

STATE OF INDIANA)	IN THE MARION SUPERIOR COURT
)SS:	JUVENILE DIVISION
COUNTY OF MARION)	CAUSE NO.:
)	
IN THE MATTER OF:)	
)	
_____)	

**MEMORANDUM OF LAW IN SUPPORT OF ORDERING DCS TO PAY FOR
OUT-OF-STATE PLACEMENT BASED ON VIOLATIONS OF THE
SEPARATION OF POWERS AND ONE SUBJECT PROVISIONS OF THE
INDIANA CONSTITUTION**

For decades the primary concern in juvenile delinquency cases has properly been the best interests, treatment, and rehabilitation of children. See Ind. Code § 31-10-2-1. That all changed in a dramatic and troubling way with two legislative developments in the past year. This case offers a crucial opportunity to return to the proper focus of the child’s best interest and rehabilitation in ordering an out-of-state placement for _____. As explained below, the court may order DCS to pay for that placement for either of two reasons: (1) the statutory amendments that became effective January 1, 2009 and allowed DCS to dictate placement options to juvenile courts violate the separation of powers provision of Article 3, Section 1, of the Indiana Constitution, and (2) the last-minute, surprise amendment that gave the DCS director an absolute veto on any out-of-state placement as part of the June 30 special session budget violates the one subject requirement of Article 4, Section 19.¹

¹ The “constitutionality of a statute may be raised at any stage of the proceeding,” including for the first time on appeal. See, e.g., Vaughn v. State, 782 N.E.2d 417, 420 (Ind. Ct. App. 2003), trans. denied (quoting Morse v. State, 593 N.E.2d 194, 197 (Ind. 1992)). This challenge to the constitutionality of these statutes is being appropriately and timely raised.

I. Allowing DCS to dictate placement decisions to juvenile court judges violates the separation of powers provision of the Indiana Constitution.

Effective January 1, 2009, P.L. 146-2008,² a major tax bill, dramatically altered the role of juvenile courts by injecting the Department of Child Services (DCS) as a participant with enormous power in all delinquency cases. Those DCS employees who have the power to approve or disapprove a juvenile judge's dispositional placement have taken on judicial functions, which violates the separation of powers provision of the Indiana Constitution.

Separation of Powers Overview

Article 7, Section 1 of the Indiana Constitution vests the judicial power in courts created by the Constitution and statute. This power includes making “decrees determining controversies.” State ex rel. Jameson v. Denny, 118 Ind. 382, 388, 21 N.E. 252, 254 (1889). This is the essential function of juvenile courts on a daily basis in ordering pre-dispositional services and placements, approving plea agreements, and entering dispositional decrees. Giving vast authority to DCS to perform these judicial functions violates Article 3, Section 1, which provides

The powers of Government are divided into three separate departments: the Legislative, the Executive including the Administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

“[T]he entire body of the intrinsic judicial power of the State” rests in the courts alone “and . . . the other departments are prohibited from assuming to exercise any part of that judicial power.” State ex rel. Kostas v. Johnson, 224 Ind. 540, 546, 69 N.E.2d 592, 594 (1946) (quoting State ex rel. Hovey v. Noble, 118 Ind. 350, 354, 21 N.E. 244, 246 (1889)).

² The legislation at issue may be accessed on the General Assembly's website. http://www.in.gov/legislative/ic_ia/ The 2008 and 2009 bills at issue were both designated House Enrolled Act 1001. To avoid any confusion, this memorandum will use their respective public law numbers.

The judicial branch “may not be controlled or even embarrassed” by the executive or legislative branch unless “so ordained in the Constitution.” In re Judicial Interpretation of 1975 Senate Enrolled Act No. 441, 263 Ind. 250, 352, 332 N.E.2d 97, 98 (1975) (quoting State v. Shumaker, 200 Ind. 716, 721, 164 N.E.2d 408, 409 (1928)). Indeed, the Indiana Supreme Court has invalidated statutes when the legislature attempted to dictate “the manner and mode in which the courts shall discharge their judicial duties,” Parkison v. Thompson, 164 Ind. 609, 626, 73 N.E.2d 109, 115 (1905), or enacted statutes that “interfere[d] with the discharge of judicial duties, or attempt[ed] to control judicial functions, or otherwise dictate[d] how the judiciary conducts its order of business.” State v. Monfort, 723 N.E.2d 407, 411 (Ind. 2000). In Kostas, the court invalidated a statute that limited the time in which a court must rule. 224 Ind. at 550, 69 N.E.2d at 596. In Hovey, the Indiana Supreme Court held the legislature could not appoint ministers and assistants for the court. 118 Ind. at 371, 21 N.E. at 252.

Taking away the power of juvenile court judges to make placement decisions violates the separation of powers provision.

P.L. 146-2008 amended and added provisions of Title 31 to grant DCS significant, and constitutionally impermissible, control over the judicial function from the beginning to the end of every juvenile delinquency case, especially at disposition. Specifically, the juvenile court is required to have its probation department run Predispositional Reports through DCS, give deference to DCS’s dispositional recommendation, and make special findings if it departs from that recommendation.

Probation officers, who are part of the judicial branch, can no longer simply include in the Predispositional Report (PDR) their objective assessment of the best placement for a child. Rather, any recommendation for a placement that would be payable by DCS must first

be sent to DCS to review and approve or make an alterative proposal. Ind. Code § 31-37-17-1.4. Moreover, to make matters worse, the requirement of juvenile court findings based on parental participation and the care, treatment, and rehabilitation of the child was amended to require “approval, modification, or rejection of the dispositional recommendations submitted in the predispositional report” from DCS. Ind. Code § 31-37-18-9(a). If the juvenile court does not agree with DCS and follow its alternative recommendation, it must enter findings directed not to the child’s care or rehabilitation but rather to DCS’s recommendation, demonstrating that it is “(1) unreasonable based on the facts and circumstances of the case; or (2) contrary to the welfare and best interests of the child.” Ind. Code § 31-37-18-9(b). This “creates in the juvenile court a presumption of correctness for the DCS final recommendations” In re T.S., 906 N.E.2d 801, 804 (Ind. 2009).³

The judiciary alone is vested with the power to make decrees regarding cases. Denny, 118 Ind. at 388, 21 N.E. at 254. Other branches of government cannot dictate the manner and mode of these decisions. Parkison, 164 Ind. at 626, 73 N.E.2d at 115. Giving DCS the power to make a recommendation that must be accepted by juvenile courts unless extraordinary findings are made is an even greater incursion on the judicial power than the invalidated statute that limited the time in which a court must rule in Kostas, 224 Ind. at 550, 69 N.E.2d at 596. It not only places restrictions on timing but also places restrictions on the ultimate determination by requiring juvenile courts to submit proposals to DCS before making an order. Juvenile courts can no longer exercise their decree-making function but rather that function is now controlled and dictated by DCS.

³ T.S. interpreted analogous language from Article 34, which governs CHINS proceedings. No separation of powers or other constitutional challenge was raised in that case or in any other DCS appellate case in Indiana. See also In re T.D., 912 N.E.2d 393 (Ind. Ct. App. 2009); In re D.S., 910 N.E.2d 837 (Ind. Ct. App. 2009), trans. denied; In re D.M., 907 N.E.2d 582 (Ind. Ct. App. 2009).

Moreover, those DCS employees who have the power to disapprove a juvenile judge's dispositional placement have impermissibly taken on judicial functions—or, at a minimum, are acting as “assistants of judges.” In Noble, the Indiana Supreme Court made clear the judicial power is “much more extensive” than hearing and deciding cases; it “includes the authority to select persons whose services may be required in judicial proceedings, or who may be required to act as the assistants of judges in the performance of their judicial functions” 118 Ind. at 360, 21 N.E. 248. “To be independent the power of the judiciary must be exclusive, and exclusive it can not be if the Legislature may deprive it of the right to choose those with whom it shall share its labors and its confidences.” Id. at 357, 21 N.E. at 247.

Perhaps the most troubling aspect of DCS's new and pervasive involvement in the juvenile justice system is the absence of any direction to make recommendations based on a child's care, treatment, or rehabilitation. P.L. 146 is not about finding the best services or placements for Hoosier children; rather, as its title suggests and content bears out, it was “AN ACT to amend the Indiana Code concerning taxation and to make an appropriation.” Any recommendation for placement must therefore be suspect. This is especially true of a recommendation to the Department of Correction when such a placement costs DCS nothing. We would never countenance allowing the Department of Correction, an executive branch agency that incurs cost for prisons, to decide where adult criminal defendants will serve their sentences. This has always been and must remain a judicial function. Juveniles deserve no less protection. See In re K.G., 808 N.E.2d 631, 635 (Ind. 2004) (collecting cases where juvenile rights are coextensive with the rights of adults).

II. The late-inning, never-debated, surprise provision giving the DCS Director control over out-of-state placements violates the one subject provision of the Indiana Constitution.

June was a busy month in the State House as the General Assembly crafted, debated, and revised a budget during the special session. Without such a budget, most of state government would have shut down on July 1. See Mary Beth Schneider, No Budget, Few Services, Daniels Says, Indianapolis Star, June 27, 2009, at A1.

In this climate of crisis, the special session budget bill morphed into something else. There was no mention or discussion of giving DCS absolute control over out-of-state placements when the budget was introduced on June 11, reported on by the House Ways and Committee on June 16, or at its second reading on June 17. There is not a word about it in the June 19 report of the Senate Appropriations Committee or in the engrossed bill on June 22. Section 387 appears to have been added to the 500-plus page bill in the final hours of the legislative session, appearing first in a House Conference Committee Report at 2:07 p.m. on June 30. It altered Indiana Code section 31-40-1-2 as follows:

(f) The department is not responsible for payment of any costs or expenses for housing or services provided to or for the benefit of a child placed by a juvenile court in a home or facility located outside Indiana, if the placement ~~does not comply with the conditions stated in IC 31-34-20-1(b) or IC 31-37-19-3(b).~~ **is not recommended or approved by the director of the department or the director's designee.**

As the plain language suggests, this provision gives absolute control over out-of-state placements to the DCS Director.

Article 4, Section 19 of the Indiana Constitution limits legislative acts to “one subject.” This provision seeks to curtail legislative “logrolling,” which is the practice of “combining into one bill several unrelated proposals in order to accumulate the requisite number of votes for the combined measure to pass.” Marcia Oddi, Enforcing Indiana’s

Constitutional Requirement That Laws be Limited to One Subject, Res Gestae, Mar. 2001, at 18; see generally Pence v. State, 652 N.E.2d 486, 489 (Ind. 1995) (Dickson, J., dissenting) (citing the 1850 constitutional debates). A subset of logrolling is the addition of an unrelated rider, usually in the last days of a legislative session, to an essential piece of legislation such as a budget or appropriation bill. Oddi, supra, at 18. The goal of Article 1, Section 19 is to prevent the addition of riders to popular and necessary bills certain to pass not because of the merit of the rider but based simply on the merit of the bill to which it is attached. Id.

There is sparse case law addressing the current version of Article 4, Section 19, which was most recently amended in 1974. One challenge was quickly dismissed on standing grounds. Pence, 652 N.E.2d 486. Here, _____ is directly affected by the P.L. 182-2009ss and thus has standing unlike the taxpayers and citizens in Pence. Although the other two cases found no Article 1, Section 19 violation, they are readily distinguishable. In Dague v. Piper Aircraft Corp., 275 Ind. 520, 532, 418 N.E.2d 207, 214 (1981), the court concluded the legislature was aware of the contents of the challenged provision when it was passed: “There is no basis for finding that some trick was employed to attach” the challenged provision in order to “deceive” the public by its location. A similar point was reiterated in Bayh v. Indiana State Building and Construction Trades Council, 674 N.E.2d 176, 179 (Ind. 1996), where the court noted that the single subject requirement is “designed to promote fair practice in legislating without much judicial intervention.” That case dealt with the prevailing wage law, which was addressed in two separate statutes signed by the Governor on the same day. The court found no section 19 violation because the challenged provision “was a free-standing, duly enacted law.” Id.

Here, there are not separate statutes as in Bayh. Section 387 was added to P.L. 182-2009ss, the special session budget, in the final days or hours of the legislative session. Although P.L. 182-2009ss is a budget bill, Section 387 is not a budgetary matter. It is about giving the DCS Director absolute control over decisions that were previously—and properly—the sole province of juvenile judges. Out-of-state placements are often much cheaper than in-state placements. See generally In re D.S., 910 N.E.2d 837, 842 (Ind. Ct. App. 2009) (noting a cost of \$156 for an out-of-state placement, which included travel expenses for the respondent’s mother, compared to \$224 or more for in-state placements). Director Payne recently explained to the Commission on Courts that the change was motivated by his belief that “[k]eeping children close to their home is the best practice.” Michael W. Hoskins, Committee Ponders DCS Authority of Juveniles, Ind. Lawyer Daily, Oct. 2, 2009; Minutes of the Commission on Courts, Oct. 1, 2009, at 3, *available at* <http://www.ai.org/legislative/interim/committee/minutes/CRTSCA1.pdf>. The DCS Director, like any Hoosier is free to propose and lobby the legislature as part of the “fair practice in legislating.” Bayh, 674 N.E.2d at 179. Section 387 was not a product of the normal legislative process; rather, it was enacted without debate or discussion by the General Assembly, and juvenile judges were not given an opportunity to offer their input. Id.⁴ This distinguishes Section 387 from the legislation in Dague, where it was clear the legislature was “aware of the contents of [the disputed provision] when the act was passed” and there

⁴ See generally Hoskins, *supra* (noting that Sen. Linda Lawson “expressed concern that the issue was tacked into the special session budget that many lawmakers failed to fully review or understand because of the last-minute action”); Tim Evans, New Law Lets DCS Decide Out-of-state Placements, Indianapolis Star, Sept. 8, 2009, at A1 (discussing the “last-minute change”); Marcia Oddi, Ind. Law – Continuing on With “Apparently there are all sorts of surprises in the special session budget”; my thoughts, www.indianalawblog.com, Aug. 30, 2009, at 12:01 p.m. (quoting Indiana Legislative Insight) (referring to the change as an “unexpected provision causing controversy”).

was “no basis for finding that some trick was employed to attached” the additional provision. 275 Ind. at 532, 418 N.E.2d at 214. Desperate to pass a budget to keep state government operating, legislators would not and could not have found this provision buried in the 500-page bill. This goes to the core of the purpose of Section 19: preventing legislative log-rolling and the late-inning addition of riders.

As a final point, the trend of our supreme court is to give more vital meaning to provisions of the state constitution. Justice Dickson made clear in his dissent in Pence that “Indiana courts should seriously consider claims that enactments violate” Article 1, Section 19. 652 N.E.2d at 489. More recently, a four-justice majority concluded in City of South Bend v. Kimsey, 781 N.E.2d 683 (Ind. 2003), that the passage of a law that could only apply to one county violated the special legislation provision in Article 4, Section 23. It reiterated the duty of courts “is delicate and unpleasant, but the duty of the Court is imperative, and its authority is unquestionable, to declare any part of a statute null and void that expressly contravenes the provisions of the constitution, to which the legislature itself owes its existence.” Id. at 696 (quoting Dawson v. Shaver, 1 Blackf. 204, 206-07 (1822)). The vitality of Article 4, Section 19 is ripe for review, and this case offers compelling reasons for the court to find a violation.

III. Severability

P.L. 146-2008, the property tax relief act, and P.L. 182-2009ss, the current biennial budget act, each span hundreds of pages. The vast majority of each act is about property tax or budgetary issues, addressing such topics as property tax relief, sales tax, increased spending controls, and school budgeting. _____’ challenge is limited to the few juvenile delinquency provisions detailed above. A finding of unconstitutionality of any of

these four provisions will not affect the hundreds of other provisions, because the General Assembly would have passed the crucial property tax relief and budget bills “had [they] been presented without the invalid [DCS] features.” Monfort, 723 N.E.2d at 415.

IV. Conclusion

For the foregoing reasons, _____ respectfully requests this Court order DCS to pay for his out-of-state placement at Boys Town by finding (1) the portions of P.L. 146-2008 that allow DCS control over placement decisions violate the separation of powers provision of Article 3, Section 1; and (2) Section 387 of P.L.182-2009ss violates the one subject requirement of Article 4, Section 19.

Respectfully Submitted,

Counsel for Respondent

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion was duly served by personal delivery upon the Marion County Prosecutor on this ____ day of October, 2009 and upon the following by email and first-class mail:

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