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ATTORNEY GENERAL OPINION NO. 89-3

TO: Richard P. Donovan, Director
State of Idaho
Department of Health and Welfare
Statehouse Mail

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Must the Idaho Department of Health and Welfare immediately apply the amendments to Section 1917(c) of the Social Security Act (42 U.S.C. 1396p) that were enacted by U.S. Public Law 100-360 and subsequently amended by U.S. Public Law 100-485, or must the department await consideration by the next regular session of the Idaho Legislature of conforming amendments to chapter 2, title 56, section 56-214, Idaho Code?

CONCLUSION:

The Idaho Department of Health and Welfare must await state legislation required to conform with U.S. Public Law 100-360 and U.S. Public Law 100-485.

ANALYSIS:

Background:

The federal statutory provisions concerning the Medicaid program appear at Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq. The purpose of the Medicaid program is to enable any state:

> As far as practicable under the conditions in said state, to furnish (1) medical assistance on behalf of families with dependent children and aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services. . . .

42 U.S.C. § 1396.

While participation in the Medicaid program is voluntary, a state that chooses to participate must comply with all requirements imposed by the federal statutory provisions and by regulations promulgated by the Secretary of the U.S. Department of Health and Human Services. See, for example, Mississippi Hospital Association, Inc. v. Heckler, 701 F.2d 511 (5th Cir. 1983); and, Massachusetts Association of Older Americans v. Sharp, 700 F.2d 749 (1st Cir. 1983).

The Medicare Catastrophic Coverage Act of 1988, U.S. Pub. L. No. 100-360, § 303 (1988), as amended by the Family Support Act of 1988, U.S. Pub. L. No. 100-485 (hereinafter "MCCA"), requires certain income and resource protections for the "community" spouse of a nursing home resident receiving Medicaid assistance. The MCCA also contains new mandatory transfer of assets penalties and repeals all transfer of assets penalties under the Supplemental Security Income Program.

Section 303(g)(2) of the MCCA provides that the amended provisions of § 1917(c) of the Social Security Act are effective and apply to assets transferred on or after July 1, 1988. Section 303(g)(5), however, provides that where the Secretary of the U.S. Department of Health and Human Services determines that state legislation is required in order for the state to apply the new federal provisions, the state may continue to apply its policies as they existed prior to July 1, 1988, until the first day of the next quarter following the close of the next regular session of the state legislature.

Existing Statutory Authority:

The state's enabling legislation, Idaho Code § 56-209b, references Title XIX of the Social Security Act in regard to who shall be awarded medical assistance. Idaho Code § 56-203(a) empowers the Idaho Department of Health and Welfare to enter into contracts and agreements with the federal government "whereby the state of Idaho shall receive federal grants-in-aid or other benefits for public assistance and public welfare purposes under any act or acts of congress heretofore or hereafter enacted." Subsection (b) of Idaho Code § 56-203 authorizes the department to cooperate with the federal government in carrying out the purposes of any federal acts pertaining to public assistance or welfare services. Subsection (g) authorizes the department to define persons entitled to medical assistance in such terms as will meet requirements for federal financial participation in medical

assistance payments. Idaho Code § 56-209b provides that medical assistance shall be awarded to persons who are recipients of categorical programs as mandated by Title XIX of the Social Security Act. The definition of "medical assistance" in Idaho Code § 56-201(o) governs "payments for part or all of the cost of such care and services allowable within the scope of Title XIX of the federal Social Security Act as amended as may be designated by Department rule and regulation."

These Idaho Code provisions provide the delegation of power by the legislature to the department to define persons entitled to medical assistance and to provide for the means and procedure to grant such medical assistance benefits to eligible individuals. Tappen v. State, Department of Health and Welfare, 102 Idaho 807, 641 P.2d 994 (1982).

The Idaho Administrative Procedure Act in Idaho Code § 67-5201(7) defines a "rule" as "any agency statement of general applicability that implements or prescribes law or interprets a statute as the statute applies to the general public." Thus, the department would have to implement the provisions of a statute by promulgation of a rule or regulation. Bingham Memorial Hospital v. Idaho Department of Health and Welfare, 108 Idaho 346, 699 P.2d 1360 (1985). The provisions affecting eligibility or level of benefits or the treatment of income and resources in the medical assistance program would have to be promulgated by rule by the department consistent with the state's enabling statutes.

It may be argued that the department has the authority to adopt rules or regulations pursuant to existing state or federal law. The test for determining whether rules and regulations have a statutory basis takes various forms, two of which seem particularly relevant to your inquiry. First is the rule that the validity of a rule or regulation will be sustained so long as a reasonable relationship exists between the rule and enabling legislation. Mourning v. Family Publication Service, Inc., 411 U.S. 356, 36 L.Ed.2d 318, 93 S.Ct. 1652 (1973). This is particularly so where the empowering provision of the statute, such as Idaho Code § 56-202, states simply that an agency may make such rules as may be necessary to carry out the provisions of this act. The companion principle provides that it is not necessary that the legislative authority be set forth in express terms where the rule or regulation may be reasonably implied to carry out the purposes of the statutory scheme as a whole. Longbridge, Inc. Co. v. Moore, 23 Ariz. App. 353, 533 P.2d 564 (1975); Tappen v. State, supra.

Applying these legal principles to the current text of Idaho Code §§ 56-209e and 56-214, compared with the provisions of the MCCA, indicates a conflict between the federal and state law at the present time. Such a conflict cannot be resolved by a rule or regulation because a rule or regulation does not have the force and effect of law to amend or modify a provision of the Idaho Code.

"One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority." State v. Purcell, 39 Idaho 642, 649, 228 P. 796 (1924). The statutory authorizations contained in the Idaho Code merely authorize the department to comply with existing federal statutes and regulations in order to maximize the amount of federal financial participation to the medical assistance program of the state. The legislature has not delegated to the federal government its authority to prescribe the state's medical assistance program requirements. See Idaho Savings & Loan Assoc. v. Roden, 82 Idaho 128, 350 P.2d 225 (1960); Board of County Commissioners v. Idaho Health Facilities Authority, 96 Idaho 498, 531 P.2d 588 (1975); Sun Valley Co. v. City of Sun Valley, 109 Idaho 424, 708 P.2d 147 (1985).

Our review of the specific language in the authorizing statutes and in the legislative history fails to reveal an adoption by reference of Title XIX of the Social Security Act. The legislature has not used the phrase "incorporated by reference," "as set forth in," or any other language indicating a legislative intent to incorporate by reference the Social Security Act as if it were set out in the Idaho Code. (Compare for example the specific language in Idaho Code § 63-2434.)

The general rule for statutory construction regarding incorporation by reference was set out in the case of Nampa and Meridian Irr. Dist. v. Barker, 38 Idaho 529, 533, 223 P. 529 (1924), as follows:

> Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute. When so adopted, only such portion is in force as relates to the particular subject of the adopting act, and as is applicable and appropriate thereto. Such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or

> modifications to the statute so taken unless it does so by express intent. . . .
>
> There is another form of adoption wherein the reference is, not to any particular statute or part of a statute, but to the law generally which governs a particular subject. The reference in such case means the law as it exists from time to time or at the time the exigency arises to which the law is to be applied.

In other words, even if it could be assumed that the Social Security Act was adopted by reference by the authorizing statute, the adoption pertains only to the Social Security Act provisions existing at the time of the adoption and not to subsequent amendments such as the MCCA. Boise City v. Baxter, 41 Idaho 368, 238 P. 1029 (1925).

As a general rule, when a statute adopts a part or all of another statute, the adoption takes the statute as it exists at that time, and does not include subsequent additions or modifications of the adoptive statute, unless expressly so declared. See, for example, Rainwater v. United States, 356 U.S. 590, 2 L.Ed.2d 996, 78 S.Ct. 946 (1958); and Hassett v. Welch, 303 U.S. 303, 82 L.Ed. 858, 58 S.Ct. 559 (1938).

Therefore, assuming that the Idaho Legislature could adopt by reference Title XIX of the Social Security Act, any subsequent addition or modification of the Social Security Act would not be incorporated into Idaho law absent an express declaration. We have failed to locate such an express declaration. Further, we have determined that the department has no authority to implement the MCCA by rule or regulation. Therefore, we are compelled to the conclusion that state legislation is required in order for the state to conform to the new federal provisions enacted by the MCCA. In the absence of such enabling legislation, the department would not meet the deadline set for compliance with the MCCA program, i.e., on or before the first day of the next quarter following the close of the current regular session of the Idaho Legislature.

AUTHORITIES CONSIDERED:

1. Idaho Statutes:

   Idaho Code § 56-201(o).
   Idaho Code § 56-202.
   Idaho Code § 56-203.

Idaho Code § 56-209b.
Idaho Code § 56-209e.
Idaho Code § 56-214.
Idaho Code § 56-218.
Idaho Code § 63-2434.
Idaho Code § 67-5201(7).

2. United States Statutes:

42 U.S.C. § 1396p.

3. U.S. Supreme Court Cases:

Hassett v. Welch, 303 U.S. 303, 82 L.Ed. 858, 59 S.Ct. 559 (1938).

Mourning v. Family Publication Service, Inc., 411 U.S. 356, 36 L.Ed.2d 318, 93 S.Ct. 1652 (1973).

Rainwater v. United States, 356 U.S. 590, 2 L.Ed.2d 996, 78 S.Ct. 946 (1958).

4. Federal Cases:

Mississippi Hospital Association, Inc. v. Heckler, 701 F.2d 511 (5th Cir. 1983).

Massachusetts Association of Older Americans v. Sharp, 700 F.2d 749 (1st Cir. 1983).

5. Idaho Cases:

Bingham Memorial Hospital v. Idaho Department of Health and Welfare, 108 Idaho 346, 699 P.2d 1360 (1985).

Board of County Commissioners v. Idaho Health Facilities Authority, 96 Idaho 498, 531 P.2d 588 (1975).

Boise City v. Baxter, 41 Idaho 368, 238 P. 1029 (1925).

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Sun Valley Co. v. City of Sun Valley, 109 Idaho 424, 708 P.2d 147 (1985).

Tappen v. State, Department of Health and Welfare, 102 Idaho 807, 641 P.2d 994 (1982).

6. Other State Cases:

Longbridge, Inc. Co. v. Moore, 23 Ariz. App. 353, 533 P.2d 564 (1975).

DATED this 8th day of February, 1989.

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