are to be given their plain, ordinary, and commonly understood meaning. N.D.C.C. § 1-02-02; Reed v. Hillsboro Pub. Sch. Dist. No. 9, 477 N.W.2d 237 (N.D. 1991); Kim-Go v. J.P. Furlong Enter., Inc., 460 N.W.2d 694 (N.D. 1990). Furthermore, a statute must be read as a whole when it is being interpreted and a remedial statute must be liberally construed with a view to effecting its objectives. N.D.C.C. § 1-02-01; Madler v. McKenzie Co., 496 N.W.2d 17 (N.D. 1993); In re C.J.A., 473 N.W.2d 439 (N.D. 1991).

As commonly understood "proceeding" means a "course of action; procedure." The American Heritage Dictionary 987 (2d. coll. ed. 1991). It is also commonly understood to mean legal action or litigation. Id. In order to understand what the Legislature intended by the term "proceeding" in N.D.C.C. § 50-25.1-10, it is necessary to examine the purpose of that section and the purposes of N.D.C.C. ch. 50-25.1.

N.D.C.C. ch. 50-25.1 was enacted to protect the health and welfare of children by encouraging the reporting of known or suspected child abuse or neglect and to protect the children from further harm. N.D.C.C. § 50-25.1-01. If N.D.C.C. § 50-25.1-10 is to effectuate the substantive goals of chapter 50-25.1, social service staff must have access to relevant information to determine whether probable cause exists to believe child abuse or neglect has occurred. Section 50-25.1-10's abrogation of privileged communication would be largely hollow if it were restricted to actual judicial proceedings which do not occur until after a finding of probable cause is made. As noted by former Attorney General Robert O. Wefald, "[t]he entire statutory scheme surrounding the reporting and investigation of child abuse or neglect reveals the legislative intent that notions of confidentiality or privacy should not be obstacles to the discovery of abuse and neglect, and to the protection of children." 1984 N.D. Op. Att'y Gen. 11, 12. Thus, as used in N.D.C.C. § 50-25.1-10, "proceeding" should be understood to mean a course of action or procedure and to include all actions which arise out of and are required by the provisions of the Child Abuse and Neglect Recording Act, i.e., the initial report, the required investigation, the determination of probable cause, the report to the court, the provision of protective and other services, and such other activities

implicitly or explicitly required to discharge the Department of Human Service's responsibilities under the law.

That the Legislature intended "proceeding" as used in N.D.C.C. § 50-25.1-10 to apply to more than legal actions in a court of law is evidenced by other sections of N.D.C.C. ch. 50-25.1. For example, in N.D.C.C. §§ 50-25.1-02(5.1) and (8) the Legislature used the term "court proceeding," and in N.D.C.C. § 50-25.1-08, the term "judicial proceeding." Had the Legislature intended N.D.C.C. § 50-25.1-10's abrogation of privileged communication to be limited to court proceedings it could have limited the scope of the term "proceeding" by qualifying it with the word "court" or "judicial" as it did in the other sections. However, the Legislature did not do so, indicating it intended the term "proceeding" as used in section 50-25.1-10 to encompass more than just judicial or court proceedings.

That the term "proceeding" as used in N.D.C.C. § 50-25.1-10 includes investigations by the Department of Human Services is also supported by decisions of the North Dakota Supreme Court. For example, in In re J.Z., 190 N.W.2d 27 (N.D. 1971), the court addressed whether an initial interview with parents was a stage of a proceeding under the North Dakota Juvenile Court Act, N.D.C.C. ch. 27-20. The court noted that the juvenile supervisor had statutory authority to make an investigation to determine whether there would be court proceedings to terminate parental rights. Id. at 32. Despite the fact that no court proceeding had been initiated, the court concluded that the initial interview was a critical stage of the proceedings under N.D.C.C. ch. 27-20. Id. See also In re D.S., 263 N.W.2d 114 (N.D. 1978) (custodial interrogation of a juvenile is a stage of the proceedings under N.D.C.C. ch. 27-20); United States v. Browning, Inc., 572 F.2d 720 (10th Cir.) (the term "proceeding" is not limited to something in the nature of a trial), cert. denied, 439 U.S. 822 (1978); Banach v. State Comm'n on Human Relations, 356 A.2d 242, 247 (Md. 1976) (administrative investigations are commonly referred to as "proceedings"); cf. Emo v. Milbank Mutual Ins. Co., 183 N.W.2d 508, 514 (N.D. 1971) (the word "proceeding" includes some form of governmental process).

In conclusion, the term "proceeding" as used in N.D.C.C. § 50-25.1-10 includes the investigation required by N.D.C.C. § 50-25.1-05. Accordingly, a request made by an authorized social service staff person, in the conduct of an investigation pursuant to section 50-25.1-05, for information concerning the subject child's medical records cannot be denied by a physician, hospital, or medical facility on the basis that the information is privileged information.

ATTORNEY GENERAL'S OPINION 94-21
July 28, 1994

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

Heidi Heitkamp
ATTORNEY GENERAL

Assisted by: Douglas A. Bahr
Assistant Attorney General

mh

Date Issued: January 19, 1984 (AGO 84-5)

Requested by: James F. Twomey
Cass County Assistant State's Attorney

- QUESTION PRESENTED -

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- EFFECT -

This opinion is issued pursuant to section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

ROBERT O. WEFALD
Attorney General

Prepared by: Blaine L. Nordwall
Assistant Attorney General

Att. 2
SB 2116
2/15/17

Testimony
Senate Bill 2116 – Disclosure of Records for Child Protection Assessment
Human Services Committee
February 15, 2017

Chairman Weisz, and members of the House Human Service Committee, I am Kim Jacobson, Director of Traill County Social Services, and member of the North Dakota County Director's Association. My testimony is in support of Senate Bill 2116.

NDCC defines county social service boards as the designee of the Department of Human Services. As described in NDCC 50.1.20-03-7 one of the core responsibilities of county social services is to perform child welfare duties. This includes the assessment of suspected reports of child abuse and neglect.

Child protection assessments are a fact-finding process in which information is gathered through interview with child victims, the alleged subject, and collateral contacts along with other relevant information that can substantiate or refute the allegations of abuse and neglect. Information gathered is compiled into a safety/strengths/risk assessment report that is utilized to determine if suspected abuse or neglect occurred, if the legal definition of child abuse and neglect was met, and if there was harm to the child. If each of those criteria are established, a determination of "Services Required" is rendered. If so, at that time a referral is made to Juvenile Court for potential court intervention and the name of the subject is placed on a child abuse index which is used for background check purposes.

Medical or related health records can be critical component to the assessment process. Such records detail the impact and severity of the suspected abuse/neglect upon the child. For example, if physical abuse is suspected and the child required medical care, that information would be very helpful for the assessment process in determining if harm resulted from the alleged abuse/neglect. While medical records are not relevant in every assessment, they are extremely valuable in some cases.

Some North Dakota medical providers are hesitant to release the information needed for child welfare assessment. They state that current NDCC language is unclear in providing to them the authority to release and protections to release this information. Therefore, the purpose of Senate Bill 2116 is to provide very clear language in NDCC that it is permissible for providers to release medical records for the sole purpose of suspected child abuse and neglect assessment and related services required case management.

Existing law requires information obtained through the child protection assessment process remain confidential. Furthermore, medical records obtained are not subject to re-release, must be held confidentially, and are subject to state record retention guidelines.

Senate Bill 2116 holds an important role in protecting North Dakota's vulnerable children and ensures critical information is obtained to aid in the accurate and informed child abuse and neglect decisions and services. I urge you to render a "Do Pass" vote on Senate Bill 2116. This concludes my testimony on Senate Bill 2116. I would be happy to answer any questions.

Att. 1 3-7-17
SB 2116

17.8069.01001
Title.02000

Adopted by the Human Services Committee

March 7, 2017

PROPOSED AMENDMENTS TO SENATE BILL NO. 2116

Page 2, line 2, remove "deemed"

Page 2, line 2, remove ", by the department or the department's authorized agent,"

Page 2, line 3, after the period insert "The request for records must be limited to the minimum amount necessary to enable a determination to be made or to support a determination of whether services are required to provide for the protection and treatment of an abused or neglected child."

Renumber accordingly