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March 24, 2009

MEMORANDUM

TO: Honorable John Riki Karamatsu, Chair
House Committee on Judiciary

FROM: Lillian B. Koller, Director

SUBJECT: S. B. 912, S.D.2, - RELATING TO PERMANENCY HEARINGS

Hearing: March 24, 2009, Monday, 2:00 p.m.
Conference Room 325, State Capitol

PURPOSE: The purpose of S.B. 912, S.D.2, an Administration bill, is to amend chapter 587, Hawaii Revised Statues (HRS), to ensure compliance with Federal Title IV-E hearing requirements.

DEPARTMENT'S POSITION: The Department of Human Services (DHS) cannot over-emphasize the importance of passing this bill. If the statute is not amended to ensure compliance with Federal Title IV-E requirements, over $50,000,000 in Federal Title IV-E funds annually will be lost.

This legislation is necessary to ensure that HRS chapter 587, is compliant with Federal Title IV-E provisions related to permanency hearings. Currently, HRS chapter 587, does not specifically address the Federal requirement for permanency hearings at 12-month intervals to determine the permanency plan for a child in accordance with Section 475(5)(C)(1) of the

Federal Social Security Act and 45 CFR 1356.21(h). Instead, HRS chapter 587, continues to require 18-month dispositional hearings along with requirements that were made obsolete by the amendments in the Federal Adoption and Safe Families Act of 1997 (P.L. 105-89).

The Department is in the process of submitting an updated Title IV-E State Plan and the amendment proposed in this bill is one of the Federal requirements needed to ensure compliance and finalize approval of our State Plan.

If the statutory changes are not made, the Department has been informed by the Federal government that our State Plan will not be approved and the State will be restricted from obtaining Federal Title IV-E funds until the statute is revised.

Currently, the Department is drawing down over $50 million in Title IV-E Federal funds for Hawaii, which covers the following expenditures:

- 600 CWS positions
- Foster parent and CWS staff training
- Foster board payments
- Adoption assistance payments
- 19 Purchase of services contracts
- Administrative costs for the Department
- Reimbursement to the Department of Attorney General, the University of Hawaii School of Social Work, the University of Hawaii Law School, the Department of Health/CAMHD and Office of Youth Services who provide support for Child Welfare Services.

Prior to submitting this legislation the Department explored implementation via administrative rules, and changes to the procedures in HRS chapter 587 reviews and permanent plan hearing sections.

We were informed by our Regional Office of the Federal Administration for Children and Families (ACF), in consultation with the ACF Central Office, that the options we proposed in lieu of the proposed legislation will not be acceptable.

We believe, based on the information and instructions given to the Department by ACF, that we do not have any other viable option besides legislation that will amend HRS Chapter 587, to ensure compliance with the requirements of Title IV-E prior to our deadline, at the end of the Legislative session in May.

To ensure the most appropriate statutory language, we are partnering with the Family Court, the Department of Attorney General, the Court Improvement Project, a parent advocate representative and representatives from the Guardian ad Litem program. This working group is having on-going meetings with representatives from the Federal Administration for Children and Families. We are confident that our group will be able to propose amended language that minimizes the impact of the required hearings on Court and agency operations, but still meets the Federal Title IV-E requirements needed to ensure an approved Title IV-E state plan.

Thank you for the opportunity to testify.

The Judiciary, State of Hawaii

Testimony to the Twenty-Fifth Legislature, Regular Session of 2009
House Committee on Judiciary
The Honorable Jon Riki Karamatsu, Chair
The Honorable Ken Ito, Vice Chair

Tuesday, March 24, 2009, 2:00 p.m.
State Capitol, Conference Room 325

by
Karen M. Radius
District Family Judge
Family Court, First Circuit

Bill No. and Title: Senate Bill No. 912, S. D. 2, Relating to Permanency Hearings.

Purpose: To amend HRS Chapter 587 to ensure compliance with federal Title IV-E hearing requirements.

Judiciary's Position:

The Judiciary has convened a planning group to collaboratively work toward a solution relating to the problems noted in Senate Bill No. 912, S.D. 2. Meetings were held on February 25th, March 2nd, March 5th and March 11th. This planning group includes representatives from the Department of Human Services, Department of the Attorney General, University of Hawai`i William S. Richardson School of Law, guardians ad litem, parents' counsel, and the Family Court. This group has been working closely with representatives from the Federal Regional Office, Region IX, U.S. Department of Health and Human Services, Administration for Children and Families. A draft was submitted to the federal representatives to address the issue of permanency at each review hearing, including a date for either: 1) proposed reunification ; 2) termination of parental rights; 3) adoption; or 4) guardianship. This approach would focus on all of the parties early on in the case regarding plans to either return the child home or to provide for guardianship or adoption. The federal representatives reviewed the draft and responded with additional questions. Therefore, a final draft is not currently available, but we continue to attempt to work towards a consensus.

Accordingly, the Judiciary must oppose the current language in S.D.2 of Senate Bill No. 912.

This bill adds yet another hearing to the child protective judicial process set for in H.R.S. Chapter 587. We were informed that the federal representative to the CFSR (Child and Family Services Review) process believes that there is a problem which may lead to the potential loss of federal Title IV-E monies.

The current Federal statute is a modified version of a provision of the 1980 P. L. 96-272. Originally, what is now called a "permanency hearing" was called a "Disposition Hearing." The 1997 Adoption and Safe Families Act revisions to that statute changed the name to "Permanency Hearing" and changed the time requirement for the hearing from 18 months to 12 months. A minor change was made in 2006 (see the underlined text in the attachment). There may be new regulations that amplify the provisions of the statute but we are not aware of them and have not been advised otherwise by the Department of Human Services (DHS).

The essential requirements of the Federal statute include:

1. Within 12 months of entry into foster care, a hearing must be held to determine if the plan is to return the child home and if so when.

2. If, at this hearing, it is determined that the plan is not to return the child home, then it must be determined whether the plan will be to have the child adopted, placed in guardianship, or placed in an alternative permanent living arrangement.

There is nothing in the current Hawaii statute that precludes such a process. In fact, the current Hawaii statute can facilitate this process, particularly if all the stakeholders are given a chance to get together to thoroughly discuss this matter and to (a) be informed of the perceived problem and, if we agree that there is indeed a problem, we first (b) determine whether we can "fix" that problem short of amending the statute and, if we are unable to, (c) take the necessary time to work together to determine how to amend the statute. This bill describes a Federal "permanency hearing" requirement that does not require a decision on whether parental rights will be terminated. Instead the case simply has to be given direction, that is, set the direction toward a permanent plan hearing or return the child within 60 days or another selected direction. The current HRS Chapter 587 already gives the court that authority at the review hearing. Even though it does not align perfectly with the Federal statute, most, if not all, Federal requirements are met in the statute or in practice.

The proposed revision to the statute addresses the issue by adding a new hearing – Permanency Hearing – to our existing HRS Chapter 587. There are other possible approaches.

Many states have made complete revisions to their statutes by adopting all the terminology of the federal statutes. If the goal is to avoid issues like the one presented, then our state should consider this route. But, this important step must be taken collaboratively.

Ours is not "the" perfect statute. We do not take the position that nothing should ever be changed in it. Our position is that, if changes are made, we have to do it collaboratively and only after reviewing how a particular change "fits" within the rest of the entire statute. Prior attempts to make our statute align with the Federal requirements, particularly the revisions of 1998, have unfortunately exacerbated the discrepancies between the Federal and State statute

As is currently proposed in S. D. 2 of this bill, the new "permanency hearing" will cause confusion if it is merely inserted into the existing statute. By requiring a separate hearing called a "permanency hearing," we would then have the following sequence of court events: - review hearing - permanency hearing - OSC hearing - permanent plan hearing. Each hearing step is likely to produce further delays and having such a sequence would very probably not promote prompt and permanent placement for the child. Furthermore, the proposed bill appears to require specific court findings. Unless there is agreement among the parties, any requirement of findings of fact by a judge will require an evidentiary hearing, that is, a trial. If this were the case, it is unclear which party would have the burden of proof (although, in all likelihood, it would be the DHS). Regardless of who bears the burden of proving the elements required in this bill, the resulting delay would only result in a direction being given to the case. It will not truly result in any concrete advances for the child. As a separate matter to consider, any additional trials will, of course, result in delays, not just for the specific case, but also for other cases and other issues.

Another example of the need to take time to consider changes to our state's statute is the bill's language in section b(2) which uses the phrase "determine the safety of the child." Is the intent that this phrase mean the same thing as "a safe family home with the assistance of a service plan," a phrase used throughout the existing statute?

As previously stated, this important work takes time and effort. There is not enough time during the remainder of this Legislative session to perform the necessary dispassionate review of the statute if major revisions are to be proposed. The Judiciary and the DHS share a history of close collaboration on policy issues. We propose to continue this tradition by working closely together with DHS and with other stakeholders to return to the 2010 Legislature either with a proposed bill or with solutions to the issues perceived by the Federal monitors.

Thank you for the opportunity to submit testimony on this matter.

42 USCA Section 675

(5)...

(C) with respect to each such child, (i) procedural safeguards will be applied, among other things, to assure each child in foster care under the supervision of the State of a permanency hearing to be held, in a family or juvenile court or another court (including a tribal court) of competent jurisdiction, or by an administrative body appointed or approved by the court, no later than 12 months after the date the child is considered to have entered foster care (as determined under subparagraph (F)) (and not less frequently than every 12 months thereafter during the continuation of foster care), which hearing shall determine the permanency plan for the child that includes whether, and if applicable when, the child will be returned to the parent, placed for adoption and the State will file a petition for termination of parental rights, or referred for legal guardianship, or (in cases where the State agency has documented to the State court a compelling reason for determining that it would not be in the best interests of the child to return home, be referred for termination of parental rights, or be placed for adoption, with a fit and willing relative, or with a legal guardian) placed in another planned permanent living arrangement, in the case of a child who will not be returned to the parent, the hearing shall consider in-State and out-of-State placement options, and, in the case of a child described in subparagraph (A)(ii), the hearing shall determine whether the out-of-State placement continues to be appropriate and in the best interests of the child, and, in the case of a child who has attained age 16, the services needed to assist the child to make the transition from foster care to independent living; (ii) procedural safeguards shall be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting visitation privileges of parents; and (iii) procedural safeguards shall be applied to assure that in any permanency hearing held with respect to the child, including any hearing regarding the transition of the child from foster care to independent living, the court or administrative body conducting the hearing consults, in an age-appropriate manner, with the child regarding the proposed permanency or transition plan for the child; [FN1]

(Aug. 14, 1935, c. 531, Title IV, s 475, as added and amended June 17, 1980, Pub.L. 96-272, Title I, ss 101(a)(1), 102(a)(4), 94 Stat. 510, 514; Apr. 7, 1986, Pub.L. 99-272, Title XII, ss 12305(b)(2), 12307(b), 100 Stat. 293, 296; Oct. 22, 1986, Pub.L. 99-514, Title XVII, s 1711(c)(6), 100 Stat. 2784; Dec. 22, 1987,
Pub. L. 100-203, Title IX, s 9133(a), 101 Stat. 1330-314; Nov. 10, 1988, Pub.L. 100-647, Title VIII, s 8104(e), 102 Stat. 3797; Dec. 19, 1989, Pub.L. 101-239, Title VIII, s 8007(a), (b), 103 Stat. 2462; Oct. 31, 1994, Pub.L. 103-432, Title II, ss 206(a), (b), 209(a), (b), 265(c), 108 Stat. 4457, 4459, 4469; Nov. 19,
1997, Pub.L. 105-89, Title I, ss 101(b), 102(2), 103(a), (b), 104, 107, Title III, s 302, 111 Stat. 2117, 2118, 2120, 2121, 2128; July 3, 2006, Pub.L. 109-239, ss 6, 7, 8(a), 11, 12, 120 Stat. 512 to 514; Sept. 28, 2006, Pub.L. 109-288, s 10, 120 Stat. 1255; Oct. 7, 2008, Pub.L. 110-351, Title I, s 101(c)(4), Title II, ss
202, 204(a), 122 Stat. 3952, 3959, 3960.)

[FN1] So in original. The semicolon probably should be a comma.