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ATTORNEY GENERAL OPINION NO. 88-9

TO: Ray Winterowd, Administrator
Division of Family and Children's Services
Department of Health and Welfare
450 West State Street, 10th Floor
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Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Does the Idaho Administrative Procedure Act apply to eighteen month permanency planning administrative hearings held pursuant to the Adoption Assistance and Child Welfare Act of 1980, 42 USC 675(5)?

CONCLUSION:

No. The Administrative Procedure Act, section 67-5207, Idaho Code, et seq., applies to contested cases. Eighteen month permanency planning dispositional hearings do not fall within the scope of "contested cases" as defined in the Administrative Procedure Act.

ANALYSIS:

Federal Public Law 96-272 was enacted by Congress in 1980 to address the national problem of "foster care drift," i.e., the serial placement of children in numerous foster homes without clear planning efforts directed toward a permanent resolution. The statute, called the Adoption Assistance and Child Welfare Act, makes available to the state additional federal funds for foster care services conditioned upon the meeting of certain criteria specified in the statute and promulgated regulations of the U.S. Department of Health and Human Services. Among other requirements, the state must insure that reviews of case plans be conducted for each child in the state's responsibility who is placed in out-of-home care and that dispositional hearings determining case plan permanency goals be held within eighteen

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months of such placement and periodically thereafter. 42 USC 475(5)(B) and (C).

Eighteen month permanency planning dispositional hearings shall determine "the future status of the child (including, but not limited to, whether the child should be returned to the parent, should be continued in foster care for a specified period, should be placed for adoption or should because of the child's special needs or circumstances, be continued in foster care on a permanent or long-term basis)...." 42 USC 475 (5)(C).

Procedural safeguards to be observed, as specified in the Act, concern parental rights relating to the removal of the child from the parental home, a change in the child's placement, and any determination affecting visitation privileges of parents. The federal agency, the Department of Health and Human Services, expressly declined to promulgate rules in this area. That department's response to public rule making comments on this issue are:

The Department has opted to give the States the responsibility for development of standards, procedures, and guidelines in implementing this program...

The Department believes that the realities of program operations in dealing with State courts and other review bodies necessitates decision-making at the State agency level. Therefore, while strongly encouraging the use of (the) voluntary sector in the periodic and dispositional reviews, the Department does not believe it is in the best interest of the program to mandate specific requirements. We believe it is better left to the judgment of the State agencies, courts and legislatures to determine the method of review 48 Fed. Reg. 100, 23107 (May 23, 1983)

Internal policies of health and human services state the following:

States are free to determine the nature and method of procedural safeguards. These may include prior written notice, verification that notice was received, notification in the language of the recipient to assure understanding, right to review, comment and object to any intended change, right to be represented

by counsel before the agency or courts, procedures to assure that objections of parents will be considered by the agency and can be appealed through agency review or hearing processes. Human Development Services, PI 82-06, dated June 3, 1982. Department of Health and Welfare Policy Memorandum 87-7. IDAPA 16.03.2851.

Idaho has implemented the stated procedural safeguards as a portion of a more comprehensive right to hearing process. Department of Health and Welfare Policy Memorandum 87-7, IDAPA 16.03.2851.

P.L. 96-272 also gives the state the option of having the dispositional hearings held by a family, juvenile, or other court of competent jurisdiction, or by an administrative body appointed or approved by the court. 42 USC 475(5)(C). Idaho has utilized a system or process of administrative hearings determined by the administrative director of the courts to be consistent with the requirements and intent of the federal law. Neither Idaho statutes nor court rules have a procedure for such appointment or approval. However, this court administrative sanction has been determined by federal auditors to be adequate court "approval" to meet the requirements of the statute.

Administrative hearings conducted pursuant to 42 USC 475(5)(C) involve individual children who are placed in the custody of the state under one or more of the following acts: Child Protective Act, sections 16-1601 et seq., Idaho Code; Youth Rehabilitation Act, sections 16-1801 et seq., Idaho Code; Hospitalization of Mentally Ill, sections 66-317 et seq., Idaho Code; and Treatment and Care of the Developmentally Disabled Act, sections 66-401 et seq., Idaho Code.

Each petition filed under these acts may result in a court order of custody placed in, or committed to, the Department of Health and Welfare for a finite period. Such custody or commitment orders can not be extended by administrative action alone. They can be extended only by court action. Under each of these acts, responsibility for development of case planning and for implementation of the plan rests with the Department of Health and Welfare. Sections 16-1610, 16-1623(h), 16-1814, 66-337, 66-413, Idaho Code. Termination of parental rights, necessary prior to any adoptive placement, is not possible under any of these acts, but must be done under the Termination Act. Sections 16-2001, et seq., Idaho Code. Such a termination of parental

rights can be effected only by court order, not administrative action.

The Administrative Procedure Act, section 67-5201, et. seq., Idaho Code, applies to "contested cases." A "contested case," as statutorily defined, "means a proceeding, including but not restricted to rate making and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for a hearing." (Emphasis added.) Idaho Code section 67-5201(2).

The Department of Health and Welfare does not have the duty or authority under the Child Protection Act to enter an order affecting custody of the named child, but may determine where a child in the legal custody of the department will reside. The department has similar authority under the other enumerated acts. These exercises of authority may be denominated orders. While the department does have authority through its personnel to determine where a committed child shall live, it does not have authority, by itself, to determine the future status of that child as defined in 42 USC 475(5)(C). Such determination can only be made by a court after an opportunity for hearing.

Planning responsibilities and authority of the Department of Health and Welfare are limited to the grant of custody ordered by the court. By contrast, eighteen month permanency planning dispositional hearings necessitate planning without such limitation of time. Administrative hearing officers are not acting as the Department of Health and Welfare, or the department's agent, in making eighteen month dispositional hearing decisions. The federal statute makes it clear that such decisions must be made by the court or persons with court sanction, not by the agency.

Departmental regulations prescribe procedural safeguards consistent with the Administrative Procedure Act. Compare section 67-5209, Idaho Code, with IDAPA 16.03.2851 and Health and Welfare Policy Memorandum 87-7. The only significant difference between these hearing processes is that the rules of evidence apply in APA proceedings and do not apply to these administrative proceedings. Section 67-5210, Idaho Code.

Although all hearing officers are trained in hearing procedures, not all are attorneys. To require the hearing officers to apply the rules of evidence would be a heavy burden.

The determination that the Administrative Procedure Act does not apply to these hearings does not jeopardize the legal rights of the child or parent. A decision by a hearing officer will be necessarily limited by the court's existing order in the case. The decision of the hearing officer may be appealed to district court under IDAPA 16.03.2851, but the scope of the appeal is limited to review of the record. It is not a de novo proceeding. The appellate order can not exceed the limits of the existing court order. The APA would allow a review with the same limitations and no additional rights. However, under each act, either the child or the parent has an ability to request a review hearing to modify the court's order. It would always be to the advantage of the child or parent aggrieved by the administrative proceeding to seek a court modification rather than to appeal the more limited administrative proceeding order.

The administrative hearing process establishes only a permanent plan of action to be taken by the department. That case plan can only be put in effect if there is consistent action in a court proceeding.

SUMMARY:

The department is not required by either state or federal law to determine the legal rights, duties or privileges of a party relevant to their permanency planning future status. Such authority is not granted in Idaho Code and the relevant federal statute requires such determination be made by a family, juvenile, or other court of competent jurisdiction, or by an administrative body appointed or approved by the court. Therefore, eighteen month permanency planning dispositional hearings are not within the definition of "contested cases." As the hearings do not involve "contested cases," the Idaho Administrative Procedure Act does not apply.

AUTHORITIES CONSIDERED:

Federal Statutes:

P.O. 96-272, 42 USC b70 et seq.

Federal Regulations:

45 C.F.R. 1350.
48 F.R. 100, 23107 (May 23, 1983).
HHS, PI 82-06, 603. 1982.

Idaho Code:

Sections 16-1601 et seq.
Sections 16-1801 et seq.
Sections 66-317 et seq.
Sections 66-401 et seq.
Sections 67-5207 et seq.

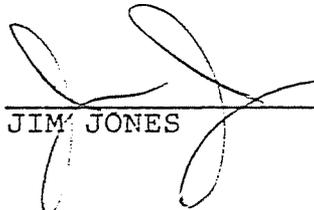
Idaho Cases:

Idaho Falls Consolidated Hospitals, Inc. v. Board of County Commissioners of Bonneville County, 104 Idaho 628, 661 P.2d, 1227 (1983).

Hoppe v. Nichols, 100 Idaho 133, 594 P.2d 643 (1979).

DATED this 30th day of December, 1988.

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Analysis by:

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cc: Idaho Supreme Court
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