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OPINION 14-0048

Ms. Emily Efferson, Administrator
Louisiana State Board of
Social Work Examiners
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Baton Rouge, Louisiana 70809

90 C PUBLIC RECORDS
107-2 SOCIAL WORKERS

La. R.S. 37:2701 *et seq.*; La. R.S. 44:1 *et seq.*;
42 U.S.C. § 12132 *et seq.*

In light of the formal record retention policy of the Louisiana State Board of Social Work Examiners (Board), the Board has an obligation to retain a former Impaired Professional Program (IPP) participant's file permanently. Documents contained within a former IPP participant's file may be exempt from disclosure pursuant to La. R.S. 44:4(26) of the Public Records Act. Further, preservation of a former IPP participant's file does not, in and of itself, violate the American Disability Act.

Dear Ms. Efferson:

Our office received a request from you on behalf of the Louisiana State Board of Social Work Examiners (Board) for clarification on records retention obligations of the Board for records of licensee participants in the Impaired Professional Program (IPP). In particular, you have asked the following questions:

1. Are the records of licensed social workers who participate in the IPP "public records" within the meaning of the Public Records Act, La. R.S. 44:1 *et seq.*?
2. Does the Board's retention policy violate La. R.S. 44:36(A) or any other state law or regulation?
3. Is the Board required to preserve and maintain such records for a period of at least three years from the date the record was created pursuant to La. R.S. 44:36(A)?
4. If the Board is required to preserve a former IPP participant's records for at least three years, does the Board's adherence to this state law violate the American with Disabilities Act (ADA)?

The Board, in accordance with its record retention schedule developed and approved by the Louisiana Secretary of State's Office, maintains files on current and former members of the Board's IPP. Your request indicates that a former participant in the IPP is asserting that the Board's retention policy for records of former IPP participants is in violation of Title II of the ADA and has requested that her entire file and any and all other records involving her participation in the IPP be returned to her. As such, the Board is requesting an opinion of the Attorney General regarding the legality of the Board's record retention policy, particularly as it relates to the records and files of participants in the IPP.

First, we will address whether the records of participants in the IPP are “public records” within the meaning of the Public Records Act. The right of access to public information is guaranteed by La. Const. art. XII, § 3, which provides, “[n]o person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law.” The Public Records Act, La. R.S. 44:1, *et seq.*, was enacted by the Louisiana Legislature to protect and define the constitutional right of access to public documents. The Public Records Act must be liberally construed so as to enlarge rather than restrict access to public records by the public.¹ There is no dispute that the Board is a “public body” for purposes of the Public Records Act. See La. R.S. 44:1(A)(1).

A “public record” is defined in La. R.S. 44:1(A)(2), which provides as follows:

All books, records, writings, accounts, letters and letter books, maps, drawings, photographs, cards, tapes, recordings, memoranda, and papers, and all copies, duplicates, photographs, including microfilm, or other reproductions thereof, or any other documentary materials, regardless of physical form or characteristics, including information contained in electronic data processing equipment, having been used, being in use, or prepared, possessed, or retained for use in the conduct, transaction, or performance of any business, transaction, work, duty, or function which was conducted, transacted, or performed by or under the authority of the constitution or laws of this state, or by or under the authority of any ordinance, regulation, mandate, or order of any public body or concerning the receipt or payment of any money received or paid by or under the authority of the constitution or the laws of this state, are “public records”, except as otherwise provided in this Chapter or the Constitution of Louisiana.

The records at issue are used, prepared, and retained for use in the conduct of work authorized under Louisiana law; thus, they are public records and the relevant inquiry is whether an exemption applies. The Public Records Act exempts from disclosure certain records within the custody or control of the Board. The exemption is found in La. R.S. 44:4(26) and provides as follows:

This Chapter shall not apply:

To any records, writings, accounts, letters, exhibits, pictures, drawings, charts, photographs, or copies or memoranda thereof, in any reports of examinations or evaluations or any other information or data concerning the fitness of any person to receive, or continue to hold, a license or certificate to practice social work or clinical social work in the custody or control of the Louisiana State Board of Social Work Examiners. However,

¹ *Amoco Production Co. v. Landry*, 426 So.2d 220 (La. App. 4 Cir. 1982).

any final determination made by the board, and any legal grounds upon which such action is based, relative to the fitness of any person to receive or to continue to hold a license or certificate to practice social work shall be a public record.

As noted within your request, IPP records generally contain documents relating to a participant's entry into the program; consent orders or other adjudication records; evaluations and medical records relating to addiction to drugs or alcohol or other disorders; adverse reports; complaints; positive drug and alcohol screens; reports of inappropriate behavior or relapse; employer agreements; discharge summaries; fit to practice letters from physicians or other treating professionals; and releases from the IPP program. Records in a participant's IPP file that fall within the parameters of La. R.S. 44:4(26) are exempt from the disclosure requirements of the Public Records Act. In general, records concerning medical information that is possessed by the Board for purposes of monitoring or evaluation of participation in the IPP would qualify within the exception, unless such information is the basis upon which disciplinary action is taken. However, determining exactly which documents within the participant's IPP file fall within the scope of La. R.S. 44:4(26) is a factual determination that, consistent with our policy, cannot be made by our office.

Your next question concerns whether the Board's retention policy violates La. R.S. 44:36(A) or any other state law or regulation. The general rule for public records retention is governed by La. R.S. 44:36(A), which states, in pertinent part:

All persons and public bodies having custody or control of any public record, other than conveyance, probate, mortgage, or other permanent records required by existing law to be kept for all time, shall exercise diligence and care in preserving the public record for the period or periods of time specified for such public records in formal records retention schedules developed and approved by the state archivist and director of the division of archives, records management, and history of the Department of State. However, in all instances in which a formal retention schedule has not been executed, such public records shall be preserved and maintained for a period of at least three years from the date on which the public record was made.

The above quoted provision mandates that public records shall be kept for at least three years from the date on which the public record was made, unless a formal retention schedule has been executed. The Board has adopted a formal retention schedule which was approved by the Secretary of State's Office.² The record retention schedule provides that impaired professional files shall be maintained as permanent records.³

² The Board's Records Retention Schedule was last approved by the Secretary of State's Office on November 29, 2010.

³ See page four (4) of the Board's Records Retention Schedule approved by the Secretary of State's Office on November 29, 2010.

Since general state law requires that public records be maintained for a minimum of three years, it is the opinion of this office that the record retention schedule relating to a former IPP participant's file complies with state law.

You have also asked whether the Board is required to preserve and maintain such records for a period of at least three years from the date the record was created pursuant to La. R.S. 44:36(A). As discussed above, La. R.S. 44:36(A) mandates that public records shall be kept for at least three years from the date on which the public record was made, unless a formal retention schedule has been executed. Since the Board has executed a formal retention schedule, the Board must conform to the retention periods provided for in the approved schedule on file with the Secretary of State's Office.⁴ In light of the retention obligations of the Board as reflected by the formal records retention schedule, it is clear that the Board has an obligation to retain an IPP participant's file permanently.

Finally, you have asked our office if the preservation of IPP former participant's records for at least three years violates the American with Disabilities Act (ADA). Title II of the ADA, 42 U.S.C. 12132, *et seq.*, prohibits discrimination against individuals with disabilities by public entities. Title II of the statute provides that no "qualified individual with a disability" shall, by reason of that disability, "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity."⁵

The definition of a "public entity" as used in Title II of the ADA includes "any department, agency, special purpose district, or other instrumentality of a State or States or local government."⁶ The Board is a regulatory board created by statute.⁷ La. R.S. 37:2705 sets forth the powers of the Board, which include, in pertinent part, as follows:

(C)(2) The board is empowered to examine for, deny, approve, revoke, suspend, and renew the license of licensed clinical social workers and shall review applications at least once a year. The board is further empowered to examine for, deny, approve, revoke, suspend, and renew the license of licensed master's social workers and shall review applications at least once a year. The board is further empowered to examine for, deny, approve, revoke, suspend, and renew the certificate of certified social workers or the license of licensed master's social workers and shall review applications at least once a year. The board is further empowered to deny, approve, revoke, suspend, and renew the registration of registered social workers and shall review applications once a year.

⁴ See the Board's Records Retention Schedule approved by the Secretary of State's Office on November 29, 2010.

⁵ 42 U.S.C. § 12132.

⁶ 42 U.S.C. § 12131(1)(B).

⁷ See La. R.S. 37:2704.

The Board's purpose and actions can therefore be classified as traditional state functions, and it is the opinion of this office that the Board is a "department, agency, special purpose district, or other instrumentality of a State" for purposes of the ADA.

To state a claim under Title II of the ADA, a plaintiff must show: (1) she is a "qualified individual with a disability"; (2) she was either excluded from participation in or denied the benefits of a public entity's services, programs or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of her disability.⁸ The ADA defines "qualified individual with a disability" as follows:

[A]n individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2).

The ADA defines a "disability" as a "physical or mental impairment that substantially limits one or more of the major life activities of such individual."⁹ The term "individual with a disability" is extended to an individual "participating in a supervised rehabilitation program, and ... no longer engaging in the illegal use of drugs."¹⁰ However, ADA protection is not extended to an individual who has used illegal drugs "recently enough so that continuing use is a real ongoing problem."¹¹

Based on the foregoing, it is the opinion of this office that retention of a former IPP participant's file does not, in and of itself, constitute a violation of the ADA. However, if a former IPP participant meets the criteria as a qualified individual with a disability for purposes of the ADA and can show that she was either excluded from participation in or denied the benefits of the Board's services, programs or activities, or was otherwise discriminated against by the Board based on the retention of records within her former IPP file, the Board could potentially be in violation of the ADA. Nevertheless, determination of a "qualified individual" with a "disability" is an issue of fact that must be made on a case-by-case basis to be determined by a court.

In conclusion, it is the opinion of this office that, in light of the retention obligations of the Board as reflected by the formal records retention schedule, it is clear that the Board has an obligation to retain a former IPP participant's file permanently. However, the

⁸ See 42 U.S.C. § 12132; *Kaltenberger v. Ohio College of Podiatric Medicine*, 162 F.3d 432, 435 (6th Cir.1998).

⁹ 42 U.S.C. § 12102.

¹⁰ 42 U.S.C. § 12210(b)(2).

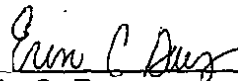
¹¹ *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1188 (9th Cir.2001).

majority of the documents contained within a former IPP participant's file are most likely exempt from disclosure under the Public Records Act pursuant to La. R.S. 44:4(26). Further, preservation of the former IPP participant's file does not, in and of itself, violate the ADA.

We hope that this opinion has adequately addressed the legal issues you have raised. If our office can be of any further assistance, please do not hesitate to contact us.

With best regards,

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ATTORNEY GENERAL

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