

USING THE ADMINISTRATIVE PROCEDURE ACT IN YOUR STATE TO CHALLENGE UNJUST STATE AGENCY RULES OR PROCEDURES

Most states have an Administrative Procedure Act (APA) that regulates how state agencies make and apply rules. You can challenge how state juvenile justice agencies make rules and apply them if they do not follow the APA requirements of the state. Contact the NJDC for more information.

Federal and state administrative procedure acts (APAs) provide advocates, parents and community organizers with an opportunity to impact the substance and form of rules made by state agencies. The Federal Administrative Procedure Act (APA) and corresponding state administrative procedure statutes set out the process that agencies must adhere to both when making broad policy decisions (rulemaking) and when applying those policies to individual circumstances (adjudicating). Administrative procedure statutes regulate executive agency behavior through the rulemaking and adjudication processes. Executive agencies include agencies involved with administering juvenile justice. These administrative procedure statutes can be effective tools to address unjust procedures within facilities housing juveniles or caring for them in the community.

The breadth of administrative procedure statutes allows parties affected by the procedures of a state agency to intervene when state agencies make rules or adjudicate. Each disciplinary code, behavioral regulation, and process for determining privileges and violations is a rule. The application of each rule to an individual's particular circumstances is an adjudication. Therefore, in some instances, administrative procedure statutes may allow for substantial oversight of state agency activities in states where statutes have been enacted or regulations have been mandated.

Most states have implemented administrative procedure statutes to govern state agency conduct. More than half of those states consulted and followed the Model State Administrative Procedure Act (Model State APA) when constructing their statutes. The other states modeled their statutes after the Federal APA. Since the Model State APA and the Federal APA differ, advocates must examine the specific provisions of their state statutes carefully.

Distinction Between Rulemaking and Adjudication

Notwithstanding specific differences in each state's statutes, all APA statutes distinguish between rulemaking and adjudication procedures.¹ An action determined to be rulemaking must allow for public participation in the formulation of the rule to satisfy due process requirements. Under the APA an adjudicatory action entitles an individual to some level of hearing. When applying administrative procedure statutes to

juvenile justice systems, it is important to determine whether the agency is acting in its rulemaking or adjudicatory capacity. The distinction between the two is based on the nature of the decision facing the agency. Actions pursuant to generalized facts do not require an individual hearing and can be taken according to procedures applicable to rulemaking. Actions pursuant to individualized facts require some level of hearing and are classified as an adjudication. Once an action is classified as rulemaking or adjudication, the agency must then follow the appropriate procedures.

For instance, if a juvenile correctional facility desired to implement a specific mental health plan, it would be rulemaking. The plan is a broad policy decision because factors such as budgeting, space, personnel, and the number of youth are general to an entire facility population. Rulemaking requires public participation in the creation of the plan to protect residents' rights.

However, it might be an adjudication if the mental health plan was applied to an individual. If the plan requires any youth who attempts suicide be placed in isolation, then the application of that rule to an individual compels some level of hearing. The hearing levels vary from formal to informal and depend on the applicable administrative procedure statute, constitutional due process, and facility regulations and practices.

Rulemaking

The Federal APA defines "rules" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."² "Rulemaking" is defined as the "agency process for formulating, amending, or repealing a rule."³ An agency action pursuant to common or generalized facts and applicable to a group of persons is termed "rulemaking" and must be carried out in accordance with statutory regulations. All agencies subject to the authority of an APA must follow its specific rulemaking procedures.⁴

These procedures allow advocates to intervene in the rulemaking process before the rules become effective. For example, a juvenile justice agency may want to implement a rule that it will not allow youth, family members, or attorneys to participate in placement decisions. The

The Administrative Procedure Act

agency may only implement the proposed rule by following proper procedures including providing proper notice, allowing for comments by all interested parties, considering all points of view, issuing a concise general statement about the basis and purpose of the rule, and publishing it at least 30 days in advance. During the notice and comment period advocates can provide arguments and documentation demonstrating their position. Through this effort, advocates can stop the implementation of proposed rules or at least gather support to have them scrutinized and possibly modified before they are enacted. Both state and federal APA's outline basic rulemaking procedures.

Rulemaking Differences Between APA's

The 1981 Model State APA differs somewhat from the Federal APA. One significant difference is the way in which each defines a rule. Under the Federal APA, a rule can have "general or particular applicability."⁵ The Model State APA requires that a rule have only "general applicability." Therefore, under the Model State APA, an action applicable to a group, but affecting only an individual, would be an adjudication requiring a hearing. The Federal APA would consider the same action as rulemaking and would only require adequate public participation in the process. For example, a rule that affects all residents with learning disabilities where only one resident has a learning disability would entitle that resident to a hearing under the Model State APA. Under the Federal APA, the action would still be considered rulemaking and the resident would be entitled to intervene only as permitted through the rulemaking process.

Another difference between the APAs is the amount of alteration permitted between the proposed and adopted rule. Under the Model State APA, the adopted rule may not be "substantially different" from the proposed rule.⁶ The Federal APA allows adopted rules that are the "logical outgrowth" of the proposed rule.⁷ However, the basic procedures for rulemaking under both APAs remain fundamentally similar and both provide advocates with an opportunity to intervene in the rulemaking process.⁸

Adjudication

Formal adjudication hearings afford an individual certain rights, which may include the right to have counsel present, cross-examine witnesses, present evidence, and obtain a record of the proceedings. Informal proceedings may merely provide the opportunity to be heard and the right to a written explanation of the fact-finder's decision. The formality of a hearing depends upon the requirements of the due process clause of the Constitution, a statute, or an agency's regulations or practice. Hearings are not automatic, and unless the affected individual asserts the right to a hearing, the right may be waived.

If an individual's constitutionally protected property or liberty interest will be affected by the adjudication, then the formality of the hearing depends on a due process analysis. This analysis balances the individual's property or liberty interest against the state's interest in restricting those interests to yield the appropriate levels of protection and hearing. The type of hearing required depends on three factors outlined by the Supreme Court in *Mathews v. Eldridge*:⁹ 1) The nature of the private interest affected; 2) the risk to that interest posed by the challenged procedure and the likelihood that a different procedure would better protect that interest; and 3) the burden upon the government in imposing a different procedure.

If an individual's statutory rights will be affected by an adjudication, the type of hearing will depend on the statute and APA in question. The Model State APA requires a formal hearing in every case of adjudication, whether or not required by statute.¹⁰ Under the Federal APA, a statute merely requiring a hearing, or one that does not speak to the matter, does not trigger the Federal APA requirement of a formal hearing.¹¹ The protection of the Federal APA only applies to hearings statutorily required to be on the record.

When a statute does not call for a hearing on the record, it is termed an "informal adjudication" (informal hearings only occur under the Federal APA). The Federal APA requires very few procedural protections for informal adjudications. It does provide, however, for the right to appear personally before an agency and to be represented by counsel.¹² It provides that subpoenas and reports be enforced only as authorized by law¹³ and that the agency give prompt notice and explanation of its decision.¹⁴ Outside these protections, agencies have substantial discretion over how to structure informal adjudications. In general, jurisdictions that follow the Federal APA have fewer formal hearings than those that follow the Model State APA.¹⁵

Agency regulations or past practices can trigger formal protections similar to those of the APA's. If an agency regulation provides certain procedural formalities for a hearing, the agency is bound to follow those formalities in every case. An agency cannot arbitrarily choose which protections to provide for hearings if its own regulations call for specific procedures. Also, that agency may be bound to apply established procedures to every similar hearing.

In juvenile justice systems, decisions are often made at the discretion of an administrator or staff member. While a discretionary decision cannot be challenged, the procedures for reaching the decision may be challenged. Suppose a staff member punishes a youth by requiring her to clean a unit's bathroom while she is in custody. If the disciplinary code requires a hearing before imposing a punishment greater than a reprimand, the administrative

procedure statute can be used to invalidate the discretionary decision if it was an adjudication without a hearing. Of course, after a hearing, the youth may be ordered to clean the bathroom. However, that juvenile was protected by a hearing, got notice of the alleged rule violation and had an opportunity to respond before the sanction.

Using APAs To Challenge State Agency Actions

APAs can play a significant role because, unless excepted by statute, they govern the actions of the agencies charged with the administration of juvenile justice. Agencies must follow procedures outlined in the state administrative procedure statute when promulgating rules, issuing orders, implementing programs, or delivering services. These procedures are intended to limit agency discretion and provide for a fair use of the agency's power.

The state statutes can be used by juvenile advocates in different ways. The statutes suggest that an agency provide a youth with a hearing when it makes decisions about that particular youth. Although a hearing may be provided for by statute, it must be demanded or an agency may deem it waived and then make important decisions without any input from the youth. State statutes also provide procedural protections for hearings. This prevents the agency from arbitrarily deciding the procedures to apply at a hearing.

If an advocate wants to use an APA to improve the care of juveniles, the first step is to track down the applicable Federal or Model State APA and study it carefully. Then identify the administrative procedure that impacts the care of the child. Next, the advocate must decide whether the action is rulemaking or adjudication.

Agencies may violate APA procedures by making decisions internally or by not fully adhering to APA requirements and those decisions can sometimes be challenged. It is important to remember that APAs govern the process of formulating and enforcing policy rather than the substance of those decisions. Nevertheless, these regulations call for input in the formulation of policies by state juvenile justice agencies and ensure that the policies are correctly applied to juveniles.

From the perspective of a juvenile advocate using APAs, the focus should be on the promulgation and application of rules to individuals. These two areas of regulation provide advocates an opportunity to challenge agency action.

Conclusion

Federal and State APAs can be effective tools for addressing unjust procedures by state agencies as they are

applied to youth. Advocates can use APAs to participate in the regulatory process, address unlawful conditions of confinement, challenge unfair rule applications or object to rulemaking that does not meet due process requirements. Under the breadth of APAs, any party negatively affected by an institution's procedures may be able to challenge them through the rulemaking or adjudicatory process.

Readers are urged to closely examine their state statutes for differences that will affect the rights of youth in their state. For more information about the Administrative Procedure Act in your state see: <http://www.law.fsu.edu/library/admin/>.

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1. *See also* Bi-Metallic Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) (case facts presenting an example where public participation in the political process sufficiently protects individual rights); *Londoner v. Denver*, 210 U.S. 373 (1908) (case facts presenting an example where a hearing is necessary to protect individual rights).
 2. 5 U.S.C. § 551(4) (1996); compare Uniform Law Commissioner's Model State Administrative Procedure Act § 1-102(10), 15 U.L.A. 7, 12 (1981) (does not include either "statement of future effect" or "statement of . . . particular applicability" as part of its definition).
 3. 5 U.S.C. § 551(5) (1996).
 4. *Id.* § 553 (provides the informal procedures that Federal agencies must follow when promulgating rules.)
 5. Uniform Law Commissioner's Model State Administrative Procedure Act § 1-102(10), 15 U.L.A. at 12 (1981).
 6. Uniform Law Commissioner's Model State Administrative Procedure Act § 3-107, 15 U.L.A. at 42 (1981).
 7. *BASE Wyandotte Corp. v. Costle*, 598 F.2d 637 (D Cir 1979).
 8. Uniform Law Commissioner's Model State Administrative Procedure Act §§ 3-101 to 117, 15 U.L.A. 33-57 (1981).
 9. *Matthews v. Eldridge*, 424 U.S. 319 (1976).
 10. Uniform Law Commissioner's Model State Administrative Procedure Act §§ 4-101, 4-201, 15 U.L.A. at 67, 74 (1981).
 11. 5 U.S.C. §§ 554, 556-57 (containing the formal protections of the APA).
 12. *Id.* § 555(b).
 13. *Id.* § 555(c), (d).
 14. *Id.* § 555(e).
 15. Uniform Law Commissioner's Model State Administrative Procedure Act §§ 4-101 to 221, 15 U.L.A. at 67-98 (1981).

—Prepared by Stephanie Hu for the NJDC.

This is an edited excerpt from *Beyond the Walls: Improving Conditions of Confinement for Youth in Custody*. For more detail please visit the OJJDP web site which is located at: <http://www.ojjdp.ncjrs.org/pubs/walls/contents.html>.

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for all children

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Statement of Beliefs

All children in the justice system must have ready and timely access to capable, well-resourced, well-trained legal counsel.

All children are entitled to legal representation that is individualized, developmentally and age appropriate, and free of racial, ethnic, gender, social, and economic bias.

All children have strengths and the potential to become productive members of society and each has the right to constitutional and statutory protections.

The juvenile defense bar must build its capacity, develop leadership and demonstrate a commitment to professionalism.

The juvenile defense bar must promote accountability and bring about reform in the juvenile justice system.

The juvenile defense bar's role in the justice system will be advanced through collaboration and partnerships.

The juvenile defense system will be enhanced by greater community involvement.