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ATTORNEY GENERAL OPINION NO. 85-10

TO: Rose Bowman, Director  
Idaho Department of Health and Welfare

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

For ease of analysis, the questions raised in your letter have been restructured into the following major areas.

- I. Idaho's "Relative Responsibility" law, codified at Idaho Code § 32-1008A, is but one of several laws dealing with the liability of parents or spouses for repayment of public assistance, including medical assistance. Which of these laws should be addressed in formulating an application for a waiver under the demonstration program provisions of section 1115 of the Social Security Act?
- II. Under Idaho's relative responsibility law, payments collected from parents and spouses are treated by the state as payments from a legally liable third party if they are made after the state has paid Medicaid bills. Should this practice be addressed in applying for a waiver under the demonstration program provisions of section 1115 of the Social Security Act?
- III. If the waiver of "general applicability" were received, would Idaho's relative responsibility law still violate the Social Security Act by selecting out only the parents, spouses and adult children of Medicaid nursing home clients?
- IV. Assuming that Idaho's relative responsibility program would qualify for a demonstration program waiver under section 1115 of the Social Security Act, the following additional questions must be addressed regarding repayment collections:

- A) Do Idaho's relative responsibility law and other pertinent statutes give the Department of Health and Welfare jurisdiction and authority to collect from non-residents?
- B) Does the Department have to obtain a district court support order prior to obtaining repayment?
- C) Can the Department collect from parents and spouses the amounts paid by Medicaid before the effective date of these rules?

CONCLUSIONS:

- I. The intent of the waiver application is to create a demonstration project along the lines of Idaho's relative responsibility law as that law is contained in Idaho Code § 32-1008A. If the application were carefully drafted to incorporate that precise intent, the other statutes in your letter would be irrelevant.
- II. A waiver request should state that collections shall be treated as payments from legally liable third parties.
- III. It is the responsibility of the federal government to determine whether those provisions of Idaho's relative responsibility law which violate the Social Security Act can be waived pursuant to section 1115 of the same act.
- IV. The collection program problems associated with implementing a relative responsibility program are significant:
  - A) The relative responsibility law does not give the Department of Health and Welfare jurisdiction or authority to collect from nonresidents.
  - B) The Department would have to obtain a district court support order prior to obtaining repayment.
  - C) The Department could not collect from responsible relatives any amounts paid by Medicaid before the effective date of promulgation of the Idaho rules.

BACKGROUND:

Idaho's relative responsibility law, Idaho Code § 32-1008A, became effective on October 1, 1983. The law governs Medicaid patients in licensed skilled nursing facilities and licensed intermediate care facilities. It provides that responsible relatives must pay specific portions of the medical assistance provided to such patients and defines "responsible relatives" to include spouses, natural and adoptive children and others.

The Idaho Department of Health and Welfare began to implement this program and adopted appropriate regulations in 1983. However, when the Department began the collection phase of the program, Senator Terry Reilly of the Idaho Legislature requested an Attorney General's opinion as to whether the new relative responsibility law conformed with federal laws and regulations regarding the use of Medicaid funds.

Pursuant to this request, the Attorney General issued Opinion No. 84-7 on March 23, 1984. That Opinion concluded that Idaho's relative responsibility law was "inconsistent with federal law regulating the use of Medicaid funds" and that a "continuation of the statutory scheme may subject Idaho to federal sanctions and/or private court actions. . . ." 1984 Attorney General Opinion No. 84-7 at 67.

In particular, the Opinion found that Idaho's relative responsibility law was not a law of "general applicability" and that its demand for repayment from responsible relatives violates the intent of Congress, which was that "States may not include in their plans provisions for requiring contributions from relatives other than a spouse or a parent of a minor child. . . ." S.Rep. No. 404, 89th Cong. 1st Sess. 78 (1965).

Subsequent to receipt of Attorney General Opinion No. 84-7, the legislative germane committees requested the Idaho Department of Health and Welfare to seek a waiver of the above-quoted prohibitions in the federal Social Security Act, pursuant to section 1115 of that law. The Department inquired into the possibility of such a waiver and, on November 2, 1984, received a response to its inquiry from Norman V. Meyer, Associate Regional Administrator for Policy of the Department of Health and Human Services. The response states that the federal agency "views the relative responsibility program as an important Medicaid issue; one which is of interest philosophically to this

administration." This Opinion addresses the questions surrounding any application Idaho might make for such a waiver.

ANALYSIS:

I. Idaho Statutes Pertinent to a Demonstration Program Waiver.

The following Idaho statutes are mentioned in your opinion request as having possible relevance to the waiver request:

Idaho Code § 56-203A--Authority of Department of Health and Welfare to enforce child support.

Idaho Code § 56-203B--Payment of public assistance for child constitutes debt to the Department by natural or adoptive parents.

Idaho Code § 56-209b(3)--Medical assistance.

Idaho Code § 32-1002--Reciprocal duties of support.

Idaho Code § 32-1003--Liability of parent for child's necessities.

Idaho Code § 66-414--Developmentally disabled persons with assets sufficient to pay expenses, liability of relatives.

Idaho Code § 32-901--Mutual obligations of husband and wife.

Idaho Code §§ 56-203A, 56-203B, 32-1002, and 32-1003, are specific laws that do not relate to the Medicaid program. Therefore, any responsibility of the Department pursuant to these laws should not be addressed in terms of a waiver/demonstration project pursuant to section 1115 of the Social Security Act.

Idaho Code § 56-209b(3) subrogates the Department to the rights of the patient to recover Medicaid monies from any third party who might be responsible for payment of this expense. However, this section clearly relates only to claims of a Medicaid recipient founded in tort against an outside third party. Therefore, this section does not relate to a third party liability such as addressed by the relative responsibility program and is not relevant to a waiver application.

Idaho Code §§ 56-203A and 56-203B do provide a specific enforcement mechanism requiring the Department to seek recovery against a natural or adoptive parent or parents for any public assistance benefits paid to any child. These specific sections have been enforced for some time in this state and have been implemented and enforced by the child support unit in the Department of Health and Welfare. Therefore, these statutes are not relevant to the proposed waiver application for a demonstration project under 42 U.S.C. 1315.

Idaho Code § 32-1002 imposes reciprocal duties of support upon the father, the mother and the children, who are unable to maintain themselves. This statute specifically refers to the county indigency program and does not give the Department responsibility or authority to require repayment for public assistance, including medical assistance and thus is not relevant to a waiver-demonstration project.

Idaho Code § 32-1003 imposes liability upon a parent for furnishing necessities to a child and allows an action by a third party who may provide such support. Isaacson v. Obendorf, 99 Idaho 304, 581 P.2d 350 (1978). Although section 32-1003 does not impose a responsibility upon the Department, it does provide a third party authorization for the Department to maintain a cause of action in the case where it has provided public assistance, including medical assistance, payments to a child if such payments are supplied in good faith and are necessary for the support of that child. Therefore, these statutes are not appropriate for the proposed waiver-demonstration project under 42 U.S.C. 1315.

Idaho Code § 32-901 imposes mutual obligations upon the husband and wife to provide support. This section is contained in title 32, chapter 9 of the Idaho Code relating to a husband and wife's separate and community property. It is concerned only with the respective rights of spouses in their community and separate property, and is not a general support statute. Williams v. Paxton, 98 Idaho 155, 559 P.2d 1123 (1973); cf. Linton v. Linton, 78 Idaho 355, 303 P.2d 905 (1956). Sections 56-203B and 56-203C are the civil statutes authorizing and requiring the Department to require spouses to repay for public assistance, including medical assistance, as defined in Idaho Code § 56-201(e). Idaho Code § 32-709 supports the Department's authority to sue for support where the spouse does not receive public assistance. Therefore, Idaho Code § 32-901 does not authorize or require the Department to require spouses to repay for aid for dependent children, including medical assistance.

Furthermore, Idaho Code §§ 56-203B and 56-203C are not appropriate for the waiver-demonstration project under 42 U.S.C. 1315.

## II. Treatment of Collection Procedures Under a Waiver Program

The policy guidelines issued by the U.S. Department of Health and Human Services, as outlined in Medicaid Manual Transmittal, HFCA pub. 45-3 no. 3812 (February, 1983), specifically note that third party liability regulations at 42 CFR 433, subpart D, do not apply to collections pursuant to a statute of general applicability. Subpart D refers to requirements and options that the state may take pursuant to its state plan under the medicaid program. As these third party liability provisions are state plan requirements, this avenue cannot be used for collections regarding the relative responsibility program. The state agency that administers the Medicaid program may not enforce the statute of general applicability because the medicaid program receives federal financial participation only for expenditures made under an approved state plan. As the Department of Health and Welfare is the designated state agency to administer the medicaid program in Idaho, a statute of general applicability which would authorize the same Department to make collections on the relative responsibility program could come into serious conflict with 42 CFR 435.602(a)(2) and § 436.602(a)(2). This concern should be addressed in the waiver application.

Medicaid Action Transmittal SRS-AT-77-4, dated January 13, 1977, regarding retroactive recoupment specifically relates to considering the financial responsibility of relatives in order to determine eligibility and the amount of benefits. It implies that the regulations do not prohibit a retroactive recoupment pursuant to a statute of general applicability. The Secretary may waive this provision but the policy guideline in publication 45-3 would still have to be followed. As the relative responsibility program set up in section 32-1008A would not deem relative responsibility contributions as income available to the Medicaid applicant or recipient, because it is not actually received by the recipient but by the Department, such a collection program would be permissible.

Under the waiver/demonstration project as guided by the existing provisions of Idaho Code § 32-1008A, subsection (5), the amounts collected under such a relative responsibility program would be received by the Department of Health and Welfare and not by the applicant or recipient. Such a process

following the guidelines of Medicaid Manual Transmittal HFCA pub. 43-3 No. 3812 (February, 1983) which would count as third party liability payment and not count such payments as income in determining medical eligibility, would not place the state out of conformance with federal laws and rules regulating the use of Medicaid funds if a specific waiver of 42 CFR 435.602 and 42 CFR 436.602 is included in the application.

### III. Validity of the Waiver.

The most important question in your letter requesting an Attorney General Opinion states:

If the waiver of "general applicability" were received, does "Relative Responsibility" (Idaho Code, Section 32-1008A) still violate Section 1902(1)(17)(D) of the Social Security Act (42 USC, Section 1396a(17)(D)?

The simple answer is that when the federal government grants a waiver of certain statutory requirements, a state agency must consider those requirements waived, or at least must be held harmless for actions taken in violation of those requirements.

As mentioned earlier, the federal official contacted regarding a waiver in this instance has replied that Health and Human Services regards "the relative responsibility program as an important Medicaid issue" and that it is "one which is of interest philosophically to this administration." The response went on to say that "[t]he waiver authority contained in section 1115 [of the Social Security Act] would be the appropriate authority for conducting a demonstration of this type." Finally, the response stated: "It would appear, at a minimum, that waivers would be needed of Section 1902(a)(17)(D) of the act and accompanying regulations and regulatory citations concerning the prohibition against treating relative contributions as third party liability."

In short, the federal government has initially assured the Idaho Department of Health and Welfare that the present administration is interested in sponsoring a demonstration project along the lines of Idaho's relative responsibility program; that a waiver under section 1115 of the Social Security Act is the appropriate mechanism for such a waiver; and that, at a minimum, the waiver application must seek exemption from all federal provisions (both statutory and regulatory) that would

otherwise forbid a state from requiring adult children to pay their parents' Medicaid bills.

The communication from the federal agency outlines the considerations that will determine whether such a demonstration project might be accepted:

I would emphasize, however, that this [waiver] authority is limited to demonstrations that test hypotheses and provide data and information that enable us to make national policy decisions.

This communication comports with the generally recognized principle that the Secretary of the Department of Health and Human Services is vested with broad powers to authorize projects which do not fit within permissible statutory guidelines of the standard public assistance programs pursuant to section 1115 of the Social Security Act, 42 USC § 1315. Aguayo v. Richardson, 352 F.Supp. 462 (S.D.N.Y.), aff'd, 473 F.2d 1090 (2d Cir. 1973), cert. den., 414 U.S. 1146, 94 S.Ct. 900, 39 L.Ed.2d 101 (1973).

The only limitation upon the Secretary's authority under section 1115 is that he must judge the project to be one which is likely to assist in promoting the objectives of the applicable title of the Act. Id. Congress has entrusted this judgment to the Secretary and not to the courts.

Thus, once a project has been approved by the Secretary, it is the function of the courts only to determine whether his decision was arbitrary and capricious and lacking in rational basis.

Crane v. Matthews, (D.C. Ga. 1976) 417 F.Supp. 532, 539. The Secretary may waive a state's compliance and conformance with section 1902(a)(17) of the Social Security Act (42 U.S.C. 1396a(a)(17)) which requires a law of general applicability for a relative responsibility program, provided that such authority of the Secretary is not exercised arbitrarily, capriciously, or on an irrational basis, and such waiver is likely to assist in promoting the objectives of the Medicaid law. California Welfare Rights Organization v. Richardson, 348 F.Supp. 491 (D.C. Cal. 1972).

The communication from the regional representative of the Department of Health and Human Services also makes clear the

obligations that Idaho's Department of Health and Welfare must assume in undertaking such a demonstration project:

In order for this project to be considered for approval, the State of Idaho would have to complete the attached grant application and submit it for review by a technical panel of government and nongovernment individuals knowledgeable in the field of social science research.

The application would have to include, among other things, a clear statement of goals and objectives, specific hypotheses to be tested, a well-formulated research design and evaluation plan, a thorough explanation of the data to be collected and a plan for using that data, an analysis of the potential utilization of the findings and an assessment of the applicant's potential for implementing the project.

In other words, the "waiver" would not simply be a waiver to go forward with Idaho's relative responsibility program. If Idaho's waiver application is to be approved, it will be because Idaho has committed significant resources to running a sophisticated, scientifically valid demonstration program. The purpose is not to exempt Idaho from a federal requirement, but to use Idaho as a test laboratory (at Idaho's expense) to run an experiment.

Such a demonstration project could be used to test such reasonable hypotheses as whether a relative responsibility program would cause Idaho residents not to enter nursing homes in Idaho or to enter nursing homes in other states. Such goals and objectives would provide data for the federal agency to evaluate the effects of the program and to determine if it is workable for all states and would not meet with a great deal of public resistance.

Further, it must be stressed that waiver programs approved under section 1115 of the Social Security Act cannot last longer than two years. Thus, it must be clearly understood at the outset that federal approval of a waiver application would not imply a long-term approval of Idaho's relative responsibility program.

#### IV. Collection Problems.

The final cluster of questions in your opinion request deals with residual collection programs that may arise even if the state succeeds in having its waiver application approved.

A. First, you ask whether Idaho Code §§ 32-1008A and 5-514 give the Idaho Department of Health and Welfare jurisdiction and authority to collect relative responsibility payments from responsible relatives who do not reside in Idaho. Idaho Code § 32-1008A(1) directs the Department to collect from all responsible relatives of a Medicaid recipient. Subsection (4) authorizes the Department to enter into reciprocal enforcement agreements if similar provisions are enacted by another state. It does not address long-arm jurisdiction at all. Neither does it avail if other states lack reciprocal enforcement agreement statutes, as is generally the case.

Idaho Code § 5-514 is the general long-arm statute but contains no provision which may be relied upon for out of state jurisdiction under the relative responsibility program. Even though this section is intended to confer all the jurisdiction available under the due process clause of the U.S. Constitution, traditional notions of fair play and substantial justice would require, at the very least, that there be some specific area of contact with the state. Southern Idaho Pipe and Steel Co. v. Cal-Cut Pipe and Supply, Inc., 98 Idaho 495, 567 P.2d 1246 (1977), cert. den., 98 S.Ct. 1225, 55 L.Ed. 2d 757 (1978); Duignan v. A.H. Robbins Co., 98 Idaho 134, 559 P.2d 750 (1977).

The mere relationship of a parent and child is not sufficient to meet the due process test requiring minimum contacts or a sufficient connection of the non-resident with the state so as not to offend the traditional notions of fair play and substantial justice. There must be some act by which a non-resident avails himself of the privileges of conducting activities within this state and clear notice that the defendant is subject to suit here. Columbia Briargate Co. v. First National Bank, 713 F.2d 1052 (4th Cir. 1983); Idaho Potato Com'n v. Washington Potato Com'n. 410 F.Supp. 171 (D.C. Idaho 1976).

Idaho Code § 5-514 is modeled after an Illinois statute which has been liberally construed to extend jurisdiction to a non-resident who fathered an illegitimate child in the state by treating paternity as a tortious act committed in the state. Poindexter v. Willis, 87 Ill. App.2d 213, 231 N.E.2d 1 (1967). Idaho Code § 32-1008A places a duty upon responsible relatives. But there would be no tortious act committed in the state, only a lack of contribution to help pay voluntary nursing home

costs. Nor would there be any medicaid application, agreement or assurance made in the state or to anyone in the state by the non-resident. This is not sufficient to meet the due process and fundamental fairness test. Madison Consulting Group v. South Carolina, 53 U.S.L.W. 2358 (C.A. 7 1985); Wright v. Yackley, (9th Cir. 1972) 459 F.2d 287; Tillay v. Idaho Power Company, 425 F. Supp. 376 (D.C. Wash. 1976); Jurisdiction Over Non-resident Parent, 76 A.L.R.3d 708 (1977). There is no language whatsoever in this subsection which could be construed to authorize out of state jurisdiction due to the fact that an individual may meet the definition of responsible relative within Idaho Code § 32-1008A.

The difficulties that will be encountered can readily be seen by referring to the history of the child support enforcement program. Several years ago states had substantial difficulties in attempting to enforce their child support obligations in other states when the father was not a resident of the same state as the mother and child. There was spotty and ineffective enforcement because the various states did not cooperate with one another without any requirement to enter into reciprocal enforcement agreements. The federal government stepped into this area by adopting the Uniform Reciprocal Enforcement of Support Act (URESA) requiring that federal financial assistance would be unavailable unless each state cooperated with other states to enforce their respective child support laws and judgments. Idaho adopted URESA in 1969, Idaho Code § 7-1948 et seq. A viable medicaid relative responsibility program should be conducted under the auspices of a federal statute or regulation which requires all states to cooperate with one another in their collection and enforcement efforts. Without this, an effective system that avoids the aforementioned constitutional problems would be difficult to obtain.

B. The relative responsibility program, of course, may obtain voluntary repayments in accordance with applicable rules and regulations adopted pursuant to the authority of Idaho Code § 32-1008A. However, in the event that a responsible relative does not voluntarily comply with the provisions of the program, the Department would be required to obtain a judgment or support order in a district court prior to being able to enforce judgment and execute thereon pursuant to Idaho Code §§ 8-505, 506, 528 and 529. By analogy a reference to Idaho Code § 56-203D(1)(a) indicates that repayment must be established by judgment.

C. The Idaho Administrative Procedure Act, Idaho Code §§ 67-5201, et seq., would require the Department to adopt and promulgate rules and regulations pursuant to the various statutes relied upon for authority to collect from parents and spouses the amounts paid by Medicaid. Even though the authorizing statutes have been in existence for some time, they are not self executing and would require appropriate rules and regulations. Thus, the Department could not collect from parents and spouses amounts paid by Medicaid before the effective date of rules properly promulgated under the Idaho Administrative Procedure Act.

It must be noted that the simplest and clearest approach for the State of Idaho would be for the legislature to amend Idaho Code § 32-1008A to make it a law of general applicability and address the other concerns expressed herein. The restrictions and limited life of a section 1115 waiver-demonstration experiment would not effectively carry out the legislative purpose in adopting Idaho Code § 32-1008A. Even if the federal agency approved a comprehensive waiver application that would hold the state harmless from losing federal funding, it would not bar third parties from initiating litigation that could adversely impact federal funding and expose the state to liability for the costs and attorney fees of such a lawsuit. Aguayo v. Richardson, supra. This opinion cannot assure that the exercise of the secretary's discretion in approving a waiver request would survive judicial review.

AUTHORITIES CONSIDERED:

1. Statutes:

Idaho Code § 5-514  
Idaho Code §§ 7-1048 et seq.  
Idaho Code § 18-401-405  
Idaho Code § 32-709  
Idaho Code § 32-901  
Idaho Code § 32-1002  
Idaho Code § 32-1003  
Idaho Code § 32-1008A  
Idaho Code § 39-1301  
Idaho Code § 56-201(e)  
Idaho Code § 56-203A  
Idaho Code § 56-203B  
Idaho Code § 56-203D  
Idaho Code § 56-209b(3)  
Idaho Code § 66-414

Idaho Code §§ 67-5201 et seq.

Social Security Act § 1115; 42 USC § 1315  
Social Security Act § 1902(a)(17)(D); 42 USC  
§ 1396a(a)(17)(D)

2. Idaho cases:

Isaacson v. Obendorf, 99 Idaho 304, 581 P.2d 350 (1978)

Williams v. Paxton, 98 Idaho 155, 559 P.2d 1123 (1973)

Linton v. Linton, 78 Idaho 355, 303 P.2d 905 (1956)

Southern Idaho Pipe and Steel Company v. Cal-Cut Pipe and Supply, Inc., 98 Idaho 495, 567 P.2d 1246 (1977), cert. den., 434 U.S. 1056, 98 S.Ct. 1225, 55 L.Ed. 2d 757 (1978)

Duignan v. A. H. Robbins Co., 98 Idaho 134, 559 P.2d 750 (1977)

Idaho Potato Com'n v. Washington Potato Com'n, 410 F. Supp. 171 (D.C. Idaho 1976)

3. Cases Cited From Other Jurisdictions:

Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973)

Potter v. James, 499 F. Supp. 607 (D.C. Ala. 1980)

Crane v. Matthews, 417 F.Supp. 532 (D.C. Ga. 1976)

California Welfare Rights Organization v. Richardson, 348 F. Supp. 491 (D.C. Cal. 1972)

Columbia Briargate Company v. First National Bank, 713 F.2d 1052 (4th Cir. 1983)

Wright v. Yackley, 459 F.2d 287 (9th Cir. 1972)

Tillay v. Idaho Power Company, 425 F. Supp. 376 (D.C. Wash. 1976)

4. Other Authorities:

S.Rep. No. 404, 89th Cong. 1st Sess. 78 (1965)

H.R. Rep. No. 213, 89th Cong. 1st Sess. 68 (1965)

42 C.F.R. 433, subpart D

42 C.F.R. 435.602

42 C.F.R. 436.602

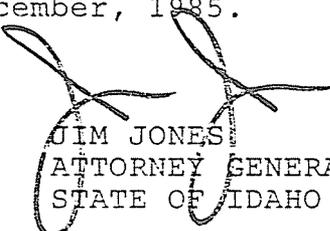
Medicaid Manual Transmittal, H.C.F.A. Pub. 45-3, No. 3812  
(February, 1983)

Medicaid Action Transmittal SRS-AT-77-4 (January 13, 1977)

Attorney General Opinion No. 84-7 (March 23, 1984)

Jurisdiction Over Nonresident Parent, 76 A.L.R. 3d 708

DATED this 31<sup>st</sup> day of December, 1985.



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