

December 19, 1996

Honorable Dr. Anne Fox
Superintendent of Public Instruction
HAND DELIVERED

Michael Johnson, Director
Idaho Department of Juvenile Corrections
STATEHOUSE MAIL

Linda Caballero, Director
Idaho Department of Health and Welfare
STATEHOUSE MAIL

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Funding for Education of Juveniles placed in Private Residential Facilities¹

Dear Superintendent Fox, Director Johnson and Director Caballero:

You have requested an opinion from the Office of the Attorney General on several questions. Those questions along with brief conclusions follow. However, because your questions are all related, we have not attempted to answer them separately and sequentially. Instead, this opinion will offer a comprehensive narrative analysis of this entire area of law.

QUESTIONS PRESENTED

1. Which state or local government entity has the responsibility to fund educational services for juveniles committed to the legal custody of the Department of Juvenile Corrections pursuant to the Juvenile Corrections Act or to the legal custody of the Department of Health and Welfare pursuant to the Child Protective Act and placed by said agencies in a private residential facility? Does the responsibility change depending on whether the student has a disability as defined by the Individuals with Disabilities Education Act (IDEA) or section 504 of the Rehabilitation Act of 1973?
2. Does the funding responsibility vary depending upon the residence of the juvenile? If so, what is the "residence" of a juvenile in the legal custody of and placed by either the Department of Juvenile Corrections or the Department of

Health and Welfare in a private residential facility in the state of Idaho? Is “residence” defined differently for a student who has a disability?

3. Do the Department of Juvenile Corrections and the Department of Health and Welfare have the legal authority to contract with private residential facilities for placement of juveniles committed to their legal custody? If so, who has the legal decision making authority to decide where the juvenile actually receives educational services?
4. If the local school district or State Department of Education has the legal responsibility to fund educational services for these juveniles, does it have the legal authority to contract with a private residential facility to provide the required services? If so, are these juveniles in private residential facilities properly counted as part of the average daily attendance (ADA) for the purpose of education funding?

CONCLUSIONS

1. The Department of Juvenile Corrections and the Department of Health and Welfare have the responsibility to fund educational services for individuals committed to their legal custody where the juveniles are placed by said agencies in a private residential facility, and a decision is made by the departments that the individuals are to be educated at such private facility. If it is appropriate that the juveniles residing in the private residential facility are accepted into the public educational system, then the responsibility to fund the educational services shifts to the local school district and the public school appropriation. These conclusions are the same regardless of whether or not a juvenile is disabled.²
2. The funding responsibility is determined by the principles announced above and does not vary depending upon the residence of the juvenile. Idaho Code § 33-1404 allows juveniles placed pursuant to court order in a private residential facility to attend the public schools without payment of tuition in the school district where the facility is located. Thus, those juveniles are treated similarly to children whose legal residence is in that particular district.
3. Both the Department of Juvenile Corrections and the Department of Health and Welfare have the authority to contract with private residential facilities for placement and education of juveniles committed to their legal custody. Because of the custodial status of these departments, they have the authority to require that a juvenile or child be educated at a private residential facility in appropriate circumstances.

4. Because the local school district does not have the legal responsibility to fund educational services for juveniles placed in and educated at a private residential facility pursuant to a determination by a state agency, its ability to contract with a private facility for such services is irrelevant. However, should the local school district choose to participate in the education of the individuals in the private residential facility, it may be able to contract with the private facility to take over and run the education program as a secondary or alternative site. Although the Department of Education does not have the legal responsibility to fund the education services for juveniles residing and educated at a private residential facility who are not disabled, the Department of Education does have some authority and responsibility as it pertains to juveniles with disabilities. Such responsibility can be fulfilled by operation of state statute, administrative rules or interagency agreements. As stated above, in the case of individuals educated at a private residential facility, current statutes place the burden to fund such education on the Department of Juvenile Corrections or the Department of Health and Welfare.

ANALYSIS

The Department of Juvenile Corrections has a significant role in the incarceration, treatment and protection of juveniles who have been committed to its custody. The Department of Juvenile Corrections derives its authority from the Juvenile Corrections Act, Idaho Code §§ 20-501, *et seq.* The Department of Health and Welfare's authority over juveniles relevant to this opinion comes from the Child Protective Act, Idaho Code §§ 16-1601, *et seq.* Both of these departments may have juveniles committed to their legal custody who may have disabilities. The education of individuals with disabilities is primarily governed by federal law. Thus, both federal and state law must be considered to answer your questions.

A. Responsibilities of the Department of Juvenile Corrections (“DJC”)

DJC was established in 1995 as a separate department of state government with its primary mission to administer the juvenile corrections system in Idaho. Prior to 1995, the Department of Health and Welfare had the responsibility to administer the state's juvenile justice system. In 1995, the legislature repealed the Youth Rehabilitation Act and replaced it with the Juvenile Corrections Act. Idaho Code § 20-502 provides definitions of terms used in the Juvenile Corrections Act which are relevant to this opinion. Because your question focuses on juveniles committed to the legal custody of DJC, the definitions of the terms “commit” and “legal custody” are instructive. “Commit” means “transfer legal custody.” Idaho Code § 20-502(2). The term “legal custody” means “the relationship created by the court's decree which imposes upon the custodian responsibilities of physical possession of the juvenile, the duty to protect, train

and discipline him and to provide him with food, shelter, education and ordinary medical care.” Idaho Code § 20-502(14) (emphasis added). In essence, because DJC has legal custody of these juveniles, it must provide for their care and well-being. This includes a duty to provide the juvenile with education. While not defined, the term “provide” should include making such programs available and supporting those programs financially where appropriate. Such duty to provide for educational services does not depend upon whether the private facility can be deemed a “secure facility.”

However, to the extent that a private residential facility can be deemed a “secure facility,” it is even clearer under the Juvenile Corrections Act that DJC must provide or make available appropriate educational services. A “secure facility” is “any state-operated facility or facility operated under contract with the state which provides twenty-four (24) hour supervision and confinement for juvenile offenders committed to the custody of the department.” Idaho Code § 20-502(17). Idaho Code § 20-531(2) provides that, “[t]he department shall provide or make available to juvenile offenders in secure facilities, instruction appropriate to the age, needs and range of abilities of the juveniles.”³

In addition, DJC and the Idaho State Department of Education (“SDE”) entered into a Memorandum of Agreement in August 1996 that relates to this issue. In that agreement, SDE agreed to distribute funds from the public school appropriation to school districts that have juveniles placed in private residential facilities by court order if the students are enrolled in and attend an approved educational program operated by and under the control of a public school district. Under the agreement, DJC agreed to provide educational programs using funds appropriated to DJC for students placed by court order into private residential facilities or work camps for secure confinement. It was further agreed by both departments that, “no provision in state law requires any school district to provide an educational program on the grounds of a private residential facility or work camp. If a private residential facility or work camp wishes to provide a private educational program, such a program will not be supported with funds from the public school appropriation.”

Thus, DJC has the responsibility to fund the education services for juveniles committed to its legal custody and placed in a private residential facility where the education is required to be provided at the private facility, regardless of whether the juvenile is disabled. DJC has the authority to contract with a private residential facility for such placement and education pursuant to Idaho Code §§ 20-504(13), 20-531(3) and 20-536.

B. Responsibilities of the Department of Health and Welfare (“DHW”)

DHW’s authority over children committed to its custody is derived from the Child Protective Act. The Act defines “legal custody” to mean, “a relationship created by order of the court, which vests in a custodian the following duties and rights: . . . (3) to provide the child with care, education and discipline.” Idaho Code § 16-1602(r) (emphasis added). Further, DHW has the authority to contract for the placement and education of children in a private residential facility pursuant to Idaho Code § 16-1623(a). Therefore, DHW must also provide for the education of children placed at a private residential facility where DHW makes a determination that the education should be provided at the private facility.

C. Responsibilities of Local Public School Districts

If the education can be provided in the public school system, the public school districts in Idaho are required to admit without the payment of tuition juveniles or children who are placed by court order and reside in licensed group homes, agencies and institutions in the school district. Therefore, the legal residency of such individuals is not relevant. Idaho Code § 33-1404 provides, “non resident pupils who are placed by court order under provisions of the Idaho youth rehabilitation [now known as Juvenile Corrections Act] or child protective acts and reside in licensed group homes, agencies and institutions shall be received and admitted by the school district in which the facility is located without payment of tuition.” Thus, juveniles placed by DJC and DHW into a private residential facility located in a school district have a right to attend the public schools located in that district. This applies to both disabled and non-disabled juveniles. If certain juveniles are appropriately placed in public education and allowed into the public school system, then the responsibility for funding the educational services rests with the public school district and SDE through the public school appropriation, pursuant to Idaho Code § 33-1002B:⁴

1. Districts which educate pupils placed by Idaho court order in licensed group homes, agencies, institutions or juvenile detention facilities shall be eligible for an allowance equivalent to the previous year’s certified local annual tuition rate per pupil. The district allowance shall be in addition to support unit funding and included in district apportionment payments, subject to approval of district applications by the state superintendent of public instruction.

DJC may determine that it is inappropriate for a particular juvenile to attend public school, because of a court order or safety concerns. Those individuals committed to the legal custody of DJC are juveniles who have committed crimes. Individuals committed to the legal custody of DHW are children who have been abandoned, abused or neglected

and may be more appropriately placed in the public education system. In the event DJC or DHW determines that the educational program for a juvenile or child should be conducted by the private residential facility, the public school district is not responsible for funding the education of those juveniles or children at the private facility. Rather, because DJC and DHW have the duty to provide for the education of such juveniles as a result of their custodial status, they have the responsibility to fund such education when a specific juvenile or child cannot properly attend the public school.

D. Juveniles with Disabilities

The answer to the question of who is responsible for funding the education of juveniles or children in the custody of DJC or DHW is the same regardless of whether the juvenile is disabled. Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 et seq., and Section 504 of the Rehabilitation Act of 1973, each state and its local school districts must make a free appropriate public education (FAPE) available to all children with specified disabilities in mandated age ranges residing within the state. 20 U.S.C. § 1412(2). The state education agency (SEA) must exercise general supervisory authority over all education programs for children with disabilities administered within the state, including each program administered by any other public agency. 20 U.S.C. § 1412(6) and 34 CFR 300.600. In Idaho, this authority is exercised by SDE. This single line of responsibility for educating children with disabilities can be accomplished by several options, including state statutes, regulations and interagency agreements. 20 U.S.C. § 1413(13) and 34 CFR 300.600. While federal law requires such education to be “free,” it leaves to each state the decision where responsibility for funding that education lies. 20 U.S.C. § 1412(2)(B); Ashland School District v. New Hampshire, 24 IDELR 165 (N.H. 1996).

This opinion has concluded that, in Idaho, the cost of educating juveniles or children in the legal custody of DJC or DHW who are placed in a private residential facility and who must be educated at the private facility remains the responsibility of DJC or DHW. Otherwise, the education would be provided by the local school district. There is nothing under federal law relating to students with disabilities that would necessitate a contrary answer for such students. As stated above, children with disabilities must be provided with FAPE in the least restrictive environment (LRE). Often this LRE requirement conflicts with other interests such as safety and penological interests. However, IDEA and section 504 cannot be used to escape incarceration. Thus, despite the LRE requirement, an individual committed to the custody of DJC or DHW could still be educated at the private residential facility if there are sufficient non-educational reasons. An individual education plan (IEP) would have to be developed which balances the juvenile’s right to FAPE with the security concerns. New Hampshire Dep’t of Ed. v. City of Manchester, 23 IDELR 1057 (N.H. 1996). The particular

educational program is determined under the normal special education regulations, e.g., child-study teams, surrogate parents, etc.

E. Authority to Contract for Educational Services

Because the local school district is not responsible to fund the educational services provided to juveniles committed to the legal custody of DJC and DHW and educated at such private facility, its authority to contract with a private facility to provide such services is not relevant.⁵ However, should the school district wish to participate in the education of such individuals, the district may contract with the facility to take over and run the educational program at the private residential facility and treat such program as a secondary or alternative education setting.

It is true that although the SDE does not have the legal responsibility to fund the educational services for non-disabled juveniles residing and educated at a private residential facility, the SDE does have some authority and responsibility pertaining to juveniles with disabilities. Such responsibility can be fulfilled by operation of state statute, administrative rules or interagency agreements. However, in the case of individuals educated at the private residential facility pursuant to a decision by DJC or DHW, the statutes place the burden to fund such education on DJC or DHW.⁶

CONCLUSION

In conclusion, it is the opinion of this office that DJC and DHW have the responsibility to fund the educational services provided to juveniles who have been committed to the legal custody of these departments, where the departments have made the decision that such individuals should be educated at a private residential facility. Otherwise, if it is appropriate to place the individual in public education, the school district in which the private residential facility is located must make such public education available, including FAPE in the LRE for juveniles with disabilities. Because of these conclusions, the legal residence of such juveniles or the ability of the school districts to contract with private facilities is not relevant to this inquiry. DJC and DHW clearly have the authority to contract with a private residential facility for placement and education of juveniles committed to their legal custody.

Although current state statutes place the responsibility to fund the educational services for juveniles placed in and educated at a private residential facility on DJC or DHW, or on the public school districts if the individuals are enrolled therein, we encourage all of the agencies and other interested parties to work together on this issue. This is especially true as it pertains to juveniles who may be disabled and in need of special education. Although state statutes have identified the source of funding in the circumstances addressed in this opinion, SDE, DJC, DHW and the public school districts

should be actively involved in the education of children with disabilities. In particular, SDE has the ultimate responsibility to ensure that FAPE is available to all children with disabilities. If those individuals with disabilities are not being properly identified, evaluated and educated, the potential liability for a violation of federal disability law by the State of Idaho is significantly increased.

Very truly yours,

THOMAS F. GRATTON
Deputy Attorney General

¹ The Superintendent of Public Instruction and Department of Juvenile Corrections submitted a joint opinion request. The Department of Health and Welfare submitted a separate letter with additional questions. Since the answers to the questions propounded by the Department of Health and Welfare will be answered in context of the questions raised by the joint opinion request, those questions have not been set out in this opinion.

² This opinion only addresses the responsibility for the provision of education services to juveniles or children committed to the legal custody of the departments of Juvenile Corrections and Health and Welfare. With respect to the conclusion of the funding responsibility of the departments of Juvenile Corrections and Health and Welfare, this opinion is limited to situations where the departments determine that the education should be provided at the private residential facility.

³ DJC promulgated temporary administrative rules which went into effect July 1, 1996, establishing minimum standards for detention facilities. It appears from a reading of these rules that they apply to private residential facilities. See, IDAPA 05.01.01.000.02 and 05.01.01.010.15 and 16. These rules further provide in IDAPA 05.01.01.465 that such detention facilities must make available certain programs and services: “[t]hese programs and services shall include . . . educational programs according to the promulgated rules of the Idaho State Department of Education.” However, according to DJC, these temporary rules were only intended to apply to county juvenile detention centers. Therefore, they will not be cited in support of the conclusions reached herein.

⁴ Generally, the public school district must accept for enrollment those juveniles or children placed by DJC or DHW at a private residential facility. However, there may be some grounds for the school district to expel or deny enrollment to such individuals under Idaho Code § 33-205.

⁵ It has been suggested that districts do have the authority to contract for the education of out-of-school youths, such as juvenile delinquents, pursuant to Idaho Code § 33-512(2), which provides that the local board of trustees has the power to “adopt and carry on, and provide for the financing of, a total educational program for the district. Such programs in other than elementary school districts may include education programs for out-of-school youth and adults” However, such authority should be further clarified by the legislature.

⁶ We must note that with regard to juveniles with disabilities, the school districts have express authority under Idaho Code § 33-2004 to contract with private residential facilities and pay the education costs of educating students with disabilities. *See also* Idaho Code § 33-1002B(2).