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Issue: Scope of the Committee's authority as it pertains to regulations governing GRS-1476 and regulation-created retention schedules in general.

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Hi Records Management Committee members-

Our assistant attorney general, Brian Swan, has researched the questions and issues raised at the March 2023 RMC meeting, and has addressed them in the following memorandum, as requested by the Committee. Please review the memorandum and come prepared to discuss it, as deemed appropriate, during the April 24 meeting.

Memorandum Opinion

To: Records Management Committee

Issue: Scope of the Committee's authority as it pertains to regulations governing GRS-1476 and regulation-created retention schedules in general.

Background

On March 22, 2023, the Committee met to discuss a proposed change to GRS-1476. The proposal was brought by the RIM Specialists at the State Archives and sought to clarify the 3 and 5-year retention requirement for certain special education records. Essentially, the reason for the different time periods within the same schedule is because regulations require that when federal money is received in conjunction with the record, the records must be kept for 3 years. Questions arose as to why the need for a 3-year **and** 5-year requirement, as well as the scope of authority the Committee has over the Utah State Board of Education's (USBE) regulations* concerning records retention. I was asked to look into this issue and render an opinion to the Committee.

*There seems to be some confusion over some of USBE's claims it made in the March meeting. I stress that I could not find any Utah statutes or regulations concerning the retention of special education records. From what I could tell and is discussed below, the 3-year regulation that USBE spoke of in the March meeting was not promulgated by USBE, nor is it a Utah regulation. Therefore, the analysis below will focus on the regulation I received from USBE when I reached out to them directly (2 CFR 200.334) and how it interplays with the Committee's authority.

The Law and the Committee's Authority

The question of the Committee's authority to modify a proposed retention schedule that is enshrined in regulation is one of first impression. That is, the question has not come up before in Utah law. As a result, I will break down the elements and the scope of the Committee's authority to come to a logical conclusion on the matter.

The Committee was formed pursuant to [Section 63A-12-112](#). As a creature of statute, the Committee not only receives its powers from statute, but is also limited to only those powers the statute prescribes. *See Ritholz v. City of Salt Lake*, 284 P.2d 702, 703 (Utah 1955); *see also Walton v. Tracy Loan & Trust Co.*, 92 P.2d 724, 728 (Utah 1939). Accordingly, we look to the Code to determine the Committee's powers and their extent.

[Section 63A-12-113](#) outlines two substantive duties in regard to record retention: (1) review and determine whether to approve each schedule for the retention and disposal of records within three months after the day on which the proposed schedule is submitted to the Committee; and (2) the Committee may make recommendations to a governmental entity regarding the management of its records. Thus, the Committee's duties can be summarized as: approving or rejecting proposed retention schedules and disposal practices, and also to make recommendations regarding management of records generally.

The Proposed Revision to GRS-1476 and Regulation

The proposed retention schedule sought to clarify the existing GRS-1476. According to USBE, when federal funds are received in connection with special education records, regulations require the records be retained for 3 years. However, when that is not the case, the records may be retained for 5 years.

In my research, I couldn't find any USBE regulation requiring a 3-year record retention for special education records. I reached out to USBE for clarification on the regulation they spoke of in the meeting. I was pointed to [2 CFR Section 200.334](#). This is a federal regulation that applies to records connected with federal awards (federal funds) received by a non-federal entity. The regulation states that "Financial records, supporting documents, statistical records, and all other non-Federal entity records pertinent to a Federal award must be retained for a period of three years from the date of submission of the final expenditure report . . ." Therefore, GRS-1476 and the proposed revision is essentially governed by federal law. It's notable that if USBE is taking the federal award and then creating a sub-award that is passed on to other organizations to carry out its purposes, then Section 200.334 would no longer apply. [2 CFR Section 200.334\(d\)](#).

In turn, "federal award" essentially means 'the federal financial assistance that a recipient receives directly from a federal agency.' [2 CFR Section 200.1](#). From the meeting, it seems that USBE or local school districts are receiving money from Medicaid in connection with the student records. Further information is needed as to what the Medicaid money is actually being used for and whether it constitutes a "federal award" under the CFR. By regulation, a federal award is either a grant, cooperative agreement, loans, and other forms of financial assistance. [2 CFR Section 200.1 \(definition of "financial assistance"\)](#). For purposes of the analysis below, we will assume the Medicaid money is a grant or loan, although I stress that the Committee should gain certainty on this point because if the Medicaid money does not constitute a "financial assistance" under the regulation, then it cannot be a "federal award" and this CFR does not apply at all. Consequently, there would be no 3-year retention requirement required by regulation.

Application and Conclusion

Because the Committee's powers are limited to accepting, rejecting, and making recommendations, it can only exercise those powers when a governmental entity brings a proposal in front of it for decision or if the Committee becomes aware of an entity's records mismanagement. Consequently, when an entity such as USBE offers a retention proposal for the Committee's consideration, the burden rests largely on the entity to ensure compliance with applicable law. With that said, however, the Committee should take the time to examine whether any applicable laws exist regarding the records retention schedule at issue. This is a reasonable task to take on since the Committee has three months to approve or reject a proposal.

Given that the Committee is charged by the legislature with the sole task of approving retention schedules, it is unlikely that a governmental entity has the legal authority to promulgate regulations addressing retention and bypass the Committee. That is, because of the Committee's statutory charge, the Committee has the final say over an entity's record retention schedule. The only exception, of course, is if the legislature, federal regulators, or a court order says otherwise.

As this applies to the proposal to revise GRS-1476, the federal regulation does impose a finite 3-year period for records where a federal award is attached. However, while Section 200.334 doesn't explicitly state that the records must be retained 'for a minimum of 3 years,' nothing in the regulation limits retention to only 3 years. I see no reason why there could not just be a 5-year retention requirement regardless of the funding source. This seems to make more sense and better comply with GRS-1476 for a couple of reasons. First, if USBE holds the records for 5 years, they are necessarily satisfying the federal requirement of holding them for 3. Second, the 3/5 year distinction is based on financial award, not the record itself. It seems odd to me that a record that should be held for 5 years may be destroyed after 3 years simply because a federal award was received. I would think that USBE and its school districts would have an interest in holding the federal award related records for 5 years for the same reasons it holds non-federal award records for 5 years. That is, if the content of the record normally warrants a 5-year retention, then it should not be destroyed after 3-years merely because of the financial award attached to it.

In conclusion, the Board may approve the proposal to revise GRS-1476, reject it, or even recommend changes to it since the changes concern the entity's record management. The Committee has 3 months to make that decision. The only thing that will be off limits is recommending/approving a retention schedule that is less than 3 years for the federal award records – assuming the Medicaid money is a financial award by definition.

We will work to get clarification from the Utah State Board of Education (USBE) regarding Medicaid and financial awards so that we can explain, and adjust, if necessary, the proposed retention for GRS-1476.

We look forward to seeing you on April 24.

Thank you!



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