IDAHO ATTORNEY GENERAL'S ANNUAL REPORT

OPINIONS
AND
SELECTED INFORMAL GUIDELINES
FOR THE YEAR
1993

Larry EchoHawk
Attorney General

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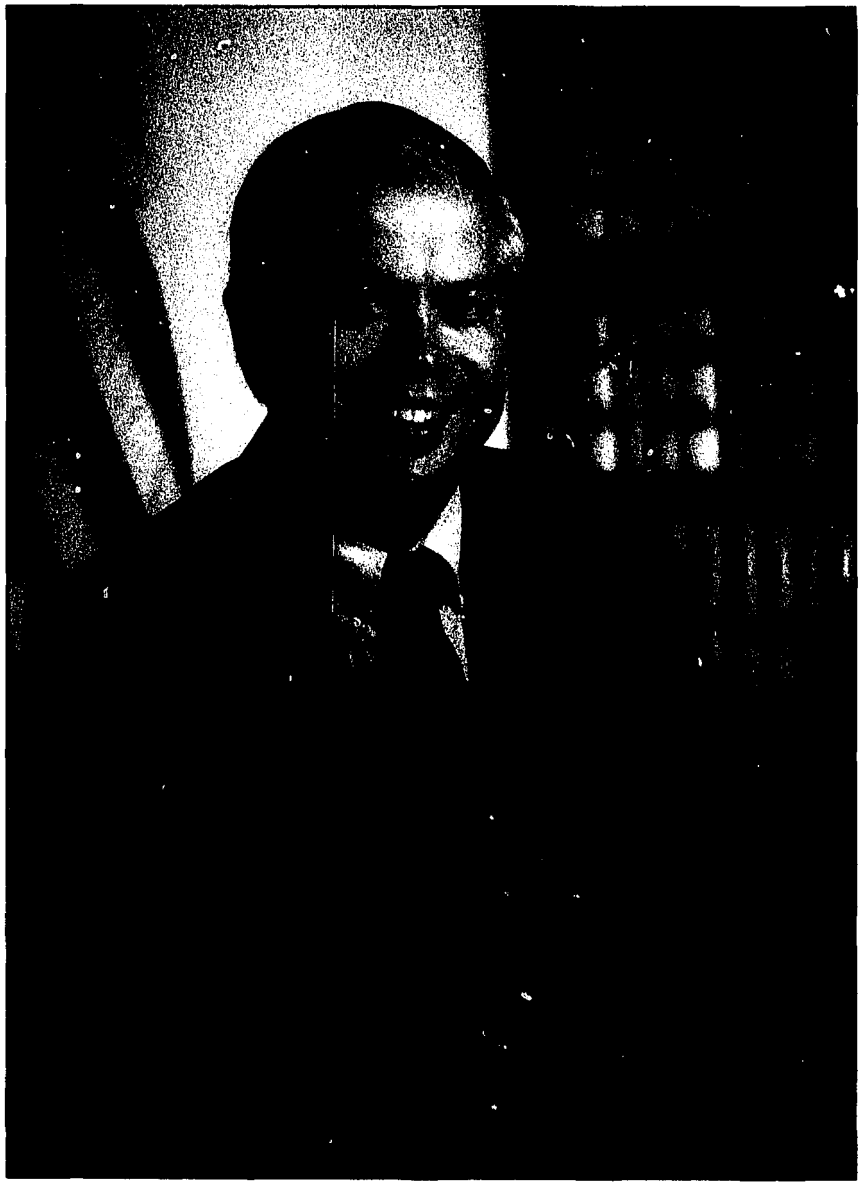

Larry EchoHawk
Attorney General

INTRODUCTION

Dear Idahoan:

I take great pride in presenting to you the opinions of the Office of the Attorney General for 1993. The opinions address the concerns of four different constituencies.

First and foremost, we answer questions posed by legislators. Three months each year the office mobilizes to serve the needs of the Idaho Legislature. We review proposed bills and advise sponsors on whether a reviewing court would find constitutional defects or any problems with the bill's "fit" into the existing Code of statutes.

Local government questions generally account for the majority of opinions each year. Responding to inquiries from cities, counties and other units of local government is not one of the Attorney General's statutory duties. But it is a task we undertake willingly so that uniform answers are provided to Idaho citizens statewide.

Our own state agencies account for yet another cluster of opinions. Our custom is to seek input from agency deputies in drafting these opinions, but to retain final editorial control in the central office. We find this practice provides a good balance between insider expertise and outsider objectivity.

Finally, in recent years, we have found it necessary to address a growing number of citizen-sponsored initiatives. The initiative is democracy in its purest form and we take our review responsibilities very seriously.

Our goal in every opinion is to provide thorough research, solid analysis and professional, nonpartisan legal advice. I am pleased with the work contained in this volume and offer it to the legal community with pride.

Best wishes,

LARRY ECHOHAWK
Attorney General
State of Idaho

OFFICE OF THE ATTORNEY GENERAL

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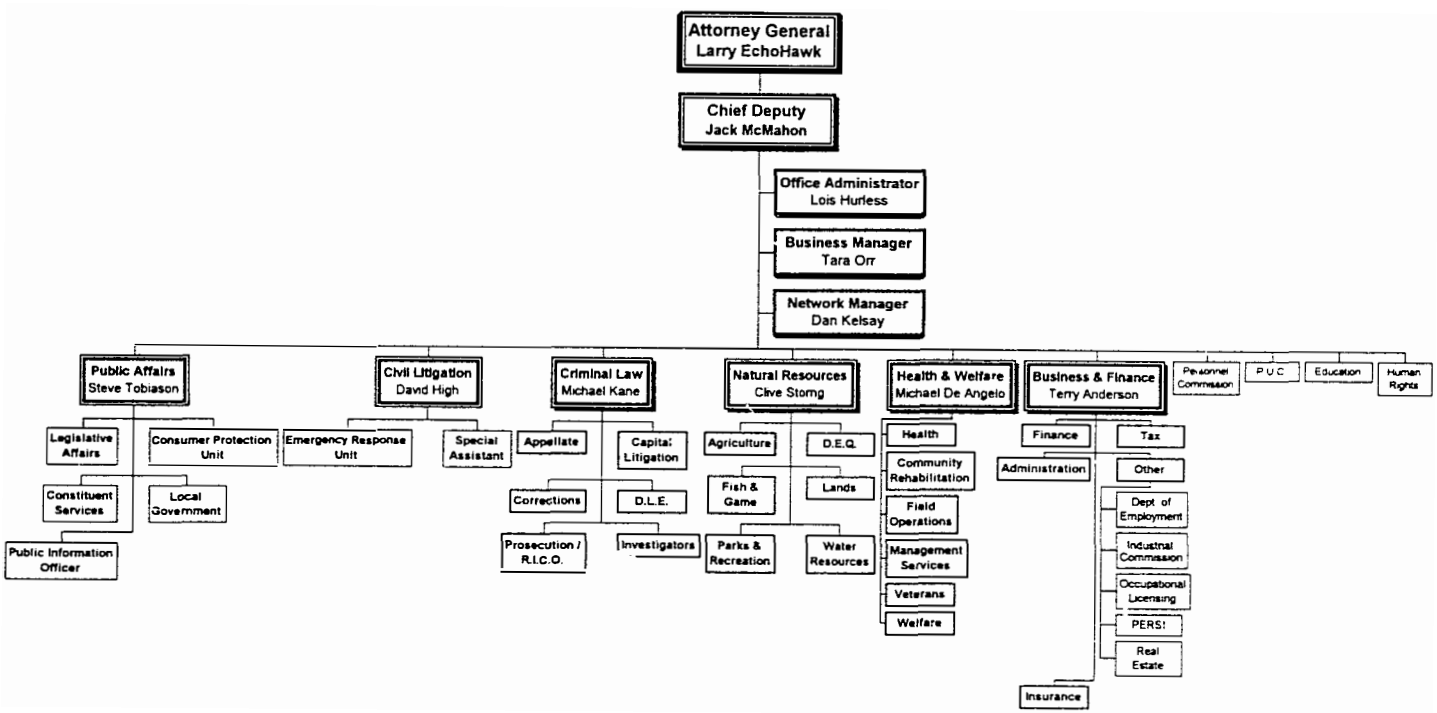
ORGANIZATION CHART - Office of the Attorney General



OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR 1993

Larry EchoHawk
Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 93-1

Mr. Richard H. Schultz, Administrator
Division of Health
Idaho Department of Health and Welfare
450 W. State Street
STATEHOUSE MAIL
Boise, ID 83720

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED

1. As the United States Supreme Court has now rejected the trimester approach of *Roe v. Wade,* 410 U.S. 113 (1973), are the provisions of Idaho Code § 18-608 (which track the *Roe v. Wade* trimester approach in determining which abortions are permitted in Idaho) valid and enforceable?

2. What are the Department of Health and Welfare's responsibilities under the requirements of Idaho Code § 18-609?

3. Does the parental notification provision contained in Idaho Code § 18-609(6) meet federal constitutional requirements?

4. Does Idaho Code § 18-609 contemplate criminal sanctions if its requirements are violated or does it merely provide civil immunity to medical practitioners who comply with its terms?

5. What agency or entity has the enforcement responsibility for violations of Idaho Code, title 18, chapter 6?

6. Do Idaho's abortion regulations violate a state constitutional right to privacy?

CONCLUSION

1. The United States Supreme Court's rejection of *Roe v. Wade*'s trimester approach to abortion has little bearing on the constitutionality of Idaho Code § 18-608. Most of this section is constitutional. However, regardless of whether a trimester or viability approach is used, the requirement of Idaho Code § 18-

608(2), that second-trimester abortions be performed in a hospital, continues to be unconstitutional under established law.

2. Under Idaho Code § 18-609, the Department of Health and Welfare must publish and make available to abortion providers printed materials containing information about fetal development, abortion procedures and risks, and services available to assist a woman through pregnancy, at childbirth and while the child is dependent. The department must also annually compile and report to the public the number of abortions performed in which materials containing the information described above were not provided to the pregnant patient.

3. While precedent on this point is not entirely clear, the parental notification provision contained in Idaho Code § 18-609(6) would survive a facial challenge but is potentially vulnerable to a constitutional challenge under certain factual circumstances as it does not contain any bypass procedure, judicial or otherwise.

4. It is not clear whether Idaho Code § 18-609 carries with it criminal penalties. Reasonable arguments can be raised on both sides of this issue. It is the opinion of this office, however, that the argument against criminal penalties is more persuasive.

5. The county prosecutor is responsible for enforcing the criminal provisions of Idaho Code, title 18, chapter 6.

6. While some state supreme courts have found a right of privacy in their state constitutions broader than that contained in the United States Constitution, there is nothing in Idaho history to indicate the Idaho Supreme Court would do likewise.

ANALYSIS

Question No. 1:

You have asked whether the United States Supreme Court's recent rejection of *Roe v. Wade*'s trimester approach to abortion issues affects the constitutionality of Idaho Code § 18-608. Our opinion is that it does not. However, regardless of whether a trimester or viability approach is used, Idaho Code § 18-608(2), which requires that second-trimester abortions be performed in a hospital, is unconstitutional.

In *Roe v. Wade*, the Supreme Court held that a woman has a fundamental right to terminate a pregnancy and established what has been characterized as a "trimester approach" to govern abortion regulations. Almost no regulation was permitted during the first trimester of pregnancy. Regulations designed to protect the woman's health, but *not* to further the state's interest in potential life, were permitted during the second trimester. Finally, during the third trimester, when the fetus was viable, prohibitions were permitted so long as they did not jeopardize the life or health of the mother. *Roe* at 163-66.

Last term, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992), the Court, in its 5 to 4 ruling, reaffirmed a woman's constitutional right to have an abortion before the fetus reaches viability. However, the Court rejected Roe's trimester construct, reasoning that its "rigid prohibition on all pre-viability regulations aimed at the protection of fetal life . . . undervalue[d] the State's interest in potential life." *Casey* at 2818. The Court adopted a new "undue burden" test. Under this test, a state may regulate abortion to further its interest in potential life or to foster the health of the mother so long as the "purpose or effect" of the regulation is not to place "a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." Id. at 2821. Once the fetus is viable, the state may proscribe abortion "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Id. at 2821.

Idaho Code § 18-608 outlines when abortions are permitted in Idaho. Because this statute was authored prior to the *Casey* opinion, it is largely based upon the trimester construct. Thus, Idaho Code § 18-608(1) addresses first-trimester abortions, 18-608(2) second-trimester abortions and 18-608(3) third-trimester abortions. The *Casey* opinion, with its new "undue burden" test, does not render this scheme unconstitutional. *Casey's* "undue burden" test allows even more state regulation in the first two trimesters than did *Roe.* Therefore, regulations contained in Idaho Code § 18-608 which were constitutional under *Roe* remain so today, regardless of any references to "trimesters" in the Idaho statute. Moreover, Idaho Code § 18-604 defines the second and third "trimesters" in terms of "viability" rather than weeks of pregnancy. The trimester framework of Idaho Code § 18-608 can thus be harmonized with *Casey's* viability approach.[1]

It must be noted, however, that regardless of whether a trimester or viability test is used, Idaho Code § 18-608(2) does raise constitutional concerns. It states that an abortion is not unlawful:

> When performed upon a woman who is in the second trimester of pregnancy, the *same is performed in a hospital* and is, in the judgment of the attending physician, in the best medical interest of such pregnant woman, considering those factors enumerated in subsection (1) of this section and such other factors as the physician deems pertinent.

(Emphasis added.)

As this office noted in a 1983 guideline, the Supreme Court, in *Akron v.* Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) *(Akron I),* concluded that medical science had advanced so that some second-trimester abortions can be safely performed without hospitalization. Op. Idaho Att'y Gen. 218 (1983). Therefore, requiring hospitalization for *all* second-trimester abortions is unreasonable and unconstitutional:

> [A]t least during the early weeks of the second trimester . . . D & E abortions may be performed at an outpatient clinic as in a full-service hospital. We conclude, therefore, that "present medical knowledge," . . . convincingly undercuts Akron's justification for requiring that all second-trimester abortions be performed in a hospital . . . . [T]he lines drawn in a state regulation must be reasonable, and this cannot be said of [the second-trimester hospitalization requirement].

Akron I at 437-38. Idaho Code § 18-608(2) conflicts with this precedent and is, therefore, unconstitutional.

In sum, the Supreme Court's rejection of *Roe's* trimester framework in the *Casey* opinion does not affect the constitutionality of Idaho Code § 18-608. However, the hospitalization requirement of Idaho Code § 18-608(2) continues to be unconstitutional just as it was prior to the *Casey* decision.[2]

Question No. 2:

Your second question concerns the Department of Health and Welfare's responsibilities under Idaho Code § 18-609, which contains Idaho's informed consent provisions. It states in pertinent part:

> (2) In order to provide assistance in assuring that the consent to an abortion is truly informed consent, the director of the department of health and welfare shall publish, after consultation with interested

parties, easily comprehended printed material to be made available at the expense of the physician, hospital or other facility providing the abortion, and which shall contain the following:

(a) Descriptions of the services available to assist a woman through a pregnancy, at childbirth and while the child is dependent, including adoption services, a comprehensive list of the names, addresses, and telephone numbers of public and private agencies that provide such services and financial aid available;

(b) Descriptions of the physical characteristics of a normal fetus, described at two (2) week intervals, beginning with the fourth week and ending with the twenty-fourth week of development, accompanied by scientifically verified photographs of a fetus during such stages of development. The description shall include information about physiological and anatomical characteristics, brain and heart function, and the presence of external members and internal organs during the applicable stages of development; and

(c) Descriptions of the abortion procedures used in current medical practices at the various stages of growth of the fetus and any reasonable foreseeable complications and risks to the mother, including those related to subsequent child bearing.

(3) No abortion shall be performed unless, prior to the abortion, the attending physician or the attending physician's agent (i) confirms or verifies a positive pregnancy test and informs the pregnant patient of a positive pregnancy test, and (ii) certifies in writing that the materials provided by the director of the department of health and welfare have been provided to the pregnant patient, if reasonably possible, at least twenty-four (24) hours before the performance of the abortion. If the materials are not available from the director of the department of health and welfare, no certification shall be required. The attending physician, or the attending physician's agent, shall provide any other information required under this act. In addition to providing the material, the attending physician may provide the pregnant patient with such other information which in the attending physician's judgment is relevant to the pregnant patient's decision as to whether to have the abortion or carry the pregnancy to term.

> (4) If the attending physician reasonably determines that due to circumstances peculiar to a specific pregnant patient, disclosure of the material is likely to cause a severe and long lasting detrimental effect on the health of such pregnant patient, disclosure of the materials shall not be required. Within thirty (30) days after performing any abortion without certification and delivery of the materials, the attending physician, or the attending physician's agent, shall cause to be delivered to the director of the department of health and welfare, a report signed by the attending physician, preserving the patient's anonymity, which explains the specific circumstances that excused compliance with the duty to deliver the materials. The director of the department of health and welfare shall compile the information annually and report to the public the total number of abortions performed in the state where delivery of the materials was excused; provided that any information so reported shall not identify any physician or patient in any manner which would reveal their identities.

Thus, as set out in Idaho Code § 18-609, under Idaho's informed consent provisions, it is the responsibility of the Department of Health and Welfare to publish and make available to abortion providers materials containing: (1) information concerning services available to assist a woman through pregnancy, at childbirth and while her child is dependent; (2) descriptions and scientifically verified photographs of fetal development in two-week intervals; and (3) information concerning abortion procedures and risks. In addition, the department must compile and annually report the number of abortions performed in Idaho where the above-described materials were not provided to the pregnant patient. Any information so reported must not identify either physicians or patients.

This office has previously discussed the constitutionality of Idaho's informed consent provisions. In 1983, the Supreme Court struck down an informed consent provision similar to that contained in Idaho Code § 18-609 *(see Akron I)* and this office issued a legal guideline questioning the constitutionality of Idaho's statute. Op. Idaho Att'y Gen. 218 (1983). Later, in 1991, in a letter to Representative Chamberlain, we again questioned the constitutionality of Idaho's informed consent provision as well as Idaho's 24-hour waiting period, relying both upon *Akron I* and *Thornburgh v. American College of Obst. and Gyn.*, 476 U.S. 747 (1986).

The legal landscape has changed significantly since *Akron I* and

Thornburgh. The *Casey* decision, discussed above, not only adopted a new "undue burden" test, it also upheld an informed consent provision and a 24-hour waiting requirement enacted by the Pennsylvania Legislature. In upholding these two provisions, the Court stated:

> As we have made clear, we depart from the holdings of *Akron I* and *Thornburgh* to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion. In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to insure an informed choice, one which might cause the woman to choose childbirth over abortion.
>
> . . . .
>
> Our analysis of Pennsylvania's 24-hour waiting period between the provision of the information deemed necessary to informed consent and the performance of an abortion under the undue burden standard requires us to reconsider the premise behind the decision in *Akron I* invalidating a parallel requirement. In *Akron I* we said: "Nor are we convinced that the State's legitimate concern that the woman's decision be informed is reasonably served by requiring a 24-hour delay as a matter of course." 462 U.S. at 450, 103 S. Ct. at 2503. We consider that conclusion to be wrong. The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision.

Casey at 2824-25.

Given this recent Supreme Court holding, our office now believes that Idaho's informed consent provision contained in Idaho Code § 18-609 does not violate the United States Constitution. The information provided to the pregnant woman in Idaho is more comprehensive and detailed than that contained in the Pennsylvania statute at issue in *Casey*. For example, unlike the Pennsylvania statute, the information contained in Idaho's statute includes sci-

entifically verified photographs of fetal development. Moreover, the Idaho statute requires that the woman be provided with details of fetal development from the fourth to the twenty-fourth week of gestation, as well as a description of the abortion procedures used at the various stages of pregnancy and the reasonably foreseeable risks. In contrast, the Pennsylvania statute merely requires that the woman be informed of the probable gestational age of the fetus at the time of the abortion, the nature and risks of the *proposed* procedure, and the *availability* of materials which describe the unborn child. *Casey,* 112 S. Ct. at 2822, 2833, 2834. Despite these differences between the Idaho and Pennsylvania statutes, it is our opinion that, under the *Casey* analysis, Idaho's statute does not create an "undue burden" on the woman's constitutional right to terminate her pregnancy. Although the information provided to the woman is more detailed than that at issue in *Casey,* it is accurate and furthers the state's legitimate interest in potential life.[3]

As to the 24-hour waiting period, this office believes it is also valid. Certainly, in a state as rural as Idaho, a waiting period may potentially be burdensome upon some women. However, in *Hodgson v. Minnesota,* 110 S. Ct. 2926 (1990), the Supreme Court upheld a 48-hour waiting period requirement following parental notification. Moreover, Idaho's waiting period need only be complied with if "reasonably possible." Idaho Code § 18-609(3). Thus, it is not an inflexible requirement. The *Casey* and *Hodgson* holdings, coupled with the flexibility built into Idaho's waiting period, indicate that the waiting period is constitutional.[4]

In conclusion, under Idaho Code § 18-609, the Department of Health and Welfare has a number of responsibilities involving the publication and provision of materials addressing fetal development, assistance to pregnant women, and abortion procedures and risks. The department must also annually report the number of cases in which these materials are not provided. These responsibilities appear to comport with constitutional strictures and, under *Casey,* would probably withstand a legal challenge.

Question No. 3:

Your third question concerns Idaho Code § 18-609(6), the parental notification provision. Your concern is whether this provision, which contains no judicial bypass procedure, is constitutional. The precedent on this point is murky and the outcome is unclear.

Idaho Code § 18-609(6) states:

> In addition to the requirements of subsection (1) of this section, if the pregnant patient is unmarried and under eighteen (18) years of age or unemancipated, the physician shall provide notice, if possible, of the pending abortion to the parents or legal guardian of the pregnant patient at least twenty-four (24) hours prior to the performance of the abortion.

Thus, in Idaho, if a pregnant patient is unmarried and under 18, her parents must be notified "if possible" of the pending abortion. Idaho's statute does not define the term "if possible" and contains no bypass procedure, judicial or otherwise, to this requirement. Consequently, it is uncertain when notice to theparents may be excused.

In *H.L. v. Matheson*, 450 U.S. 398 (1981), the Supreme Court upheld an almost identical statute. In that case, the Court reviewed a Utah statute which stated that the doctor should:

> Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor, or the husband of the woman, if she is married.

While the statute did withstand a facial challenge, the challenger in *Matheson* failed to offer *any* evidence that she was a mature minor; that is, a minor with adequate capacity to give a valid and informed consent. Id. at 406. The Court stressed this factor and concluded that, as applied to immature and dependent minors, the Utah statute served important state interests. Id. at 413. The Court also held that, as the statute might in the future be construed by the state judiciary to excuse mature minors, the Supreme Court would not invalidate the statute based on a *facial* challenge alone. Id. at 407. "We cannot assume that the statute, when challenged in a proper case, will not be construed also to exempt demonstrably mature minors." Id. at 406.

Matheson indicates that Idaho's parental notification provision could withstand a facial challenge. Whether the statute would survive a challenge if a minor could prove that she has adequate capacity to give a valid and informed consent could depend on the Court construing the "if possible" language so as to exempt demonstrably mature minors.

Since *Matheson,* the Supreme Court has twice more examined parental notification statutes. Unfortunately, neither opinion clarifies the issue. In *Hodgson v. Minnesota,* 110 S. Ct. 2926 (1990), the Court examined a two-parent notification requirement without a judicial bypass. The Court concluded that a two-parent notification provision without a bypass procedure was unconstitutional. While this opinion might be interpreted as governing the issue at hand, the Court made a further point of distinguishing statutes, such as that in *Hodgson,* which require notification to "two parents," as opposed to statutes like Idaho's which merely refer to "parents":

> Although the Massachusetts statute reviewed in *Bellotti v. Baird,* 428 U.S. 132, 49 L. Ed. 2d 844, 96 S. Ct. 2857 (1976) (Bellotti I), and Bellotti II required the consent of both parents, and the Utah statute reviewed in *H.L. v. Matheson,* 450 U.S. 398, 67 L. Ed. 2d 388, 101 S. Ct. 1164 (1981), required notice to "the parents," none of the opinions in any of those cases focused on the possible significance of making the consent or the notice requirement applicable to both parents instead of just one.

Hodgson at 2938. The Court, after highlighting this fine distinction between "two parents" and "parents," did not conclude what the legal consequences would be.

To confound matters, in another opinion issued that same day, Justice Kennedy stated that the Court had *"not* decided whether parental notice statutes must contain [bypass] procedures" and that the Court would "leave the question open . . . ." *Ohio v. Akron Center for Reproductive Health,* 110 S. Ct. 2972, 2979 (1990) *(Akron II).* Adding to the confusion, in his concurring opinion, Justice Stevens opined that the Court had "squarely held that a requirement of preabortion parental notice in all cases involving pregnant minors is unconstitutional" and "although it need not take the form of a judicial bypass, the State must provide an adequate mechanism for cases in which the minor is mature or notice would not be in her best interests." *Akron II* at 2994. (Stevens, J., concurring.)

Thus, the United States Supreme Court precedent on parental notification and bypass procedures is confusing. Nevertheless, it appears that a number of the Justices believe there must be some way to excuse minors from notifying their parents if the minor has adequate capacity to give a valid and informed consent or if notification would not be in her best interest. Certainly,

Matheson strongly hints at this position and at least Justice Stevens thinks this principle has been settled. Whether the mechanism to avoid parental notice must be a judicial bypass procedure is uncertain.

As noted, Idaho Code § 18-609(6) contains no express bypass provision, judicial or otherwise, nor does it provide any other formal mechanism for exempting mature minors from its terms. However, the statute does require parental notification only "if possible," thus seemingly providing a safety valve in the notification requirement. Problems with Idaho's statute would thus arise only in the unlikely event that the doctor and minor disagree as to whether notification is, in fact, "possible." In that situation, the statute does not protect the mature minor's decision-making ability by affording that minor the protection of a formal bypass procedure. Under these circumstances, a court reviewing Idaho Code § 18-609(6) might well require some bypass mechanism to ensure that the mature minor can be excused from the statute's terms. While Idaho Code § 18-609(6) could perhaps survive a pure facial challenge, if a challenger demonstrated she had adequate capacity to give a valid or informed consent or that notification was not in her best interests, it is our opinion that the statute would be vulnerable to attack unless a court were to find that the safety valve language—"if possible"—is flexible enough to provide an outlet for such a challenge.

Question No. 4:

You have also asked whether the informed consent provisions in Idaho Code § 18-609 carry criminal penalties. Responding to your question requires interpretation of language found at Idaho Code § 18-609(3):

> *No abortion shall be performed* unless, prior to the abortion, the attending physician or the attending physician's agent (i) confirms or verifies a positive pregnancy test and informs the pregnant patient of a positive pregnancy test, and (ii) certifies in writing that the materials provided by the director of the Department of Health and Welfare have been provided to the pregnant patient, if reasonably possible, at least twenty four (24) hours before the performance of the abortion.

(Emphasis added.)

The fundamental rule of statutory construction is to give force and effect to legislative intent and purpose. *Sherwood v. Carter*, 119 Idaho 246, 805 P.2d

452 (1991); *Sweitzer v. Dean,* 118 Idaho 568, 798 P.2d 27 (1990). If the language of a statute is not ambiguous, the language must be given its plain and ordinary reading. *Sherwood v. Carter, supra; Bunt v. City of Garden City,* 118 Idaho 427, 797 P.2d 135 (1990). The language "no abortion shall be performed unless," by its plain and ordinary meaning, prohibits abortions that do not comply with subsection (3). However, it is not clear what legal sanction can be imposed against a physician who performs an abortion in violation of subsection (3). Although written in mandatory terms, the statute contains no express criminal sanction. Because the legislative meaning of the introductory language in subsection (3) is ambiguous, a court would apply rules of statutory construction to ascertain the legislature's intent and purpose. In particular, a court would examine the legislative history of the statute (*Leliefeld v. Johnson*, 104 Idaho 357, 659 P.2d 111 (1983)), and would apply the principle that related or similar statutes be construed in a consistent fashion ("*in pari materia*"). *George W. Watkins Family v. Messenger,* 118 Idaho 537, 797 P.2d 1385 (1990).

A. *Legislative History: The 1973 Legislation*

In 1973, the Idaho legislature enacted Senate Bill 1184, as amended, which is codified as Idaho Code §§ 18-604 to 18-615.[5] Therefore, Idaho Code § 18-609, as originally codified, was part of a comprehensive act regulating abortions consistent with the Supreme Court's decision in *Roe v. Wade.* Applying the principle of "*in pari materia,*" it is necessary to construe Idaho Code § 18-609 in relation to the other sections of Senate Bill 1184.

Senate Bill 1184, as adopted and printed in chapter 197 of the 1973 Idaho Session Laws, is divided into 16 sections. The first section contains a statement of legislative purpose; the second repeals Idaho Code §§ 18-601 and 18-602. Section 3 defines key words, and sections 4, 5 and 6 define criminal conduct and applicable criminal penalties. Section 4 provides in pertinent part:

> Every person who, *except as permitted by this act,* provides, supplies or administers any medicine, drug or substance to any woman or uses or employs any instrument or other means whatever upon any then pregnant woman with the intent thereby to produce an abortion shall be guilty of a felony . . . .

(Emphasis added.) Section 5 provides in pertinent part:

> *Except as provided by this act:*
>
> (1) every person who, as an accomplice or an accessory to any violation of Section 4 of this act, induces or knowingly aids in the production or performance of an abortion; and,
>
> (2) every woman who knowingly submits to an abortion or solicits of another, for herself, the production of an abortion or who purposely terminates her own pregnancy otherwise than by a live birth, shall be deemed guilty of a felony.

(Emphasis added.)

For the purpose of this opinion, the key language in sections 4 and 5 is the phrase "except as permitted by this act." This language indicates that, elsewhere in the same "act" (Senate Bill 1184), the legislature spells out the conditions under which abortions may be performed without criminal penalties. The authority to perform *legal* abortions is found in logical sequence in section 7 (codified as Idaho Code § 18-608), which immediately follows the criminal penalty provisions in sections 4, 5 and 6. Section 7 permits abortions by physicians under certain conditions within the trimester framework contained in *Roe v. Wade.*

Section 8 of Senate Bill 1184 provides protection from civil liability for the physician and hospital based upon the "absence of actual negligence" and the dual consent of the patient and her husband (absent abandonment). The introductory language provides:

> Any physician may perform an abortion *not prohibited by this act,* and any hospital may provide facilities for such procedures without, in the absence of actual negligence, incurring civil liability therefor to any person, ...

(Emphasis added.)

The phrase "an abortion not prohibited by this act" obviously refers back to section 7 which describes when an abortion is permitted. The focus and purpose of section 8 was embodied in the section heading: "[P]hysicians and hospitals not to incur civil liability-consent to abortion-notice."

Section 8 was unique in requiring consent not only by the physician's patient but also by her husband. Normally, a physician would be required to obtain only the consent of a patient who has the legal capacity to give consent. The dual consent provision of Section 8 required the physician to overcome an additional legal obstacle to avoid civil liability even assuming the physician was not negligent. Therefore, the actual effect of the language in Section 8 was not to grant immunity to a physician unless the dual consent requirement was met.

As originally enacted, therefore, Idaho Code § 18-609 addressed the civil liability of a physician performing a legal abortion and did not expressly provide for criminal penalties. Neither the title reference to section 8 ("providing that physicians may perform, and hospitals may provide, facilities for abortions without civil liability if proper consent is given and providing guidelines for such consent") nor the section heading for 18-609 as codified suggests that the legislature intended criminal penalties for a violation of that section.

Based upon this analysis, it is our conclusion that the legislature did not intend in 1973 to apply the criminal penalties of Idaho Code §§ 18-605 or 18-606 to an abortion performed in compliance with the trimester provisions contained within Idaho Code § 18-608 but lacking the husband's consent as required by Idaho Code § 18-609. Rather, the sole purpose of 18-609 was to condition a physician's civil liability on obtaining consent of both the patient and her husband (assuming the physician knew the patient was married or had been at any time since conception).

B. *Legislative History: The 1983 Amendments*

In 1983, the original language of Idaho Code § 18-609 was modified in two significant areas: (1) the word "informed" was added immediately before the word "consent," and (2) the provision requiring the consent of the patient's husband was deleted. The remainder of the original 1973 language was codified as subsection (1) to Idaho Code § 18-609. The statute still provided immunity from civil liability for physicians and hospitals, but to be guaranteed such immunity, the physician was now required to: (1) "perform an abortion not prohibited by this act," (2) be non-negligent, and (3) obtain the patient's "informed" consent. The obstacle to avoiding civil liability was no longer "dual" consent but "informed" consent. If the patient did not give such consent, the physician would not be protected from civil liability even assuming the abortion was otherwise legal and the physician was non-negligent.

The meaning of "informed" consent was spelled out by the addition of subsections (2) and (3) to Idaho Code § 18-609. Subsection (2) imposed a duty upon the Department of Health and Welfare to prepare for distribution detailed information about adoption services, fetal development, abortion procedures and medical risks to the patient. Subsection (3) imposed a two-fold requirement upon physicians: (1) to confirm a positive pregnancy test and so inform the patient, and (2) to certify in writing that the "informed consent materials" provided by the Department of Health and Welfare were given to the patient at least 24 hours before the abortion. Idaho Code § 18-609(3).[6]

The question that arises from the 1983 amendments to Idaho Code § 18-609 is whether the legislature intended to impose criminal penalties against a physician for failure to comply with the informed consent provisions. We shall examine both the legal case for and the legal case against criminal sanctions.

1. *Criminal Sanctions*

The language in the first line of subsection (3), "[n]o abortion shall be performed unless," is prohibitory on its face and is the foundation for the argument that the legislature intended to impose criminal sanctions. When a statute is amended, it is presumed the legislature intended to change the prior law. *Nebeker v. Piper Aircraft Corp.*, 113 Idaho 609, 747 P.2d 18 (1987). A court will construe a statute to avoid surplusage or superfluous language. *Hartley v. Miller-Stephan,* 107 Idaho 688, 692 P.2d 332 (1984). Furthermore, the legislature is presumed to have consulted earlier or existing law on the same subject. *State v. Long*, 91 Idaho 436, 423 P.2d 858 (1967).

In 1973, the legislature authorized only those abortions that complied with the conditions described in Idaho Code § 18-608. By adding subsection (3) to Idaho Code § 18-609, the legislature expanded those conditions to include the "informed" consent provisions of 18-609(3). It did so knowing that both Idaho Code §§ 18-605 and 18-606 prohibited all abortions "except as permitted by this act." If the legislature did not intend to criminalize abortions that did not comply with subsection (3) of Idaho Code § 18-609, it did not need to include the language "no abortion shall be performed." Subsection (1) of Idaho Code § 18-609 addressed the issue of civil liability of physicians and hospitals. The language of subsection (3), "no abortion shall be performed," would be surplus or superfluous unless it went beyond the civil liability of physicians and

imposed criminal penalties for failure to comply with Idaho Code § 18-609(3).

The legislative history of Senate Bill 1121 as adopted in 1983 does not reveal any specific discussion of criminal penalties for a violation of Idaho Code § 18-609. This issue was, however, apparently discussed in 1982 concerning a predecessor "informed consent" bill that contained the same language ("no abortion shall be performed unless"). Reports in the *Lewiston Morning Tribune* and the *Idaho Statesman* at the time suggested that language similar to that of Senate Bill 1121 (1983) and Senate Bill 1415 (1982) was viewed in 1982—at least by some—as imposing felony penalties against any physician who violated the informed consent provisions of Idaho Code § 18-609.[7]

These points supporting felony penalties for abortions performed in violation of Idaho Code § 18-609(3) are reinforced by the fact that, when the subsection was enacted in 1983, Idaho had an unbroken history of a conservative and punitive policy toward abortions. The statutes were liberalized solely because of decisions of the United States Supreme Court.

2. *Lack of Criminal Sanctions*

The more persuasive reading is that Idaho Code § 18-609 is not criminally enforceable but merely provides civil immunity to physicians who comply with its terms. To begin with, Idaho Code § 18-608, which refers to sections of the act which provide for felony sanctions, also states that those sections "shall not apply to and neither this act, *nor other controlling rule of Idaho law, shall be deemed to make unlawful an abortion performed by a physician*" if the requirements contained within Idaho Code § 18-608 are followed. (Emphasis added.) This language, providing that an abortion performed in compliance with Idaho Code § 18-608 is not unlawful, any other provision of law notwithstanding, suggests that Idaho Code § 18-609 is not criminally enforceable.

Added to this is the contrast between the language of Idaho Code § 18-608 and 18-609. If a legislature includes particular language in one section but omits it from another section of the same act, it is presumed to have intentionally excluded the particular language. *See generally, Kopp v. State,* 100 Idaho 160, 595 P.2d 309 (1979). While Idaho Code § 18-608 expressly refers to sections of the act which provide felony sanctions, Idaho Code § 18-609 contains

no such reference and would, therefore, be interpreted to have intentionally excluded such language.

Moreover, if it was the intent of the legislature to impose criminal sanctions for a violation of Idaho Code § 18-609, it was not stated in the title, in the statement of purpose or in the fiscal note for Senate Bill 1121.

Earlier in this opinion, we indicated there was limited discussion by the legislature of criminal penalties in 1982 concerning Senate Bill 1415 (House State Affairs Committee Minutes; *Idaho Statesman* and *Lewiston Morning Tribune* articles). Reviewing the same sources for 1983 does not reveal any discussion related to the imposition of criminal penalties pursuant to Senate Bill 1121. Although legislative history is typically sketchy, it is unusual that the minutes of the testimony of numerous opponents to Senate Bill 1121 (including the Idaho Hospital Association and the Idaho Medical Association) do not include any recorded objections to the criminal sanctions arguably imposed against physicians under Idaho Code § 18-609.

Therefore, if it was the intent of the legislature to change prior law by imposing criminal penalties under Idaho Code § 18-609, the legislature failed to provide notice to the public by appropriate language in the title, in the statement of purpose or in the fiscal note or, apparently, by committee discussion or floor debate. Moreover, we found no record in other contemporaneous documents of legislative history or related information to signal that it was the 1983 legislature's intent to impose criminal penalties by Senate Bill 1121.

Finally, one other rule of statutory construction must be considered. Criminal statutes must be strictly construed, "and courts are without power to supply what the legislature has left vague." *State v. Thompson*, 101 Idaho 430, 437, 614 P.2d 970, 977 (1980) (quoting *State v. Hahn,* 92 Idaho 265, 267, 441 P.2d 714, 716 (1968)). Given the failure of Idaho Code § 18-609 to expressly provide for criminal sanctions, it is our opinion that a court would be reluctant to attach criminal penalties to the statute.

Thus, solid arguments can be made for and against the legislative intent to impose criminal sanctions for a violation of Idaho's "informed consent" law. After careful legal analysis and full consideration of both viewpoints, it is the opinion of this office that the argument against criminal sanctions is more persuasive. Therefore, it is our conclusion that the legislative intent and purpose behind Idaho Code § 18-609 was to provide legal protection from civil liabil-

ity for physicians performing abortions in compliance with both Idaho Code § 18-608 and 18-609. Further, it was not the intent or purpose of the legislature to impose criminal sanctions against a physician for non-compliance with Idaho Code § 18-609.

Question No. 5:

You have also asked what agency or entity has the enforcement responsibility for violations of the provisions of title 18, chapter 6, Idaho Code. Idaho Code § 31-2227 provides that:

> [I]t is hereby declared to be the policy of the state of Idaho that the primary duty of enforcing all the penal provisions of any and all statutes of this state, in any court, is vested in the sheriff and prosecuting attorney of each of the several counties.

The statute goes on to provide that those officers can call upon municipal peace officers and the Department of Law Enforcement when assistance is needed. Under Idaho Code § 31-2604, it is the duty of the prosecuting attorney to prosecute all felony criminal actions within his or her county, and all misdemeanor actions involving violations of state laws where the arresting or charging officer is a state or county employee. The city attorney or contract counsel has responsibility for prosecuting state misdemeanors committed within the municipal limits. Idaho Code § 50-208A. These provisions are fully applicable to the provisions of Idaho Code § 18-605, 18-606 and 18-607 making certain violations criminal offenses. Thus, prosecutions for unlawful abortions under Idaho Code § 18-605 and 18-606, which are declared to be felonies, would be the responsibility of the prosecuting attorney.

Question No. 6:

Your final inquiry concerns the Idaho Constitution. You asked whether article 1, sections 1 and 21, of the Idaho Constitution contain a right of privacy which might be violated by the provisions of title 18, chapter 6, Idaho Code, even if federal constitutional mandates are met.

Certainly, a state supreme court may construe its own state constitution more broadly than the United States Constitution. Indeed, a number of state courts that have considered the abortion issue have afforded greater individual rights to their citizens under their state constitutions than those recognized

under the United States Constitution. *See, e.g., Committee to Defend Reproductive Rights v. Myers,* 625 P.2d 779 (Cal. App. 1981); *Doe v. Maher,* 515 A.2d 134 (Conn. Super. Ct. 1986). The Idaho Supreme Court has already held that it may afford citizens greater protection under the Idaho Constitution than is afforded under the United States Constitution. *See, e.g., State v. Guzman,* ___ Idaho ___ , ___ P.2d ___ (slip op. no. 126, Nov. 5, 1992); *Hellar v. Cenarrusa,* 106 Idaho 586, 682 P.2d 539 (1984). Additionally, in *Murphy v. Pocatello School District No. 25,* 94 Idaho 32, 480 P.2d 878 (1971), the Idaho Supreme Court appeared to recognize a right of privacy in our state constitution.

Despite these holdings, it is our opinion that it would be premature and speculative to assume the Idaho Supreme Court would be willing to go beyond *Casey* and other federal precedent. Until 1973, when *Roe v. Wade* was decided, abortion was criminalized in Idaho and, in fact, was a crime when our constitution was adopted. *See* Idaho Crimes & Punishment, 1864, 42. Worth noting is *State v. Alcorn,* 7 Idaho 599, 64 P. 1014 (1901), an early Idaho Supreme Court opinion characterizing abortion as both illegal and immoral. There is little in the history or tradition of this state to indicate that the framers of our constitution intended to protect a woman's right to terminate her pregnancy. This is not to suggest that our state constitution is necessarily frozen as of a century ago, but merely that, at this point, neither Idaho history nor legal precedent suggests that our state constitution is more protective of abortion rights than is the United States Constitution.

AUTHORITIES CONSIDERED

1. **Idaho Constitution:**

   Art. 1, sec. 1.
   Art. 1, sec. 21.

2. **Idaho Code:**

   Title 18, chapter 6.
   § 31-2227.
   § 31-2604.
   § 50-208A.

3. **Idaho Cases:**

Bunt v. City of Garden City, 118 Idaho 427, 797 P.2d 135 (1990).

George W. Watkins Family v. Messenger, 118 Idaho 537, 797 P.2d 1385 (1990).

Hartley v. Miller-Stephan, 107 Idaho 688, 692 P.2d 332 (1984).

Hellar v. Cenarrusa, 106 Idaho 586, 682 P.2d 539 (1984).

Kopp v. State, 100 Idaho 160, 595 P.2d 309 (1979).

Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983).

Murphy v. Pocatello School District No. 25, 94 Idaho 32, 480 P.2d 878 (1971).

Nebeker v. Piper Aircraft Corp., 113 Idaho 609, 747 P.2d 18 (1987).

Sherwood v. Carter, 119 Idaho 246, 805 P.2d 452 (1991).

State v. Alcorn, 7 Idaho 599, 64 P. 1014 (1901).

State v. Guzman, ___ Idaho ___ , ___ P.2d ___ (slip op. no. 126, Nov. 5, 1992).

State v. Hahn, 92 Idaho 265, 441 P.2d 714 (1968).

State v. Long, 91 Idaho 436, 423 P.2d 858 (1967).

State v. Thompson, 101 Idaho 430, 614 P.2d 970 (1980).

Sweitzer v. Dean, 118 Idaho 568, 798 P.2d 27 (1990).

4. **Other Cases:**

Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983).

Bellotti v. Baird, 428 U.S. 132 (1976).

Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779 (Cal. App. 1981).

Doe v. Maher, 515 A.2d 134 (Conn. Super. Ct. 1986).

H.L. v. Matheson, 450 U.S. 398 (1981).

Hodgson v. Minnesota, 110 S. Ct. 2926 (1990).

Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972 (1990).

Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992).

Roe v. Wade, 410 U.S. 113 (1973).

Thornburgh v. American College of Obst. and Gyn., 476 U.S. 747 (1986).

5. **Other Authorities:**

Op. Idaho Att'y Gen. 218 (1983).

Idaho Crimes & Punishment, 1864, § 42.

DATED this 10th day of February, 1993.

LARRY ECHOHAWK
Attorney General

Analysis by:

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[1] Not only does Idaho Code § 18-608 track *Roe's* trimester framework, it also closely tracks *Roe's* reasoning that, in the first trimester, it is the physician, in consultation with the pregnant woman, who determines whether an abortion should be performed. *See* Roe, 410 U.S. at 163; Idaho Code § 18-608. Since *Roe*, the Supreme Court has stated that it is the *woman's* liberty interest in retaining "the ultimate control over her destiny and her body" which is constitutionally protected. *Casey*, 112 S. Ct. at 2816. While the focus of Idaho Code § 18-608 is on the

physician's judgment, this focus was intended to parallel the holding of *Roe*. It is, therefore, our opinion that a reviewing court would not interpret Idaho Code § 18-608 so as to diminish the *woman's* right to abortion that was established in *Roe*.

[2] The language of Idaho Code § 18-608(3)—which prohibits third-trimester abortions unless "undertaken for preservation of the life of a pregnant patient"—may also raise constitutional difficulties. In *Casey*, the Court stated that post-viability abortions may be proscribed unless necessary "for the preservation of the *life or health* of the mother." *Casey* at 2821 (emphasis added). If a court were to read Idaho Code § 18-608(3) as not containing an exception for the preservation of the pregnant woman's *health*, the statute would, therefore, be unduly restrictive.

[3] It is important to note that, while *Casey* allows a state to provide a woman with information which "might cause the woman to seek childbirth over abortion," such information must be "truthful and not misleading." *Casey* at 2821, 2823. Idaho Code § 18-609 expressly states that the photographs provided to the mother be "scientifically verified." Of course, under Casey, it is essential that all other information provided also be accurate.

[4] The Fifth Circuit recently addressed an argument that a 24-hour waiting period constitutes an undue burden in rural states. Rejecting this argument, the court stated:

> In their post-*Casey* supplemental brief, plaintiffs reduce their argument to the aphorism"Mississippi ain't Pennsylvania," stating, "The record in this case proves what all know empirically: Mississippi ain't Pennsylvania." This speaks volumes about the invalidity of their challenge to the Mississippi Act on its face; in fact, no more really need be said.

Barnes v. Moore, 970 F.2d 12, 15, n.5 (5th Cir. 1992), *cert. denied*, ___ U.S. ___ (1992).

[5] Senate Bill 1184 repealed existing code sections prohibiting abortions contained in Idaho Code §§ 18-601 and 18-602 that would not survive constitutional challenge based upon the 1972 United States Supreme Court decision in *Roe v. Wade*.

[6] The new language added in 1983 also provided certain escape clauses for physicians that excused the requirement to provide the Department of Health and Welfare materials to the physician's patient.

[7] In 1983, neither the minutes for the senate and house state affairs committees nor newspaper articles in the *Idaho Statesman* and *Lewiston Morning Tribune* reflected any discussion of the issue of criminal penalties pursuant to Senate Bill 1121. In 1982, the minutes for Senate Bill 1415 in the senate and house state affairs committees do not reflect any discussion of criminal penalties except a brief reference in the House State Affairs Committee to a question by Rep. Bengson to the bill's sponsor, Senator Watkins, "about a penalty." The senator's response was, "The penalty was presently in the law." The senator's response may be referring to Idaho Code § 18-609, although that conclusion would be contrary to our interpretation of that section prior to its amendment in 1983. In 1982, both the *Idaho Statesman* and the *Lewiston Morning Tribune* contained references that support the view that felony penalties could be imposed under the present language of Idaho Code § 18-609. In reference to Senate Bill 1415, the *Lewiston Morning Tribune* reported, "Senate Bill 1415, however, requires physicians to obtain

'informed consent' from any patient before an abortion is performed and makes failure to do so a felony. . . . It requires doctors to provide the materials at least three hours before an abortion is performed leaving open the possibility of a 'two-hour and 59-second felony,' according to IMA representative, Tim Hart." *Lewiston Morning Tribune,* March 12, 1982. The *Idaho Statesman* wrote, "Senate Bill 1415 sponsored by Sen. Dane Watkins, R-Idaho, would mandate that doctors give abortion patients the materials at least three hours before the operation. Those who failed to do so could be prosecuted." *Idaho Statesman,* March 12, 1982.

ATTORNEY GENERAL OPINION NO. 93-2

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Per Request for Attorney General's Opinion

QUESTIONS PRESENTED

1. What are the responsibilities of school personnel in reporting suspected child abuse?

2. Does the Idaho Department of Health and Welfare have the authority to investigate within school facilities reports of child abuse, abandonment and neglect?

3. Does the authority to investigate reports of child abuse, abandonment and neglect include the authority to determine who may be present and/or participate in the interview process?

4. What is the potential liability for school personnel if investigations are conducted in school facilities?

5. What are the requirements for parent notification of child protection investigations?

For the purposes of this opinion, there is no distinction made between public and private schools.

CONCLUSION

1. School personnel must report all instances of suspected child abuse, abandonment and neglect to either law enforcement or the Department of Health and Welfare within 24 hours of discovery. Failure to do so is a misdemeanor.

2. The Department of Health and Welfare has the authority to investigate reports of suspected child abuse, abandonment and neglect. The department's authority to investigate extends to school facilities. The investigation should proceed in accordance with governing statutes, the department's promulgated rules, and internal policies.

3. The authority of the Idaho Department of Health and Welfare to investigate reports of child abuse, abandonment and neglect includes the ability to determine who may be present and/or participate in the interview process.

4. School personnel incur no liability for allowing use of school facilities for purposes of child abuse investigation so long as the reporting was done in good faith and without malice.

5. Interviews of suspected victims of child abuse, abandonment and neglect without parental consent or notification do not violate the parent's right to privacy in family relationships and the responsibility of notification is that of the Department of Health and Welfare.

ANALYSIS

Question No. 1:

Idaho is one of many states which has mandatory reporting requirements when child abuse, abandonment or neglect is suspected. Case law clearly upholds the validity of these statutes in that they are neither far reaching nor unconstitutional. *Jett v. State,* 605 So. 2d 926 (Fla. App. 1992); *People v. Hedges,* 13 Cal. Rptr. 2d 412 (Cal. Super. Ct. 1992); *Morris v. Coleman,* 194 Mich. App. 606, 488 N.W.2d 464 (Mich. App. 1992).

Idaho Code § 16-1619 provides:

Any physician, resident on a hospital staff, intern, nurse, coroner, *school teacher,* day care personnel, social worker, *or other person having reason to believe* that a child under the age of eighteen (18) years has been abused, abandoned or neglected or who observes the child being subjected to conditions or circumstances which would reasonably result in abuse, abandonment or neglect *shall report or cause to be reported within twenty-four (24) hours* such conditions or circumstances to the proper law enforcement agency or the

department [of health and welfare]. The department shall be informed by law enforcement of any report made directly to it.

(Emphasis added.) Idaho Code § 16-1602 defines "abused," "abandoned" and "neglected" as follows:

> (a) "Abused" means any case in which a child has been the victim of:
>
> > (1) Conduct or omission resulting in skin bruising, bleeding, malnutrition, burns, fracture of any bone, subdural hematoma, soft tissue swelling, failure to thrive or death, and such condition or death is not justifiably explained, or where the history given concerning such condition or death is at variance with the degree or type of such condition or death, or the circumstances indicate that such condition or death may not be the product of an accidental occurrence; or
> >
> > (2) Sexual conduct, including rape, molestation, incest, prostitution, obscene or pornographic photographing, filming or depiction for commercial purposes, or other similar forms of sexual exploitation harming or threatening the child's health or welfare or mental injury to the child.
>
> (b) "Abandoned" means the failure of the parent to maintain a normal parental relationship with his child, including but not limited to reasonable support or regular personal contact. Failure to maintain this relationship without just cause for a period of one (1) year shall constitute prima facie evidence of abandonment.
>
> . . . .
>
> (s) "Neglected" means a child:
>
> > (1) Who is without proper parental care and control, or subsistence, education, medical or other care or control necessary for his well-being because of the conduct or omission of his parents, guardian or other custodian or their neglect or refusal to provide them; provided, however, no child whose parent or guardian chooses for such child treatment by prayers through spiritual means alone in lieu of medical treatment, shall be deemed for

> that reason alone to be neglected or lack parental care necessary for his health and well-being, but further provided this subsection shall not prevent the court from acting pursuant to section 16-1616, Idaho Code.

The statute clearly requires anyone, specifically teachers and other employees within a school system, to report suspected child abuse, abandonment and neglect to the department of health and welfare or law enforcement. The reporting party is immune from criminal and civil liability so long as he or she has reason to believe that a child has been abused, abandoned or neglected and, acting upon that belief, makes a report of abuse, abandonment or neglect as required in section 16-1619 of the Idaho Code. Any person reporting in bad faith or with malice is not immune from liability.

Although "reasonable belief" is not defined within Idaho Code, the elements of abuse, abandonment or neglect are in Idaho Code § 16-1602(a)(b)(s). This does not mean school personnel must report every bruise or scratch noticed on a child. *Mattingly v. Casey,* 509 N.E.2d 1220 (Mass. App. Ct. 1987) "It requires reporting on a basis of indicators which give reasonable cause to believe that a child is being abused. That conclusion requires an element of judgment to separate an incident from a pattern, the trivial from the serious." *Id.* at 1222-23. The "reasonable belief" standard is what a similarly situated person would do under similar circumstances. *White by White v. Pierce County,* 797 F.2d 812 (9th Cir. 1986).

Forming a "reasonable belief," however, does not reach the level of performing a preliminary investigation. A preliminary investigation may include interviewing the child, family members, or collateral contacts, physically examining the child, and determining whether a valid child abuse complaint exists. IDAPA 16.06.01300-16.06.01302 *et seq.*, 16.06.01310, 16.06.01311, and 16.06.01315 *et seq.* The responsibility to perform the preliminary investigation is that of the Department of Health and Welfare. Therefore, school personnel have no obligation to perform any further investigation once the suspected abuse is reported.

It should be noted that communications regarding child abuse, abandonment and neglect disclosed between a child and the child's counselor, psychologist, or clergy are not confidential and are subject to disclosure to the Department of Health and Welfare. Idaho Code § 9-203(3) and (6); *Jett v. State,* 605 So. 2d 926 (Fla. App. 1992); *People v. Hedges,* 13 Cal. Rptr. 2d

412 (Cal. Super. 1992). In other words, the confidential nature of communications between a counselor and a student is testimonial only and does not apply to child protection cases.

Question No. 2:

You next ask whether the authority of the Department of Health and Welfare to investigate reports of child abuse, abandonment and neglect extends within school facilities.

The Idaho Legislature has clearly placed the authority and responsibility to investigate reports of child abuse, abandonment and neglect in the Idaho Department of Health and Welfare. Idaho Code § 16-1601 provides:

> The policy of the state of Idaho is hereby declared to be the establishment of a legal framework conducive to the judicial processing of child abuse, abandonment and neglect cases, and the protection of children whose life, health or welfare is endangered. Each child coming within the purview of this chapter shall receive, preferably in his own home, the care, guidance and control that will promote his welfare and the best interest of the state of Idaho, and if he is removed from the control of his parents, guardian or other custodian, the state shall secure adequate care for him; provided, however, that the state of Idaho shall, to the fullest extent possible, seek to preserve, protect, enhance and reunite the family relationship. This chapter seeks to coordinate efforts by the state and local public agencies, in cooperation with private agencies and organizations citizens' groups, and concerned individuals, to:
>
> > (1) preserve the privacy and unity of the family whenever possible;
> >
> > (2) take such actions as may be necessary and feasible to prevent the abuse, neglect or abandonment of children.

Idaho Code § 56-204A provides:

> The state department [of health and welfare] is hereby authorized and directed to maintain, by the adoption of appropriate rules and reg-

ulations, activities which, through social casework and the use of other appropriate and available resources, shall embrace:

(a) *Protective services on behalf of children* whose opportunities for normal physical, social and emotional growth and development are endangered for any reason;

. . . .

Such rules and regulations shall provide for:

(1) *Receiving from any source and investigation all reasonable reports* or complaints of neglect, abuse, exploitation or cruel treatment of children;

(2) *Initiation of appropriate* services and *action* where indicated with parents or other persons *for the protection of children* exposed to neglect, abuse, exploitation or cruel treatment.

(Emphasis added.)

The legislature has clearly indicated the intent to protect children from abuse. In a declaratory judgment action involving the exact question you pose, it was held that such specific child protection statutes and policies giving school boards power to control activities occurring at schools. *Decatur City Board of Education v. Aycock,* 562 So. 2d 1331 (Ala. Civ. App. 1990). Department employees investigating child abuse cases are defined as law enforcement agents. Idaho Code § 9-337(5). Therefore, the scope of the Idaho Department of Health and Welfare's authority is not limited by statute and extends into all public and private facilities, including school facilities, just as law enforcement's authority is not limited when investigating crimes committed by youth. Idaho Code § 16-1811.

Question No. 3:

You next ask whether the authority of the Department of Health and Welfare to investigate reports of child abuse, abandonment or neglect includes the authority to determine who may be present and/or participate in the interview process.

Title 6, chapter 1, of the Rules and Regulations Governing Social Services sets forth the procedures which the department must follow when investigating child abuse. IDAPA 16.16.013000 *et seq.* Those procedures include assigning the case for investigation, investigating the complaint, entering the complaint on a "Child Neglect and Abuse Register," and forwarding this information to law enforcement. All complaints are deemed "reasonable for purposes of preliminary investigation unless" the information received discredits the report beyond reasonable doubt. IDAPA 16.06.01301,01(a)(b)(c) and (d). The internal policy of the Department of Health and Welfare directs how investigations are to proceed.

In making investigations, the Department of Health and Welfare "shall use its own resources, and may enlist the cooperation of peace officers for phases of the investigation for which they are better equipped." Idaho Code § 16-1625. Idaho Code § 16-1627 grants great latitude to the Department of Health and Welfare in determining how investigations of child abuse cases should proceed by requiring that the provisions of the Child Protective Act be "liberally construed."

It is presumed that the Department is in the best position to make decisions regarding the protection of children and their families. The Department has staff trained in dealing with all aspects of child abuse from the recognition of abuse to the removal of children from dangerous environments. The Department's services must also include assistance and support for the families of the abused child. Idaho Code § 16-1601.

The importance of properly handling child abuse investigations becomes apparent with *State v. Wright,* 116 Idaho 382, 775 P.2d 1224 (1989). In *Wright,* the Idaho Supreme Court excluded hearsay testimony regarding the statements of a 2+-year-old victim given to a pediatrician from the criminal trial because the statements were taken outside the scope of a proper investigation. *Wright* was appealed to the United States Supreme Court. *Idaho v. Wright,* 110 S. Ct. 3139 (1990). The United States Supreme Court ruled that in order for hearsay statements to be admissible at trial, the investigation must be free from any suggestive or intimidating procedure by participants. *Wright,* 110 S. Ct. at 3142:

> The purpose of an in-school interview outside the presence of parents, guardians, or other persons responsible for the care of the child is so that welfare officials and police officers may obtain an untainted

interview. *R.S. v. State of Minnesota and Hennepin County,* 459 N.W.2d 680, 687 (1990).

The dangers of not conducting a proper investigation are obvious. The presence of school officials could hinder the investigation itself, involve a potentially intimidating authority figure, and taint potential evidence for future court proceedings. Therefore, the determination of who should be present during the course of a child abuse investigation is solely within the discretion of the Department of Health and Welfare and law enforcement. The department in its sole discretion may exclude school personnel from the interview.

The same conclusion was reached by the Court of Civil Appeals of Alabama in *Decatur City Board of Education v. Aycock,* 562 So. 2d 1331 (1990). In that case, several local school boards had adopted a policy "denying private, on-campus interviews to [the Alabama Department of Human Resources] in every instance . . . ." 562 So. 2d at 1331-32. The school boards insisted that school personnel needed to be present at the investigative interview "to protect the child's welfare, to limit the potential liability of the Bards, and to fulfill an obligation to the parents and the children." Id. at 1334. The boards argued further that their organic statutes gave "them the power to control all activities occurring at schools and involving school children." Id.

The court in *Decatur* agreed with the Department of Human Resources that private interviews with an alleged victim of child abuse were needed to establish rapport with the child and to avoid embarrassment for the child. They stressed the need for special training for those present at interviews to learn to relate at the child's level, to learn to use specific interview techniques to enhance ability to elicit information, and to learn not to react to the child's statement about abuse.

The Alabama court, relying on much the same general statutory framework as exists in Idaho, concluded: "[T]here is no reasonable justification for, or right to, the Boards' policy requiring that an official school representative be present at all interviews, . . ." We are convinced an Idaho court would reach the same conclusion.

Question No. 4:

You next ask whether school personnel expose themselves to liability if investigations are conducted in school facilities.

Idaho Code § 33-601(7) authorizes and directs the board of trustees of each school district to use "any school building of the district . . . for any public purpose." The policy of the Child Protective Act establishes that the coordination between state and local public agencies to prevent child abuse should be considered to be such a public purpose. Idaho Code § 16-1601; *Decatur City Board of Education v. Aycock*, 562 So. 2d 1331, 1334 (Ala. Civ. App. 1990). Moreover, the Department of Health and Welfare is required to cause a child abuse investigation to be made in accordance with the Child Protective Act as appropriate under the circumstances. Idaho Code § 16-1625.

Idaho Code § 16-1620 provides immunity to any person who has reason to believe that a child has been abused, abandoned or neglected and acts upon that belief. Thus, so long as the school official does not report in bad faith or with malice, Idaho Code § 16-1620 will provide protective immunity. The qualified good faith standard is what a similarly situated person would do under similar circumstances. *White by White v. Pierce City*, 797 F.2d 812 (9th Cir. 1986). Such immunity extends to participating in any judicial proceeding resulting from such reporting. The school district or school employees will not incur liability for allowing use of school facilities for such a purpose. Idaho Code § 6D904(1).

A school district may be liable for negligence if the danger noted in the Act should have been "protected against by the District" or if either law enforcement or the Department of Health and Welfare is obstructed from completing a proper investigation. *Boykin v. District of Columbia*, 484 A.2d 560 (D.C. App. 1984); *State v. Wright, supra.* Therefore, if a school district refuses to allow the Department of Health and Welfare access to a child at any time, thereby delaying the investigation of the allegation, the protection of that child may be hindered. Balancing the respective interests, it is more likely that liability could be incurred by hindering, delaying or obstructing a child protection investigation than by permitting it to proceed as authorized by the governing law. The public interest will best be served by allowing the child protective professionals to do their jobs.

It should be noted that the Public Records Act states that the Idaho

Department of Health and Welfare is a "law enforcement agency" in performing its duties under the Child Protective Act. To this extent, its social workers are law enforcement officers. Idaho Code § 9-337(5). Thus, there may also be criminal liability against school officials should a law enforcement officer be obstructed from discharging his or her duty when investigating a child abuse report just as if they hindered a peace officer's investigation of any other crime. Idaho Code § 18-705.

Question No. 5:

Your final question asks whether parents must be notified of child protection investigations.

The very nature of a child abuse investigation and the fact that parents cannot invoke a legal privilege to prevent a child from testifying against them in Child Protective Act cases negates the requirement for parental consent or notification prior to interviewing the child. Idaho Code § 9-203(7).

Interviewing the suspected victim of child abuse without parental consent or notification, even when the "identification of the perpetrator is unknown, is a reasonable means to effectuate the state's interest in identifying and protecting abused children." *R.S. v. State of Minnesota and Hennepin County,* 459 N.W. 2d 680, 690 (1990).

The responsibility of notifying parents is that of the Department of Health and Welfare and is not required until such time as the department deems it necessary to ensure the best interest and needs of the child are met.

AUTHORITIES CONSIDERED

1. **Idaho Code:**

§ 6-904(1).
§ 9-203(3).
§ 9-203(6).
§ 9-203(7).
§ 9-337(5).
§ 16-1601.
§ 16-1602
§ 16-1619.

§ 16-1620.
§ 16-1625.
§ 16-1627.
§ 16-1811.
§ 18-705.
§ 33-601(7).
§ 56-204A.

2. **IDAPA:**

16.06.01300
16.06.01301
16.06.01302
16.06.01303
16.06.01304
16.06.01305
16.06.01310
16.06.01311
16.06.01315 *et seq.*

3. **U.S. Supreme Court Cases:**

Idaho v. Wright, 110 S. Ct. 3139 (1990).

4. **Idaho Cases:**

State v. Wright, 116 Idaho 382, 775 P.2d 1224 (1989).

5. **Other Cases:**

Boykin v. District of Columbia, 484 A.2d 560 (D.C. App. 1984).

Decatur City Board of Education v. Aycock, 562 So. 2d 1331 (Ala. Civ. App. 1990).

Jett v. State, 605 So. 2d 926 (Fla. App. 5 Dist. 1992).

Mattingly v. Casey, 509 N.E.2d 1220 (Mass. App. Ct. 1987).

Morris v. Coleman, 194 Mich. App. 606, 488 N.W.2d 464 (Mich. App. 1992).

People v. Hedges, 10 Cal. App. 4th. Supp. 20, 13 Cal. Rptr. 2d 412 (Cal. Super. 1992).

R.S. v. State of Minnesota and Hennepin County, 459 N.W.2d 680 (1990).

White by White v. Pierce City, 797 F.2d 812 (9th Cir. 1986).

DATED this 24th day of March, 1993.

LARRY ECHOHAWK
Attorney General

Analysis by:

Ann Cosho
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 93-3

Olivia Craven, Executive Director
Idaho Commission of Pardons and Parole
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STATEHOUSE MAIL
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Per Request for Attorney General's Opinion

QUESTION PRESENTED

May the Commission of Pardons and Parole commute an indeterminate sentence to a lesser fixed term for purposes of the Prisoner Transfer Treaty between the United States and Mexico?

CONCLUSION

The Commission may indeed commute an indeterminate sentence to a lesser fixed term for the purposes of complying with the Prisoner Transfer Treaty.

ANALYSIS

You have asked whether the Commission of Pardons and Parole has the power to commute an indeterminate sentence to a lesser fixed sentence. The inquiry stems from the special conditions imposed by the Prisoner Transfer Treaty between the United States and Mexico. The treaty allows for the transfer of a prisoner of Mexican nationality serving time in the United States to Mexico, in order to serve out the remaining sentence in his or her home country. Because Mexico does not have a parole system, the Mexican authorities cannot accept a prisoner unless sentenced to a time certain.

Apparently, thirteen Mexican nationals serving time in Idaho prisons have requested that they be returned to Mexico under the terms of the treaty. All of these individuals are currently serving indeterminate sentences. In order to facilitate the transfer of these prisoners, the Commission wishes to commute each of the indeterminate sentences to lesser fixed terms.

It is beyond argument that the power to grant a commutation is vested in

the commission. Idaho Constitution art. 4, sec. 7; *State v. Beason,* 119 Idaho 103, 803 P.2d 1009 (Ct. App. 1991). A commutation "diminishes the severity of a sentence, *e.g.*, shortens the term of punishment." *Standlee v. State*, 96 Idaho 849, 852, 538 P.2d 778 (1975).

The question that remains is whether a sentence that is changed from an indeterminate term to a shorter fixed term can be considered to be diminished. This issue was answered by the Attorney General in 1984:

> Of particular concern is the possibility that the commission, by commuting an indeterminate sentence to a fixed term sentence, can deprive the inmate of a parole date arising earlier than the date of expiration of the fixed term. Would such a commutation actually increase the severity of the adjudged sentence? Under the indeterminate sentence statute, Idaho Code § 19-2513, an offender is theoretically eligible for parole the day of being sentenced to the custody of the state board of correction. Idaho Code § 20-223 requires certain other offenders to serve one third or five years of their sentence before being eligible for parole. An offender serving a fixed term sentence under Idaho Code § 19-2513A, however, is not eligible for parole. See Attorney General Opinion 82-9. The commutation of a 15-year indeterminate sentence to, say, a 10-year fixed term sentence could therefore deprive the offender of an early parole date.
>
> Whether such a commutation is constitutionally permissible depends largely on the nature of the interest which an inmate has in commutation and parole. *Board of Regents v. Roth,* 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 228 (1972). The fourteenth amendment protects only against deprivations of life, liberty, or property without due process of law, and a prisoner who alleges violations of the right to due process must first show a protectable "liberty interest." *Paratt v. Taylor,* 451 U.S. 527, 101 S. Ct. 1908, 69 L. Ed. 2d 228 (1981). If an inmate's interest in commutation or parole amounts to a right, rather than a mere expectation, then the inmate is entitled to some measure of due process of law before being deprived of that right. *Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979); *Connecticut Board of Pardons v. Dumschat,* 452 U.S. 458, 101 S. Ct. 2460, 69 L. Ed. 2d 158 (1981).
>
> In Idaho, however, pardon, parole, and commutation are not mat-

> ters of right or privilege. They are matters of grace or clemency. *State v. Evans,* 73 Idaho 50, 245 P.2d 788 (1952); *Malloroy v. State,* 91 Idaho 914, 435 P.2d 254, 255 (1967). Furthermore, the Idaho Supreme Court has determined that there is no right to parole under Idaho Code § 20-223 and therefore no right to written reasons for denial of parole. *Izatt v. State*, 104 Idaho 597, 661 P.2d 763 (1983). In *Connecticut Board of Pardons* the court analyzed the Connecticut commutation statute and determined that the mere existence of a power to commute, which imposed no limit on what procedure was to be followed, what evidence was to be considered, or what criteria were to be applied by the board of pardons, created no right or entitlement recognized by the due process clause. An Connecticut felon's expectation that a lawfully imposed sentence would be commuted was nothing more than a mere unilateral hope. *Connecticut Board of Pardons, supra,* at 465. Comparison of Connecticut's commutation statute with Idaho's constitutional grant of authority for commutation reveals that the two are similar and discretionary.
>
> The case law cited above supports the proposition that commutation of a lawfully imposed sentence which effectively deprives an inmate of a parole date is not violative of due process.

Attorney General Opinion 84-8 (1984). The law has not changed in this respect since 1984, and the logic of Attorney General Opinion 84-8 still applies.

Can it be argued that because prisoners serving indeterminate sentences are often paroled upon completion of one-third of their terms, a prisoner may expect to be released upon service of one-third of his or her term? Or, has an expectancy been created because the Idaho appellate courts have traditionally used a rule of thumb in sentence review cases to the effect that one-third of an indeterminate sentence is a likely term of imprisonment? These questions were answered in *State v. Nield*, 105 Idaho 153, 666 P.2d 1164 (Ct. App. 1983), aff'd 106 Idaho 665, 682 P.2d 618 (1984):

> By definition, an indeterminate sentence does not specify the term of confinement. The actual period of confinement is later determined by administrative authority. . . .

> [In *State v. Toohill*, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982), it was] held that, unless there is a contrary statute or other indication on the record, we will deem one-third of an indeterminate sentence to be an appropriate measure of the term of confinement. This is a general approximation, intended solely to facilitate judicial review. It does not represent a prediction of the actual length of confinement in a particular case. Neither does it connote any expectation that parole necessarily will be granted when one-third of an indeterminate sentence has been served. Parole may be granted earlier, later, or not at all. Under Idaho law, parole is merely a possibility, not an expectancy.

105 Idaho at 156-57.

There is yet another way to consider the commutations in question. They are, in effect, "conditional" commutations. In other words, under the unique circumstances of these thirteen cases, a bargain will be struck:

> You, the prisoner, have asked that you be sent to Mexico to finish out your term. We, the Commission, agree to that, but in order to do this legally we will attach a condition to the commutation—you must serve a term certain that is less than your indeterminate term.

"The pardoning authority generally has the power to grant a commutation on conditions it deems proper, provided they are not illegal, immoral, forbidden by law, or impossible of performance; and such conditions are binding on the prisoner, at least if he accepts the commutation." 67A C.J.S., *Pardon and Parole* 37. *See also In re Prout*, 12 Idaho 494, 86 P. 275 (1906).

For the above stated reasons, it is the opinion of this office that the procedure contemplated by the Commission and the prisoners is a legal and appropriate method of complying with the Prisoner Transfer Treaty.

AUTHORITIES CONSIDERED

1. **United States Constitution:**

Fourteenth Amendment.

2. **Idaho Code:**

§ 19-2513.
§ 20-223.

3. **U.S. Supreme Court Cases:**

Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 228 (1972).

Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 101 S. Ct. 2460, 69 L. Ed. 2d 158 (1981).

Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979).

Paratt v. Taylor; 451 U.S. 527, 101 S. Ct. 1908, 69 L.Ed.2d 228 (1981).

4. **Idaho Cases:**

In re Prout, 12 Idaho 494, 86 P. 275 (1906).

Izatt v. State, 104 Idaho 597, 661 P.2d 763 (1983).

Malloroy v. State, 91 Idaho 914, 435 P.2d 254 (1967).

Standlee v. State, 96 Idaho 849, 538 P.2d 778 (1975).

State v. Beason, 119 Idaho 103, 803 P.2d 1009 (Ct. App. 1991).

State v. Evans, 73 Idaho 50, 245 P.2d 788 (1952).

State v. Nield, 105 Idaho 153, 666 P.2d 1164 (Ct. App. 1983), *aff'd* 106 Idaho 665, 682 P.2d 618 (1984).

State v. Toohill, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982).

5. **Other Authorities:**

67A C.J.S., *Pardon and Parole* § 37.

Attorney General Opinion 82-9 (1982).

Attorney General Opinion 84-8 (1984).

DATED this 31st day of March, 1993.

LARRY ECHOHAWK
Attorney General

Analysis by:

Michael Kane
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 93-4

Honorable Jerry L. Evans
State Superintendent of Public Instruction
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED

1. Is a child entitled to attend an Idaho public school kindergarten when the child does not meet the Idaho school entry age but has completed a portion of kindergarten in another state and moves to Idaho?

2. If a child has completed kindergarten in another state or in a private kindergarten but is not six years old prior to August 16, may he or she be admitted into the first grade?

3. Is the first grade age requirement set forth in Idaho Code § 33-201 only applicable to those children who have not completed a kindergarten?

CONCLUSION

1. A child who has attended part of the school year in a private or out-of-state kindergarten but is not five years of age prior to August 16, and who therefore does not meet the Idaho school entry age, may not attend kindergarten in Idaho public schools until "school age" is met.

2. If a child has completed a kindergarten program but is not six years old prior to August 16 that child may, but is not entitled to, enter the first grade. The school personnel will determine what is an appropriate placement of that child.

3. The first grade age requirement of six prior to August 16 applies only to those students who have not completed a kindergarten.

ANALYSIS

Question No. 1:

Your first question asks whether a child is entitled to attend an Idaho public school kindergarten if the child has completed a portion of kindergarten in another state but is not five years old prior to August 16, and thus does not meet Idaho's "school age" entrance requirement.

It is not uncommon for families with children to move into Idaho from other states during the school year. Many states have a later entry date for school age. Recent experiences of the Weiser School District illustrate typical age-related situations faced by school districts in Idaho.

In the first situation, a parent residing in the Weiser School District has a child whose fifth birthday falls only days after the August 15 cut-off date for entry into kindergarten in Idaho. Since Oregon has a later starting date for school age, the parent sends the child to school in Ontario, Oregon, for ten days. The parent then seeks to enroll the child in kindergarten in Weiser as a transfer student.

In the second situation, a family moving from Bend, Oregon, to Weiser in November has a child who completed a quarter of a year of kindergarten in Oregon but misses the Idaho school age date by a few days. The parents seek to enroll their child in kindergarten in Weiser as a transfer student.

Historically, the practice around the state has been not to allow the child in the first situation to enroll in an Idaho public school kindergarten since the child is not of school age and was sent to Oregon specifically to attempt to circumvent the Idaho statute. In the second situation, however, the practicehas been to allow the student to transfer into an Idaho public kindergarten since the child did meet the school age requirements of the state where he or she was a resident even though the child, having moved to Idaho, did not meet Idaho's school age.

Prior to July 1, 1988, "school age" was defined as turning five prior to October 16. As Idaho Code § 33-201 reveals, the legislature, over the perlod of several years, changed the date by which a child must attain the age of five in order to be considered of "school age." The statute now requires children wishing to enroll in kindergarten to turn five prior to August 16:

> The services of the public schools of this state are extended to any acceptable person of school age. "School age" is defined as including all persons resident of the state, between the ages of five (5) and twenty-one (21) years. For the purposes of this section, the age of five (5) years *shall* be attained when the fifth anniversary of birth occurs: before the beginning of the sixteenth day of September for the school year beginning in 1990; and before the beginning of the sixteenth day of August for any school year thereafter. *For a resident child who does not attend a kinderqarten,* "school age" *shall* be the age of six (6) if this age has been reached: before the beginning of the sixteenth day of October for the school year beginning in 1990; before the sixteenth day of September for the school year beginning in 1991; and before the sixteenth day of August for each school year thereafter.

(Emphasis added.)

The residency of a student is defined as the residence of the child's parent or guardian. Idaho Code § 33-1401(2). A nonresident student is defined as a student attending a school in a district other than the home district, or attending school in another state. Idaho Code § 33-1401(5). A student who moves with his or her family to Idaho becomes a resident student.

The Idaho Legislature used the word "shall" in setting forth the "school age" required for admission to kindergarten and first grade. Usually "shall" is mandatory, not directory. Mandatory statutes are usually imperative, and directory statutes are permissive. Sutherland *Stat. Const.* § 57.01 (5th Ed.). When a statute is not ambiguous, "it is the duty of the court to follow the law as written, and if it is socially or otherwise unsound, the power to correct is legislative, not judicial." *Anstine v. Hawkins*, 92 Idaho 561, 563, 447 P.2d 677, 679 (1968). As stated in *Morrison v. Chicago Board of Education,* 544 N.E.2d 1099 (Ill. App. 1 Dist. 1989):

> Statutes must be construed so as to ascertain and give effect to the intention of the legislature as expressed in the statute, and absent some clear legislative intent to the contrary, terms are to be given their ordinary and commonly understood meaning. The language used in a statute is the primary source for determining legislative intent, and where that language is certain and unambiguous, the proper function of the courts is to enforce the statute as enacted.

Id. at 1102.

The legislative history in amending Idaho Code § 33-210 reveals that the House and Senate Education Committees listened to testimony both for and against the moving of the entrance school age to August. The legislature heard testimony regarding the percent of children at-risk with birthdays between August 15 and October 15. House Education Committee, February 8, 1988, Mr. Yankey. One person did testify to the House Education Committee that he felt transfer students from out of state would have more access to the schools than Idaho students. House Education Committee, February 1, 1988, J.B. Johnston. There is, however, no record of any discussion of allowing out-of-state kindergarten students, who do not meet Idaho's school age for kindergarten, to transfer into Idaho's schools.

While the legislature also heard testimony suggesting that school districts might be able to test children who fall below the school age to determine their readiness for school, it did not make any provisions for such testing. In fact, there was concern for the school districts if they were made responsible for determining who was to be excepted from the age requirements and thus accepted into school. Senate Education Committee, February 17, 1988, Senator Twiggs.

Thus, the legislative history indicates that the Idaho Legislature, in amending Idaho Code § 33-210, made no provision for case-by-case evaluations of children who have completed a portion of kindergarten at the time they move into Idaho but who do not otherwise meet Idaho's "school age" entry requirements.

Other states have also wrestled with this issue. In *Morrison, supra*, an Illinois appellate court reviewed the Illinois statute regarding school age. The statute provides that children must be five by "September 1 of the year of the 19881989 school term . . . ." Daniel Morrison turned five on September 4, 1988. In reviewing the issue of school age, the court stated:

> The general purpose of the statute is to impose an age limit on students eligible to attend public schools. The legislature, in the debates involving this provision, stated that the imposition of an earlier cut-off date was due to studies that have shown that the older a child is upon entering kindergarten, the more successful the schooling experience.

> In evaluating the statute in light of its general purpose, it is clear that the legislature intended to impose a strict age limitation on students eligible for kindergarten . . . .

544 N.E.2d at 1102-03 (citation omitted). As a result, Daniel Morrison was not admitted to school in 1988-89.

The state of Pennsylvania, in *O'Leary v. Wisecup,* 364 A.2d 770 (1976), reviewed a case in which a five-year-old child began kindergarten in one school district and then, mid-year, moved to another school district with a different age requirement. The child was not allowed to enroll in kindergarten in the second district since he did not meet the age requirement for that district. The child's parents brought an action for preliminary injunction, claiming he should be allowed to transfer to the second kindergarten from the first kindergarten, even though he did not meet the age requirements of the second kindergarten. The Commonwealth Court of Pennsylvania found that when a statutory entitlement exists, "that eligibility is also subject to the protection of the Fourteenth Amendment and may 'not be limited in any way that works an invidious discrimination or constitutes a denial of due process.'" 364 A.2d at 773 (citation omitted). The court concluded that the student had not acquired a property right to continue his education in the second school district and that his constitutional rights were not violated. The court also held that a public education is not a fundamental right and that classification by age does not constitute a suspect classification. *See also Goldsmith v. Lower Moreland School District,* 461 A.2d 1341 (Pa. Cmwlth. 1983) (child under the age of six does not have a constitutionally protected property interest in admission into kindergarten); *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635 (1975) (Idaho Supreme Court refused to classify the right to education as a fundamental right).

The minimum school age entry requirement of Idaho Code § 33-201 is mandatory ("shall"). In addition, school districts' boards of trustees also have the duty "to exclude from school, children not of school age." Idaho Code § 33-512(5). It is, therefore, our opinion that the legislature intended that *all* children—even those who have completed a portion of kindergarten prior to moving into Idaho during the school year—must meet the "school age" requirement of turning five prior to the sixteenth day of August in order to be allowed to enroll in an Idaho public school kindergarten.

Question No. 2:

The next question to be addressed deals with those children who are five prior to the sixteenth day of August, have not yet turned six, and have already attended a kindergarten consisting of at least 450 hours of instruction in a school year.

The Weiser School District has also experienced this situation. A family with twin daughters moved from California around the first of December and asked that their daughters be admitted into the first grade. The girls had successfully completed kindergarten and the first quarter of the first grade in California where the entrance date for "school age" is later than that of Idaho. The girls were of "school age" as defined by Idaho Code § 33-201—they turned five prior to the sixteenth day of August—but had they started school in Idaho, they would have been placed in kindergarten.

Idaho Code § 33-201 provides both the date by which a child must attain the age of five to enter into kindergarten and the date by which a child must attain the age of six to enter into the first grade if that child has not attended a kindergarten. However, the statute does not expressly address the situation where a child has attended a private or out-of-state kindergarten for the required 450 hours, but has not reached the "school age" requirement in Idaho to enter into the first grade.

It is well established that a child who meets the definitlon of "school age" is entitled to attend the public schools in Idaho. Idaho Code § 33-201. However, a child who has attended a private or out-of-state kindergarten for the required 450 hours is not automatically entitled to enter into the first grade in an Idaho public school.

Once a child is of legal age to be admitted to school, it is up to school officials to determine the appropriate placement of the child. The courts will not intervene in areas where school personnel have discretion, and have the expertise to determine the appropriate placement. As stated in *Morrison, supra:*

> [I]t is well established that where the legislature has empowered a school board to perform certain functions, the courts will not interfere with the exercise of such powers nor substitute their discretion for that of the school board unless the board's action is palpably arbitrary, unreasonable, or capricious.

544 N.E.2d at 1101.

In this case, school officials would determine whether first grade or kindergarten is the appropriate placement for the girls and would no doubt take into consideration the fact that the girls had completed an entire year of kindergarten and part of the first grade in California.

Question No. 3:

The final fact pattern to be discussed in this opinion deals with those children who have not attended a kindergarten in Idaho, or elsewhere, for at least 450 instructional hours in a school year.

Idaho Code § 33-201 specifically states: "For a resident child who *does not* attend *a kindergarten* . . . 'school age' shall be the age of six . . . ." (Emphasis added.) Thus, if a child does not attend a kindergarten, then he or she must turn six prior to the sixteenth day of August to be enrolled in the first grade. If this requirement cannot be met, the child should be placed in kindergarten. However, once the child is properly enrolled, it is within the discretion of the school officials thereafter to change that placement if it is in the child's best interest.

AUTHORITIES CONSIDERED

1. **Idaho Code:**

§ 33-201.
§ 33-210.
§ 33-512(5).
§ 33-1401.

2. **Idaho Cases:**

Anstine v. Hawkins, 92 Idaho 561, 447 P.2d 677 (1968).

Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975).

3. **Other Cases:**

O'Leary v. Wisecup, 364 A.2d 770 (1976).

Goldsmith v. Lower Moreland School District, 461 A. 2d 1341 (Pa. Cmwlth. 1983).

Morrison v. Chicago Board of Education, 544 N.E.2d 1099 (Ill. App. 1 Dist. 1989).

4. **Other Authorities:**

Sutherland, *Statutory Construction* § 57. 01 (5th Ed.).

DATED this 1st day of April, 1993.

LARRY ECHOHAWK
Attorney General

Analysis by:

Elaine Eberharter-Maki
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 93-5

G. Anne Barker, Administrator
Division of Public Works
STATEHOUSE MAIL
Boise, ID 83720-1000

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED

1. *Impact Fees Assessed by Ada County Highway District.*

a. Are impact fees assessed by Ada County Highway District true fees, or unauthorized taxes in violation of article 7, sections 4 and 5, of the Idaho Constitution?

b. Do the impact fees assessed by Ada County Highway District pursuant to Ordinance 184 meet substantive due process requirements of the constitution?

2. May Ada County Highway District, as a legislatively created taxing district, assess impact fees against the state without express authority from the state to do so?

CONCLUSION

1. *Impact Fees Assessed by Ada County Highway District.*

a. The provisions of ACHD's Ordinance 184 allow for discretionary application of impact fees outside of designated benefit zones, require payment of fees with what appears to be no determination of need for services as a result of the new development, and lack clarity on accounting for revenues. Although, it is difficult to determine with certainty whether ACHD's impact fee ordinance allows for an assessment of a regulatory fee, or is a disguised tax in violation of article 7, sections 4 and 5 of the Idaho Constitution, the above stated provisions are indicia of a tax rather than a fee. It is recommended that the sweeping powers provided to the fee administrator in the ordinance and the failure to define within the ordinance procedures for collection and accounting of fees be reviewed and amended by ACHD to clearly

comport with the requirements in the enabling statute, chapter 82, title 67, Idaho Code.

b. To meet the requirements of substantive due process, the ordinance must provide a rational nexus between the impact fees assessed to a new development and the need for additional capital improvements. Further, there must be a rational nexus between the expenditure for capital facilities and the benefits accruing to the property in which the impact fees are assessed. The enabling statute requires that an ordinance establish a rational nexus between the expenditures for capital facilities and the benefits accruing to the property on which the charge is imposed. It is not clear that Ordinance 184 establishes a need resulting from the new development prior to assessing impact fees. In addition, it is not clear that Ordinance 184 complies with the earmarking and expenditure requirements of the "Idaho Development Impact Fee Act." As a result, it is not clear that Ordinance 184 meets the requirements of the enabling act or the rational nexus standard required by the constitution.

2. Statutes are subject to the rule of construction exempting government from their operation in the absence of a clear expression of intent on the part of the legislature to the contrary. The language contained in the "Idaho Development Impact Fee Act" does not indicate that the state was to be included for the purpose of payment of development impact fees. In fact, the fiscal note attached to H.B. 805 indicates that the legislative intent was not to include the state within the purview of the act. As such, the state is excluded from compliance with impact fee ordinances enacted pursuant to the "Idaho Development Impact Fee Act."

BACKGROUND

In September of 1991 the Ada County Highway District (achd) enacted Ordinance 184, effective April 15, 1992, requiring each new development in the county to pay an "impact fee" for capital expenditures to provide adequate roadway systems in the county.[1] Ordinance 184 divides developments by type and provides a formula which attempts to determine a new development's proportionate share of capital improvements resulting from the increase in use of the roadway due to the development. Ordinance No. 184, sections 6-10, and 14.

Pursuant to the ordinance, imposition and expenditure of impact fees are restricted to capital improvements within or immediately adjacent to eight

"benefit zones" designated in the ordinance. *Id.* at section 14. However, it is in the fee administrator's discretion to determine that a particular development has countywide impact and, at that point, the fees may be used without regard to the designated benefit zone. *Id.*

Impact fees may be determined on an individual basis if an individual fee payer can establish that a proposed development is unique. *Id.* at section 10. Otherwise, fees are ascertained through the standardized fee schedule evidenced by Exhibit "A" to the ordinance, which determines the approximate impact on the roadways and assesses a fee for various types of developments. ACHD has attempted to assess impact fees against all developers within Ada County, including the state.

Subsequent to ACHD's adoption of Ordinance 184, the legislature enacted H.B. 805, creating chapter 82, title 67, Idaho Code, entitled "Idaho Development Impact Fee Act." H.B. 805 went into effect on July 1, 1992, approximately two and a half months after ACHD implemented Ordinance 184. The purpose of the act is to empower governmental entities to adopt ordinances allowing the imposition of development impact fees under the parameters delineated in the act. ACHD contends the act contemplates assessment against all developers, including the state when the state acts to construct any new facility within the boundaries of Ada County.

ANALYSIS

In discussing the issue of the legality of ACHD's impact fee assessment it is helpful to have a definition of the term "impact fee." Impact fees are a relatively new local government technique for funding capital improvements needed to serve new development in high growth areas. They are typically designed to require that each development pay its proportionate share of the cost of providing offsite public services and facilities required by the new development. The following are elements of impact fees which distinguish these fees from other types of exactions, such as fees in lieu of mandatory dedication, connection fees and user fees:

An "impact fee" is a type of exaction which is:

In the form of a predetermined money payment;

Assessed as a condition to the issuance of a building permit, an occupancy permit or plat approval;

Pursuant to local government powers to regulate new growth and development and to provide for adequate public facilities and services;

Levied to fund large-scale, off-site public facilities and services necessary to serve new developments;

In an amount which is proportionate to the need for the public facilities generated by the new development.

Bryan Blaesser and Christine Kentopp, *Impact Fees: the Second Generation,* 38 Wash. U.J. Urb. & Contemp. L. 55, 64 (1990).

When impact fees first appeared as an alternative to financing capital improvements, courts frequently struck down the fees on various constitutional grounds. However, in the last 20 years, a number of jurisdictions which previously found user fees or impact fees to be invalid have overruled or distinguished those earlier cases, and have found the assessment of impact fees or user fees, in certain circumstances, to be valid. *See Bloom v. City of Fort Collins,* 784 P.2d 304 (Colo. 1989); *Homebuilders and Contractors' Ass'n of Palm Beach County, Inc., v. Board of Palm Beach Comm.,* 446 So. 2d 140 (Fla. App. 4th Dist. 1983); *Holmdel Builders Ass'n v. Township of Holmdel,* 583 A.2d 277 (N.J. 1990).

In construing impact fees, courts generally provide a two-tiered analysis. First, the issue of statutory or constitutional authority to assess the impact fee is addressed. Second, the ordinance is reviewed to determine if its application violates constitutional provisions of due process or uniform taxation. In this situation, the enactment of H.B. 805 authorizing governmental entities to adopt ordinances imposing development impact fees provides state statutory authority.

Since statutory authority is provided, the first issue addressed by this analysis is whether the impact fees assessed by ACHD are incidental to a regulation, or a disguised tax in violation of article 7, §§ 4 and 5, of the Idaho Constitution. If the fees are determined to be incidental to a regulation, it must be determined whether the ordinance can withstand a challenge on the basis of

constitutional due process requirements of reasonableness. The final issue addressed by this analysis is whether the statutory authorization provided by H.B. 805 contemplates an assessment of impact fees against the state.

A. *Constitutional Considerations*

1. *Tax v. Regulatory Fee*

The characterization of impact fees presents a complex problem. If the impact fees are found to be disguised taxes rather than fees, the ordinance, and possibly the enabling statute, would be in violation of article 7, § 4 (exempting public property from taxation) and § 5 (requiring uniform taxation) of the Idaho Constitution.

In reviewing the constitutionality of the "Idaho Development Impact Fee Act" chapter 82, title 67, Idaho Code, we are bound, as would be the judiciary, to treat with deference the legislature's classification of impact fees and to resolve any doubt concerning interpretation of the statute in favor of rendering the statute constitutional. *See Olson v. J.A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990).

With these considerations in mind, we turn to the question whether the ACHD assessment is a fee or a disguised tax. Fees imposed by a governmental entity tend to fall into one of two principal categories: user fees based upon the rights of the entity as a proprietor of the instrumentality used (*see Kootenai County Property Association v. Kootenai County,* 115 Idaho 676, 769 P.2d 553 (1989); *Loomis v. City of Hailey,* 119 Idaho 434, 807 P.2d 1272 (1991)), or regulatory fees founded on the police power to regulate particular businesses or activities (*see Foster's Inc. v. Boise City*, 63 Idaho 201, 118 P.2d 721 (1941); *Brewster v. City of Pocatello,* 115 Idaho 502, 768 P.2d 765 (1988)).

Proprietary fees, such as fees for sewer and water systems, do not implicate the taxation power if they are reasonably related to the cost of construction and maintenance of the facilities used and there is statutory authorization for such fees. *Kootenai County Property Ass'n v. Kootenai County, supra; Loomis v. City of Hailey, supra.* Similarly, regulatory fees are not taxes if the "funds generated thereby . . . bear some reasonable relationship to the cost of enforcing the regulation." *Brewster,* 115 Idaho at 504; *State v. Nelson,* 36 Idaho 713, 213 P. 358 (1923); *Foster's Inc. v. Boise Idaho, supra.* The general rule is that

the fee may properly be fixed with the intent of reimbursing the local governmental entity for all expenses imposed upon it as a result of the regulation.

User fees and regulatory fees share traits that distinguish them from taxes. First, fees are charged in exchange for a particular governmental service rendered to a particular consumer which benefits the party paying the fee in a manner "not shared by other members of society." *National Cable Television Ass'n v. United States*, 415 U.S. 336, 341, 94 S. Ct. 1146, 1149, 39 L. Ed. 2d 370 (1974); *Brewster*, 115 Idaho at 505. Second, fees are not a forced contribution, *Brewster v. City of Pocatello, supra.* Finally, fees charged are collected not to raise revenues but to compensate the governmental entity for its expenses in providing the services. *Foster's Inc. v. Boise City, supra; Loomis v. City of Hailey, supra.* Thus, there is a three-pronged analysis for the determination of whether an exaction is appropriately defined as a fee or a tax.

a. *Providing a Benefit Not Shared By Members of the General Public*

To meet the first prong of the analysis, ACHD's ordinance must convey a benefit not shared by the general traveling public. The enabling statute also requires conveyance of a benefit to the new development. The "Idaho Development Impact Fee Act" defines development impact fee as follows:

> [A] payment of money imposed as a condition of development approval to pay for a proportionate share of the costs of system improvements *needed to serve development*. . . .

Idaho Code § 67-8202(9) (emphasis added).

Idaho Code § 67-8207 requires that:

> The development impact fee imposed must not exceed a proportionate share of the costs incurred or costs that will be incurred by the governmental entity in the provision of system improvements to serve the new development.

In addition, Idaho Code § 67-8204(11) requires that a development impact fee ordinance provide improvements for the "benefit of the service area in which the project is located."

In its "intent and purpose" section, Ordinance 184 states that one of the

purposes of the ordinance is to require that "each new development bear its proportionate fair share of the costs of capital expenditures necessary to provide adequate roadway systems in Ada County." Ordinance 184, section 3B. However, ACHD assesses an impact fee on *all* new development. *Id.* at sections 6, 8, 9 and Schedule "A." The ordinance does not appear to require a determination that the new development necessitates changes or additional construction of new roadways prior to making an assessment.

In *Brewster v. City of Pocatello, supra,* the Idaho Supreme Court reviewed a case involving an ordinance enacted by the city of Pocatello purporting to impose a "street restoration and maintenance fee" upon all owners of property adjoining streets. Like the fee in Ordinance 184, owners were to be assessed based upon a formula reflecting the traffic generated by the particular property. The court held the charge was a tax rather than a fee, stating:

> We view the essence of the charge at issue here as a tax imposed on occupants or owners of property for the privilege of having a public street abut their property. In that respect it is not dissimilar from a tax imposed for the privilege of owning property within the municipal limits of Pocatello. *The privilege of having the usage of city streets which abuts [sic] one's property is in no respect different from the privilege shared by the general public in the usage of public streets.*

Brewster, 115 Idaho at 504-05 (emphasis added). *See contra, Bloom v. City of Fort Collins, supra* (a transportation utility fee imposed upon owners or occupants of any developed lots for the purpose of providing revenues for maintenance of local streets was not a property tax but a special fee).

In distinguishing its ordinance from the ordinance discussed in *Brewster,* ACHD notes provisions of its ordinance which, it contends, establish it as a fee and not a disguised tax. The ordinance in *Brewster* provided for assessment for the maintenance and repair of existing streets and was assessed against existing developments, whereas ACHD's ordinance is used "exclusively for capital improvements or expansion of transportation facilities as identified by the adopted capital improvement plan" and is only assessed against new development. Ordinance 184, section 15. In addition, ACHD contends that its impact fee reasonably relates to and pays for the actual cost of construction of new highways as a result of increased use from the new development. However, as previously noted, it is not clear what procedure is used by ACHD to make a determination that road construction is necessitated as a

result of new development. ACHD further notes that revenues generated by impact fees must be spent within or immediately adjacent to the "benefit zone within which the fees were raised." However, the fee administrator may, in his discretion, determine that a particular development has a countywide impact and, with that determination, the fees may be used anywhere in the county without regard to benefit zones. *Id.* at section 14.

In *Eastern Diversified Properties, Inc. v. Montgomery County,* 570 A.2d 850 (Md. 1990), the Maryland Court of Appeals determined that a "development impact fee" was a tax that the county lacked authority to impose. Montgomery County imposed a monetary payment upon prospective land developers in order to "regulate growth by obtaining partial funding of construction costs for roads which the county, based upon the cumulative impact of new development, has determined will be necessary." *Id.* at 851. The ordinance established an impact fee formula requiring payment of the fee prior to the issuance of the building permit and calculating the fee based upon the type of structure to be built. The plaintiff developer maintained that the impact area for the use of the fees was so large that there was no assurance that the revenue generated by the fee would actually be used for the construction of the highways claimed to be impacted by the development of plaintiff's property. *Id.* at 853. The court noted the nexus that must exist to substantiate the fee as a regulatory measure:

> The relationship between the fee and the benefit to the property owner necessary for the measure to be regulatory in effect is not just that the property owner receive some benefit from the improvement, as the County asserts, but . . . "[t]he amount must be reasonable and have some definite relation to the purpose of the Act."

570 A.2d at 855; *Homebuilders v. Board of Palm Beach Comm.,* 446 So. 2d 140, 143-144 (Fla. App. 4th Dist., 1983) (development impact fee assessed to defray cost of constructing new roadways due to additional traffic not a tax where fee does not exceed cost of improvements required by new development and the improvements adequately benefit the development which is the source of the fee). *See also Foster's Inc. v. Boise City, supra.*

If ACHD exercises its authority under the ordinance broadly, *i.e.*, assessing impact fees without determining a need arising from the new development and applying revenue from fees on a countywide basis instead of within benefit zones, the ordinance does not meet the first prong of the test. Without addi-

tional information concerning the application of ACHD's ordinance, it is not possible to determine with certainty whether the ordinance provides a benefit to new development not shared by the general traveling public.

b. *Fee Not Forced Contribution*

The second prong of the analysis requires that the fee not be a forced contribution. The fees assessed by ACHD are only assessed against developers building in the Ada County area. The enabling statute limits the authority granted governmental entities to assess impact fees to the proportionate share of cost of services to the new development. *See* Idaho Code § 67-8202(9). A developer may voluntarily choose not to build, or may choose not to build in the Ada County area and thus forego the assessment. As such, the fee does not appear to be an involuntary contribution as was the fee in *Brewster v. City of Pocatello, supra. See also City of Casa Grande v. Tucker*, 169 Ariz. 143, 817 P.2d 947 (Ct. App. 1991). Thus, the enabling statute and ACHD's ordinance meet the second prong of the test.

c. *Compensation For Expenses In Providing Services.*

The final prong of the analysis requires that to meet the definition of a fee, the charges collected must be collected not to raise revenue but to compensate the governmental entity for its expenses in providing the services. In *Foster's Inc. v. Boise City, supra,* the Idaho Supreme Court found a parking fee ordinance allowing for the installation of parking meters intended by the city of Boise as a means of traffic and parking regulation to be valid and enforceable. In so holding, the court found:

> The fact, that the fees charged produced more than the actual costs and expense of the enforcement and supervision (of traffic and parking regulation), is not an adequate objection to the exaction of the fees. The charge, however, must bear a reasonable relation to the thing to be accomplished.
>
> The spread between actual cost of administration and the amount of fees collected must not be so great as to evidence on its face a revenue measure rather than a licensed tax measure.

Id. at 219 (citations omitted). *See also Loomis v. City of Hailey, supra.*

The enabling act requires that an ordinance imposing development impact fees must segregate the fees and provide accounting records to establish that the expenditures of the fees were made only for the "category of system improvements within, or for the benefit of, the service area for which the development impact fee was imposed . . . ." Section 67-8210(1), (2), Idaho Code. Ordinance 184 requires that the revenues from impact fees be used "exclusively for capital improvements or expansion of transportation facilities" and shall not be used for "roadway improvements that are needed to address deficiencies existing on the effective date of the ordinance" or for maintenance and repair of existing roadways. Ordinance 184, section 15.

It is not clear from the ordinance how ACHD accounts for its expenditures of revenues garnered from impact fees and whether these fees are segregated and accounted for by benefit zones. Since ACHD's ordinance fails to delineate a method for segregating and accounting for the revenues collected, it is unclear whether ACHD could establish that expenditures of impact fees are reasonably related to the cost of providing services to the new development. It is, therefore, not clear whether the ordinance complies with the final prong of the test.

In conclusion, the provisions of ACHD's Ordinance 184 allow for discretionary application of the fees outside the benefit zones, require payment of fees with what appears to be no determination of need for services as a result of the new development and lack clarity as to how revenues are accounted. As a result, it is difficult to determine with certainty whether ACHD's impact fee ordinance allows for an assessment of a regulatory fee or is a disguised tax. It is recommended that the sweeping powers provided to the fee administrator and the failure to define within the ordinance procedures for collection and accounting of fees be reviewed and amended by ACHD to clearly comport with the requirements provided in the enabling statute and discussed in this analysis.

If a court finds that the application of impact fees pursuant to Ordinance 184 is in fact the assessment of a fee and not a disguised tax, it may then analyze whether it violates constitutional provisions of substantive due process.

2. *Substantive Due Process/Needs Nexus Analysis.*

An impact fee regulation can also be challenged on substantive due process grounds. The inquiry here is whether the police power has exceeded its consti-

tutional limits. State courts apply a variety of different standards to determine whether impact fees meet the substantive due process provision of the constitution.

Three standards are most frequently applied. The strictest is the "specifically and uniquely attributable test," applied in Illinois and a few other jurisdictions. *See Pioneer Trust and Savings v. Village of Mount Prospect,* 22 Ill. 2d 375, 176 N.E.2d 799 (1961). The most liberal test is the "reasonable relationship" standard which is used in California. *See Associated Homebuilders v. City of Walnut Creek,* 94 Cal. Rptr. 630, 484 P.2d 606 (1971). However, the majority of states employ a "rational nexus" standard. Under this test, there must be a rational nexus between the development project and the need for the additional capital improvements. There must also be a rational nexus between the expenditure for capital facilities and the benefits accruing to the property on which the charge is imposed. *See Contractors and Builders Ass'n v. City of Dunedine*, 329 So. 2d 314 (Fla. 1976).

The "Idaho Development Impact Fee Act" establishes that all development impact fee ordinances enacted by any governmental entity must require that: (1) fees be collected within or for the benefit of the service area in which the project is located; (2) the fees be segregated from other funds and earmarked for expenditure on improvements within the benefit zones; (3) the construction, improvement, expansion or enlargement of new or existing public facilities for which the fee is imposed be attributable to the demands generated by the new development; and (4) the development impact fee shall not exceed the proportionate share of the cost of the system improvements. *See* Idaho Code §§ 67-8204(1), (2), (8), (11); 67-8207; 67-8210. Thus, built into the enabling statute is a requirement that the ordinance establish a rational nexus between the expenditure for the capital facilities and the benefits accruing to the property on which the charge is imposed.

Since a needs/benefit rational nexus analysis is required for both constitutional and statutory compliance, the next step in the analysis is to determine whether Ordinance 184 complies with these requirements. The purpose of the ordinance is to "assist in the implementation of . . . the transportation plan adopted by the Ada Planning Association." It is further noted that the intent of the ordinance is to require each new development to bear its "proportionate fair share of the cost of capital expenditures" and that the assessment of fees be done in a manner which is fair. Ordinance 184, section 3(a), (b), (c). However, section 8 of the ordinance establishes a fee schedule which divides

developments into categories and establishes an impact fee for each category. The ordinance thus assumes that each development results in a need for road expansion or construction; it does not require an individualized determination of an actual need for road expansion as a result of the new development.

In *Lee County v. New Testament Baptist Church of Ft. Meyers, Fla.*, 507 So. 2d 626 (Fla. App. 2d Dist. 1987), the court applying the rational nexus test found the ordinance unconstitutional. Property owners in new developments whose property abutted certain streets would have been required to give the county enough land to meet minimum right-of-way requirements established by the county, regardless of the impact the proposed development had on the roadway. The court stated:

> The ordinance does not comply with the rational nexus test because it does not require any reasonable connection between the requirement that the land be given to the county and the amount of increased traffic, if any, generated by the proposed development.

507 So. 2d at 629.

In *New Jersey Builders Ass'n v. Bernard Township,* 108 N.J. 223, 528 A.2d 555 (1987), the New Jersey Supreme Court invalidated a transportation fee ordinance that required new developers to pay a pro rata share of the township's long-term $20 million dollar road improvement plan. The court held that the revenue raised through impact fees of this nature did not pay for improvements which arose as a direct consequence of the particular subdivision or development for which the money was assessed.

Based upon the requirements of chapter 82, title 67, Idaho Code, and the case law interpretations, ACHD must establish a need resulting from the new development in order to comply with the rational nexus standard. It is not clear that ACHD can meet this requirement.

Another indication of compliance with the rational nexus standard would be confining the use of the funds to a benefit zone. Although ACHD's ordinance establishes benefit zones as required by the "Idaho Development Impact Fee Act," it does not require use of the fees assessed within that benefit zone. In addition, it is not clear that Ordinance 184 complies with the earmarking and expenditure requirements of Idaho Code § 67-8210 requiring that expenditures of development impact fees be made only within or for the bene-

fit of the service area for which the fee was assessed and not be used for any purpose other than system improvement cost resulting from new growth.

In conclusion, it appears that the guidelines established in the "Idaho Development Impact Fee Act" comply with the rational nexus standard. However, it is not clear that Ordinance 184 meets the requirements of the act or the rational nexus standard required by the constitution.

B. *ACHD's Authority to Assess "Impact Fees" Against the State Pursuant to the Enabling Legislation*

The final issue requires an analysis of whether the state should be assessed impact fees where there is no clear authorization allowing for assessments against the state in the "Idaho Development Impact Fee Act." Some statutory provisions are written in general language and are reasonably susceptible to being construed as applicable both to government and private parties. Such statutes are subject to the rule of construction which exempts government from their operation in the absence of a clear expression of intent on the part of the legislature. *See* Sutherland, *Statutory Construction, Statutes in Derogation of Sovereignty,* § 62.01 *et seq.* (1992). McQuillan, *Municipal Corporations,* § 2.13 *Quasi Municipal Corporations,* (3rd ed. 1987). In his treatise on statutory construction, Sutherland distinguishes between situations where the right of the sovereign is asserted against an individual from those where it is interposed against another agency of government, finding that there are sound constitutional policy reasons for intergovernmental immunities. Sutherland, *supra* at 62.03, p. 223.

Idaho courts, in accord with the above stated general rule of statutory construction, have held that broad language in the statute will not be interpreted to include government, or affect its rights, unless that construction is clear and indisputable on the face of the statute. *Local Union 283, Intn'l Brotherhood of Electrical Workers v. Robison,* 91 Idaho 445, 423 P.2d 999 (1967); *Wilcox v. City of Idaho Falls,* 23 F. Supp. 626 (D.C. Idaho 1938).

In *Local Union 283,* the Idaho Supreme Court discussed the basis for this rule of statutory construction:

> Legislative acts are normally directed to activities in the private sector of society and effect a modification, limitation, or extension of the private individual's rights and duties. Under our political system, the

> individual is relatively free to pursue his own self-interest, but the government, which is representative of the people, must act in a disinterested manner in the public interest. . . . A judicial rule of statutory construction, whereby broad language in a statute is construed to govern the conduct of the state and its political subdivision, would undoubtedly result in dire consequences. Therefore, in order to maintain the operations of state and local government on an efficient, unimpaired basis, this court will not interpret broad language in a statute "to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act."

91 Idaho at 447-48 (citations omitted).

To assess impact fees against the state, in essence, is a general assessment against the taxpayers of the state. Taxpayers fund the workings of government, including the construction of the state government buildings which house state operations. The intent of development impact fees is to avoid placing further tax burdens on the general public as a result of new development. Assessment of impact fees against the state would be in derogation of the general intent behind the establishment of impact fees.

In addition, the language contained in the "Idaho Development Impact Fee Act" does not indicate that the state was to be included for the purposes of payment of development impact fees. In fact, the fiscal note attached to H.B. 805 indicates that the legislative intent was not to include the state within the purview of the act. The comment under the section delineating the fiscal impact on the state was that "there will be no fiscal impact on the general fund." The assessment of impact fees against the state would have an obvious impact on the general fund. Thus, it would appear clear that the legislative intent was to exclude the state from compliance with impact fee ordinances enacted pursuant to the act.

AUTHORITIES CONSIDERED

1. **Idaho Constitution:**

Article 7, sections 4 and 5.
Article 12, section 2.

2. **Idaho Code:**

Title 67, chapter 82.
§ 67-8202(9).
§ 67-8204(11).
§ 67-8207.
§ 67-8210.

3. **U.S. Supreme Court Cases:**

National Cable Television Ass'n v. United States, 415 U.S. 336, 94 S. Ct. 1146, 39 L. Ed. 2d 370 (1974).

4. **Idaho Cases:**

Brewster v. City of Pocatello, 115 Idaho 502, 768 P.2d 765 (1988).

Foster's Inc. v. Boise City, 63 Idaho 201, 118 P.2d 721 (1941).

Kootenai County Property Association v. Kootenai County, 115 Idaho 676, 769 P.2d 553 (1989).

Local Union 283, Intn'l Brotherhood of Electrical Workers v. Robison, 91 Idaho 445, 423 P.2d 999 (1967).

Loomis v. City of Hailey, 119 Idaho 434, 807 P.2d 1272 (1991).

Olson v. J.A. Freeman Co., 117 Idaho 706, 791 P.2d 1285 (1990).

State v. Nelson, 36 Idaho 713, 213 P. 358 (1923).

5. **Other Cases:**

Associated Homebuilders v. City of Walnut Creek, 94 Cal. Rptr. 630, 484 P.2d 606 (1971).

Bloom v. City of Fort Collins, 784 P.2d 304 (Colo. 1989).

City of Casa Grande v. Tucker, 169 Ariz. 143, 817 P.2d 947 (Ct. App. 1991).

Contractors and Builders Ass'n v. City of Dunedine, 329 So. 2d 314 (Fla. 1976).

Eastern Diversified Properties, Inc. v. Montgomery County, 570 A.2d 850 (Md. 1990).

Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277 (N.J. 1990).

Homebuilders and Contractors' Ass'n of Palm Beach County, Inc., v. Board of Palm Beach Comm., 446 So. 2d 140 (Fla. App. 4th Dist., 1983).

Lee County v. New Testament Baptist Church of Ft. Meyers, Fla., 507 So. 2d 626 (Fla. App. 2d Dist. 1987).

New Jersey Builders Ass'n v. Bernard Township, 108 N.J. 223, 528 A.2d 555 (1987).

Pioneer Trust and Savings v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961).

Wilcox v. City of Idaho Falls, 23 F. Supp. 626 (D.C. Idaho 1938).

6. **Other Authorities:**

Ada County Highway District Ordinance No. 184.

Bryan Blaesser and Christine Kentopp, *Impact Fees: the Second Generation,* 38 Wash. U.J. Urb. & Contemp. L. 55 (1990).

McQuillan, *Municipal Corporations,* § 213 *Quasi Municipal Corporations* (3rd ed. 1987).

Sutherland, *Statutory Construction, Statutes in Derogation of Sovereignty*, § 62.01 *et seq.* (1992).

DATED this 7th day of April, 1993.

LARRY ECHOHAWK
Attorney General

Analysis by:

Terry B. Anderson
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Chief, Business Regulation and State Finance Division

[1] ACHD cites as authority for its Ordinance 184, article 12, § 2, of the Idaho Constitution, which is the general grant of police powers to municipalities and counties. Since ACHD is merely a quasi-municipal corporation with limited objectives and powers granted to it by the legislature, it would not enjoy a direct grant of police powers from the constitution. *See generally,* McQuillan, *Municipal Corporations* § 213 *Quasi Municipal Corporations* (3rd ed. 1987). Generally, courts in other jurisdictions have held that municipalities or taxing districts attempting to establish impact fees need enabling legislation unless the local governmental entity has home rule authority. *See* Juergensmeyer and Blake, *Impact Fees: An Answer to Loc'l Gov'ts' Capital Funding Dilemma,* 9 Fla. St. U. L. Rev. 415 (1981). *See generally* Michael C. Moore, *Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?* 14 Idaho L. Rev. 143 (1977).

ATTORNEY GENERAL OPINION NO. 93-6

Honorable Jerry Evans
Superintendent of Public Instruction
Len B. Jordan Building
Statehouse Mail
Boise, ID 83720-1000

Per Request for Attorney General's Opinion

QUESTION PRESENTED

May the Board of Education be divided into two councils, one for higher education and one for public schools as required by House Bill 345, without violating the provisions of article 9, section 2, of the Idaho Constitution?

CONCLUSION

No. Creating two autonomous councils, one with final authority over matters relating to higher education and the other with final authority over matters relating to public schools would violate article 9, section 2, of the Idaho Constitution, which requires that a single board of education govern all educational institutions in the state of Idaho. However, if the Board of Education implements House Bill 345 by developing guidelines which require that decisions of the two councils be reviewed and ratified by the Board of Education, the requirements of article 9, section 2, of the Idaho Constitution will be satisfied.

ANALYSIS

The First Regular Session of the 52nd Legislature passed House Bill 345 providing for a State Board of Education comprised of two councils, one representing the interests of higher education and the other representing public schools. House Bill 345 provides in pertinent part as follows:

> 33-101. CREATION OF BOARD. For the general supervision, governance and control of all state educational institutions, a state board of education is created. The board shall comprise two (2) separate councils, distinguished as follows:

(1) For general supervision of all state institutions of higher education, and such institutions as may be designated by law, to wit: University of Idaho, Idaho State University, Boise State University, Lewis-Clark State College, the College of Southern Idaho, North Idaho College, and for any other state higher educational institutions which may hereafter be founded, a council for higher education and board of regents of the University of Idaho is hereby created.

(2) For general supervision, government and control of the public school system of the state, including the School for the Deaf and the Blind and any other state educational institution not connected with higher education which may hereafter be founded, a council for public schools is created.

(3) For the general supervision, governance and control of general educational institutions and programs of common access to both higher education and public school systems, including Eastern Idaho Technical College, vocational education, the State Library Board, Idaho work study program, public broadcasting system, Idaho state historical society, *and other matters where required by law,* the state board of education shall regularly convene as a whole.

. . . .

Where the term "state board" shall hereafter appear, it shall mean the state board of education and, notwithstanding any other provision of law to the contrary, where appropriate, pursuant to the assignment of duties provided in this section, where such reference is relative to post secondary institutions and programs or associated arrangements such reference shall mean the council for higher education and board of regents of the University of Idaho, and, where such reference is relative solely to public schools, elementary through secondary levels, and associated programs, such reference shall mean the council for public schools.

(Emphasis added.)

There are two possible interpretations that can be given to the above quoted language. The first interpretation would provide three autonomous boards to govern education in the state of Idaho. The first board would be the Council

for Higher Education and Board of Regents at the University of Idaho, which would provide general supervision for all state institutions of higher education. The second autonomous board would be the Council for Public Schools providing general supervision over public schools, the School for the Deaf and Blind and other educational institutions not connected with higher education. The final board would be the Board of Education which would supervise areas of general education and overlap areas, as well as institutions specifically listed within the statute. This appears to be the intent of House Bill 345 as it was originally drafted. With reference to the original draft, this office gave an opinion to the legislature that the division of the Board of Education into three autonomous governing entities was a violation of article 9, section 2, of the Idaho Constitution. Subsequent to receiving this opinion, the legislature amended the bill. The amendment to the bill provides a basis for the second interpretation which can be given to the quoted language.

In an apparent effort to cure the constitutional defects of the legislation, section 33-101, subparagraph 3, was amended to require the State Board of Education to act on all "other matters where required by law." Although this amendment could have been drafted with more clarity, it does provide a basis for the interpretation that the board must retain supervisory control over all areas required by the constitution and laws of the state. This would be the interpretation favored by the standard principles of statutory construction. A cardinal rule of statutory construction presumes that the legislature intended to enact valid and constitutional law and, thus, the statute must be given as liberal an interpretation as possible to avoid finding the statute unconstitutional. *Scandrett v. Shoshone County,* 63 Idaho 46, 116 P.2d 225 (1941); *State v. Gibbs.* 94 Idaho 908, 500 P.2d 209 (1972).

We have been asked to aid the Board of Education in determining whether House Bill 345, as amended, can be implemented without violating the provisions of article 9, section 2, of the Idaho Constitution. Our analysis is divided into two parts. In part one we address the constitutional requirements of article 9, section 2. This analysis is consistent with the opinion given to the legislature prior to the enactment of House Bill 345. In part two, we provide guidance to the Board of Education in interpreting House Bill 345 and developing guidelines for implementing a structure which would satisfy the requirements of article 9, section 2, of the Idaho Constitution.

1. *Article 9, Section 2*

Article 9, section 2, states:

> Board of education. — The general supervision of the state educational institutions and public school system of the state of Idaho, shall be vested in a state board of education, the membership, powers and duties of which shall be prescribed by law. The state superintendent of public instruction shall be ex officio member of said board.

In interpreting article 9, section 2, well-established rules of constitutional construction should be followed. The first rule of interpretation is to apply the plain language of the constitution. *Powell v. Spackman,* 7 Idaho 692, 65 P. 503 (1901); *Sweeney v. Otter,* 119 Idaho 135, 804 P.2d 308 (1990).

Article 9, section 2, speaks in the singular of "*a* state board" having supervisory powers over all "the state educational institutions *and* the public school system of the state of Idaho." (Emphasis added.) The plain language of the constitution indicates that the supervision of education in the state shall be governed by a single board. This interpretation of article 9, section 2, is in accord with an historical review of the intent of the framers of article 9, section 2. Determining the intent of the framers of a constitutional provision is also a fundamental objective in construing that provision. *Haile v. Foote*, 490 Idaho 261, 409 P.2d 409 (1965).

As originally written, article 9, section 2, of the Idaho Constitution provided that the supervision of education was to be divided between public instruction and higher education. Public schools were supervised by the Board of Education which comprised the Superintendent of Public Instruction, the Secretary of State, and the Attorney General. Higher education, consisting at that time only of the University of Idaho, was governed by a separate Board of Regents.

Shortly after statehood, problems arose in the system established in the constitution for governing education within the state. For all practical purposes, the Board of Education was the Superintendent, and the Superintendent's ability to supervise and direct public schools was hampered by the lack of support from the Secretary of State and the Attorney General who had little time or inclination to assume that task. The disjointed system of education had little unity or coordination. Various educational institutions of

the state and of local governments viewed one another with distrust and as competitors for limited state money. *See*, Farley, *An Unpublished History of Idaho Education* (1974) at page 20; McCoy, *Educational Progress in Idaho is Shown by the Development of the Public School System 1863 through 1923*, University of Idaho, Master's Thesis at 52 (1923).

By 1911, conditions in the educational system of the state had deteriorated to the point that radical change to the structure of state education was favored.

Governor Hawley, in his address to the legislature on January 3, 1911, recognized the problems with the state's educational system. Hawley spoke of the need for fixing an appropriation and creating a tax specifically to support the state's educational institutions. Although the Governor did not call for a constitutional amendment creating a single Board of Education, the legislature followed that course of action. House Joint Resolution No. 12 proposed to amend article 9, section 2, by creating a state commissioner of education and a board of regents. This resolution was rejected by the Senate. House Joint Resolution No. 30, substituted in its place, called for the amendment of article 9, section 2, by creating the State Board of Education. It is House Joint Resolution No. 30 which placed the constitutional amendment on the ballot and resulted in the amendment of article 9, section 2, to its present form.

The problems which occurred in education prior to 1911 are evidence that the legislature and the public intended the constitutional amendment to article 9, section 2, to create a single board governing all the educational affairs of the state. Comments made by superintendents, historians and governors following the adoption of the amendment are further evidence that the intent was for a single board to be created.

Governor Haines, in his address to the legislature, stated:

> At the last general election there was also adopted a proposed amendment to the constitution of our state, which provides for the general supervision of state educational institutions and the public school system of the state of Idaho by a state board of education, the membership, powers and duties of which shall be prescribed by law. It is entirely clear to my mind that the legislative enactment which is necessary to give this constitutional amendment force and effect should be promptly considered by you.

. . . .

> The duties of this board should include the general management and control of all our state educational institutions.

Message of Governor Haines to the Twelfth Legislature of the State of Idaho at 26-27 (1913) (Archives of the State Historical Library).

Similarly, the first Commissioner of Education, Edward O. Sisson, in reporting to the legislature, stated:

> *The plan of a single State Board of Education to direct all the educational affairs of the State* was ordered by a constitutional amendment, proposed by the Eleventh Session of the State Legislature in 1911, and approved by popular vote in November, 1912. The Twelfth Session of the Legislature in 1913 enacted a law to put the amendment into effect.
>
> . . . .
>
> The characteristic feature of the new system is that the six state institutions and the public schools are all to be considered in relation to each other, and with a view to the welfare of the State. The State Board of Education has only the welfare of the children and young people as its aim and purpose.
>
> . . . .
>
> The essence of the plan is that we should get together in the interests of our schools and our children; that we should think educationally for the whole State, and not for any one institution or any one community or any one section. This means more attention to education, and constant vigilance.

Sisson, *Report of the Commissioner of Education* at 1 (1914) (emphasis added).

The interpretation of the constitutional amendment as requiring a single board to govern all the educational affairs of the state is further strengthened

by the report of the State Superintendent of Public Instruction contained in the Biennial Report of 1913-14.

> The State Legislature in 1911 passed a resolution calling for a Constitutional Amendment providing for *a State Board of Education to have control of all schools, public and State,* whose membership, duties and powers should be prescribed by law. . . . The law made many striking changes in the educational system of the State, yet it is one of the wisest and best laws ever placed on our statutes.

Sisson, *Biennial Report of the State Superintendent of Public Instruction, 1913-14* at 191 (emphasis added).

Bernice McCoy was Assistant State Superintendent for the years immediately preceding 1914. In 1914, she was elected Superintendent of Public Instruction. For this reason, her master's thesis is particularly enlightening as to this period in history. Regarding the changes to the educational system of the state as a result of the amendment to the constitution in 1912, McCoy writes:

> As has already been indicated, this period is separated from the first period in Education under Statehood by the change in the system of administration of the public school system of the State, through the establishment by legislative enactment of "The State Board of Education and Board of Regents of the University of Idaho," *thus placing the control of the entire educational system of the State*, consisting of the various parallel movements described in a previous section of this thesis, *under one board of control.*
>
> Viewed from one standpoint this law was the most unique piece of school legislation ever enacted by any State legislature; viewed from another standpoint it was the most natural and logical step for a legislature to take, the establishment of *a system of administration which would unify and coordinate the various public educational movements* had long been the dream of intelligent educators and laymen, and considered from the standpoint of the Idaho situation the wisdom of the step was doubly true. It grew quite naturally out of the experiences and problems which had arisen in the educational work of the State. Problems and situations not unlike those which had arisen in other States; but which were more acute in Idaho because of the topogra-

> phy, its sparse population, its pioneer conditions, its magnificent distances, together with its lack of transportation facilities and other mediums of communication, all of which made unity and coordination in the State educational work impossible even in a slight degree.

McCoy, *Educational Progress in Idaho as Shown by the Development of the Public School System 1863-1923,* University of Idaho, Master's Thesis at 44 (1923) (emphasis added).

In conclusion, the historical overview of the enactment of article 9 section 2, of the Idaho Constitution, as well as the plain language of that constitutional provision, requires that the educational affairs of the state be governed by a single board of education. Therefore, the first interpretation of House Bill 345 providing for three autonomous governing boards to supervise the educational affairs of the state is unconstitutional.

Since the legislature is presumed to enact valid and constitutional law and, further, since the legislature was aware prior to enactment of House Bill 345 that dividing the board into three autonomous governing boards would be unconstitutional, it must be presumed that the intent of the legislature in amending House Bill 345 was to correct the constitutional deficiencies of the legislation.

To correct the constitutional deficiencies of the original legislation, the legislation must be amenable to an interpretation that the councils are merely advisory in nature. As previously noted, section 33-101(3) requires the State Board of Education to act on all "other matters where required by law." Although this language could have been more clearly and artfully drafted, it does appear to require the Board of Education to act as required by the constitution and statutes of the state. Since the constitution requires the Board of Education to govern all of the educational affairs of the state, the appropriate interpretation of House Bill 345 is that the legislature intended to create two advisory councils to the Board of Education, with the board retaining its constitutionally required control over the educational system of the state.

2. *Guidance to the Board of Education in Interpreting House Bill 345 and Developing Guidelines for Implementing a Structure Which Would Satisfy the Requirements of Article 9, Section 2, of the Idaho Constitution.*

In implementing the provisions of House Bill 345 to comply with the con-

stitutional requirements of article 9, section 2, of the Idaho Constitution, the Board of Education may create guidelines dividing the board into two advisory councils, one for higher education and the other for public education. The general supervision and control of education in Idaho must be retained by the board. Duties of the councils should be structured by the board with this requirement in mind.

Each council can provide oversight in its particular areas of specialization. The councils can be fact finders for the Board of Education and they can provide their findings along with recommendations to the Board of Education. However, the board must retain the power to make final determinations governing state educational institutions and the public school systems in the state of Idaho.

AUTHORITIES CONSIDERED

1. **Idaho Constitution:**

   Article 9, section 2.

2. **Idaho Code:**

   § 33-101.

3. **Idaho Cases:**

   Haile v. Foote, 490 Idaho 261, 409 P.2d 409 (1965).

   Powell v. Spackman, 7 Idaho 692, 65 P. 503 (1901).

   Scandrett v. Shoshone County, 63 Idaho 46, 116 P.2d 225 (1941).

   State v. Gibbs, 94 Idaho 908, 500 P.2d 209 (1972).

   Sweeney v. Otter, 119 Idaho 135, 804 P.2d 308 (1990).

4. **Other Authorities:**

   Farley, *An Unpublished History of Idaho Education* (1974).

McCoy, *Educational Progress in Idaho is Shown by the Development of the Public School System 1863 through 1923,* University of Idaho, Master's Thesis (1923).

Message of Governor Haines to the Twelfth Legislature of the State of Idaho (1913) (Archives of the State Historical Library).

Sisson, *Biennial Report of the State Superintendent of Public Instruction,* 1913-14.

Sisson, *Report of the Commissioner of Education* (1914).

DATED this 14th day of April, 1993.

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Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 93-7

Senator Mark Ricks, Chair
Senate State Affairs Committee
STATEHOUSE MAIL

Senator Dennis Hansen, Chair
Senate Transportation Committee
STATEHOUSE MAIL

Representative JoAn Wood, Chair
House Transportation and
Defense Committee
STATEHOUSE MAIL

Representative Pam Ahrens, Chair
House State Affairs Committee
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTION PRESENTED

What authority does the Idaho Public Utilities Commission have under chapters 1 and 8 of title 61, Idaho Code, to provide for the regulation of tow trucks and require certain standards to be adhered to such as equipment requirements, safety requirements, operator requirements, insurance requirements, log book requirements and other requirements as if the tow trucks were common carriers?

CONCLUSION

Tow trucks fit the statutory definition of a common carrier under the Motor Carrier Act, chapter 8, title 61, Idaho Code. However, statute also provides that all common carriers operating within a municipality (or in certain circumstances, within the municipality and contiguous territory) are exempt from the Commission's regulation. Accordingly, the Idaho Public Utilities Commission has statutory authority to prescribe rules concerning equipment requirements, safety requirements, operator requirements, insurance requirements, log book requirements and other requirements for tow truck operations, unless the tow truck operations fall under the municipal exemption from the Commission's regulation.

ANALYSIS

The Idaho Public Utilities Commission has no authority other than the statutory authority granted to it by the legislature; it exercises a limited jurisdiction, and nothing is presumed in favor of its jurisdiction. However, when

necessary to enable the Public Utilities Commission to exercise powers expressly granted to it, and once jurisdiction is clear, the Idaho Public Utilities Commission is allowed all power that is either expressly granted by statute or which may be fairly implied. *See Idaho State Homebuilders v. Washington Water Power Company,* 107 Idaho 415, 418, 690 P.2d 350, 353 (1984). Accordingly, the question to be determined is whether regulation of tow truck operations falls within the Commission's statutory authority.

The relevant statutes are found in the Motor Carrier Act, chapter 8, title 61, Idaho Code. In examining statutory language, there are a number of general rules of statutory construction to keep in mind:

> It is a basic rule of statutory construction that, unless the result is palpably absurd, we must assume that the legislature means what is clearly stated in the statute. It is also well established that statutes must be interpreted to mean what the legislature intended the statute to mean, and the statute must be construed as a whole. Statutory interpretation always begins with an examination of the literal words of the statute. In so doing, every word, clause and sentence should be given effect, if possible. The clearly expressed intent of the legislature must be given effect and there is no occasion for construction where the language of a statute is unambiguous. Finally, when construing a statute, its words must be given their plain, usual and ordinary meaning.

In the Matter of Application for Permit No. 36-7200 in the Name of the Idaho Department of Parks and Recreation, 121 Idaho 819, 822-23, 828 P.2d 848, 851-52 (1992) (citations omitted).

The statute containing the relevant definitions is Idaho Code § 61-801, the first section of the Motor Carrier Act. It provides, in pertinent part:

> 61-801. Definitions of Terms.—The following definitions shall apply to this chapter:
>
> a. The term "person" means any individual, firm, copartnership, corporation, company, association, or joint stock association, and includes any trustee, receiver, assignee, or personal representative thereof.

b. The term "commission" means the Idaho Public Utilities Commission.

c. The term "permit" means a permit issued under this chapter to any motor carrier.

d. The term "highway" means the public roads, highways, streets, and ways of the state.

e. The term "motor vehicle" means any vehicle, machine, tractor, trailer, or semi-trailer propelled or drawn by mechanical power and used upon the highway in the transportation of passengers and/or property that does not include any vehicle, locomotive, or car operated exclusively on a rail or rails.

f. The term "common carrier" means any person, which holds itself out to the general public to engage in the transportation by motor vehicle in commerce in the state of Idaho of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, or by scheduled or unscheduled service.

. . . .

i. The term "motor carrier" means common carrier, contract carrier or private carrier.

j. The term "transportation" includes all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or contract, express or implied, together with all services, facilities and property furnished, operated or controlled by any such carrier or carriers and used in the transportation of passengers and/or property in commerce in the state.

Tow truck operators are persons holding themselves out to the general public to provide transportation services by motor vehicle in intrastate commerce. The transportation services that they provide are towing of disabled vehicles and incidental passenger transportation along with the disabled vehicles. They operate motor vehicles on the highways of the state. Thus, tow truck operators squarely fall within the definition of "common carrier" (which is one of three

kinds of motor carriers defined in the act—the other two are "contract carrier" and "private carrier").

The definitions in paragraphs (a) through (j) are the beginning of this analysis, but not the ending. That is because paragraph (k) of Idaho Code § 61-801 contains a number of explicit exemptions. It provides, in pertinent part:

> k. Exemptions. Notwithstanding the definition of "motor carrier" as defined in this section, the following transportation shall be exempt from regulation by and payment of fees to the commission:
>
> (1) motor vehicles employed solely in transporting school children . . . ; or
>
> (2) taxicabs . . . ; or
>
> (3) motor vehicles owned or operated by or on behalf of hotels and used exclusively for the transportation of hotel patrons between hotels and local railroads or airports or other common carrier stations; or
>
> (4) motor vehicles controlled or operated by any farmer . . . ; or
>
> (5) motor vehicles used exclusively in the distribution of newspapers; or
>
> (6) transportation of persons or property by motor vehicle at an airport . . . ; or
>
> (7) transportation of persons and/or property, including mobile and modular houses manufactured with wheels and undercarriage as part of the substructure, but not transportation of other houses, buildings or structures within a municipality or territory contiguous to such municipality if such operation outside such municipality be a part of a service maintained within the limits of a municipality with the privilege of transfer of passengers to vehicles within the municipality without additional fare; or

(8) the transportation of agricultural products . . . or livestock and livestock feed; or

(9) motor propelled vehicles for the sole purpose of carrying United States mail or property belonging to the United States; or

(10) motor carriers transporting products of the forest; or

(11) motor carriers transporting products of the mine . . . , except petroleum products; or

(12) motor carriers transporting household goods . . . .

Exemption (7) is the only one of these 12 exemptions that arguably could apply to tow truck operators. The seventh exemption, which has been amended several times, can best be understood by examining its version and the amendments to it.

The seventh exemption first appeared in the 1951 amendment to Idaho Code § 61-801. Chapter 291 of the 1951 Session Laws added subsection (k) to Idaho Code § 61-801. The following is the seventh paragraph of the 1951 version of subsection (k), which is the predecessor to the current version. It is reproduced once as it appears in the session law and a second time broken by line spacing and bracketed subdivisions not appearing in the text to assist in parsing the statute:

(7) Transportation of persons and/or property within a municipality or territory contiguous to such a municipality if such operation outside such municipality be a part of a service maintained within the limits of a municipality with the privilege of transfer of passengers to vehicles within the municipality without additional fare;

(7) Transportation of persons and/or property

[a] within a municipality or

[b] territory contiguous to such a municipality if such operation outside such municipality

> [i] be a part of a service maintained within the limits of a municipality
>
> [ii] with the privilege of transfer of passengers to vehicles within the municipality without additional fare;

Paragraph (7) contains two municipal exemptions. The first is a "pure" municipal exemption: All carriage of persons and/or property within a municipality is exempted from the Public Utilities Commission's regulation. The second is an exemption for operations in and contiguous to municipalities that are part of a service maintained within the municipality and with a privilege of transfer within the municipality without additional fare. Although the words "municipal bus" or "municipal bus services" never appear in the 1951 version of paragraph (7), the plain and natural reading of paragraph (7)'s second exemption to the general definition of common carrier would clearly apply to municipal bus services because they are transportation of persons and/or property within a municipality (or territory contiguous to such municipality) with the privilege of transfer of passengers to vehicles within the municipality without additional fare. Any other kind of transportation service qualifying under this second exemption would have to provide for similar transfer rights to a service provided within the municipality.

Paragraph (7) was next amended in 1963 by Chapter 160 of the Session Laws. The title to that act described the amendment to Idaho Code § 61-801 as amending that section "BY INCLUDING THE TRANSPORTATION OF HOUSES, BUILDINGS OR STRUCTURES WITHIN THE JURISDICTION OF THE PUBLIC UTILITIES COMMISSION." Section 1 of the Session Law amended paragraph (7) of subsection (k) by adding the underlined words shown below:

> (7) Transportation of persons and/or property *except transportation of any house, building or structure* within a municipality or territory contiguous to such municipality if such operation outside such municipality be a part of service maintained within the limits of the municipality with the privilege of transfer of passengers to vehicles within the municipality without additional fare;

The combination of the explanation in the title to the 1963 amendment and the plain language of the 1963 amendment itself shows that the "pure municipal" exemption and the "contiguous municipal bus exemption" were continued in

all regards but one: the municipal exemption for housemovers was repealed. In all other regards, the two exemptions continued as before.

Paragraph (7) was last amended in 1981, by Chapter 230 of the Session Laws. That amendment provided:

> (7) Transportation of persons and/or property, including mobile and modular houses manufactured with wheels and undercarriage as part of the substructure, but not ~~except~~ transportation of ~~any~~ other houses, buildings or structures within a municipality or territory contiguous to such municipality if such operation outside such municipality be a part of a service maintained within the limits of the municipality with the privilege of transfer of passengers to vehicles within the municipality without additional fare;

The plain and clear reading of this amendment is to clarify the existing law that the municipal exemption applies to movement of mobile and modular homes and to further clarify that the municipal exemption does not apply to movement of houses, buildings, or structures.

Nothing in the original version of paragraph (7) or either of its two amendments specifically addresses tow truck operations. Accordingly, tow truck operations may fall under the general municipal exemption: tow truck operations, like all other transportation of persons and/or property not specifically addressed in paragraph (7), are not subject to the Commission's regulation when they are conducted exclusively within the borders of the municipality or territory contiguous to the municipality with the privilege of transfer. However, tow truck operations that hold themselves out to the general public to operate outside municipal limits do not fall within the exemption from the Commission's regulation and they are common carriers subject to the regulation prescribed by the Motor Carrier Act.

Under Idaho Code § 61-802, "it shall be unlawful for any motor carrier . . . to operate any motor vehicle and motor transportation without first having obtained from the Commission a permit covering such operation." Accordingly, the Motor Carrier Act itself requires tow truck operators who do not qualify for the municipal exemption to obtain a permit from the Commission as a condition of operating their common carrier tow truck services.

Idaho Code § 61-802 further provides that the Commission must find that any applicant for a permit be "fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules and regulations of the commission thereunder . . . ." This statutory requirement subjects all motor carriers to the Commission's rules concerning motor carriers.

The Motor Carrier Act provides a number of specific requirements with which motor carriers must comply:

> 61-804. Liability and Property Damage Insurance.—The commission shall, before granting any permit to any motor carrier for transporting persons and/or property, require such motor carrier to procure and file with said commission liability and property damage insurance or a surety bond . . . on each motor propelled vehicle used in transporting persons and/or property providing for indemnity for loss or damage legally imposed upon such motor carrier, in an amount to be determined by general order of the commission for any personal injury suffered by one (1) person, by or while being transported in any vehicle, and in such additional amount as the commission shall determine, for all persons receiving personal injury; and also in an amount as shall be determined by the commission by general order for damage to the property of any person other than the insured . . . .
>
> . . . .
>
> 61-807. Rules, Regulations and Rates.—The commission is hereby vested with the power and authority, and it is hereby made its duty, to fix just, fair, reasonable and sufficient rates, fares, charges, and classifications, and to alter and amend the same, and to prescribe such rules and regulations for common carriers as may be necessary to provide for adequate service and safety of operation, and to require the filing of such reports and other data with the commission as may be necessary, and to adopt any such other rules and regulations as may be necessary to govern the relationship between such common carriers and the traveling and shipping public; and also to prescribe such rules and regulations for contract carriers and private carriers as may be necessary to provide safety of operations. Such rules and regulations as may be adopted and promulgated by the said commission shall be

adopted and promulgated by general order of such commission or otherwise.

The specific provisions of these two sections of the code give the Commission authority to provide requirements for equipment, safety, operators, insurance, log books, etc. The Commission may do so by "general order," which is the pre-Administrative Procedure Act term for what are now called rules. The Commission has done so by its adoption of the Motor Carrier Rules, IDAPA 31.B (in the current codification, which will be transferred to IDAPA 31.61.01000 *et seq.* in the new codification effective July 1, 1993).

Unless Idaho Code § 61-801 is amended to specifically address tow truck operators in its exemptions from the general definition of common carriers subject to the Motor Carrier Act, all tow truck operators that do not fall within the municipal exemptions fall within the statutory definition of common carrier. They are subject to the statutory requirement of obtaining a permit before operating outside the municipality and are subject to the Commission's rules concerning equipment, safety requirements, insurance, log books, etc. The Commission is, however, authorized by statute to prescribe various classifications of common carriers. It has the statutory authority to provide different requirements for equipment, safety, operators, insurance, log books, etc., for tow truck operators differing from the rules for common carriers as a whole.

AUTHORITIES CONSIDERED

1. **Idaho Statutes:**

Idaho Code § 61-801.
Idaho Code § 61-802.
Idaho Code § 61-804.
Idaho Code § 61-807.
1951 Idaho Session Laws, Chapter 291.
1963 Idaho Session Laws, Chapter 160.
1981 Idaho Session Laws, Chapter 230.

2. **Idaho Cases:**

Idaho State Homebuilders v. Washington Water Power Company, 107 Idaho 415, 690 P.2d 350 (1984).

DATED this 27th day of May 1993.

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ATTORNEY GENERAL OPINION NO. 93-8

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Per Requests for Attorney General's Opinion

QUESTION PRESENTED

Do county commissioners have the ability to retain civil counsel outside the county prosecutor's office on a long-term or continuous basis?

CONCLUSION

1. Pursuant to the Idaho Constitution, statutes and case law, county commissioners do not have the authority to hire civil counsel outside of the county prosecutor's office on a long-term or continuous basis unless they comply with Idaho's constitutionally mandated standard of "necessity."

2. It is the county prosecutor's duty to try civil matters in which the county is a party and give the board legal advice. Before the board of county commissioners may hire private counsel, the board must conduct a case-by-case analysis and state the facts which create the necessity of hiring such counsel. It must also make these reasons a matter of record and this factual justification is reviewable by the courts of this state. Mere comfort level or convenience does not rise to the level of "necessary" in this context.

3. The duty of a prosecutor "to prosecute or defend all civil actions in which his or her county is a party," pursuant to Idaho Code § 31-2604, supersedes the power of the county commissioners "to hire counsel with or without the prosecutor" granted by Idaho Code § 31-813.

ANALYSIS

Your opinion request concerns the ability of the Bonneville and Kootenai County commissioners to employ, on a retained basis, a private civil attorney not affiliated with the duly elected county prosecutor. Art. 18, sec. 6, of the Idaho Constitution places a limitation on the discretion of a board of county commissioners and allows it to hire counsel only when the circumstances warrant such action.

1. *The Plain Meaning of Art. 18, Sec. 6, of the Idaho Constitution*

Since statehood, art. 18, sec. 6, of the Idaho Constitution has provided the board of county commissioners with the ability to hire counsel when special circumstances arise. Art. 18, sec. 6, reads, in pertinent part: "The county commissioners may employ counsel *when necessary*." (Emphasis added.)

The Idaho Supreme Court has held that the rules of statutory construction apply to constitutional provisions. *Sweeney v. Otter*, 119 Idaho 135, 804 P.2d 308 (1990). A fundamental rule of statutory and constitutional construction is if a statute or constitutional provision is not ambiguous, the language will be given its plain and ordinary meaning. *Sherwood v. Carter*, 119 Idaho 246, 805 P.2d 452 (1991). By this notion, the plain meaning of the word "necessary" is presumed to be the meaning given to it in common parlance. The term "necessary" has been defined as follows:[1]

> An indispensable item; essential; absolutely needed; required. Webster's New Collegiate Dictionary 790 (9th ed. 1991).

The term "necessity" is defined as:

> The quality of being necessary; pressure of circumstance; physical or moral compulsion; impossibility of a contrary order or condition; the quality or state of being in need. Webster's New Collegiate Dictionary 790 (9th ed. 1991).

> Controlling force; irresistible compulsion; a power or impulse so great that it admits no choice of conduct; a condition arising out of circumstances that compel a certain course of action. Black's Law Dictionary 1030 (6th ed. 1990).

These entries indicate that the words "when necessary" are words of limitation as used in the constitution. Given their natural significance these words bridle the discretion of county commissioners when they are considering hiring private counsel. Thus, it is the opinion of this office that mere convenience or personal preference does not rise to the level of "necessary" or "necessity" in this context.

2. *Case Interpretation of Art. 18, Sec. 6*

There are several Idaho Supreme Court cases which have interpreted the language of art. 18, sec. 6, of the Idaho Constitution. The first was *Meller v. Board of Commissioners of Logan County,* 4 Idaho 44, 35 P. 712 (1894). In *Meller,* the board of county commissioners for Logan County entered into a contract in which it retained H.S. Hampton, a private attorney, to provide legal services to the county at $2,000 per year for a two year period. The supreme court held that the board had gone beyond the scope of its constitutional and statutory authority by hiring private counsel. The court therefore found the contract in question to be void and a nullity, and in so holding stated:

> We are unwilling to believe that it was the purpose of the framers of our constitution to "pluck the muzzle of restraint" from the boards of county commissioners throughout the state, and leave them with the sole limit of the vagaries of their own sweet wills in imposing burdens upon the taxpayers of the state.

4 Idaho at 51. It is clear from this language that the court intended to limit the discretion of county commissioners in hiring counsel to something narrower than the "vagaries of their own sweet wills." The court also found that "the Legislature cannot take from a constitutional officer a portion of the characteristic duties belonging to the office, and devolve them on an office of its own creation. And if this cannot be done by the Legislature, will it seriously be contended that it can be done by a board of county commissioners?" *Id.* The supreme court went on to set forth the standard under which boards of county commissioners could hire counsel. It stated that "the board of county commissioners may, when the *necessity* exists, employ counsel, but that necessity must be apparent, and the action of the board in each case is subject to review by the courts." *Id.* at 53 (emphasis added).

Two years later the supreme court decided *Hampton v. Commissioners of Logan County,* 4 Idaho 646, 43 P. 324 (1896). The same facts that gave rise to

the decision in *Meller* were at issue here. After the *Meller* decision was handed down, H.S. Hampton, the attorney who was retained under the void contract, presented an itemized bill for his services to the Logan County commissioners. The board refused to pay the bill and Mr. Hampton appealed this decision to the district court which decided he was entitled to $832 on a *quantum meruit* basis. In holding that Hampton was entitled to nothing, the supreme court opined that "before the authority given to the county commissioners by section 6, article 18 of the constitution can be exercised, the necessity which authorizes it must not only be apparent, but the facts creating such necessity must be made *a matter of record by the board.*" *Hampton*, 4 Idaho at 652 (emphasis added). This holding has become the controlling standard in construing the language of art. 18, sec. 6, which relates to commissioners' ability to hire private counsel.

The next case to apply the *Hampton* "necessity" standard was *Ravenscraft v. Board of Commissioners of Blaine County*, 5 Idaho 178, 47 P. 942 (1897). In this case the board of Blaine County had hired a private firm to defend a *single* suit in which the constitutionality of the act creating Blaine County was challenged. Before hiring the private firm, the board of commissioners had first made a matter of record the circumstances which gave rise to its decision to retain private counsel. Because of the magnitude of the legal crisis facing Blaine County, the supreme court held the record contained "the facts creating the necessity for the employment of counsel by the board of commissioners of Blaine County." *Id.* at 183. Once again the *Hampton* "necessity" standard controlled the inquiry and was satisfied only because the Blaine County board had made an official record of the compelling facts which justified their actions to retain private counsel to defend the county in a single lawsuit.

A similar factual situation was at issue in *Barnard v. Young*, 43 Idaho 382, 251 P. 1054 (1926). In this case the Power County Board of Commissioners hired private counsel on a contingent fee basis to assist the prosecuting attorney in collecting deposits from several bondsmen for deposits of county money in closed banks. The supreme court followed the principle laid down in *Hampton* and held: "[B]y the constitution, section 6, art. 18, county commissioners are expressly empowered to employ counsel in civil cases when necessary" *Barnard*, 43 Idaho at 386. The court went on to conclude that the board had satisfied the necessity standard set forth in *Hampton* in hiring private counsel for this matter because the commissioners had identified on the record the facts which created the need for such counsel before retaining the

attorney. It should be noted that the Power County board in *Barnard* hired counsel for a single legal issue.

In *Anderson v. Shoshone County,* 6 Idaho 76, 53 P. 105 (1898), the Idaho Supreme Court found that a contract for legal services between the board of commissioners of Shoshone County and a private attorney was valid. However, in coming to its conclusion, the court stated: "It is not contended by respondent that no necessity for the employment of counsel existed, nor that the same is not made apparent by the records of the board." *Id.* at 77. It also opined that "it seems to us this objection should more properly come from the district attorney himself, but that officer does not seem to have considered himself especially aggrieved by the action of the board; at least, he has made no moan apparent in the record." *Id.* It should also be noted that the respondent cited no relevant cases to support his contention that the board had no authority to employ counsel.

The most recent published case construing the constitutionally granted power of commissioners to hire counsel when necessary was decided in 1932. *Clayton v. Barnes,* 52 Idaho 418, 16 P.2d 1056 (1932). In this case the court found that "section 6 article 18, in providing that the county commissioners may employ counsel when necessary, *is a limitation upon the authority of the county commissioners to employ counsel* and a denial of the authority of all other county officials to do so." *Id.* at 424 (emphasis added).[2]

Since the adoption of the constitution of Idaho, there have been only three instances where the Supreme Court of Idaho has upheld a board of county commissioners' decision to hire private counsel. All three are distinguishable from the situations in Kootenai and Bonneville counties. In *Anderson v. Shoshone County,* the respondent neither asserted that the board had failed to meet the necessity standard nor did he contend the board lacked factual justification for its action. The respondent in that case did not present a single cognizable argument to support his position. Thus, the supreme court ruled in favor of the validity of the board's action. The court did, however, state that the proper person to bring such a complaint was the district attorney. In *Ravenscraft,* the very existence of Blaine County was at stake and the court held that the necessity standard had been met because of the obvious importance of this crisis. *Ravenscraft* also only involved the ability of the Blaine County board to hire outside counsel to handle only one case. *Barnard* is distinguishable on the same grounds, namely that the Power County board hired outside counsel for a specific legal problem and not on a retained or continu-

ous basis. The boards in *Ravenscraft* and *Barnard* also made a record of the factual justification for hiring private counsel.

The situations in Bonneville and Kootenai counties are most closely analogous to the facts of *Meller* and *Hampton* where the Logan County board attempted to retain private civil counsel, not for a specific case, but rather on a two year retained basis at a fixed salary. The supreme court ruled that this affiliation was impermissible.

After a thorough examination of the constitution and all relevant case law, this office concludes that county commissioners do not have the authority to hire civil counsel outside of the county prosecutor's office on a long-term or continuous basis unless they comply with Idaho's constitutionally mandated standard of "necessity." Before a board of county commissioners may hire private counsel, it must conduct a case-by-case analysis and state the facts which create the necessity of hiring such counsel. The board must also make these factual justifications a matter of record and that record is reviewable by the courts of this state.

3. *Proceedings at the Constitutional Convention*

Assuming that the language of art. 18, sec. 6, is subject to more than one reasonable interpretation, the intent and purpose of the framers controls the provision's meaning. *Sherwood v. Carter*, 119 Idaho 246, 805 P.2d 452 (1991). It is helpful to look at the context in which this provision was adopted to glean the intent and purpose of its drafters. The proceedings at the Constitutional Convention in 1889 provide insight into what the framers intended in enacting the language, "county commissioners may hire counsel when necessary."

Some historical background is necessary to provide insight into what occurred at the convention proceedings. From the organization of Idaho as a territory in 1863 to 1883, a system of district attorneys was employed. There was one district attorney for each judicial district. In 1883 the existing system was modified and provided a county attorney for each of the seventeen counties. *Meller v. Board of Commissioners of Logan County*, 4 Idaho 44. Upon statehood, the framers expressly rejected the county attorney format and opted for district attorneys. At statehood there were only five judicial districts, comprised of multiple counties. The framers' obvious motive in adopting the district attorney system was to save money. At the Convention, delegate Reid stated:

> The district attorneys cost this territory now $36,600. We have five district attorneys already provided for and have fixed their salaries at $2,500. That makes $7,500, which is a saving on that item of $29,000 to the people.

Proceedings of the Idaho Constitutional Convention of 1889 at 1821 (Hart ed. 1912). During the same discussion, the framers decided to adopt the language which allows the commissioners to "hire counsel when necessary." There was much discussion about giving the commissioners unbridled discretion to hire counsel at any price they deemed prudent. In adopting the current language, the following discussion ensued:

> Mr. Reid: If the county has an important suit or has important legal business, the commissioners ought to be allowed to go into the market and get the best legal talent; and if they do not have the business they do not have to have to have [sic] the counsel.
>
> Mr. Beatty: Suppose an important murder case has to be prosecuted before the committing magistrate?
>
> Mr. Reid: There is the district attorney who is already paid by the state to do that.
>
> Mr. Beatty: But he is off in some other county.
>
> Mr. Reid: I have seen this very system, and if it be necessary, the chairman of the board is always on hand, and upon application to him, when he sees public justice is about to fail, he can employ a man.

Id. at 1822. It is apparent from this debate that the framers granted the commissioners the ability to hire counsel when the district attorney was unavailable or when circumstances indicated that such counsel was absolutely needed, for example, when "public justice is about to fail."[3]

Thus, the proceedings at the Constitutional Convention further bolster the conclusion that the framers only intended to give county commissioners the ability to hire private counsel in emergency or special circumstances. This intention controls the meaning of the words "when necessary" if they are deemed to be ambiguous.

4. *Statutory Duties of County Commissioners and Prosecutors*

In addition to the constitutional provision, there are three statutes that relate to this issue. Idaho Code § 31-813 relates to the power of the county commissioners to hire counsel. It reads:

> 31-813. Control of suits.—To direct and control the prosecution and defense of all suits to which the county is a party in interest, and employ counsel to conduct the same, *with or without the prosecuting attorney*, as they may direct.

(Emphasis added.) The Idaho statute which enumerates the duties of the prosecuting attorney reads as follows:

> 31-2604. Duties of prosecuting attorney.- It is the duty of the prosecuting attorney:
>
> 1. To prosecute or defend all actions, applications or motions, *civil or criminal*, in the district court of his county in which the people, or the state, or the county, are interested, or are a party; and when the place of trial is changed in any such action or proceeding to another county, he must prosecute or defend the same in such other county.
>
> 2. . . . *to prosecute or defend all civil actions* in which the county or state is interested . . . .
>
> 3. To give advice to the board of county commissioners, and other public officers of his county, when requested in all public matters arising in the conduct of the public business entrusted to the care of such officers.

(Emphasis added.) In addition, Idaho Code § 31-2607 provides as follows:

> 31-2607. Adviser of county commissioners.- The prosecuting attorney is the legal adviser of the board of commissioners; he must attend their meetings when required, and *must* attend and oppose all claims and accounts against the county when he deems them unjust or illegal.

(Emphasis added.)

It is not immediately clear how these statutes should be reconciled. On the one hand, Idaho Code § 31-813 authorizes the county commissioners to "employ counsel" to prosecute and defend all suits "with or without the prosecuting attorney, as they may direct." On the other hand, Idaho Code § 31-2604 twice makes it the duty of the prosecuting attorney "to prosecute and defend all civil actions" in which the county is interested. Similarly, Idaho Code § 31-2607 makes the prosecuting attorney "the legal adviser of the board of county commissioners."

Fortunately, the apparent conflict between these statutes has been resolved by the Idaho Supreme Court in *Conger v. Commissioners of Latah County,* 5 Idaho 347, 48 P. 1064 (1897). In holding that the board had no authority to hire counsel in any criminal case, the court discussed § 1759 Revised Statutes of the Territory of Idaho (1887), which is identical to and the predecessor of current Idaho Code § 31-813. In construing this statute the court stated "said provision was in force prior to the adoption of our state constitution and prior to the admission of Idaho into the Union." *Conger,* 5 Idaho at 352. The court then discussed the predecessor statute to Idaho Code § 31-2604, § 2052 Revised Statutes of Idaho, amended in 1891. This provision has, in relevant part, remained unchanged. In reference to the apparent conflict between the two statutes, the court stated:

> Some of the provisions of that section [§ 2052 Revised Statutes] are repugnant to the provisions of . . . section 1759 of the Revised Statutes, in that they make it the duty of the district attorney to prosecute or defend in all cases when a county of his district is an interested party, while the provisions of [section 1759] authorize the board to employ counsel to conduct such cases with or without the district attorney, as they may direct. If there is a conflict, as suggested, the latest expression of the legislative will must control.

Conger at 354. The court then went on to find that the board had no jurisdiction or control over criminal matters.

Thus, the discussion in *Conger* makes clear that where the duties of prosecutors, embodied in Idaho Code § 31-2604, and the duties and powers of county commissioners, contained in Idaho Code § 31-813, conflict, the more recently enacted expression of legislative will must control. As previously stated, the language of Idaho Code § 31-813 pre-dates the statehood of Idaho. R.S. § 1759 (1887). However, the predecessor to Idaho Code § 31-2604 was

adopted four years later in the first legislative session in 1891. 1891 Sess. Laws, p. 47. Although the language which sets forth the duties of prosecutors is over one hundred years old, it is, compared to the duties and powers of county commissioners, "the latest expression of the legislative will" and, therefore, must control in the event of a conflict.

In short, a prosecutor's statutory duty "to prosecute or defend all civil actions" in which the county is a party supersedes the statutory ability of the county commissioners to hire counsel "with or without the prosecutor." The statutory duties of a prosecutor obviously do not supplant art. 18, sec. 6, of the Idaho Constitution. A board of county commissioners may still hire private counsel if they meet the constitutionally mandated necessity standard.

CONCLUSION

Based on the plain meaning of art. 18, sec. 6, of the Idaho Constitution, the Idaho Supreme Court cases construing this constitutional provision and the history of the statutes that prescribe the duties of prosecutors and commissioners, it is our conclusion that the board of county commissioners does not have the authority to hire civil counsel outside of the county prosecutor's office on a long-term or continuous basis unless they comply with Idaho's constitutionally mandated standard of "necessity." Before hiring outside counsel, the board must conduct a case-by-case analysis and state the facts which create the necessity of hiring such counsel. It must also make these reasons a matter of record and the facts made of record are reviewable by the courts of this state. Mere comfort level or convenience does not rise to the level of "necessity" in this context. In addition, the duty of a prosecutor "to prosecute or defend all civil actions in which his or her county is a party," pursuant to Idaho Code § 31-2604, supersedes the power of the county commissioners "to hire counsel with or without the prosecutor" granted by Idaho Code § 31-813.

AUTHORITIES CONSIDERED

1. **Idaho Constitution:**

   Art. 18, sec. 6.

2. **Idaho Statutes:**

   Idaho Code § 31-813.

Idaho Code § 31-2604.
Idaho Code § 31-2607.
1887 Revised Statutes § 1759.
1890-91 Sess. Laws, p. 47.

3. **Idaho Cases:**

Anderson v. Shoshone County, 6 Idaho 76, 53 P. 105 (1898).

Barnard v. Young, 43 Idaho 382, 251 P. 1054 (1926).

Clayton v. Barnes, 52 Idaho 418, 16 P.2d 1056 (1932).

Conger v. Board of County Commissioners, 5 Idaho 347, 48 P. 1064 (1896).

Hampton v. Commissioners of Logan County, 4 Idaho 646, 43 P. 324 (1896).

Meller v. Board of County Commissioners, 4 Idaho 44, 35 P. 712 (1894).

Ravenscraft v. Board of Commissioners, 5 Idaho 178, 47 P. 942 (1897).

Sherwood v. Carter, 119 Idaho 246, 805 P.2d 452 (1991).

Sweeney v. Otter, 119 Idaho 135, 804 P.2d 308 (1990).

4. **Other Authorities:**

Proceedings of the Idaho Constitutional Convention of 1889 (Hart ed. 1912).

Black's Law Dictionary (6th ed. 1990).

Webster's New Collegiate Dictionary (9th ed. 1991).

DATED this 20th day of July, 1993.

LARRY ECHOHAWK
Attorney General

Analysis by:

Steve Tobiason
Deputy Attorney General
Chief, Legislative and Public Affairs Division

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[1] The definition of "necessary" in Black's Law Dictionary reads:

> This word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. . . ." Black's Law Dictionary 1029 (6th ed. 1990).

This is the only definition which creates an issue of ambiguity. It indicates that the meaning of the word is controlled by the context in which it is used. The constitutional context in which art. 18, sec. 6, was adopted indicates that when the framers incorporated the "necessary" standard into the constitution they had in mind exigent or special circumstances. The case law has also interpreted the necessary standard to be much more than mere convenience.

[2] The holding in *Clayton* makes it apparent that the conclusion reached in AG opinion 76-42, that "administrative boards [created by the board of county commissioners] have the right to hire counsel," is incorrect.

[3] The district attorney system was ultimately abandoned by returning to the county prosecutor format in 1897 by constitutional amendment. Since the framers adopted the "necessity" language of art. 18, sec. 6, expressly with a five member district attorney system in mind, it would appear that a board of county commissioners would be held to a more exacting "necessity" standard since there are now forty-four county prosecutors.

ATTORNEY GENERAL OPINION NO. 93-9

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Per Request for Attorney General's Opinion

QUESTIONS PRESENTED

1. Does Idaho's religious exemption provision, which allows parents to treat their sick children through "spiritual means," limit administrative or judicial authority to provide medical services to children?

2. What is the standard for state intervention for children who are in need of medical treatment?

3. Does the religious exemption provision affect the normal reporting and investigation provisions for suspected child abuse, neglect and abandonment?

CONCLUSION

1. Idaho's religious exemption provision does not limit administrative or judicial authority to provide medical services to children.

2. The standard for state intervention for the medical treatment of children is that intervention is authorized when children are threatened by, or are in, actual harm.

3. The religious exemption provision does not affect the normal reporting and investigation provision for suspected child abuse, neglect and abandonment.

ANALYSIS

Question No. 1:

You have asked whether Idaho's religious exemption provision, which allows parents to treat their sick children through "spiritual means," limits administrative or judicial authority to provide medical services to children. Idaho's Child Protective Act does contain a provision allowing parents to treat their sick child through "spiritual means." On its face, this appears to conflict with other provisions of the Act which define "neglect" as the lack of medical care for ill children and require such "neglect" before the state is authorized to act in protecting the health of children. Our opinion is that the statutes do not conflict, and the state has authority to act on behalf of ill children.

The Idaho Legislature has authorized state agencies to intervene through the Child Protective Act in instances where children are in need of medical attention, provided that the religious preference of the parent is considered.

Idaho Code § 16-1602 defines "neglected" as follows:

> (s) "Neglected" means a child:
>
> (1) Who is without proper parental care and control, or subsistence, education, medical or other care or control necessary for his well-being because of the conduct or omission of his parents, guardian or other custodian or their neglect or refusal to provide them; *provided, however, no child whose parent or guardian chooses for such child treatment by prayers through spiritual means alone in lieu of medical treatment, shall be deemed for that reason alone to be neglected or lack parental care necessary for his health and well-being,* but further provided this subsection shall not prevent the court from acting pursuant to section 16-1616, Idaho Code.

(Emphasis added.)

Furthermore, the Idaho Legislature has granted state courts authority to act as follows:

> (a) *At any time* whether or not a child is under the authority of the

court, the court may authorize medical or surgical care for a child when:

(1) A parent, legal guardian or custodian is not immediately available and cannot be found after reasonable effort in the circumstances of the case; or

(2) A physician informs the court orally or in writing that in his professional opinion, the life of the child would be greatly endangered without certain treatment and *the parent, guardian or other custodian refuses or fails to consent.*

(b) If time allows in a situation under subsection (a)(2) of this section, the court shall cause every effort to be made to grant the parents or legal guardian or custodian an immediate informal hearing, but this hearing shall not be allowed to further jeopardize the child's life.

(c) In making its order under subsection (a) of this section, the court shall take into consideration any treatment being given the child by prayer *through spiritual means alone,* if the child or his parent, guardian or legal custodian are adherents of a bona fide religious denomination that relies exclusively on this form of treatment in lieu of medical treatment.

Idaho Code § 16-1616 (emphasis added).

Neither the administrative nor judicial provisions falling within the purview of these statutes have been challenged in Idaho on general religious freedom grounds. Other states with similar provisions, however, have addressed this issue. Colorado's religious exemption references also contain the language "through spiritual means alone." In analyzing the legislative intent, the Colorado Supreme Court concluded that:

It allows a finding of dependency and neglect for other "reasons," such as where the child's life is in imminent danger, despite any treatment by spiritual means. In other words, a child who is treated solely by spiritual means is not, for that reason alone, dependent or neglected, but if there is an additional reason, such as where the child is deprived of medical care necessary to prevent a life-endangering

> condition, the child may be adjudicated dependent and neglected under the statutory scheme.

People in Interest of D.L.E., 645 P.2d 271, 274-275 (Colo. 1982). Thus, the Colorado court holds that a child who is treated "through spiritual means alone" is not deemed for that reason only to be neglected. Neither is such a child, for that reason alone, shielded from a finding of neglect if the child is deprived of medical care necessary to prevent a life-endangering condition.

In *Walker v. Superior Court,* 763 P.2d 852 (Cal. 1988), the parent of a deceased child challenged the state's ability to proceed with involuntary manslaughter and felony child-endangerment charges arising from the death of her four-year-old daughter. Her daughter was treated through prayer in lieu of medical care and subsequently died as a result of acute meningitis. The challenge was based upon a "spiritual exemption" clause found within that state's child protective statutes, which are similar to those of Idaho.

In analyzing the legislative intent of California's child protection laws, the California Superior Court concluded: "The legislative design appears consistent: prayer treatment will be accommodated as an acceptable means of attending to the needs of a child only insofar as serious physical harm or illness is not at risk." *Walker,* 763 P.2d at 866.

This balancing analysis is consistent with Idaho's Child Protective Act. Just as Idaho Code § 16-1602 defines child "neglect" to include lack of medical treatment, Idaho Code § 16-1616 provides the court with the option of providing a child with medical treatment whether or not the child's parent consents. In other words, nowhere in Idaho law does the religious exemption provide that a child cannot be medically treated if prayer is not effective and the child's life is endangered. Idaho's religious exemption references do not limit either administrative or judicial action when medical treatment for children is deemed necessary.

This analysis of the Child Protective Act is consistent with Idaho's constitutional provisions protecting religious freedom. The Declaration of Rights provision of the Constitution of the State of Idaho provides in article 1, § 4:

> Guaranty of religious liberty.—The exercise and enjoyment of religious faith and worship shall forever be guaranteed; and no person shall be denied any civil or political right, privilege, or capacity on

> account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, or excuse acts of licentiousness or justify polygamous or other pernicious practice, inconsistent with morality or the peace or safety of the state; nor to permit any person, organization, or association to directly or indirectly aid or abet, counsel or advise any person to commit the crime of bigamy or polygamy, or any other crime. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination, or pay tithes against his consent; nor shall any preference be given by law to any religious denomination or mode of worship.

The drafters of the Idaho Constitution recognized the importance of assuring that although there should be no limit to an individual's rights to a religious belief, there were boundaries on an individual's right to religious practices. Polygamy, for example, could be part of a religion so long as the followers did not participate in this illegal practice. *Constitutional Convention Proceedings*, vol. 1, pp. 129-135.

Case law supports this contention. The right to hold a religious belief is guaranteed and the freedom to practice a religion is constitutionally protected. *Bissett v. State,* 111 Idaho 865, 867, 727 P.2d 1293 (1986); *Cantwell v. Connecticut,* 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1939). However, the practice of those religious beliefs is subject to some regulation. *United States v. Lee,* 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982).

States may clearly regulate "circumstances where the exercise of religious freedom by parents would expose their children to ill health or death." 52 A.L.R.3d 1120.

> The right to practice religion freely does not include liberty to expose the . . . child to . . . ill health or death.
>
> Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.

Prince v. Massachusetts, 321 U.S. 158, 166-67, 64 S. Ct. 438, 88 L. Ed. 645, *reh'g denied*, 321 U.S. 804, 64 S. Ct. 784, 88 L. Ed. 1090 (1944).

Therefore, a "state may regulate the health, safety, and general welfare of society in a manner which may infringe upon religion without unconstitutionally invading liberties protected by the Constitution." *State v. Heritage Baptist Temple, Inc.*, 693 P.2d 1163, 1165 (Kan. 1985).

Neither the express language of Idaho's religious exemption, nor traditional constitutional principles of religious freedom limit administrative or judicial authority to provide medical services to children.

Question No. 2:

You next ask what the standard is for state intervention for children who are in need of medical treatment. Intervention under the Child Protective Act is justified when a child is threatened by, or in, actual harm.

Idaho Code § 16-1601(2) authorizes the Department of Health and Welfare to "take such actions as may be necessary and feasible to prevent the . . . neglect . . . of children." Furthermore, the Department shall maintain: "(a) Protective services on behalf of children whose opportunities for normal physical, social and emotional growth and development are endangered *for any reason.*" Idaho Code § 56-204A (emphasis added).

The Department of Health and Welfare's rules regarding the handling of child abuse, neglect and abandonment are found in IDAPA 16.06.01300, *et seq.* All cases of children threatened with or in actual danger of serious physical harm or illness by reason of neglect, due to any act or inaction, are therefore subject to the provisions of the Child Protective Act. These rules are neutral toward religious beliefs. The investigation will proceed and the determination of neglect will be made based upon the threat of harm to the child, not upon the religious beliefs of the parents.

Question 3:

Your final question asks whether the religious exemption provision affects the normal reporting and investigation provision for suspected child abuse, neglect and abandonment. Clearly, it does not.

In a previous Attorney General's Opinion, Idaho's child abuse reporting statute was discussed. The opinion of this office has not changed in that Idaho

is one of many states which has mandatory reporting requirements when child abuse, abandonment or neglect is suspected.

> Case law clearly upholds the validity of these statutes in that they are neither far reaching nor unconstitutional. *Jett v. State,* 605 So. 2d 926 (Fla. App. 1992); *People v. Hedges*, 13 Cal. Rprt. 2d 412 (Cal. Super. Ct. 1992); *Morris v. Coleman,* 194 Mich. App. 606, 488 N.W.2d 464 (Mich. App. 1992).

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The premise that parents have a duty to supply their children with food, clothing, education and medical needs is firmly rooted in history. *People v. Pierson,* 68 N.E. 243, 245 (N.Y. 1903). This duty is "a basic tenet of our society and law." *State v. Williams*, 484 P.2d 1167 (Wash. App. 1971); *In re Hudson,* 126 P.2d 765 (Wash. 1942); *Lizotte v. Lizotte,* 551 P.2d 137 (Wash. App. 1976).

Idaho Code § 16-1619 provides:

> Reporting of abuse, abandonment or neglect.—(a) Any physician, resident on a hospital staff, intern, nurse, coroner, school teacher, day care personnel, social worker, or other person having reason to believe that a child under the age of eighteen (18) years has been abused, abandoned or neglected or who observes the child being subjected to conditions or circumstances which would reasonably result in abuse, abandonment or neglect shall report or cause to be reported within twenty-four (24) hours such conditions or circumstances to the proper law enforcement agency or the department [of Health and Welfare]. The department shall be informed by law enforcement of any report made directly to it.

The statute clearly requires anyone to report any suspected child neglect, which includes a child lacking necessary medical care or treatment, to the Department of Health and Welfare or law enforcement. The reporting party is immune from criminal and civil liability so long as he or she has reason to believe that a child has been medically neglected and, acting upon that belief, makes a report of neglect as required in section 16-1619, Idaho Code. Any person reporting in bad faith or with malice is not immune from liability.

AUTHORITIES CONSIDERED

1. **Idaho Constitution:**

Art. 1, § 4.

2. **Idaho Code:**

§ 16-1601(2).
§ 16-1602.
§ 16-1616.
§ 16-1619.
§ 56-204A.

3. **Idaho Cases:**

Bissett v. State, 111 Idaho 865, 727 P.2d 1293 (1986).

4. **Federal Cases:**

Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1939).

Prince v. Massachusetts, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645, *reh'g denied,* 321 U.S. 804, 64 S. Ct. 784, 88 L. Ed. 1090 (1944).

United States v. Lee, 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982).

5. **Other Cases**

In re Hudson, 126 P.2d 765 (Wash. 1942).

Jett v. State, 605 So. 2d 926 (Fla. App. 1992).

Lizotte v. Lizotte, 551 P.2d 137 (Wash. App. 1976).

Morris v. Coleman, 488 N.W.2d 464 (Mich. App. 1992).

People in Interest of D.L.E., 656 P.2d 271 (Colo. 1982).

People v. Hedges, 13 Cal. Rprt. 2d 412 (Cal. Super. Ct. 1992).

People v. Pierson, 68 N.E. 243 (N.Y. 1903).

State v. Heritage Baptist Temple Inc., 693 P.2d 1163 (Kan. 1985).

State v. Williams, 484 P.2d 1167 (Wash. App. 1971).

Walker v. Superior Court, 763 P.2d 852 (Cal. 1988).

6. **Other Authorities**

IDAPA 16.06.01300 *et seq.*

Attorney General Opinion No. 93-2.

DATED this 6th day of September, 1993.

LARRY ECHOHAWK
Attorney General

Analysis by:

Ann L. Cosho
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 93-10

Honorable Jerry L. Evans
State Superintendent of Public Instruction
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED

1. Does a school trustee have a direct or indirect pecuniary interest, pursuant to Idaho Code § 33-307, in the school district's contract with a health insurance company—over which trustees exercise some decision-making authority—if she is also a former school teacher receiving health insurance benefits from that company as part of the district's retirement program?

2. If a pecuniary interest exists, may the individual declare her conflict of interest and disqualify herself from discussing or voting on the contract, or is the individual precluded from serving as duly elected trustee for that same school district?

CONCLUSION

1. An individual who benefits from a contract between an insurance company and a school district has a pecuniary interest in that contract.

2. Pursuant to Idaho Code § 33-507, an individual with a pecuniary interest in a contract with the school district may not be a trustee of that school district if the individual continues to receive benefits under the contract.

ANALYSIS

I. *Facts*

Norinne Kunz is a retired Bear Lake School District teacher who was elected on May 18, 1993 to serve as a trustee for that school district. In the spring of 1992, Ms. Kunz took advantage of an "early retirement" incentive program. As part of Bear Lake School District's master agreement with the Bear Lake Education Association, the "early retirement" program provides that the former employee and his or her spouse receive health insurance until

the former employee reaches the age of 65. Before a change to the master agreement can occur, the entire board of trustees must vote on making the changes. The board further votes on the total budget allocation for insurance, including the insurance for the school district's early retirees.

Ms. Kunz began receiving the insurance coverage benefit on September 1, 1992 and is scheduled to continue receiving this coverage until December 24, 1995. The cost to the school district for the 1993-94 school year for this benefit is $4,831.20.

Your question is whether Ms. Kunz can serve as a trustee on the school district board while at the same time receiving benefits from an insurance contract administered by that same board. We conclude that she may not.

II. *Discussion*

A. *The Board of Trustees Statute*

The statute that deals specifically with the limitation on the authority of trustees is Idaho Code § 33-507, which states in pertinent part:

> It shall be unlawful for any trustee to have pecuniary interest directly or indirectly in any contract or other transaction pertaining to the maintenance or conduct of the school district, or to accept any reward or compensation for services rendered as a trustee.

This section provides that *no* member of the board of trustees may personally have a monetary interest in any contract pertaining to the maintenance or conduct of the school district. This is true regardless of whether the interest is direct or indirect.

An Attorney General's Legal Guideline issued September 11, 1981, held it would violate Idaho Code § 33-507 for a school district to pay health insurance premiums for its school board of trustees members:

> [A] persuasive argument can be developed for the position that members of a school board of trustees would have at least an indirect pecuniary interest in the contract between the district and an insurance company under circumstances where the district would provide for the payment of health insurance premiums for its trustees. Such a situ-

> ation clearly would be in violation of the letter and intent of Idaho Code § 33-507 and provides further support for the conclusion that participating school districts should be advised to weigh carefully a decision to continue such a practice.

The facts set forth above suggest that, in light of the 1981 Attorney General's Legal Guideline, should Ms. Kunz take the position of trustee of the Bear Lake School District, she would have a pecuniary interest in a contract pertaining to the conduct or maintenance of the school district, which is prohibited pursuant to Idaho Code § 33-507.

B. *The Ethics in Government Act*

The other statute that is arguably applicable in this situation is Idaho's Ethics in Government Act, Idaho Code §§ 59-701 through 59-706. This act, as passed by the Idaho Legislature in 1990, deals with conflicts of interest for all persons in government positions in Idaho. Key to the act is the requirement that a public official with a real or potential conflict must disclose that conflict prior to acting on the matter. The public official may obtain an advisory opinion from private counsel, from an attorney representing the school district, or, in this case, from the attorney general. The individual may then act on that advice.

The act further defines a conflict of interest as:

> [A]ny official action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit of the person or a member of the person's household, or a business with which the person or a member of the person's household is associated . . . .

Idaho Code § 59-702(4). Thus, the Ethics in Government Act, originally enacted in 1990, paralleled the provisions of Idaho Code § 33-507 and identified a "conflict of interest" as any situation in which a public official participates in a decision affecting a contract involving his or her own private pecuniary benefit.

In 1992, through Senate Bill 1440, the Idaho Legislature amended the Ethics in Government Act by adding a new section, Idaho Code § 59-704A, which states:

> When a person is a public official by reason of his appointment or election to a governing board of a governmental entity for which the person receives no salary or fee as compensation for his service on said board, he shall not be prohibited from having an interest in any contract made or entered into by the board of which he is a member, if he strictly observes the procedures set out in section 18-1361A, Idaho Code.

According to the Statement of Purpose to Senate Bill 1440, the new section 59-704A was intended to "make an exception to the prohibition against contracts section of the code and the ethics in government section for unpaid elected or appointed official [sic]." It was further stated in the Senate State Affairs Committee that the bill was "especially for Hospital Boards who have no compensated board members but would also apply to *any* non compensated public servants." Thus, it could be argued the legislature meant to apply Idaho Code § 59-704A to *all* non-compensated elected and appointed officials. School board trustee members fall within the category of non-compensated elected officials pursuant to Idaho Code § 33-507 and, therefore, would not be prohibited from having an interest in any contract made or entered into by the school board.

C. *Reconciling the Two Statutes*

The 1993 legislature did not repeal Idaho Code § 33-507. This section, governing the conduct of local school board trustees, has been in its present form since 1963. Similar language can be traced back to the Revised Statutes of Idaho Territory, title III, chapter VI, section 665 (1887), which stated:

> *Sixth.* Said Trustees have further power when directed by a vote of their district to purchase, receive, hold, and convey real and personal property for school purposes, and to hold, purchase, hire, and repair school houses, and supply the same with necessary furniture in accordance with the provisions of this Title and to fix the location of school *houses: Provided, that no Trustee shall be pecuniarily interested in any contract made by the Board of Trustees of which he is a member; and any contract made in violation of this section is null and void . . .*

Id. at 129 (emphasis added).

As a general rule, the legislature is presumed to envision the whole body of the law when it enacts new legislation. Furthermore, this presumption has been held to have special application to important public statutes of long standing. *Doe v. Durtschi*, 110 Idaho 466, 478, 716 P.2d 1238, 1250 (1986). The Idaho courts will only find an implied repeal when new legislation is irreconcilable with and repugnant to a preexisting statute. *Id.* The Idaho Supreme Court has further held that "[t]he legislature is presumed not to intend to overturn long established principles of law unless an intention to do so plainly appears by *express declaration* or the language employed admits of no other reasonable construction." *George W. Watkins Family v. Messenger*, 118 Idaho 537, 540, 797 P.2d 1385, 1388 (1990) (emphasis added).

Idaho Code § 33-507 is an important public statute of long standing which the legislature cannot be presumed to have intended to amend or repeal without specific mention. The Idaho Legislature did not make an express declaration that Idaho Code § 33-507 was to be repealed upon the enactment of Idaho Code § 59-704A. While Idaho Code § 33-507 is more prohibitive than the amended version of Idaho Code § 59-704A, it is not irreconcilable or repugnant.

Yet another principle of statutory construction invoked when statutes appear to be in conflict with one another holds that a specific statute controls over a more general statute when there is any conflict. *Guillard v. Dept. of Employment*, 100 Idaho 647, 603 P.2d 981 (1979); *Swisher v. State Dept. of Environmental and Community Services*, 98 Idaho 565, 569 P.2d 910 (1977).

Idaho Code § 330507 deals *specifically* with the limitations of authority of the local board of trustees of each school district and is more restrictive than the Ethics in Government Act. If a conflict of interest of an individual exists under Idaho Code § 33-507 but does not exist under the Ethics in Government Act, the conflict of interest is still present and is not cured by the terms of the Ethics in Government Act.

We conclude that the specific provisions of the school board trustees law, Idaho Code § 33-507, take precedence over the general conflict of interest law found in the Ethics in Government Act.

III. *Conclusion*

Idaho Code § 33-507 prohibits a member of the board of trustees of a

school district from receiving a personal pecuniary benefit from a contractual relationship between the school district and the teachers' association. Idaho Code § 33-507 is absolute and provides no leeway or exceptions to the prohibition of pecuniary interest. There is no provision that allows a trustee to simply declare the conflict of interest and disqualify herself or himself from discussing or voting on the insurance benefits issue. A trustee member cannot have a personal interest in any contract made by the board of trustees. Thus, Idaho Code § 33-507 prohibits Ms. Kunz from becoming a trustee if she continues to receive the insurance benefits set forth in the master agreement with the teacher's association.

AUTHORITIES CONSIDERED

1. **Idaho Code:**

   § 33-507.
   §§ 59-701 through 706.

2. **Idaho Cases:**

   Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986).

   George W. Watkins Family v. Messenger, 118 Idaho 537, 797 P.2d 1385 (1990).

   Guillard v. Dept. of Employment, 100 Idaho 647, 603 P.2d 981 (1979).

   Swisher v. State Dept. of Environmental and Community Services, 98 Idaho 565, 569 P.2d 910 (1977)

3. **Other Authorities:**

   Attorney General's Legal Guideline issued September 11, 1981.

   Revised Statutes of Idaho Territory, title III, chapter VI, section 665 (1887).

DATED this 22nd day of September, 1993.

LARRY ECHOHAWK
Attorney General

Analysis by:

Elaine Eberharter-Maki
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 93-11

Honorable Mary Lou Reed
Minority Leader
Idaho State Senate
10 Giesa Road
Coeur d'Alene, ID 83814

Honorable Dennis M. Davis
Assistant Minority Leader
Idaho State Senate
816 Sherman Avenue
Coeur d'Alene, ID 83814

Honorable Mary Ellen Lloyd
Minority Caucus Chair
Idaho State Senate
162 Hawthorne
Pocatello, ID 83204

Per Request for Attorney General Opinion
Regarding the Idaho Citizens Alliance's Revised Initiative

Dear Senators Reed, Davis and Lloyd:

QUESTIONS PRESENTED

1. Section 67-8002 addresses minority status of those who engage in homosexual behavior as well as special classifications based upon homosexuality or sexual orientation. What would be the effect of this section and does it violate the United States Constitution?

2. Section 67-8003 addresses same-sex marriages and domestic partnerships. What, if any, is the legal effect of this provision and what does the term "domestic partnership" mean?

3. Section 67-8004 limits the discussion of homosexuality in the public elementary and secondary schools. Does this provision violate the United States Constitution?

4. Section 67-8005 limits expenditure of public funds and access to library materials discussing homosexuality. Does this provision violate the United States Constitution?

5. Section 67-8006 addresses consideration of private sexual behavior in the public employment context. What does this section mean? What is its

scope and how would a court likely construe this provision in context with the balance of the initiative's provisions?

6. Does the initiative violate any rights guaranteed under the Idaho Constitution?

7. If certain provisions of the initiative are unconstitutional, can the other provisions be given effect by employment of the initiative's severability clause?

CONCLUSION

1. Section 67-8002 essentially authorizes discrimination against homosexuals in such contexts as employment, housing, education and health care. This provision violates equal protection guarantees of the United States Constitution by officially condoning discrimination against homosexuals and by denying them equal access to the political process.

2. Section 67-8003, addressing same-sex marriages and domestic partnerships, is merely a statement of the current law already in place in Idaho. The term "domestic partnership" presumably means an arrangement whereby two homosexuals have agreed to share their home, financial resources and life together. Because the provision simply restates current law, it has no legal effect.

3. Section 67-8004 violates First Amendment protections. A state may reasonably restrict school-endorsed curriculum-related speech in elementary and secondary schools to further legitimate pedagogical concerns. Significant discretion is given to the state and local authorities in determining whether such restrictions are reasonable and whether the concerns they further are, in fact, legitimate pedagogical ones. Nevertheless, there are limits. Suppression of a viewpoint not based on legitimate pedagogical concerns but because the state disagrees with it falls outside the bounds of the state's permitted discretion. As to curriculum-related speech, section 67-8004 goes beyond the bounds of the state's discretion and violates the First Amendment. Further, the section restricts some non-curriculum-related speech as well as advice a counselor may offer a student/ patient. These restrictions are also violations of free speech rights.

4. Section 67-8005, addressing expenditure of public funds and access to

library materials for minors, is unconstitutional. The government can place some restrictions on the expenditure of public funds to ensure those funds are not spent on speech which falls outside of the scope of the particular government program being subsidized. However, restricting funds to suppress an idea in numerous programs at state and local government levels falls far beyond what is a legitimate restriction. Moreover, there are certain traditional areas, such as universities, public forums, doctor-patient relationships, artistic expression and scientific research, in which the government cannot censor speech even if that speech is directly subsidized by the government. Section 67-8005 is drafted in sweeping terms and violates this precept. Additionally, the provision addressing access to library materials is overbroad and violates the First Amendment rights of minors.

5. Section 67-8006 allows discrimination against homosexuals in the public employment context, but does not *require* it. More importantly, the section does not address discrimination in housing, education, health care and private employment contexts. Thus, section 67-8006 does not remedy the constitutional problems created by section 67-8002.

6. Like the United States Constitution, the Idaho Constitution guarantees equal protection of the law and free speech. These independent state constitutional rights are also violated by the initiative's sweeping terms.

7. The severability clause would not salvage this initiative because so many of its provisions violate the federal and state constitutions. A reviewing court will not rewrite a law when its basic core and purpose have been invalidated.

BACKGROUND

The Idaho Citizens Alliance ("ICA") is sponsoring an effort to place its initiative regarding homosexuality on the 1994 election ballot. The ICA submitted a draft of its initiative on March 4, 1993, and this office, in its March 18, 1993, Certificate of Review, stated that almost every provision of the proposed initiative was unconstitutional. The ICA subsequently redrafted the initiative, making, in at least some of the provisions, substantial changes. Consequently, this office's Certificate of Review is no longer completely germane as to each provision. This formal opinion will review afresh each of the initiative's provisions and discuss their validity.

ANALYSIS

I.
SECTION 67-8002

The first section of the ICA initiative, section 67-8002, provides:

> SPECIAL RIGHTS FOR PERSONS WHO ENGAGE IN HOMOSEXUAL BEHAVIOR PROHIBITED. No agency, department, or political subdivision of the State of Idaho shall enact or adopt any law, rule, policy, or agreement which has the purpose or effect of granting minority status to persons who engage in homosexual behavior, solely on the basis of such behavior; therefore, affirmative action, quota preferences, and special classifications such as "sexual orientation" or similar designations shall not be established on the basis of homosexuality. All private persons shall be guaranteed equal protection of the law in the full and free exercise of all rights enumerated and guaranteed by the U.S. Constitution, the Constitution of the State of Idaho, and federal and state law. All existing civil rights protections based on race, color, religion, gender, age, or national origin are reaffirmed, and public services shall be available to all persons on an equal basis.

This section violates the Equal Protection Clause of the United States Constitution, both by promoting discrimination against homosexuals and by denying them equal access to the political process.

A. *The Legal Effect of Section 67-8002*

A constitutional analysis of proposed section 67-8002 cannot be undertaken without first discussing the section's legal effect.

The section begins by forbidding any "agency, department or political subdivision of the State of Idaho" from enacting any "law, rule, policy or agreement" which has the "purpose or effect of granting minority status to persons who engage in homosexual behavior." Thus, the section is directed at three legal entities—agencies, departments and political subdivisions of the state. Agencies and departments include an array of governmental or public organizations ranging from the Department of Health and Welfare to the State Board of Education which governs public universities. The term "political subdivision[s] of the State of Idaho" clearly encompasses counties, entities such as

county hospitals, and other subdivisions such as school, highway and irrigation districts. Finally, the term includes cities and public organizations which they fund.[1]

What the initiative targets is the enactment of certain "law[s], rule[s], polic[ies], or agreement[s]." The use of the term "law" is confusing in this context as it would normally refer to statutes, which only the legislature can enact. Consequently, the question arises as to whether this initiative is directed at the state legislature as well as agencies, departments and political subdivisions. However, it is well settled that the legislature cannot be bound by an initiative. *Luker v. Curtis*, 64 Idaho 703, 136 P.2d 978 (1943). Indeed, this settled principle likely accounts for the legislature not being expressly mentioned in the initiative. This office concludes that, while section 67-8002 is not entirely clear, the term "law" is probably used in a generic sense meaning enactments such as ordinances, rules and policies that have the force of law, and that its use is not intended to pull the legislature within the scope of this section.

Having addressed which public entities are restricted by the initiative, the next question is which group of citizens is burdened by these restrictions. Section 67-8002 forbids the granting of "minority status to persons who engage in homosexual *behavior,*" but then adds that "special classifications such as 'sexual orientation' or similar designations" based on *"homosexuality"* cannot be established. (Emphasis added.) Thus, the provision is not limited to overt conduct, but encompasses the mere status of homosexuality. The "homosexual behavior" which falls within the section's reach is not defined by the initiative but is, instead, left vague. Arguably, the term encompasses conduct ranging from sexual acts criminalized by Idaho Code § 18-6605 (infamous crimes against nature) to clearly legal conduct such as holding hands.[2] *See Watkins v. U.S. Army,* 875 F.2d 699, 715 (9th Cir. 1989) (alleged knee-squeezing described as homosexual act). As to the status of "homosexuality," it is not necessarily linked to any behavior at all and includes within its scope feelings, thoughts and preferences, and an identification with a particular group.

Section 67-8002 of the initiative first precludes "granting minority status" to homosexuals. The term "minority status" *alone* has little legal significance. Idaho's statutory and case law recognize some legal classifications based upon race, color, religion, gender, age and national origin. In Idaho, the primary legal significance of these classifications is that they form the bases for legally

required equal treatment in the areas of employment, real estate transactions, educational services and public accommodations. See Idaho Code § 18-7301 and 67-5909. Additionally, these legal classifications can be used to enhance penalties for "hate crimes." Idaho Code §§ 18-7902 and 18-7903.

It is important to note that Idaho law, as presently structured, does not confer special status upon any minority. Idaho Code §§ 18-7301 and 67-5909, for example, prohibit discrimination on the basis of race, national origin and religion. But those statutes offer no more protection to "minorities" such as blacks, Hispanics, or adherents of particular religions than to "non-minority" whites of mainstream religions.

To implement its "minority status" provision, however, section 67-8002 of the initiative further provides that "affirmative action, quota preferences and *special classifications* such as *'sexual orientation'* or *similar designations*" may not be "established on the basis of homosexuality." (Emphasis added.) Idaho's statutory and case law do not have "affirmative action" or "quota preferences" for any specific group of people. However, Idaho does have legal classifications based upon characteristics such as race, gender, religion, age and national origin to legally require equal treatment for these groups. This initiative, in forbidding "special classifications such as 'sexual orientation'" or "similar designations . . . established on the basis of homosexuality," limits the protection homosexuals can obtain against discrimination. The true harm of section 67-8002 is its mandate precluding classifications based on homosexuality or sexual orientation. Under even the most narrow construction, this initiative, by forbidding classifications based upon "homosexuality" or "sexual orientation," ensures that homosexuals cannot receive the protections against discrimination in areas of employment, real estate transactions, educational services and public accommodations that other identifiable groups either currently receive or can seek. Section 67-8002, at a minimum, assures that rules, policies and agreements enacted or adopted by agencies, departments and political subdivisions of this state cannot require equal treatment of homosexuals.[3]

Finally, it is our opinion that the section's statement that "all private persons shall be guaranteed equal protection of the law" does not ameliorate the pragmatic consequences of section 67-8002. The equal protection guarantees provided in the state and federal constitutions reach only state action, not private acts of discrimination. Other types of legal provisions must be enacted or adopted to reach such private discrimination. Consequently, stating the Equal

Protection Clause remains in effect does not soften the section's pragmatic effect of uniquely limiting the ability of agencies, departments and political subdivisions to legally require equal treatment of homosexuals. Indeed, this provision, reiterating equal protection guarantees, is little more than surplusage, as the ICA does not have the authority to suspend the Equal Protection Clause by initiative.

In short, this section has significant pragmatic effects on the homosexual community. It prohibits agencies, departments and political subdivisions from adopting any laws, rules, policies or agreements requiring that homosexuals be treated equally.

B. *Encouragement of Private Discrimination and the Equal Protection Clause*

Given the legal effect of section 67-8002 of the ICA initiative, the next question is what the constitutional implications are likely to be. At the outset, the provision, even under its most narrow construction, violates the Equal Protection Clause by condoning discrimination against homosexuals.

Under current Idaho law, the state has taken no position on discrimination against homosexuals. Thus, for example, a private landlord can refuse to rent an apartment to someone because the landlord thinks (rightly or wrongly) that the person is a homosexual. That is a private bias. The state does not prohibit or approve of it; it simply does not address it. Its position is neutral, and the Equal Protection Clause is not implicated

This initiative, however, goes one step further. It effectively gives state approval to that private bias by announcing that this bias cannot be prohibited by agencies, departments and political subdivisions of the state. Moreover, the initiative also forecloses public agencies, departments and political subdivisions of the state from adopting policies or rules to prohibit such a bias in the decisions made within their own structure.[4] The initiative, in essence, promises those who would discriminate that, no matter how serious the problems created by their discrimination or how dire the need for legal protections, absent a statute enacted by the legislature, the state will not interfere. By taking this position, the government becomes a partner in the discrimination against homosexuals, fostering that discrimination and placing upon it the state's endorsement.

Similar official sanctions of discrimination have been found to violate

equal protection guarantees. One of the earliest cases, *Reitman v. Mulkey*, 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967), involved a California amendment which prohibited the state from forbidding any person from selling or renting his real property to "such persons . . . as he, in his absolute discretion, chooses." The U.S. Supreme Court first reviewed the history of the amendment, noting its purpose was to overturn state laws prohibiting racial discrimination in housing and real estate, and concluded: "Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market. . . . [T]he section will significantly encourage and involve the State *in* private discriminations . . . ." Id. at 381. The Court struck down the amendment, holding that it violated the Equal Protection Clause of the Constitution.

Reitman involved discrimination against a racial minority. However, the Equal Protection Clause guarantees against invidious discrimination apply to *all* citizens, not just those who are members of traditionally "suspect" classes such as racial minorities. For example, in *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985), the U.S. Supreme Court reviewed a zoning ordinance banning group homes for the mentally retarded in a particular zoning district. Acknowledging the mentally retarded are *not* a suspect class under the Equal Protection Clause, the Court, using a lesser standard of judicial scrutiny, nevertheless struck down the ordinance on the ground that it arbitrarily and invidiously discriminated against the mentally retarded:

> Our refusal to recognize the retarded as a quasi-suspect class does *not* leave them entirely unprotected from invidious discrimination. To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be *rationally related to a legitimate* government purpose . . . . [S]ome objectives—such as "a bare . . . desire to harm a politically unpopular group"—are *not legitimate* state interests . . . .

473 U.S. at 446-47 (emphasis added; citations omitted). Thus, it is apparent that the Equal Protection Clause applies to all citizens, and state encouragement of private discrimination violates constitutional protections even if the targeted group is not a suspect class such as a racial minority.

Indeed, the holding of *Reitman*, that state encouragement of private discrimination violates the Equal Protection Clause, has already been held to encompass discrimination against the homosexual community. In *Citizens for*

Responsible Behavior v. Superior Court, 2 Cal. Rptr. 2d 648 (Cal. App. 4 Dist. 1991), a California court examined an initiative which would have prohibited the City of Riverside, California, from enacting "any policy or law which . . . classifi[ed] AIDS or homosexuality as the basis for determining an unlawful discriminatory practice . . . ." The court found that the proposed ordinance was designed to promote bias against a selected class of citizens—homosexuals —in violation of the Equal Protection Clause: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." 2 Cal. Rptr. 2d at 658 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984)).

The ICA initiative, like the amendment in *Reitman* and the initiative in *Citizens for Responsible Behavior*, does not require private discrimination against homosexuals, but it condones it. It condones it by officially forbidding state agencies, departments and political subdivisions, like counties, from using their authority to require equal treatment of homosexuals. Thus, for example, a state agency contracting with builders could not include an anti-discrimination clause in its agreement. Likewise, a county could not use its inherent police power under art. 12, sec. 2 of the Idaho Constitution to require equal treatment of homosexuals in businesses within its borders. Moreover, the section condones public as well as private discrimination, as agencies, departments and political subdivisions are also forbidden to adopt policies prohibiting bias against homosexuals within their own confines. Importantly, this state-condoned discrimination is not based upon criminal conduct of the targeted group. As noted, this section of the initiative encompasses both conduct and status; behavior defined and prohibited by Idaho Code § 18-6605 as well as other behavior, feelings, preferences and an identification with a particular group. Thus, under the initiative's terms, the state is encouraging discrimination against a broad range of Idahoans, many of whom may be in absolute compliance with Idaho law.

When the state expressly announces that in many instances discrimination against a targeted group will not be halted, that discrimination bears the state's imprimatur. It is the opinion of this office that this state involvement in discrimination would not pass the most relaxed standard of review under the Equal Protection Clause—that the law be rationally related to a *legitimate* government purpose. Making the state a partner to discrimination against homosexuals in central areas of life is not a "legitimate" state objective nor a "legitimate" use of the government's power. *City of Cleburne*, 473 U.S. at 447; *Citizens for Responsible Behavior*, 2 Cal. Rptr. 2d at 658. Rather, it is an

abuse of power based upon hostility to a particular group. An Idaho court would find that section 67-8002 is unconstitutional.

C. *Access to the Political Process and the Equal Protection Clause*

Section 67-8002 singles out homosexuals as a group and substantially limits their ability to have many of their problems addressed by agencies, departments and political subdivisions of the state. While homosexuals may still seek beneficial legislation at the statewide legislative level, agency, department and political subdivision avenues are foreclosed to them. The same is not true for any other independently identifiable group in Idaho seeking comparable legal protections. This redefining of the political structure as to homosexuals alone is an unconstitutional denial of their right to equal access to the political process.

In *Evans v. Romer,* 854 P.2d 1270 (Colo. 1993), the recent opinion addressing Colorado's Amendment 2, which, among other things, forbade "any statute, regulation, ordinance or policy . . . whereby homosexual[ity]" could "entitle any person" to a "claim of discrimination," the Colorado Supreme Court discussed at length the right of equal access to the political process. After reviewing a series of opinions from the U.S. Supreme Court, the Colorado court concluded that "[t]he Equal Protection Clause guarantees the fundamental right to participate equally in the political process" and, further, "laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process absent a compelling state interest." 854 P.2d at 1279.

This principle of equal access to the political process has been implicated in situations, like the one here, involving legislation intended to prevent an independently identifiable group of voters from using the *normal* political institutions and processes for obtaining legal protections beneficial to them. The landmark case is *Hunter v. Erickson,* 393 U.S. 385, 89 S. Ct. 557, 21 L. Ed. 2d 616 (1969), which involved an Akron city charter amendment that required any fair housing ordinance to be approved directly by the electorate, while all other types of ordinances could be enacted by the city council. The Court invalidated the amendment under the Equal Protection Clause because it "place[d] special burdens on racial minorities within the governmental process." 393 U.S. at 391. While the law reviewed targeted a particular racial minority, the principle at stake was broader. The Supreme Court stated that Akron was free to require a plebiscite as to *"all* its municipal legislation," but,

having chosen to do otherwise, Akron could "no more disadvantage *any particular group* by making it more difficult to enact legislation on its behalf than it [could] dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.* at 392-93 (emphasis added).

In *Washington v. Seattle School District No. I*, 458 U.S. 457, 102 S. Ct. 3187, 73 L. Ed. 2d 896 (1982), the U.S. Supreme Court reviewed an initiative which prohibited local school districts from using busing as a means to achieve integration. Due to the initiative, unlike all other local education issues, busing alone could only be decided at the statewide level. Revisiting *Hunter*, the Supreme Court held that the voters of Washington had impermissibly interfered with the political process and unlawfully burdened the efforts of an independently identifiable group to secure public benefits. *Washington*, 458 U.S. at 467-70. The Court stated that the Equal Protection Clause reaches political structures that "distort[] governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Id.* at 467. The Court distinguished the *Washington* initiative from "laws structuring political institutions or allocating political power according to *'neutral principles'* . . . [which] are not subject to equal protection attack." *Id.* at 470. Because laws based upon neutral principles "make it more difficult for *every* group in the community to enact comparable laws, they 'provide a just framework within which the diverse political groups in our society may fairly compete.'" *Id.* (citation omitted). The Court held that the initiative invalidated in *Washington* was not based upon a "neutral principle" which burdened all seeking comparable laws equally, but instead used "the racial nature of an issue to define the governmental decisionmaking structure." *Id.*

The principles articulated in *Hunter* and *Washington* are clearly not limited to race and, indeed, have already been applied to laws restructuring the political process in order to burden the homosexual community's ability to obtain beneficial legislation. The Colorado Supreme Court in *Evans* concluded that the homosexual community's access to the political process was burdened by Colorado's recent amendment barring discrimination claims brought by homosexuals because, unlike any other identifiable group, homosexuals alone would now have to amend the state constitution in order to be protected from discrimination:

> Rather than attempting to withdraw antidiscrimination issues as a whole from state and local control, Amendment 2 singles out one

> form of discrimination and removes its redress from consideration by the normal political processes.
>
> Amendment 2 expressly fences out an independently identifiable group. Like the laws that were invalidated in *Hunter*; which singled out the class of persons "who would benefit from laws barring racial, religious or ancestral discriminations," Amendment 2 singles out that class of persons (namely gay men, lesbians, and bisexuals) who would benefit from laws barring discrimination on the basis of sexual orientation. No other identifiable group faces such a burden—no other group's ability to participate in the political process is restricted and encumbered in a like manner. . . . Strict scrutiny is thus required because the normal political processes no longer operate to protect these persons. Rather, they, and they alone, must amend the state constitution in order to seek legislation which is beneficial to them.

854 P.2d at 1285. The Colorado Supreme Court remanded the case for trial, but also upheld the trial court's preliminary injunction that enjoined the amendment from going into effect, making it clear that the amendment would ultimately be struck down unless the state succeeded in proving a compelling interest justifying the burden placed upon the fundamental right of equal access to the political process.

Likewise, in *Citizens for Responsible Behavior*, the California court concluded that an initiative requiring voter approval *only* for ordinances prohibiting discrimination against homosexuals or AIDS victims, while all other comparable anti-discrimination laws could be enacted directly by the city council, violated the Equal Protection Clause:

> It is obvious that this provision raises obstacles in the path of persons seeking to have such ordinances enacted. The city council itself may enact ordinances barring discrimination against persons suffering from cancer or tuberculosis, or against families with children. However, under the proposed ordinance, persons seeking protective legislation against discrimination based on sexual orientation or AIDS must attempt to persuade a majority of the voters that such an ordinance is desirable. Precisely this arrangement was condemned in *Hunter v. Erickson* . . . .
>
> . . . .

> We are simply unable to conceive of any rational reason why the city council should be permitted to enact an ordinance barring discrimination against persons with any other disease, no matter how serious or communicable, but not one dealing with persons suffering from AIDS. Nor does any significant justification exist for allowing the City to continue to deal with housing difficulties faced by large families, but not with those confronting homosexuals.

2 Cal. Rptr. 2d at 655-56 (citations omitted).[5]

The ICA initiative also uses homosexuality to redefine the governmental decision-making structure. While the initiative does not require homosexuals to amend the state constitution or seek direct voter approval before obtaining beneficial laws, the initiative does foreclose to the homosexual community certain normal political avenues—namely, access to agencies, departments and political subdivisions which otherwise might be used to address their concerns. Thus, unlike all other identifiable political groups, homosexuals are barred from having their problems remedied via these regular political processes. Other identifiable groups can seek comparable anti-discrimination laws, rules, policies and agreements from an "agency, department or political subdivision of the State of Idaho." The homosexual community cannot. Regardless of the narrowness of the issue they need addressed or the local level of the interests involved, statewide legislative decision-making is all that is available to them.

If an initiative were proposed stating that farmers could not seek relief for their problems through the normal political processes, it would clearly be unconstitutional. Yet, that is what is happening here. An independently identifiable group is being subjected to political obstacles not because of the substantive nature of their problems, but, rather, because of who they, as a group, are. Using homosexuality as the basis to redefine the governmental decision-making structure and to foreclose normal routes of relief available to all other Idahoans seeking comparable protections violates the homosexual citizens' fundamental right to equal access to the political process. Under the strict scrutiny test and even under the rational basis test, it is difficult to conceive of a legitimate justification for this distinction. The Idaho judiciary would conclude that the distinction violates the Equal Protection Clause.

D. *Summary*

Section 67-8002 of the initiative, at a minimum, precludes the homosexual community from obtaining anti-discrimination laws, rules, policies or agreements from agencies, departments and political subdivisions of the state. This violates the Equal Protection Clause both by using the state to encourage discrimination against homosexuals and by denying homosexuals equal access to the political process. The section's statement that "equal protection of the law" continues to be protected under the federal and state constitutions does not ameliorate the constitutional problems raised by section 67-8002. A law which specifically deprives individuals of constitutional rights cannot be remedied by an additional boilerplate clause stating the constitution has not been suspended. This section, if it is passed and challenged, will not withstand judicial scrutiny.

II.

SECTION 67-8003

The next section of the initiative, section 67-8003, states:

> EXTENSION OF LEGAL INSTITUTION OF MARRIAGE TO DOMESTIC PARTNERSHIPS BASED ON HOMOSEXUAL BEHAVIOR PROHIBITED. Same-sex marriages and domestic partnerships are hereby declared to be against public policy and shall not be legally recognized in any manner by any agency, department or political subdivision of the State of Idaho.

This provision provides that same-sex marriages and domestic partnerships may not be legally recognized in Idaho. While the term "domestic partnership" is not defined in the initiative, presumably, the drafters intended to refer to arrangements whereby two homosexuals have agreed to share their home, financial resources and life together.

The legal effect of this provision is nil. The State of Idaho does not legally recognize either homosexual marriages or homosexual domestic partnerships. By statute, marriage is limited in Idaho to the union between a man and a woman. See Idaho Code § 32-202. Moreover, "domestic partnerships" are nowhere officially recognized in Idaho law. Thus, the state currently has a

policy on the institution of marriage, and section 67-8003 is merely a restatement of state law and policy.

III.
SECTION 67-8004

Section 67-8004 of the initiative addresses speech relating to homosexuality in public elementary and secondary schools. The section provides:

> PUBLIC SCHOOLS. No employee, representative, or agent of any public elementary or secondary school shall, in connection with school activities, promote, sanction, or endorse homosexuality as a healthy, approved or acceptable behavior. Subject to the provisions of federal law, any discussion of homosexuality within such schools shall be age-appropriate as defined and authorized by the local school board of trustees. Counseling of public school students regarding such students' sexual identity shall conform in the foregoing.

This provision restricts speech that endorses the viewpoint that homosexuality is "healthy, approved or acceptable behavior." As with section 67-8002, the provision's language is inconsistent, referencing both homosexual "behavior," *i.e.*, conduct, as well as the status of "homosexuality."

The section restricts curriculum-related speech regarding homosexuality. In addition, the section's restrictions go beyond the classroom, preventing any "employee, representative or agent" from expressing those viewpoints in "connection with school activities." Finally, the section limits the discussion of homosexuality between counselors and students. Each of these restrictions will be discussed in turn.

A. *Curriculum-Related Speech*

When this office reviewed the proposed initiative on March 18, 1993, the public school provision under review encompassed all public schools, from elementary through the doctorate level. We concluded that the provision violated basic principles of academic freedom. Much of our focus was upon censorship of unpopular or controversial ideas at the university level. The "public schools" section of the ICA initiative has been substantially altered by its drafters and now encompasses only elementary and secondary schools and no longer addresses universities.[6] The question now is whether the restrictions

placed upon teachers' and other school employees' speech in elementary and secondary schools, particularly as those restrictions relate to curriculum, violate any First Amendment rights of students or their teachers.

At the outset, it should be noted that schoolchildren and their instructors, even through the high school level, do not enjoy the same degree of First Amendment protections as do university students and faculty. The Supreme Court's recent opinions have upheld restrictions on speech at the high school level. These recent opinions indicate that, although teachers and students in secondary schools retain some First Amendment protections, teachers' and students' speech which is curriculum-related and appears to carry the school's endorsement—such as statements made by a teacher in a classroom, articles in a student newspaper prepared by a journalism class, and statements made by students during school assemblies or school theater productions—may be restricted if the restrictions are both reasonable and further "legitimate pedagogical concerns." *Hazelwood School Dist. v. Kuhlmeier*; 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988).

Initially, the Supreme Court appeared poised to apply extensive First Amendment protections at the secondary school level similar to those associated with academic freedom at the university level. *See Keyishian v. Board of Regents of U. of St. of N.Y.*, 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967). Two years after *Keyishian,* the Court upheld the right of schoolchildren to wear black armbands to class in protest of the Vietnam war, stating in now-famous language that it could "hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). *Tinker* swept broadly in its protection of First Amendment rights while its description of exceptional situations justifying interference was narrow. The court stated that, in order to justify prohibiting expression, the speech must "'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" *Id.* at 509 (citation omitted).

Thirteen years later, in *Board of Education v. Pico,* 457 U.S. 853, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982), the Supreme Court revisited free speech in public secondary schools and held that a school board could not remove books from a school library merely because of content objectionable to the board. In *Pico,* the Court began differentiating between school-sponsored as opposed to non-school-sponsored expression. Justice Brennan's plurality opinion focused

on the library as the embodiment of the marketplace of ideas and, impliedly, less a part of the school curriculum than an opportunity for students' self-education. Chief Justice Burger's dissent viewed the library as part of the school's curricular environment and the selection of library materials as part and parcel of the school officials' authority to establish school curriculum. 457 U.S. at 889. Chief Justice Burger urged that school officials should be given wide discretion in exercising this authority.

In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986), the Court addressed the power of schools to impose standards not merely on formal curriculum but upon students' speech in school-sponsored forums. The Court in Fraser balanced free speech concerns against a high school's role in teaching "appropriate behavior" and "shared values." Holding that a school district had acted within its permissible authority in imposing sanctions upon a student in response to a speech he delivered at a voluntary school assembly in which he used elaborate and explicit sexual metaphors, the Court stated:

> These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.
>
> . . .

. . . The determination of what manner of speech in the classroom or in the school assembly is inappropriate properly rests with the school board. The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class.

478 U.S. at 681, 683 (citations omitted). Thus, in *Fraser*, the Supreme Court clarified that schoolchildren in school-sponsored forums do not have the full panoply of First Amendment free speech rights available to adults in other settings. Importantly, however, in reaching its holding the Court also emphasized that the penalties imposed and upheld in *Fraser* "were unrelated to any political viewpoint." 478 U.S. at 685.

The Court's subsequent opinion in *Kuhlmeier* dealt with a school's prepublication control of the content of a school newspaper. In *Kuhlmeier*, the principal had banned from a school newspaper an article concerning divorce and an article addressing teen pregnancy. The Court first determined that the newspaper was *not* a public forum but instead part of the school's journalism curriculum. The Court then upheld the restriction, stating:

> [E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in *school-sponsored* expressive activities so long as their actions are reasonably related to *legitimate pedagogical concerns.*

484 U.S. at 273 (emphasis added). The Court described "legitimate pedagogical concerns" expansively:

> In addition, a school must be able to take into account the emotional maturity of the intended audience. . . . A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with "the shared values of a civilized social order . . ." or to associate the school with any position other than neutrality on matters of political controversy . . . .

484 U.S. at 272. Likewise, the Court used a broad definition of "curriculum" which it said encompassed "school-sponsored publications, theatrical productions, and other expressive activities that students, parents and members of the public might reasonably perceive to bear the imprimatur of the school." *Id.* at 271.

Under the Supreme Court's recent jurisprudence, it is clear that elementary and secondary school speech that is curriculum-related may be reasonably restricted to further legitimate pedagogical concerns. A school may take into account the age of the audience and the sensitivity of issues being addressed.

This is particularly so when sexual issues are involved, as *Kuhlmeier* held. *See also Fraser,* 478 U.S. 675. Thus, there is clearly no constitutional problem with section 67-8004's requirement that any discussion of homosexuality within public schools be "age-appropriate."

On the other hand, it does not necessarily further a "legitimate pedagogical concern" if a school opens up a topic for political discussion and then bans the opposing viewpoint. A school could not, for example, establish a rule that during class discussions on current events, students who criticized one political party would be suspended while students who criticized another political party would receive higher marks. *See, e.g., Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989) (once school board determines students should learn about career opportunities at "career day," it cannot exclude peace organization solely because organization disagrees with board's views regarding the military). At some point, the state, the school board and educators' discretion to establish and control school curriculum can be abused. This abuse occurs if restrictions, rather than furthering "legitimate pedagogical concerns," are simply pretexts for suppressing political viewpoints with which the state does not agree.

When it comes to homosexuality, the balance is more difficult. Arguably, the state could exclude the issue from teachers' discussions altogether in curriculum-related activities. However, the ICA initiative does not do this. Age-appropriate discussion of the topic is allowed, but one viewpoint on the issue is prohibited. Yet, it is also true that homosexual sodomy, like heterosexual sodomy, is a crime in Idaho, *see* Idaho Code § 18-6605, and *Kuhlmeier* certainly holds that the advocacy of illegal or irresponsible behavior can be restricted in the classroom. The language of section 67-8004 of the initiative, however, goes beyond mere "endorsement" of the specific conduct prohibited by Idaho Code § 18-6605. It prohibits the "promot[ion], sanction[ing] or endorse[ment] [of] homosexuality as a healthy, approved or acceptable behavior." "Homosexuality" as used throughout the initiative is a broad term, encompassing both conduct and status; behavior defined and prohibited by Idaho Code § 18-6605; as well as other behavior, feelings, preferences and an identification with a particular group.

The ICA initiative abuses the discretion given the state and educators over school curriculum. Curriculum-related speech endorsing illegal or irresponsible sexual conduct can be restricted in elementary and secondary schools and, thus, the state could preclude teachers from advocating, in the classroom, ille-

gal homosexual sodomy. But, the wording of the initiative goes beyond this. It would affect the discussion of topics ranging from homosexuals in the military to AIDS. A court would be troubled by the breadth of the ICA initiative. The initiative, for example, would allow a teacher to raise, in a high school civics class, gays in the military as a topic for discussion, with the state officially dictating the outcome of the discussion and prohibiting one viewpoint on this topic from being addressed. The ICA initiative permits the state to cross the line between refusing to endorse illegal conduct and requiring the classroom to choose sides in an ongoing political debate and banning the viewpoint with which the state disagrees. Therefore, it is the opinion of this office that the ICA initiative has crossed that line by either prohibiting or chilling expression which is protected by the First Amendment.

B. *Non-Curriculum-Related Speech*

While the government has the discretion to significantly limit curriculum-related speech to further legitimate pedagogical concerns, this authority does not extend to non-curriculum-related or non-school-sponsored speech. Public school employees do not lose their First Amendment rights merely because they work for the state. *See Pickering v. Board of Education,* 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) (holding teacher could not be fired for letter to editor of local newspaper criticizing school board); *City of Madison v. Wis. Emp. Rel. Com'n,* 429 U.S. 167, 97 S. Ct. 421, 50 L. Ed. 2d 376 (1976) (non-union teacher cannot be prohibited from speaking on negotiation issue at open school board meeting); *Levin v. Harleston,* 966 F.2d 85 (2d Cir. 1992) (teacher cannot be disciplined for letters he wrote to *New York Times*); *National Gay Task Force v. Board of Education of the City of Oklahoma,* 729 F.2d 1270 (10th Cir. 1984), *aff'd,* 470 U.S. 903, 105 S. Ct. 1858, 84 L. Ed. 2d 776 (1985) (teacher cannot be punished for publicly advocating the repeal of an anti-sodomy law).

The ICA initiative prohibits speech sanctioning homosexuality by any "employee, representative or agent" of a public elementary or secondary school "in connection with school activities." The scope of this provision is much too broad. Not only does it encompass curriculum-related speech, it also encompasses such statements as those made by teachers at faculty meetings and by board members at board meetings. Discussion and opinion on homosexual issues cannot be censored by the state at these adult, non-curriculum-related functions. To even attempt to do so is a violation of First Amendment principles and would be enjoined by a court.

C. *Counseling Services*

Finally, section 67-8004 mandates that counseling of public school students must conform with the standard on homosexuality enunciated in that section. In short, a counselor must not indicate to a troubled youth seeking counseling that homosexual behavior can ever be considered "healthy, approved or acceptable."

This provision prohibits a non-judgmental approach toward sexual orientation and requires an institutional stance against homosexuality. Under this restriction, a counselor's independent judgment relative to the best interests of a minor client is subordinated to the state's endorsed sexual identity preference, regardless of the psychological needs of the client or the harm potentially inflicted.

The U.S. Supreme Court recently addressed First Amendment implications of restrictions placed upon government counseling services and upheld a regulation prohibiting funds granted under the federal Title X family planning program from being expended on abortion counseling. *Rust v. Sullivan,* ___ U.S. ___ , 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991). The Court reasoned that the speech at issue was simply beyond the scope of the narrow federal program being funded, 111 S. Ct. at 1773, also noting that fund recipients remained "free to pursue abortion-related activities when they [were] not acting under the auspices of the Title X project." 111 S. Ct. at 1775. Importantly, the Court further stated that some types of speech could not be censored by the government even if directly subsidized by the government, and that this "could" include speech that is part of a "traditional" relationship such as that between a "doctor and patient." 111 S. Ct. at 1776. The Court in *Rust* went on to conclude that the doctor-patient relationship in that case was so limited under the narrow federally funded program at issue, a patient would not be justified in expecting "comprehensive medical advice." Moreover, as the Title X program did not provide "post-conception medical care," a "doctor's silence with regard to abortion" would not "mislead a client into thinking that the doctor [did] not consider abortion an appropriate option for her." *Id.*

The counseling services at issue appear to fall within the scope of traditional relationships that, according to *Rust,* cannot be controlled by the state, even if the state is the funding source for that relationship. Moreover, unlike the doctor-patient relationship at issue in *Rust,* when a student seeks counseling on issues of sexual identity, that student is justified in expecting compre-

hensive and accurate information. To withhold such information either by silence or by offering only state-approved advice would be misleading and possibly harmful. Of course, this is not to say that counselors necessarily will sanction homosexuality as "acceptable" behavior. However, counselors should be able to exercise independent judgment and give accurate advice as to the psychological, medical and legal implications of homosexuality. They should be able to counsel students in a manner that serves the students' best interests and that is neither misleading nor harmful. In our opinion, to require otherwise in the name of an institutionalized position on homosexuality violates the First Amendment.

D. *Summary*

In short, section 67-8004 of the initiative restricts curriculum-related speech, some non-curriculum-related speech, and the discussions between school counselors and students. Generally, discretion is allowed as to restrictions of curriculum-related speech, but this initiative exceeds the bounds of that discretion to the extent it allows curriculum-related discussions concerning ongoing controversies while banning one particular point of view on those issues. A court would conclude that "legitimate pedagogical concerns" are not at the core of these curriculum-related restrictions, and that the restrictions are overly broad and violate the First Amendment. As to the potential non-curriculum-related censorship at school activities such as faculty and board meetings, the initiative clearly violates the First Amendment rights of school employees, representatives and agents. Finally, the counseling restrictions may also run afoul of the First Amendment. Taken as a whole, section 67-8004 is unconstitutional.

IV.
SECTION 67-8005

Section 67-8005 addresses public funding as well as access to library materials. This opinion will discuss each of these provisions separately.

A. *Public Funding*

The public funding portion of section 67-8005 states:

> EXPENDITURE OF PUBLIC FUNDS. No agency, department or political subdivision of the State of Idaho shall expend public funds in

> a manner that has the purpose or effect of promoting, making acceptable, or expressing approval of homosexuality. This section shall not prohibit government from providing positive guidance toward persons experiencing difficulty with sexual identity . . . .

This provision restricts both public funding and, potentially, counseling services. The funding restrictions are clearly unconstitutional; the counseling restrictions raise serious constitutional concerns.

1. *Funding*

The funding restriction prohibits the expenditure of public funds "in a manner" that would have the "purpose or effect of promoting, making acceptable, or expressing approval of homosexuality." The substance of this funding restriction is sweeping and, again, it is aimed at homosexuality, not just homosexual behavior. For example, government funding of artistic endeavors which treat favorably homosexuality, such as the play *La Cage aux Folles*, would be prohibited. Likewise, a program addressing the pros as well as the cons of homosexual lifestyles could not be aired on public television without first being censored. Academic freedom at public universities would be curtailed to ensure public funds were not expended in a manner that could have the "effect" of "expressing approval" of homosexuality. This could impact the manner in which homosexual issues are discussed in sociology, psychology and law classes, the type of articles published in university publications, the research conducted at the university level and even the books purchased for university libraries.

Nor is the provision's array of consequences necessarily limited to the suppression of ideas. Public health and safety issues could also fall within its scope. By illustration, publicly funded AIDS education programs directed at high-risk groups might have to be tailored to avoid the "effect" of "expressing approval" of homosexuality—which could severely impact the candor and efficacy of such programs. Not only does this section constitute an aggressive effort to suppress controversial ideas, its terms could potentially be construed in a manner that would increase public health and safety risks for that segment of Idaho citizens that it targets.

This funding provision is repugnant to First Amendment free expression principles. The landmark case on restricting expenditure of public funds to regulate the content of expression is *Perry v. Sindermann*, 408 U.S. 593, 597,

92 S. Ct. 2694, 33 L. Ed. 2d 570 (192). In that opinion, the U.S. Supreme Court held that a state college could not refuse to rehire a professor solely because of his public criticism of the college administration. In so holding, the Court stated:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly."

Under *Perry*, the government cannot indirectly burden protected speech through its funding mechanisms.

In *Rust*, the Court revisited this issue in the context of a federal funding restriction on abortion counseling. The Court drew a distinction between the denial of a benefit to a recipient on account of his speech (which is unconstitutional) and an insistence that public funds be spent for the program purposes for which they are specifically authorized (which the Constitution allows). In so holding, the Court emphasized that it was not addressing a "general law singling out a disfavored group on the basis of speech content," but was instead only reviewing speech which was simply beyond the scope of the narrow federal program being funded. 111 S. Ct. at 1773. Moreover, even within the realm of government-subsidized programs and speech, the Court carved out areas as to which restrictions on the content of government-funded speech are *not* allowable, including open forums, universities, and traditional relationships such as that between a doctor and patient:

> This is not to suggest that funding by the government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression. For example, this Court has recognized the existence of a government "subsidy" in the form of government-owned property, does not justify the

> restriction of speech in areas that have "been traditionally open to the public for expressive activity" . . . or have been "expressly dedicated to speech activity" . . . . Similarly, we have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment . . . . It could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by Government.

111 S. Ct. at 1776 (citations omitted).

In short, under *Rust*, the government's interest is in ensuring that the money it raises and appropriates for a particular program is spent to further the purpose of that program. The government does not have a valid interest in simply suppressing speech with which it disagrees, and *Rust* does not stand for that proposition. Further, there are certain traditional areas such as government-owned open forums, universities and doctor-patient relationships where the content of speech cannot be controlled through funding expenditure restrictions, even if the government is the funding source for those programs or relationships. In those areas, the historic value placed upon free speech overrides the government's interest in strictly controlling all of its funds.

Since *Rust*, lower courts have had the opportunity to clarify the list of areas that are "traditionally" open to free expression and, therefore, immune from government efforts to attach content-based conditions to the expenditure of subsidies. For example, in *Board of Tr. of Leland Stanford Univ. v. Sullivan*, 773 F. Supp. 472 (D.D.C. 1991), the court set aside the confidentiality clause in a research contract, stating it unconstitutionally impinged upon freedom of expression in the area of scientific research:

> The Supreme Court decided in *Rust v. Sullivan* that when the government grants money to an institution or a program, it may under certain circumstances condition that grant upon curtailment of the program participants' rights under the First Amendment. Defendants' argument in this case is that that decision is applicable to government grants and contracts generally, without substantial limitation. The *Rust* decision opened the door to government review and suppression

> of speech and publication in areas which had theretofore been widely thought immune from such intrusion; the government's position in this case, if endorsed by the courts, would take that door off its hinges.
>
> That position must be viewed in the context of the fact that few large-scale endeavors are today not supported, directly or indirectly, by government funds—from the health care of senior citizens, to farm subsidies, to the construction of weaponry, to name but a few of the most obvious. Defendants' proposal would, at least potentially, subordinate the free speech rights of the participants in the program receiving such federal monies to the government's wishes. *To put it another way, if the Supreme Court decision were to be given the scope and breadth defendants advocate in this case, the result would be an invitation to government censorship wherever public funds flow, and acceptance by the courts of defendants' position would thus present an enormous threat to the First Amendment rights of American citizens and to a free society.*

773 F. Supp. at 478 (emphasis added).

Likewise, in *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457 (C.D. Cal. 1992), the court held that as artistic expression, like academic speech, is "at the core of a democratic society's cultural and political vitality," the government is without free reign to impose whatever content restrictions it chooses on funding for the arts:

> In both settings, limited public funds are allocated to support expressive activities, and some content-based decisions are unavoidable. Nonetheless, this fact does not permit the government to impose whatever restrictions it pleases on speech in a public university, nor should it provide such license in the arts funding context.

795 F. Supp. at 1475.

The public funding restrictions contained in the ICA initiative fall far beyond what *Rust* and its progeny have held is permissible. It would be apparent to a reviewing court that, unlike the narrow restriction upheld in *Rust*, these initiative provisions are not a good faith effort to ensure that specifically earmarked funds raised by the state are spent for the program purposes for

which they are authorized. Rather, it is an effort to censor a controversial idea in numerous public programs at all levels, regardless of whether the censored speech falls within the scope of the funded programs' purposes. Worse, the restrictions cut severely into areas which the courts have expressly granted heightened free speech protection from government conditions on funding, such as universities, scientific research and the arts. In the words of the U.S. Supreme Court:

> We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. *But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.*

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 641-42, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (emphasis added). The public funding provision of section 67-8005 violates this First Amendment principle and would be struck down by a reviewing court.

2. *Counseling Restrictions*

Like the public school section, the public funding section also contains a counseling provision. Here, "positive guidance toward persons experiencing difficulty with sexual identity" is allowed. What constitutes "positive guidance" is not defined. The context of this initiative and its general tenor regarding homosexuality suggest that "positive guidance" on "sexual identity" difficulties means disapproving of homosexuality regardless of the client's needs and interests. As with the school counseling provision addressed above, if this provision divests counselors and doctors of their independent judgment and intrudes upon the therapist-patient relationship to suppress an unpopular viewpoint, regardless of the health needs of the patient or the medical accuracy of the state-approved view, freedom of speech in a traditionally protected relationship is violated.

B. *Library Materials*

Section 67-8005 of the initiative addresses library materials as well as public funding, stating:

> This section shall not limit the availability in public libraries of books and materials written for adults which address homosexuality, provided access to such materials is limited to adults and meets local standards as established through the normal library review process.

Under the terms of this provision, materials "written for adults" which "address homosexuality" may still be retained in public libraries and adults may have access to them. However, such access is denied to minors. This provision violates the First Amendment of the United States Constitution.

As noted above, minors do have limited First Amendment rights, although these rights are not as broad as the rights of adults. As already discussed, substantial restrictions on free expression are allowed in the school classroom to further legitimate pedagogical concerns. Moreover, materials that are "pervasively vulgar," obscene or otherwise age-inappropriate for impressionable young minds may be denied to minors in or out of the classroom. *See Ginsberg v. New York*, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968). However, despite these limits, minors nevertheless retain some First Amendment rights to receive information and gain knowledge. For example, in *Pico*, 457 U.S. at 871, the U.S. Supreme Court held that local school boards may not remove books from secondary school libraries simply because they dislike the ideas contained in those books:

> Our Constitution does not permit the official suppression of *ideas*. Thus, whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution.

In reaching its holding, the Court emphasized that minors have First Amendment rights to receive information and ideas and to "'remain free to inquire, to study and to evaluate, to gain new maturity and understanding.'"

457 U.S. at 868 (citation omitted). Under this analysis, it is evident that while minors may not have the full panoply of First Amendment rights as do adults, certainly, when it comes to library reading materials, minors cannot be denied access to those materials for no other reason than that the state disagrees with the ideas expressed therein.

The provision at issue here severely limits the library books that minors may read. The term "materials written for adults which address homosexuality" is both vague and overbroad. Arguably, it encompasses virtually any reading material not written for children that contains homosexual themes, references, allusions, etc. The list of books and other written materials affected by this provision includes literary works by Socrates, Plato, Thomas Mann, E.M. Forster, James Baldwin, Tennessee Williams and Walt Whitman, to name a few. Likewise, historical biographies on important figures such as Michelangelo, Alexander the Great, Oscar Wilde and King James I would be off-limits. Added to this are the numerous legal, political, scientific and social science writings which may address homosexuality. Moreover, access to widely read magazines generally available at libraries, such as *Time* or *Newsweek,* which periodically contain articles discussing homosexual issues would have to be strictly curtailed.

The provision's broad restrictions do not appear to be tied to any valid considerations such as the "age-appropriateness" of the banned material. Notably, under the provision, minors are not denied access to adult materials which address *heterosexuality.* Indeed, under the provision's terms, even explicit age-inappropriate material addressing heterosexuality would not be restricted. The provision is a transparent effort to prevent exposure to ideas with which the initiative's proponents disagree. This sweeping content-based restriction on minors' First Amendment rights to receive information and ideas violates the Constitution and is invalid.

Moreover, the library restriction is also unworkable. It is simply unrealistic to assume that librarians are aware of all adult materials which address homosexuality, and a librarian can hardly be expected to go through the library book-by-book, magazine-by-magazine, reading each one and separating any that address the topic. Indeed, a likely consequence of this unreasonable legal duty is that librarians, in an effort to comply with the law, will deny to minors materials to which they should have access even under this provision's restrictive terms. This foreseeable "chilling" effect further exacerbates the constitutional problems at play here.

In sum, while there are certainly materials in public libraries minors ought not to read, section 67-8005's sweeping provision does not address that problem in a realistic or constitutional manner, but instead creates an unworkable scheme which violates the First Amendment rights of minors.

V.
SECTION 67-8006

Section 67-8006 states:

> EMPLOYMENT FACTORS. With regard to public employees, no agency, department or political subdivision of the State of Idaho shall forbid generally the consideration of private sexual behaviors as non-job factors, provided that compliance with Title 67, Chapter 80, Idaho Code is maintained, and that such factors do not disrupt the work place.

This section, unlike the other sections of the proposed initiative, does not address homosexuality alone, but, rather, addresses all private sexual behavior. This provision certainly clarifies that, in the public employment context at least, discrimination against either homosexuals or heterosexuals based upon their private sexual behavior is not required by the initiative, although it is permitted. The provision does not purport to address such areas as real estate transactions, public accommodations, education and private employment. Thus, the official state policy of section 67-8002 permitting discrimination against homosexuals in these areas remains firmly intact, as does the equal protection abridgment. Section 67-8006 does not cure any of the other constitutional problems discussed in this opinion.

VI.
THE IDAHO CONSTITUTION

The constitutional issues raised throughout this opinion have been analyzed under the United States Constitution. Idaho has its own state constitutional provisions which also protect freedom of speech and equal protection of the law. *See* art. 1, secs. 2, 9 and 10, Idaho Constitution. Importantly, the Idaho Supreme Court has held that the protections provided by the Idaho Constitution can be given broader scope than those provided under the United States Constitution. *See, e.g., State v. Guzman,* 122 Idaho 981, 842 P.2d 660 (1992). Thus, the Idaho Supreme Court is not limited by the federal judi-

ciary's interpretation of the United States Constitution. Rather, it can and has relied upon its own authority and responsibility to independently construe and apply state constitutional protections.

The placement of our own state "Bill of Rights" first in the Idaho Constitution reveals how deeply Idahoans cherish both their civil liberties and principles of fairness to others. This initiative, which burdens freedom of expression and equal treatment of all Idaho citizens, clearly violates the principles of the Idaho Constitution. The Idaho Supreme Court is unlikely to stand by and allow a segment of Idaho's citizens to be targeted for state-condoned discrimination and denial of equal access to the political process. Likewise, the court will no doubt find repugnant to free speech guarantees the burdens placed upon the expression of controversial ideas.

VII.
SECTION 67-8007

Section 67-8007 of the initiative is a severability clause stating that if any section of the "enactment" is "found unconstitutional," the "remaining parts will survive in full force and effect." Generally, courts favor severing unconstitutional provisions in a statute from the remaining portion, if such was the intent of the drafters. However, when the purpose of an act fails, the entire act must also fail. *See, e.g., State Water Conservation Board v. Enking,* 56 Idaho 722, 58 P.2d 779 (1936). A court is not obligated to rewrite an entire statute when its purpose has been defeated.

This initiative could not survive constitutional scrutiny with respect to many, perhaps all, of its substantive portions. The purpose and concept of this initiative is fundamentally flawed, and it is unlikely that a court would invoke the severability clause in an attempt to salvage a portion of it. Indeed, even if a court were so inclined, it is doubtful the initiative could be severed in a constitutionally suitable manner.

CONCLUSION

The past holds a lesson for the present. In 1879, when U.S. Supreme Court Justice Stephen Field was handling circuit duties in California, he was presented with a San Francisco ordinance requiring that every male entering the county jail have his hair cut to a uniform length of one inch. Despite the innocuous terms in which the ordinance was written, Justice Field understood

it to be legislation designed to punish the then-unpopular Chinese by subjecting them to the loss of their traditional "queue." In striking down the seemingly innocent ordinance, Justice Field had this to say:

> We cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men . . . .

Ho Ah Kow v. Nunan, 12 F. Cas. 546, p. 252 (D. Cal. 1879) (No. 6).

In the history of a nation composed of ever-initially unpopular groups, citizens of a homosexual orientation are but the most recent of frequently persecuted persons who look to the law and those who enforce it for fairness and decency. The ICA initiative seeks to corrupt that law, using it as an instrument of division and discrimination rather than for equal protection and equal rights. We live in a country in which our highest court has unequivocally held that some objectives such as "'a bare . . . desire to harm a politically unpopular group' . . . are *not* legitimate state interests." *City of Cleburne*, 473 U.S. at 447 (citation omitted). Further, that Court has stated:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials . . . . One's right to life, liberty, and property, to *free speech*, a free press, freedom of worship and other *fundamental rights* may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (emphasis added).

Freedom of speech, equal protection, fair access to the political process—these are all basic principles upon which our society rests. They are the principles which allow our society to flourish. This initiative, while purporting to deny special or unusual protection to one group, in fact seeks to deprive this group of the full enjoyment of these essential principles. The Idaho Supreme Court will not permit this to happen. It is our opinion that even if this initiative marking a politically unpopular group of Idahoans for abridgment of their core constitutional rights succeeds at the ballot, it will never be allowed to go into effect.

AUTHORITIES CONSIDERED

1. **United States Constitution:**

First Amendment.
Fourteenth Amendment.

2. **Idaho Constitution:**

Art. 1, sec. 2.
Art. 1, sec. 9.
Art. 1, sec. 10.

3. **Idaho Code:**

§ 18-6605.
§ 18-7301.
§ 18-7902.
§ 18-7903.
§ 32-202.
§ 67-2402.
§ 67-5909.

4. **U.S. Supreme Court Cases:**

Board of Education v. Pico, 457 U.S. 853, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982).

Bethel School District No. 403 v. Fraser, 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986).

City of Cleburne, Texas v. Cleburne Living Center, Inc., 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

City of Madison v. Wis. Emp. Rel. Com'n, 429 U.S. 167, 97 S. Ct. 421, 50 L. Ed. 2d 376 (1976).

Ginsberg v. New York, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968).

Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988).

Hunter v. Erickson, 393 U.S. 385, 89 S. Ct. 557, 21 L. Ed. 2d 616 (1969).

Keyishian v. Board of Regents of U. of St. of N.Y., 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967).

Palmore v. Sidoti, 466 U.S. 429, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984).

Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972).

Pickering v. Board of Education, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

Reitman v. Mulkey, 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967).

Rust v. Sullivan, ___ U.S. ___ , 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991).

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).

Washington v. Seattle School District No. 1, 458 U.S. 457, 102 S. Ct. 3187, 73 L. Ed. 2d 896 (1982).

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943).

5. **Idaho Cases:**

Luker v. Curtis, 64 Idaho 703, 136 P.2d 978 (1943).

State v. Goodrick, 102 Idaho 811, 641 P.2d 998 (1982).

State v. Guzman, 122 Idaho 981, 842 P.2d 660 (1992).

State Water Conservation Board v. Enking, 56 Idaho 722, 58 P.2d 779 (1936).

6. **Other Cases:**

Board of Tr. of Leland Stanford Univ. v. Sullivan, 773 F. Supp. 472 (D.D.C. 1991).

Citizens for Responsible Behavior v. Superior Court, 2 Cal. Rptr. 2d 648 (Cal. App. 4 Dist. 1991).

Evans v. Romer, 854 P.2d 1270 (Colo. 1993).

Finley v. National Endowment for the Arts, 795 F. Supp. 1457 (C.D. Cal. 1992).

Ho Ah Kow v. Nunan, 12 F. Cas. 546, p. 252 (D. Cal. 1879) (No. 6).

Levin v. Harleston, 966 F.2d 85 (2d Cir. 1992).

National Gay Task Force v. Board of Education of the City of Oklahoma, 729 F.2d 1270 (10th Cir. 1984), *aff'd,* 470 U.S. 903, 105 S. Ct. 1858, 84 L. Ed. 2d 776 (1985).

Searcey v. Harris, 888 F.2d 1314 (11th Cir. 1989).

Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989).

DATED this 3rd day of November, 1993.

LARRY ECHOHAWK
Attorney General

Analysis by:

Margaret Hughes
Deputy Attorney General

[1]"Political subdivision" is commonly defined in the Idaho Code to include numerous local governmental entities including counties, cities and other municipal corporations. *See, e.g.,* Idaho Code §§ 6-902, 21-101, 31-4510 and 63-3622 J.J. We assume a similar meaning was intended in the proposed initiative.

[2]It is important to note that, while the term "homosexual behavior" includes conduct proscribed

by Idaho Code § 18-6605, that criminal statute is not limited to homosexual conduct alone. Idaho Code § 18-6605 proscribes heterosexual as well as homosexual sodomy. It also criminalizes oral sex, both heterosexual and homosexual. *See State v. Goodrick*, 102 Idaho 811, 641 P.2d 998 (1982).

[3]This is the most narrow reading of section 67-8002. Under a broader construction, by forbidding "special classifications" based upon homosexuality or sexual orientation, other types of beneficial legal provisions are arguably also precluded, such as AIDS education programs created by county hospitals and targeted at the homosexual community, or express policies at county sheriffs' offices to aggressively enforce criminal laws to combat local violence against homosexuals. In short, under a broader reading of section 67-8002, agencies, departments or political subdivisions of the state are forbidden to adopt any beneficial legal provision to address unique problems faced by the homosexual community because such provisions would invariably require a "special classification" based upon homosexuality.

[4]As discussed below at p. 29, section 67-8006 of the initiative allows *public* employers to treat "private sexual behaviors" as a non-job-related factor. However, that section does not preclude discrimination against homosexuals in public employment, and it does not address discrimination in the areas of real estate, educational services, public accommodations and private employment, leaving the discriminatory effect of section 67-8002 intact as to these matters.

[5]In *Citizens for Responsible Behavior*, the court further noted that prohibiting local government from addressing local issues encountered by a specific group might also violate the First Amendment right to petition the government for redress of grievances as "the right becomes a hollow exercise if the local government has been deprived of the power to grant redress of the subject grievance." *Id.* at 655, n.9.

[6]While public universities have now been excluded from section 67-8004, the "public schools" section of the initiative, they continue to be included within the broad scope of the "public funding" provision. The application and validity of the public funding restrictions as they relate to universities will be addressed at p. 22 discussing section 67-8005 of the initiative.

ATTORNEY GENERAL OPINION NO. 93-12

Honorable Roger Madsen
Idaho State Senate
7842 Desert Ave.
Boise, ID 83709

Per Request for Attorney General's Opinion

QUESTION PRESENTED

May the statute pertaining to automatic review of death penalties be amended in such a way as to delete the current provisions mandating proportionality review without rendering Idaho's capital sentencing scheme unconstitutional?

CONCLUSION

Such an amendment to the current law would not jeopardize Idaho's capital sentencing scheme and would therefore be constitutional.

ANALYSIS

I. *Introduction*

On October 8, 1993, you requested an opinion from this office regarding Idaho Code § 19-2827(c)(3). Specifically, you wanted to know whether the deletion of the "proportionality review" provisions of the subsection of the statute pertaining to automatic review of death penalties would be constitutional.

The current statute reads:

> (c) With regard to the sentence the court shall determine: . . . (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

You have proposed a bill which would amend the statute to read:

> (c) With regard to the sentence the court shall determine: . . . (3) Whether the sentence of death is excessive.

In addition, you have suggested deletion of the first sentence of subsection (e), which reads:

> (e) The court shall include in its decision a reference to those similar cases which it took into consideration.

Therefore, the issue you have presented is whether "proportionality review" is required by either the Idaho or United States Constitutions in order to ensure that Idaho's death penalty is valid.

II. *Proportionality in General*

In beginning an analysis of this issue it is important to note that there are two mutually exclusive concepts of proportionality. The first and more traditional form in which proportionality is discussed deals with "an abstract evaluation of the appropriateness of a sentence for a particular crime." *Pulley v. Harris,* 465 U.S. 37, 42-43 (1984). In this sense, the discussion centers around whether a sentence is cruel and unusual, considering the gravity of the offense and the severity of the penalty. As part of the analysis, sentences imposed for other crimes and sentencing practices of other jurisdictions are looked to. Hence, the federal courts have not hesitated to strike down punishments which have been found to be inherently disproportionate and, therefore, unconstitutional, when imposed for a particular crime or category of crime. See, *e.g., Enmund v. Florida,* 458 U.S 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977).

The Idaho court has also spoken in terms of this type of proportionality when discussing the constitutionality of a sentence under art. 1, § 6, of the Idaho Constitution:

> [I]t is generally recognized that imprisonment for such a length of time as to be out of proportion to the gravity of the offense committed, and such as to shock the conscience of reasonable men, is cruel and unusual within the meaning of the constitution.

State v. Evans, 73 Idaho 50, 58, 245 P.2d 788, 792 (1952).

The death penalty is not in all cases a disproportionate penalty in this sense. *Gregg v. Georgia,* 428 U.S. 153 (1976).

The proportionality review required by Idaho Code § 19-2827 and by some other states is of a different sort. "This sort of proportionality review presumes that the death sentence is not disproportionate to the crime in the traditional sense. It purports to inquire instead whether the penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime." *Pulley v. Harris,* 465 U.S. at 43. This second sort of review, known as comparative proportionality, is the subject of the remainder of this opinion.

III. *Comparative Proportionality and the Federal Constitution*

The issue of whether comparative proportionality review is required by the Eighth Amendment to the United States Constitution (concerning cruel and unusual punishment) was squarely presented in *Pulley v. Harris,* 465 U.S. 37 (1984). In that case, a man convicted of murdering two boys in order to steal their car (Harris) challenged California's scheme for the automatic appellate review of death penalties. Harris claimed that the scheme was flawed because it did not require comparative proportionality review. Therefore, the argument went, the death penalty could be imposed wantonly or freakishly in violation of the United States Constitution.

The United States Supreme Court first noted that "[n]eedless to say, that some schemes providing proportionality review are constitutional does not mean that such review is indispensable." *Id.* at 44-45. The fact that the Court had approved of earlier death penalty review schemes containing comparative proportionality review was not to be understood as mandating such review.

The Court then noted that it had already upheld a death penalty sentencing scheme which did not contain comparative proportionality review in *Jurek* v. *Texas,* 428 U.S. 262 (1976). The Court found in Jurek that Texas' narrowing of capital murders to those containing at least one aggravating circumstance, coupled with a separate sentencing hearing which allowed for whatever mitigating circumstances the defendant could adduce, provided adequate guidance to the sentencer. In addition, automatic judicial review provided a means to promote the evenhanded and consistent imposition of the death penalty.

The Court in *Pulley* then compared the California scheme to that approved

in *Jurek* and found it to be constitutional because it, too, required the finding of at least one special aggravating circumstance beyond a reasonable doubt, and because that finding would be reviewed.

The Court concluded there was no basis in prior law to conclude that comparative proportionality review was required, and that schemes such as California's that adequately channel a sentencer's discretion are not violative of the Eighth Amendment despite the lack of such review. Since *Pulley,* the Supreme Court has reaffirmed the notion that comparative proportionality review is not constitutionally required. *See McCleskey v. Kemp,* 481 U.S. 279 (1987), and *Walton v. Arizona,* 497 U.S. 639 (1990).

In *Beam v. Paskett,* 744 F. Supp. 958, (D. Idaho 1990), a man convicted of first degree murder and sentenced to death in Idaho (Beam) filed a petition for habeas corpus in federal district court. Among Beam's claims was the allegation that his *federal* rights were violated because the guidelines set forth in Idaho Code § 19-2827(c)(3) failed to "minimize the risk of arbitrary or *capricious* decisions in cases having similar factual circumstances." Id. at 960. This claim was based upon his co-defendant's sentence of life imprisonment.

The court reviewed Idaho's capital sentencing scheme and found it to be constitutional because it adequately channels the sentencer's discretion. Noting that *Pulley* held that the existence of other safeguards rendered comparative proportionality review "superfluous," the court found that the mere fact that Beam's co-defendant did not receive the death penalty did not establish that Idaho's capital scheme operated in an unconstitutional manner. *Id.* at 960.

From these authorities, it is clear that comparative proportionality as mandated by Idaho Code § 19-2827 is not required by the United States Constitution. Idaho's capital scheme without comparative proportionality would still adequately channel a judge's discretion at sentencing because the court would still have to find at least one of several aggravating factors to exist beyond a reasonable doubt. Idaho Code § 19-2515(g). In addition, the court would have to find that all of the mitigating circumstances presented by the defendant taken together did not outweigh each of the aggravating factors considered separately. Idaho Code § 19-2515(c). *State v. Charboneau,* 116 Idaho 129, 774 P.2d 299 (1989). Further, the Idaho Supreme Court would still be mandated to determine whether: 1) the sentence was the result of passion, prejudice or any other arbitrary factor; 2) whether the evidence supports the

finding of an aggravating factor; and 3) whether the sentence is excessive. Idaho Code § 19-2827.

IV. *Comparative Proportionality and the Idaho Constitution*

The language of art. 1, § 6, of the Idaho Constitution pertaining to cruel and unusual punishment is identical to the Eighth Amendment. However, this does not mean that the two constitutional provisions will be identically interpreted. The Idaho courts have in the past departed from federal constitutional doctrine in order to enhance a defendant's rights under the Idaho Constitution, primarily in the area of search and seizure. *State v. Guzman,* 122 Idaho 981, 842 P.2d 660 (1992); *State v. Thompson,* 114 Idaho 746, 760 P.2d 1162 (1988).

On the other hand, Idaho's guarantee against cruel and unusual punishment, in particular, has never been interpreted by any Idaho appellate court to differ significantly from the federal guarantee. As a result, Idaho has only engaged in comparative proportionality analysis when it appeared that the federal courts required it under the Eighth Amendment. For example, in *State v. Broadhead*, 120 Idaho 141, 814 P.2d 401 (1991), a second degree murder case, the court engaged in a comparative proportionality discussion because of the apparent requirement of *Solem v. Helm,* 463 U.S. 277 (1983), to so analyze the case.

Since *Broadhead,* the United States Supreme Court has refined the law regarding the Eighth Amendment to make it clear that comparative proportionality is not required when determining if a case is cruel and unusual. *Harmelin v. Michigan,* ___ U.S. ___, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). As a result, the Idaho Supreme Court specifically overruled *Broadhead* "to the extent it relies on *Solem.*" *State v. Brown,* 121 Idaho 385, 394, 825 P.2d 482 (1992). The court went on to say:

> We limit our proportionality analysis to death penalty cases and, under the Idaho Constitution as contemplated in *State v. Evans,* to those cases which are "out of proportion to the gravity of the offense committed" in the cruel and unusual punishment setting similar to the "grossly disproportionate" analysis of the eighth amendment. . . . The lack of objective standards for evaluating differing terms of imprisonment . . . gives proportionality review outside these two limited areas the potential of essentially allowing, if not requiring, this Court to

> second guess the trial court's discretionary determination of the criminal sentence that best fits the criminal defendant and the crime.

121 Idaho at 394. In other words, the court found no independent state constitutional basis for engaging in comparative proportionality in reviewing sentences.

As noted previously, the reason the court engages in proportionality analysis in the death penalty setting is because of the statutory mandate. There appears to be no independent constitutional ground for a system that would "allow, if not require" the court to second guess a district court's death penalty sentence other than the statute. If the statute were to be amended to delete comparative proportionality, it would be unlikely in the extreme that a principled basis for proportionality could be found under the state constitution.

V. *Conclusion*

In summary, it is the opinion of this office that the proposed amendment to Idaho Code § 19-2827 deleting reference to comparative proportionality would not render Idaho's death penalty scheme unconstitutional, under either the federal or state constitutions.

AUTHORITIES CONSIDERED

1. **U.S. Constitution:**

Eighth Amendment.

2. **Idaho Constitution:**

Art. 1, § 6.

3. **Idaho Code:**

§ 19-2515.
§ 19-2827.

4. **Idaho Cases:**

State v. Broadhead, 120 Idaho 141, 814 P.2d 401 (1991).

State v. Brown, 121 Idaho 385, 825 P.2d 482 (1992).

State v. Charboneau, 116 Idaho 129, 774 P.2d 299 (1989).

State v. Evans, 73 Idaho 50, 245 P.2d 788 (1952).

State v. Guzman, 122 Idaho 981, 842 P.2d 660 (1992).

State v. Thompson, 114 Idaho 746, 760 P.2d 1162 (1988).

5. **Other Cases:**

Beam v. Paskett, 744 F. Supp. 958 (D. Idaho 1990).

Coker v. Georgia, 433 U.S. 584 (1977).

Enmund v. Florida, 458 U.S. 782 (1982).

Gregg v. Georgia, 428 U.S. 153 (1976).

Harmelin v. Michigan, ___ U.S. ___ , 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991).

Jurek v. Texas, 428 U.S. 262 (1976).

McCleskey v. Kemp, 481 U.S. 279 (1987).

Pulley v. Harris, 465 U.S. 37 (1984).

Solem v. Helm, 463 U.S. 277 (1983).

Walton v. Arizona, 497 U.S. 639 (1990).

DATED this 29th day of November, 1993.

LARRY ECHOHAWK
Attorney General

Analysis by:

Michael Kane
Deputy Attorney General
Chief, Criminal Law Division

ATTORNEY GENERAL OPINION NO. 93-13

Ms. Susan Renfro
Benewah County Assessor
County Courthouse
St. Maries, ID 83861

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED

1. Are the Idaho State Tax Commission's property tax rules IDAPA 35.01.03.585.04 and 585.05, which require applying a multiplier of five to the net profits of mines when valuing mining property under chapter 28, title 63, Idaho Code, valid?

2. If Rules 585.04 and 585.05 are not valid what is the proper method of assessing the net profits of mines?

CONCLUSION

1. Paragraphs .04 and .05 of Rule 585 are invalid because they conflict with the clear language of the statute they purport to implement. So, too, is the similar provision of IDAPA 35.01.03.580 requiring a similar multiplier to the price of patented mining claims.

2. The proper method of assessing net profits of mines is to apply Idaho Code § 63-2801 on its face. The "factor of five" required by rules 585 and 580 should be ignored.

ANALYSIS

1. *Is the Rule Valid?*

Chapter 28, title 63, Idaho Code, provides special rules for applying Idaho's property tax to mining property. It is commonly referred to as the "net profits of mines tax " The Idaho State Tax Commission's administrative rules relating to property taxes provide in IDAPA 35.01.03.585 (hereafter "Rule 585") administrative guidance and construction to be followed by county officers who administer and collect the net profits of mines tax. The

Commission's rulemaking authority is found in Idaho Code §§ 63-2801 and 63-513(25).

Idaho Code § 63-2801 directs how the county assessor determines the value of mining property. It provides:

> Valuation of mines for taxation.—All mines and mining claims, both placer and rock in place, containing or bearing gold, silver, copper, lead, coal or other valuable mineral or metal deposits, after purchase thereof from the United States, shall be taxed at the price paid the United States therefor, unless the surface ground, or some part thereof, of said mine or mining claim is used for other than mining purposes, and has a separate and independent value for such other purposes, in which case said surface ground or any part thereof so used for other than mining purposes, shall be taxed at its value for such other purposes, and all machinery used in mining, and all property and surface improvements upon mines or mining claims, which have a value separate and independent of such mines or mining claims and the net annual proceeds of all mines and mining claims shall be taxed: provided, that nothing in this chapter contained must be construed so as to be exempt from taxation improvements, buildings, erections, structures or machinery placed upon any mining claims, or used in connection therewith: provided that all mineral rights reserved to any grantor, except the United States or the state of Idaho, by the terms of any conveyance of lands other than lands acquired under the mining laws of the United States [shall] be assessed for taxation purposes at the rate of not less than five dollars ($5.00) per acre of the mineral rights so reserved, to be assessed against the recorded owner thereof. When, in the opinion of the county assessor, the value of reserved mineral rights does not warrant the expenditure to appraise and assess such value, such de minimis values need not be appraised or assessed, but the failure to assess such values does not constitute a failure to pay such taxes on the part of the owner, and does not constitute a delinquency on the part of the owner.

The case law interpreting this statute recognizes the legislature's intent and the effect of this statute:

> Instead of directly assessing the ore bodies, which usually constitute the chief actual value of the property, the statute contemplates the

> assessment only of the net output, and this is its most distinctive feature.

Hanley v. Federal Mining & Smelting Co., 235 F. 769 (D.C. Idaho 1916). Thus, this section provides for different ways to value different kinds of mining property. These properties and their method of valuation can be summarized as follows:

Property	*Valuation Method*
1. Patented mining claims	Price paid the United States
2. Patented claims not used for mining	Market value of the property
3. Equipment and improvements	Market value
4. Ore bodies	Net profits[1] from mining
5. Reserved mineral rights	Not less than $5.00 per acre

The total value determined under Idaho Code § 63-2801 is multiplied by the property tax levies that apply where the mining property is located to compute the property tax payable by the mining property.

The Tax Commission's Rule 585.04 provides:

> Since net profits of mines were set by statute so as to represent assessed value rather than market value, and since it was consequently at a level less than market value, an acceptable multiplier is necessary to convert these values to market value representative of the statutory base date.

Rule 585.05 provides:

> The Commission hereby sets as the proper multiplier, five (5). Therefore, the net profits as reported shall be multiplied by five (5) to convert reported profits to market value for assessment purposes.

The statute sets the value of mining property by including the annual net profits as part of the value. Rule 585 requires the value of mining property to include five times the annual net proceeds. The issue presented by the request for an opinion is whether the rule, by requiring the net profits be multiplied by five, is consistent with the statute. In our opinion, it is not.

Rule 585 is an attempt to amend the statute by applying a factor of five to the statutory rate of taxation for patented mining claims and net profits of mines. Where conflict exists between a rule and a statute the rule must give way. *Curtis v. Canyon Highway Dist. No. 4,* 122 Idaho 73, 831 P.2d 541 (1992) ("In order for an administrative regulation to be valid, it must be adopted pursuant to authority granted to the adopting body."). *See also Pumice Products v. Robinson*, 79 Idaho 144, 312 P.2d 1026 (1957). That is because rules may be given the force and effect of law but they do not rise to the level of statutory law and are not equal in dignity or status with statutory law. *Mead v. Arnell*, 117 Idaho 660, 791 P.2d 410 (1990). A rule conflicting with any statute must fall. *K-Mart Corporation v. Idaho State Tax Commission,* 111 Idaho 719, 727 P.2d 1147 (1986). Therefore, Rules 585.04 and 585.05 are invalid because they conflict with the statutes they interpret and must give way to the statute.

Although the request for an opinion asks only about the multiplier found in Rule 585, the Commission's rules contain a similar requirement as to the value of patented mining claims. See IDAPA 35.01.03.580 (hereafter "Rule 580"). That rule states:

> 580. VALUATION OF MINES FOR TAXATION. The prices referred to for patented lode and placer claims are five dollars ($5) and two dollars fifty cents ($2.50), per acre, respectively. These prices are to be multiplied by five (5); per acre market values for assessment purposes are then twenty-five dollars ($25) for patented lode claims and twelve dollars fifty cents ($12.50) for patented placer claims.

For the reasons expressed above, the multiplier required by Rule 580 is also invalid.

2. *What is the Proper Method of Assessing the Net Profits of Mines?*

The proper method of valuing mining property according to the statute is to include net profits of mines computed in accord with Idaho Code § 63-2802 and to value patented mining claims at the price paid the United States. This amount is determined by Rule 580 to be five dollars for lode claims and two dollars and fifty cents for placer claims.

AUTHORITIES CONSIDERED

1. **Idaho Code:**

§ 63-2801.
§ 63-2802.

2. **Idaho Cases:**

Curtis v. Canyon Highway Dist. No. 4, 122 Idaho 73, 831 P.2d 541 (1992).

Hanley v. Federal Mining & Smelting Co., 235 F. 769 (D.C. Idaho 1916).

K-Mart Corporation v. Idaho State Tax Commission, 111 Idaho 719, 727 P.2d 1147 (1986).

Mead v. Arnell, 117 Idaho 660, 791 P.2d 410 (1990).

Pumice Products v. Robinson, 79 Idaho 144, 312 P.2d 1026 (1957).

3. **Idaho Administrative Procedure Act:**

35.01.03.580.
35.01.03.585.

DATED this 3rd day of December, 1993.

LARRY ECHOHAWK
Attorney General

Analysis by:

Lawrence G. Wasden
Theodore V. Spangler, Jr.
Deputy Attorneys General

[1] Idaho Code § 63-2801, quoted *supra*, says the value includes the "net annual proceeds" from mining. The next section, § 63-2802, provides a definition of "'net profits', as employed in this chapter." It is clear from the rules, the case law and from practice that the term "net annual proceeds" has been understood to mean "net profits."

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ATTORNEY GENERAL's SELECTED INFORMAL GUIDELINES FOR THE YEAR 1993

Larry EchoHawk
Attorney General
State of Idaho

January 13, 1993

Ms. Leola Daniels, M.S., R.N.
Executive Director
Idaho State Board of Nursing
280 N. Eighth, Suite 210
STATEHOUSE MAIL
Boise, ID 83720

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

Dear Ms. Daniels:

On October 11, 1991, you requested an opinion from this office interpreting the Idaho Nursing Practice Act, concerning non-licensed personnel administering prescribed medications to patients in medical offices. The issue presented was whether Idaho Code §§ 54-1402(b)(1)(f) and (2)(d) of the Nursing Practice Act mandates that only licensed nurses be authorized to perform such nursing functions as administration of medications and treatments prescribed by physicians (except as specifically exempted by the Nursing Practice Act or rules of the Board of Nursing).

This office responded by letter dated January 24, 1992, stating that the law in Idaho governing the practice of medicine and the administration of prescribed medication does not exclusively reserve to licensed nurses the ability to administer prescribed medication. This opinion was based in part upon Idaho Code § 54-1402 which grants licensed nurses the power to administer medication, but lacks any express language exclusively granting this power to licensed nurses. We noted that this section must be read in conjunction with the Medical Practice Act, Idaho Code § 54-1804, which provides the penalties and remedies relating to the unlicensed practice of medicine. Idaho Code § 54-1804(1) states exceptions to the rule:

> Under the circumstances described and subject in each to limitations stated, the following persons, though not holding a license to practice medicine in this state, may engage in activities included in the practice of medicine:

> (g) A person administering a remedy, diagnostic procedure or advice as specifically directed by a physician . . . .

We concluded that, although the extent to which a physician may delegate duties to unlicensed personnel pursuant to Idaho Code § 54-1804(1)(g) is unclear, it is inappropriate to define the limits through the duties enumerated to licensed nurses in Idaho Code § 54-1402.

On May 1, 1992, Mr. Meuleman and yourself met with Attorney General EchoHawk to urge reconsideration of the conclusion stated in the opinion letter of January 24, 1992. Mr. Meuleman provided this office his legal analysis of the relevant statutes in a letter dated June 2, 1992.

After reviewing Mr. Meuleman's analysis, and further researching and considering this issue, we conclude that our original reasoning was correct.

The regulation of duties non-licensed medical personnel are allowed to perform under the control and supervision of a physician is not governed by the state regulations governing the practice of nursing. The Nursing Practice Act regulates the profession of nursing, not the entire field of health care providers. The regulation of duties non-licensed medical personnel may perform is governed by Idaho Code § 54-1804, which provides the penalties and remedies relating to the unlicensed practice of medicine.

As Mr. Meuleman pointed out in his legal analysis, the initial step in interpreting statutory language is the plain meaning rule. "[U]nless the result is palpably absurd, we must assume that the legislature means what it clearly stated in the statute." *Sherwood v. Carter*, 119 Idaho 246, 254, 805 P.2d 452, 460 (1991). Nowhere in the Nursing Practice Act is there any indication that the duties enumerated therein are to be exclusively reserved to registered nurses. In addition, the plain language of Idaho Code § 54-1804(1)(g) states that any person may administer "a remedy, diagnostic procedure or advice specifically directed by a physician." There is no language limiting the duties that a physician may delegate to those for whom licensure is not otherwise required.

Read together, nurses may perform all functions enumerated in Idaho Code § 54-1402, and physicians may direct a non-licensed person to administer a remedy, diagnostic procedure or advice, pursuant to Idaho Code § 54-1804(1)(g). To conclude that the extent to which a physician may direct a non-

licensed assistant is governed by the duties enumerated to licensed nurses is to go beyond the plain language of these two statutes.

This conclusion is supported by the construction of Idaho Code § 54-1803(1), which defines physicians' assistants. This section excludes physicians' assistants from performing those functions and duties specifically delegated by law to those persons licensed as pharmacists, dentists, dental hygienists and optometrists. If the legislature had intended to restrict the activities of non-licensed persons under Idaho Code § 54-1804(1)(g), in relation to traditional nursing functions, it could easily have done so in this subsection just as it did in 54-1803 (1) with regard to physicians' assistants and several other potentially overlapping health care professions.

The doctrine of *expressio unius est exclusio alterius* provides that if the statute specifies one exception to a general rule, other exceptions are excluded. Black's Law Dictionary, 521 (rev. 5th ed.), Kansas Attorney General Opinion No. 86-125. Given this rule of statutory construction, it follows that nonlicensed assistants as referred to in Idaho Code § 54-1804(1)(g) are not prohibited from administering medication because the legislature would have so stated if it had so intended.

To add to Idaho Code § 54-1804(1)(g) "for which licensure is not otherwise required," as Mr. Meuleman suggests, would not be giving the plain meaning to the statute, but imposing our own interpretation. Such action is inappropriate by this office, and must be left to the legislature to clarify.

Our statutory interpretation is consistent with that of other jurisdictions' interpretations of similar statutes. Tennessee Attorney General Opinion No. 88-09 addressed the issue of under what circumstances unlicensed staff members of private group homes may administer medication to residents. The opinion concluded that although administering medication was a function expressly granted to licensed nurses and physicians, non-licensed persons were also allowed to administer medication when under the supervision of a licensed physician or nurse.

Utah Attorney General Opinion No. 80-12 answered the question whether the use of psychological assistants by individuals licensed to practice psychology in the state of Utah was proper. Finding no law on point, that office analogized the use of non-licensed employees in a professional setting to the

practice of medical doctors and dentists using non-licensed assistants to aid in the performance of their duties. The Utah opinion concluded:

> [T]he law inherently recognizes that anyone practicing in the field of the learned professions . . . may employ assistants provided they serve under the direct control and supervision of the licensed practitioner and do not directly counsel with or advise the client or perform any other function specifically reserved to one who is so licensed.

Utah Attorney General Opinion No . 80-12, p. 2.

The common thread running through these opinions is the direct control and supervision provided by the physician. The authority for a non-licensed employee to assist the professional is not limited by the duties the state empowers to other licensed personnel, absent express legislative intent to the contrary. Rather, it is governed by the plain meaning of the statutes the legislature has enacted.

In Kansas, the issue of whether physicians' assistants could issue prescription orders was raised during the 1978 session of the legislature. The special committee's report on the proposed bill states as follows:

> The Committee has concluded that the scope of practice of a physicians' assistant in Kansas should be determined by the employing physician rather than by the Board of Healing Arts or by statutes. Experience in those states which have adopted a statutory "laundry list" of responsibilities which can be assumed by the physicians' assistant indicates that this approach needlessly limits the use of the physicians' assistant. In reaching the conclusion that the responsible physician should determine the scope of practice of the physicians' assistant, the Committee recognizes that the physician who employs. a physicians' assistant remains legally and medically responsible for the actions of that assistant. Ultimately, only the employing physician can judge effectively how the physicians' assistant performs and the limits of his capabilities. The physician should be free to exercise judgment in such matters, fully realizing that if his judgment is faulty he retains liability for the practice acts of the physicians' assistant.

Kansas Attorney General Opinion No. 86-125.

The opinion concluded that, because physicians' assistants are expressly authorized by statute to practice medicine under the direction and supervision of a physician and that practice includes the prescribing of medicine, physicians' assistants were allowed to issue prescriptions under the direction and supervision of a physician. *See also* Michigan Attorney General Opinion No. 77-5220; Maryland Attorney General Opinion No. 86-008.

The issue of non-licensed assistants performing tasks which are also functions granted to licensed nurses is analogous to one of the issues addressed in *Magit v. Board of Medical Examiners,* 17 Cal. Rptr. 488, 366 P.2d 816, 820 (1961). There, the court noted:

> It has generally been recognized that. the functions of nurses and physicians overlap to some extent, and a licensed nurse, when acting under the direction and supervision of a licensed physician, is permitted to perform certain tasks which, without such direction and supervision, would constitute the illegal practice of medicine and surgery.

This issue in *Magit,* the status of a licensed nurse administering anesthetics, is analogous to the issue before us. *Magit* recognized the right of nurses under the supervision of physicians to perform functions they were not otherwise licensed to perform and that would otherwise constitute the illegal practice of medicine. Similarly, in this instance, non-licensed personnel may perform functions otherwise granted to licensed nurses, so long as they perform these functions under the supervision of a physician.

Although the extent to which a physician may delegate duties to office personnel pursuant to Idaho Code § 54-1402 is unclear, it is not defined by the duties enumerated to licensed nurses in Idaho Code § 54-1402. Further clarification is appropriate only by the legislature.

Very truly yours,

JOHN J. McMAHON
Chief Deputy

January 13, 1993

Mr. Stephen V. Southwick
Lincoln County Sheriff
P.O. Box 458
Shoshone, ID 83352

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

Dear Sheriff Southwick:

By letter dated November 20, 1992, you requested an opinion from this office regarding the responsibility of Lincoln County in relation to persons arrested by city police officers. According to your letter, Lincoln County no longer maintains a full-time jail facility and houses its prisoners at the Gooding County Jail under contract. Soon, due to reductions in available space in the Gooding County Jail, Lincoln County will have to begin housing prisoners at the Cassia County Jail.

Lincoln County does have a detention facility for booking and holding persons until they can be transported to Gooding County. Your questions relate to the county's responsibility to detain and transport persons arrested by city police officers within the county. In this regard, you have raised several questions which I will address in turn.

Question No. 1:

Do I as Sheriff have the responsibility to accept city prisoners at the Sheriff's Office even when I do not have a jail or holding facility, but use a jail in another county?

Answer:

Yes. County sheriffs do have the responsibility to accept persons arrested by city police officers. Initially, it should be noted that municipalities in Idaho have no statutory responsibility to maintain jail facilities. To the extent that a municipality may maintain a jail, the persons subject to incarceration in a city jail is limited. Idaho Code § 50-302A provides:

> Any person charged with or convicted of violation of a city ordinance and subject to imprisonment shall be confined in the city jail; provided, however, *that any city shall have the right to use the jail of the county for the confinement of such persons* but it shall be liable to the county for the cost of keeping such prisoners .

(Emphasis added.) Thus, under the clear language in this provision, a person arrested and charged for violating a law other than a city ordinance is not subject to confinement in a municipal jail. Moreover, a city has the statutory right to rely upon the county to provide jail facilities.

Unlike cities, counties in Idaho do have a statutory duty to maintain a jail. Idaho Code § 20-601 provides:

> The common jails in the several counties of this state are kept by the sheriffs of the counties in which they are respectively situated, and are used as follows:
>
> 1. For the detention of persons committed in order to secure their attendance as witnesses in criminal cases.
>
> 2. For the detention of persons charged with crime and committed for trial.
>
> 3. For the confinement of persons committed for contempt, or upon civil process, or by other authority of law.
>
> 4. For the confinement of persons sentenced to imprisonment therein upon a conviction for crime.

The scope of this statute is broad and does not differentiate between the state, its political subdivisions or the nature of the crime. Further, Idaho Code § 20-612 states:

> The sheriff must receive all persons committed to jail by competent authority except mentally ill persons not charged with a crime and juveniles. It shall be the duty of the board of county commissioners to furnish all persons committed to the county jail with necessary food, clothing and bedding, and the board of county commissioners is

> authorized to pay therefor out of the county treasury under such rules and regulations as they may prescribe.

These statutes correspond with title 31, Idaho Code, which provides for counties and county law. Idaho Code § 31-2202 sets forth the duties of the county sheriff. Idaho Code § 31-2206(6) states:

> The sheriff must:
>
> . . . .
>
> (6) take charge of and keep the county jail and the prisoners therein.

Idaho Code § 31-3302 provides that "the expenses necessarily incurred in the support of persons charged with or convicted of crime and committed therefor to the county jail" are charges to be borne by the county.

In light of the foregoing statutes, it is clear that the Idaho Legislature intended counties to be primarily responsible for providing jail facilities within the county and left the matter of city jails to the discretion of the various cities. Since Lincoln County has the statutory duty to provide a jail, it follows that the county must accept city prisoners regardless of the nature of the crime. The fact that Lincoln County has decided to no longer maintain a full-scale jail facility does not relieve the county of its statutory duty to accept city prisoners. Although these prisoners must be transported to Gooding County or Cassia County, it does not alter the statutory right of municipalities to rely upon Lincoln County for housing prisoners.

Question Nos. 2 and 3:

Do I as Sheriff have the responsibility to transport city prisoners from Lincoln County to jail (in another county) at the time of the arrest? Do I as Sheriff have the responsibility to transport prisoners who were arrested by the city from jail (in another county) to court and back to jail?

Answer:

The analysis set forth above is equally applicable to these questions. Again, the county has the statutory duty to provide a jail. This duty includes detention

of prisoners in order to secure their attendance to all court proceedings. Idaho Code § 20-601. Even though the county has decided to contract with other counties for jail services, this decision does not alter this duty. Moreover, there is no basis to require a municipality to transport prisoners to and from other counties simply because Lincoln County has decided not to maintain a jail. The additional burden caused by this decision, therefore, falls upon the county.

Question No. 4:

Does the city have the responsibility to pay for board of prisoners arrested by city officers on city ordinances and state motor vehicle violations?

Answer:

Clearly, the city must bear the reasonable costs of incarceration for persons charged and convicted of violating city ordinances. Idaho Code § 50-302A. In regard to the confinement expense for persons arrested by city police officers for violations of state motor vehicle laws, Idaho Code §§ 20-604 and 20-605 provide the answer. Idaho Code § 20-604 permits a court to order a prisoner's confinement in a county other than the county where the person was charged. In this instance, since Lincoln County has an agreement with Gooding County to provide jail services, the court presiding in Lincoln County can, pursuant to Idaho Code § 20-604, enter an order directing confinement of Lincoln County prisoners in Gooding County.

The costs of confinement outside Lincoln County are provided in Idaho Code § 20-605. This statute provides in relevant part:

> The county wherein any court has entered an order pursuant to section 20-604, Idaho Code, shall pay all direct and indirect costs of the detention or confinement of the person to the governmental unit or agency owning or operating the jail or confinement facilities in which the person was confined or detained. The amount of such direct and indirect costs shall be determined on a per day per person basis by agreement between the county wherein the court entered the order and the county or governmental unit or agency owning or operating such jail or confinement facilities. In the absence of such agreement or order fixing the cost as provided in section 20-606, Idaho Code, the charge for each person confined or detained shall be the sum of thirty-

> five dollars ($35.00) per day, plus the actual cost of any medical or dental services; . . . . *In case a person confined or detained was initially arrested by a city police officer for violation of the motor vehicle laws of this state or for violation of a city ordinance. the cost of such confinement or detention shall be a charge against such city by the county wherein the order of confinement was entered. All payments under this section shall be acted upon for each calendar month by the second Monday of the month following the date of billing.*

(Emphasis added.)

In *County of Bannock v. City of Pocatello,* 110 Idaho 292, 715 P.2d 962 (1986), the Idaho Supreme Court construed this provision with Idaho Code §§ 50-302A and 20-612 to reach the conclusion that, if a person is arrested by a city officer for violating a state motor vehicle law and confined in the county where charged, the city has no liability for costs of confinement. The county must bear these costs. However, if the person is confined outside the county pursuant to Idaho Code § 20-604, the city is liable for costs of confinement. The court held:

> Accordingly, while I.C. § 50-302A does make the city liable to the county for the cost of jailing prisoners charged with or convicted of a city ordinance and I.C. § 20-605 places on the city liability for the cost of keeping prisoners in *other counties if that* offending person was either initially arrested by a city police officer for violation of a city ordinance or for violation of the state motor vehicle laws, nevertheless, under I.C. § 20-612, the City of Pocatello is not liable for the cost of keeping prisoners in the Bannock County Jail if the prisoner has been arrested by a city police officer for violation of a state motor vehicle law. Pursuant to I.C. § 20-612, the county has "the duty" to pay for the incarceration of such prisoners.

110 Idaho at 295.

A strong dissent argued that the city should be liable for the costs of confinement regardless of the site of incarceration. Nonetheless, it is clear that a city must pay the costs of confinement if the prisoner is incarcerated outside of the county where charged.

I am enclosing a copy of Attorney General Opinion 84-4. This opinion dis-

cusses the duties of the county sheriff in relation to municipal prisoners. It also has a detailed description of the evolution of the office of sheriff which should be of some interest to you and your county commissioners. The *Bannock County* case quoted above does not support this office's conclusion regarding costs of confinement of city prisoners within the county. Since Lincoln County does not maintain a jail, that aspect of both opinions is not germane to this discussion.

Please let me know if I can be of further assistance in this matter.

Yours very truly,

FRANCIS P. WALKER
Deputy Attorney General

January 15, 1993

Mr. Max M. Sheils, Jr.
Idaho Code Commission
State of Idaho
707 North 8th Street
STATEHOUSE MAIL
Boise, ID 83701

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

Re: *Publication of Materials Contained in the Idaho Code*

Dear Mr. Sheils:

On August 12, 1992, you requested a formal Attorney General Opinion concerning the publication of the materials contained in the Idaho Code. Your letter raises the following questions:

1. Is the compilation known as the Idaho Code owned by the State of Idaho? If so, are these materials owned solely by the State of Idaho?

2. If yes, may/should the State of Idaho authorize the publication and sale of an "unofficial" compilation of any materials contained in the Idaho Code? If so, is a charge or fee appropriate?

3. May any entity publish or market, in written or electronic form, any version of the materials contained in the Idaho Code, whether annotated or not, with or without approval of the Code Commission?

Ownership of the copyright to the compilation known as the Idaho Code is governed by Idaho Code § 73-210. It states:

> Copyright of all compilations shall be taken by and in the name of the publishing company which shall thereupon assign the same to the state of Idaho, and thereafter the same shall be owned by the state of Idaho.

The State of Idaho, therefore, owns the copyright to the compilations

known as the Idaho Code. However, the fact that a work is copyrighted does not mean that every element of the work may be protected. A copyright can not protect the text of state statutes or court rules. *See Wheaton v. Peters*, 33 U.S. 591 (1983). The rationale of this rule is set forth in *Building Officials and Code Administration v. Code Technology, Inc.*, 628 F.2d 730, 734 (1st Cir. 1980):

> The citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process.

What is in the public domain, therefore, may not be copyrighted. As such, the State of Idaho's copyright to the compilations known as the Idaho Code does not protect the text of the Idaho statutes or the Idaho Court Rules. Title headings in the compilation are also not protected by copyright if taken verbatim from the title headings in the Idaho Session Laws.

Pagination may become an issue with the advent of the electronic publication of statutes on CD-ROM. The leading case on pagination, *West Publishing Co. v. Mead Data Central,* 799 F.2d 1219 (8th Cir. 1986), *cert. denied,* 479 U.S. 1070 (1987), holds that the arrangement of judicial decisions, including internal page citations, are protected by copyright. The logic of the holding in *West Publishing* could easily be extended to the compilation of statutes. However, *West Publishing* has received severe criticism, and a bill has been introduced in the U. S. Congress to exclude copyright protection for certain legal compilations. *See* 1991 U.S. House Bill H.R. 4426. One result of this bill would be to repudiate *West Publishing*. Thus, although the state of the law is in question, an argument can be made based upon the holding in *West Publishing* that pagination is protected by the copyright.

Factual compilations are eligible for copyright protection if they feature an original selection or arrangement of the facts. Section 101 of the Copyright Act of 1976 (17 U.S.C. § 101) defines "compilation" as a work formed by the collection and assembly of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.

The State of Idaho's copyright, therefore, protects all original works contributed by the Michie Company in compiling the Idaho Code. It follows that

the following are protected by the copyright: the compilers' notes, section to section references, citation references, analysis sections, indexes, tables, and, arguably, the pagination. The State of Idaho is the sole owner of the copyright to these provisions of the compilations known as the Idaho Code.

Whether the Code Commission should authorize the publication and sale of an "unofficial" compilation of the materials contained in the Idaho Code is governed in part by the copyright laws discussed above. Because the text of the statutes and court rules is in the public domain and, therefore, not protected by the state's copyright, the Code Commission has no control over the republication of the statutes or court rules. Any party may publish the text of the Idaho statutes or court rules. However, the Code Commission has exclusive authority over the use of the copyright covering the portions of the compilation discussed above. Section 73-210 of the Idaho Code provides:

> The commission is authorized and empowered to grant the use of the copyrights of the Idaho Code published pursuant to Session Laws of 1947, Chapter 224, and of all compilations authorized by this act, in connection with the performance of its said duties and obligations.

In Idaho Code § 73-210, the legislature provides the intent and purpose of the act empowering the Code Commission with the exclusive authority to grant use of the copyright:

> The intent and purpose of this act is to keep current so far as practicable the compilation known as the Idaho Code, by authorizing publication of pocket parts to the volumes of the Idaho Code, or as necessary, the republication of single or more volumes, or the addition of volumes, or by other devices designed and intended to maintain the Idaho Code up to date, and especially after each session of the legislature, indicating therein existing laws, repealed laws or parts of laws, substitute laws, additional laws, and constitutional provisions and changes, rules of the Supreme Court of Idaho, additional notes, annotations and indexing . . . .

Idaho Code § 73-201.

The latitude of such power is governed by § 73-201. It states in part: "This act shall be so interpreted as to grant the commission hereby created all power and authority necessary to accomplish such intent and power."

The Code Commission, by virtue of the above cited statutes, has the requisite power necessary to ensure the appropriate publication of the code. The Code Commission accomplishes this goal by contracting and executing contracts for the publication of the Idaho Code as provided in § 73-205 and examining the publication for the purpose of determining whether the compilation meets the requirements of § 73-205 as provided in § 73-208. By following the detailed process by which the legislature has specified the Idaho Code be published, the Code Commission ensures the accuracy and quality of the compilation and publication of the Idaho Code.

Interpreting the authority to grant use of the copyright in conjunction with the intent of the legislature in granting this power, it becomes clear that use of this power by the Code Commission must be at the Code Commission's discretion, but in furtherance of the intent of the legislature.

Whether a fee may be charged for use of the copyright is not expressly provided for in either the Session Laws or in Idaho Code, title 73, ch. 2. Due to a lack of legislative intent or statutory authority, it would not be appropriate to charge a fee for use of the copyright. Any authority to charge such a fee must be expressly provided by the legislature.

The third question is whether any entity may publish or market, in written or electronic form, any version of the materials contained in the Idaho Code, whether unannotated or not, with or without approval of the Code Commission. Based upon our analysis above, any entity may publish the text and title headings of the Idaho Statutes or Idaho Court Rules. Apart from the actual text and title headings, no entity may publish or market any version of the materials contained in the Idaho Code without the approval of the Code Commission.

I hope this adequately addresses your questions. If I can be of further assistance, please let me know.

Very truly yours,

TERRY B. ANDERSON
Chief, Business Regulation
and State Finance Division

January 22, 1993

Honorable J. D. Williams
State Auditor
STATEHOUSE MAIL
Boise, ID 83720-1000

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

Re: *Transfer of Post-Audit Function to Auditor's Office*

Dear Mr. Williams:

By letters dated December 15, 1992, you have asked this office to review the following questions. First, does the State Auditor have constitutional authority to begin conducting modern post-audits on July 1, 1993? Second, may the State Auditor, or any other office of the government, conduct a performance audit on activities of other branches of government?

ANALYSIS

A. *Modern Post-Audit Function*

In *Williams v. State Legislature of Idaho,* 111 Idaho 156, 722 P.2d 465 (1986), then-State Auditor, Joe Williams, challenged the legislature's placement of post-audit functions in the Legislative Auditor's office. The court held that the State Auditor's constitutionally mandated duties encompass the duties which the territorial controller was empowered to do and, thus, the court found the State Auditor has comprehensive auditing powers which include the modern post-audit function. *Id.* at 160:

> [W]e conclude that the Territorial Controller would have been authorized to perform a modern post-audit function should that function have been in use at the time. The above considerations lead us to conclude that the constitution authorizes the State Auditor to have those comprehensive auditing powers.

The supreme court in *Williams* also held that the legislature cannot preclude

the Auditor from carrying out his constitutional duties by failing to appropriate monies for those duties or restricting the appropriation. *Id.* at 161.

The *Williams* decision was issued in 1986 with a notation that, because the legislature would have completed its 1986 session at the time the opinion was issued, the opinion would not take effect until July 1, 1987. However, because of agreements between the State Auditor's office and the legislature, the post-audit function was not transferred to the Auditor's office in 1987 or in any of the subsequent years to date. However, this delay does not detract in any manner from the holding of the court in *Williams* nor the powers of the State Auditor to perform the post-audit function in general. The *Williams* court found that a "constitutional official need not exercise a function to be authorized to perform it." *Id.* at 161. In so holding, the court cited favorably to a Maryland decision:

> If an office is created by the Constitution, and specific powers are granted or duties imposed by the Constitution, although additional powers may be granted by statute, the position can neither be abolished by statute nor reduced in impotence by the transfer of duties characteristic of the office to another office created by the legislature . . .

Id. at 160 (citing *Murphy v. Yates*, 348 A.2d 837, 846 (Md. 1975)) (citations omitted).

The holding of the Idaho Supreme Court in *Williams* is binding and, therefore, the State Auditor's office has the constitutional authority to conduct modern post-audits. The legislature cannot preclude the Auditor from performing his constitutional obligations by restricting funds or failing to appropriate for those functions. However, the legislature does have authority to statutorily authorize another entity, such as the Legislative Auditor, to perform duplicate or additional audits.

B. *Performance Audit by One Branch of Government on Another Branch*

The second question you asked our office to address concerns whether one branch of government can conduct performance audits on the activities of other branches of government and, specifically, whether the Auditor's office can conduct performance audits. With reference to the Auditor, the Idaho Supreme Court in *Wright v. Callahan*, 61 Idaho 167, 99 P.2d 961 (1940), held

that the provisions of art. 4, § 1, of the constitution contained implied constitutional powers and duties equivalent to those of the territorial controller pursuant to title 1, ch. 7, § 205, of the revised statutes of the Idaho Territory of 1887. 61 Idaho at 177. In *Williams,* the supreme court found the implied constitutional duties of the state auditor included modern post-audit functions to the extent that those functions consisted of an examination of the books and financial records of state agencies and the rendition of professional accounting opinions concerning those books and records. The court expressed some concern with reference to extending modern post-audit authority to include evaluations of the performance of one branch of government to another branch of government:

> Although the issue is not directly raised by this appeal, we observe that the "modern post-audit," to the extent which one branch of government may use such an audit to evaluate the performance of another branch, may implicate the separation of powers provisions of the Idaho Constitution. Idaho Const. art. 2, § 1. We distinguish such a "performance audit" from an audit consisting of an examination of the books and financial records of a state agency and the rendition of a professional accounting opinion concerning those books and records.

Williams, 111 Idaho at 158, n.1.

Other than the above-cited footnote, the supreme court in *Williams* did not analyze the use of performance evaluations by one branch of government on another. It is therefore necessary to review the separation of powers doctrine to determine if such evaluations would violate the provisions of art. 2, § 1, of the Idaho Constitution. The separation of powers provision of the constitution states as follows:

> 1. Departments of government. — The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

There was very little consideration given to the separation of powers provision embodied in art. 2, § 1, by the framers of the Idaho Constitution. During the proceedings of the constitutional convention, there was no article regard-

ing separation of powers in the papers before the convention delegates or in any committee of the convention. However, Judge Beatty, a committee delegate, noted the omission of a provision for separation of powers and, under a suspension of the rules, the article was adopted unanimously. Thus, there is little information to be garnered from the proceedings before the constitutional convention regarding the intent of the framers in applying the separation of powers provision. However, in interpreting the separation of powers provision, the Idaho Supreme Court has taken a fairly flexible approach.

The flexibility of Idaho's approach in dealing with separation of powers issues is partially provided for by a clause in art. 2, § 1, which provides an exception, "except as in this constitution expressly directed or permitted." In *Sweeney v. Otter*; 119 Idaho 135, 804 P.2d 308 (1991), the Idaho Supreme Court noted that "art. 2, § 1, of the Idaho Constitution contemplates limited interbranch encroachment when it follows the separation of powers pronouncement with the language, 'except as in this Constitution expressly directed or permitted.'" This exception to the separation of powers doctrine has led the Idaho Supreme Court to allow a member of the executive branch, the Lieutenant Governor, to cast a tie breaking vote in the Senate *(Sweeney v. Otter)*, and to allow district court judges to exercise non-judicial powers in the appointment of drainage district commissioners to drainage districts where called upon to do so by statute pursuant to the appointment clause of the constitution, art. 6, § 4. (*Elliot v. McCrea*, 23 Idaho 524, 130 P. 785 (1913).)

The Idaho Supreme Court has also been flexible in reading the separation of powers clause provision which expressly forbids "the exercise of powers properly belonging" to another branch of government. In *Jewett v. Williams*, 84 Idaho 93, 369 P.2d 590 (1962), the court held that four members of the legislature could sit on a commission created by statute under the jurisdiction of the executive branch. The court explained its holding as follows:

> It is the basic powers of sovereignty which must remain separate; not subsidiary activities which include the ascertainment of facts, investigation and consultation, the duty of reporting facts and making recommendations, for the purpose of carrying out those basic powers.

84 Idaho at 100. The *Jewett* court conducted an examination of the powers conferred upon the commission by statute and determined that these powers were limited to study, appraisal and making non-binding recommendations

through a report to the Governor. The court held these powers to be "subsidiary" and not "basic," thus finding no violation of art. 2, § 1.

With reference to the issue addressed by this analysis, the constitution does not appear to "expressly" allow one branch of government to conduct performance audits on another branch of government. As such, the exception delineated in art. 2, § 1, contemplating limited interbranch encroachment, would not seem to apply in this instance.

The next step requires an analysis of the supreme court's holding in *Jewett*. It would seem, with proper statutory authority, that *Jewett* would allow one branch of government to conduct performance audits as long as those audits were limited to fact finding and fact evaluation for the purpose of providing information to the body being evaluated.

Arguably, the Auditor's office has statutory authority to conduct performance audits under the provisions of Idaho Code § 67-1001(5) which states: "It is the duty of the Auditor . . . (5) to suggest plans for the improvement and management of the public revenues." If, however, the Auditor's office undertakes performance audits on other branches of government, it must do so cautiously, strictly following the provisions of the supreme court holding in *Jewett*. If conducting performance evaluations on other branches of government, the Auditor's office should limit its activities to ascertainment of facts, investigation and consultation. The Auditor cannot act as a policy maker when reviewing the performance of other branches of government; he must act in a subservient position to the separate branches of government, merely consulting and making non-binding recommendations.

CONCLUSION

The court in *Williams v. State Legislature* of Idaho held that the post-audit function, as limited to an examination of the books and financial records of state government and the rendition of professional accounting opinions concerning those books and records, is a constitutional function of the State Auditor's office. Although the legislature is not precluded from funding a second audit function in state government, it is precluded from using its power of appropriation to prevent the Auditor from performing this function.

With reference to performance audits conducted by one branch of government on another branch of government, it is clear that the supreme court will

look very closely at this activity to determine whether it violates the principles of separation of powers delineated in art. 2, § 1, of the Idaho Constitution. *See Williams v. State Legislature of Idaho,* 111 Idaho at 158, n.1. However, if the performance audit by one branch of government on another branch of government is limited and follows the parameters delineated by the court in *Jewett v. Williams,* it may be held that such a limited function is not violative of the doctrine of separation of powers.

I hope this addresses your concerns, if I can be of further assistance to you in this or in any other matter, please let me know.

Very truly yours,

TERRY B. ANDERSON
Chief, Business Regulation
and State Finance Division

January 25, 1993

Ms. Joan Cartan-Hansen
Idaho Press Club
P.O. Box 2221
Boise, ID 83701

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

Re: *Public Records Copying Costs*

Dear Ms. Cartan-Hansen:

You requested an opinion from this office regarding Idaho's Public Records Law, Idaho Code §§ 9-337 through 9-348. According to your letter, the City of Boise (the "City") has established a copying fee for reproducing public records of $1.00 for the first page and 25 or each additional page thereafter. The City acknowledges that the fee is in excess of the actual cost for reproducing such records. Your question is whether such a fee violates Idaho Code § 9-338(8), which limits the allowable fees to be charged for making copies to "the actual cost . . . of copying the record if another fee is not otherwise provided *by law.*" (Emphasis added.) The City takes the position that it is able to charge more than actual cost for copying public records because it has established a fee schedule *by ordinance.* Thus, the City contends that its fee schedule complies with Idaho Code § 9-338(8).

For the reasons set forth below, it is the opinion of this office that, regardless of the City's authority to pass ordinances, such an interpretation of Idaho Code § 9-338(8) would defeat the clear intent of the legislature in enacting the Idaho Public Records Law. The City has no authority to charge a fee in excess of the "actual cost" of reproducing requested records, and the practice of charging a fee of $1.00 for the first page and $.25 for each additional page violates the Idaho Public Records Law.

1. *Legislative Intent*

The intention of the legislature in enacting the Idaho Public Records Law is that all records maintained by state and local government entities must be available for public access and copying.

> Every person has the right to examine and take a copy of any public record of this state and there is a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute.

Idaho Code § 9-338(1). One way to frustrate the clear policy established by the legislature in enacting the Public Records Law would be to charge exorbitant copying fees and thereby discourage requests for public records. The legislature anticipated this potential abuse and provided strict measures for determining the costs that may be charged. Idaho Code § 9-338(8) provides in pertinent part:

> A public agency or public official may establish a copying fee schedule. *The fee may not exceed the actual cost to the agency for copying the record if another fee is not otherwise provided by law.* The actual cost shall not include any administrative or labor costs resulting from locating and providing a copy of the public record.
>
> . . . .
>
> The custodian may require advance payment of the costs of copying. Any money received by the public agency shall be credited to the account for which the expense being reimbursed was or will be charged, and such funds may be expended by the agency as part of its appropriation from that fund.

(Emphasis added.) The concept of the law is that examination and copying of public records is part of the public business, already funded by taxpayers. Therefore, fees for copying may not exceed the "actual cost" to the agency, and a public agency is expected to absorb labor and administrative costs. This office is informed that the general range of costs being charged by various state agencies and local governments is from four to ten cents per page. (Attached is a copy of a model policy for handling public record requests. Included therein is a worksheet for determining the actual cost for making a copy of a public record.)

2. *Statutory Construction*

In determining whether the term "law" as used in Idaho Code § 9-338(8) encompasses ordinances, the term should be given its plain and ordinary meaning unless a contrary purpose is clearly indicated in the statute. *Bunt v.*

City of Garden City, 118 Idaho 427, 797 P.2d 135 (1990). The problem, however, that gives rise to this question is the difficulty in ascertaining the plain and ordinary meaning of the word "law," given the wide range in its accepted definition and application. As noted by the California Supreme Court many years ago:

> There is no word in the language which, in its popular and technical application, takes a wider or more diversified signification than the word "law." Its use in both regards is illimitable.

Miller v. Dunn, 14 P. 27, 28 (Cal. 1887).

If construed broadly, the term "law" could extend to ordinances, resolutions and even rules and regulations adopted by state agencies. The statutory requirement in Idaho Code § 9-338(8) to limit copying fees to actual costs would then be largely discretionary. Every public agency coming within the scope of the Public Records Law could simply enact a "law" and be relieved of the express requirements stated in Idaho Code § 9-338. To the extent that so broad an interpretation of the term "law" permits evasion of the limitations found in Idaho Code § 9-338(8), a clear conflict exists between the expressed purpose and policy of the Idaho Public Records Law and such an expansive interpretation of the term.

Another general rule of statutory construction is that the strict letter of the statute will not be blindly followed when strict adherence to the language in the statute would frustrate the policy and purpose of the law and lead to an absurd result. 82 C.J.S. Stat. § 325. The Idaho Supreme Court enunciated this principle in *In re Gem State Academy Bakery,* 70 Idaho 531, 224 P.2d 529 (1950):

> In determining the meaning of a statute, the particular mischief which it was designed to remedy and the history of the period and of the act itself may be considered.
>
> . . . [A]nd intention may be ascertained, in doubtful cases, not only by considering the words used, but also by taking into account other matters, such as the context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, contemporaneous construction, and the like. In other words, the courts will not blindly follow the letter of a law, when its

> purpose is apparent, to consequences which are inconsistent with that purpose; and this would seem to be particularly true when the results of the literal interpretation, if adopted, would be absurd.

70 Idaho at 541-42 (quoting *Eugene School Dist. No. 4 v. Fisk*, 79 P.2d 262 (Oregon 1938) and *Jordt v. California State Board of Education,* 96 P.2d 809 (Cal. App. 1939)). As noted above, an expansive interpretation of the term "law" in relation to Idaho Code § 9-338(8) would frustrate the express purpose of the law and render that provision superfluous. It is certainly an absurd result when the use of one word within a provision eliminates the force and effect of that provision.

3. *Legislative History*

The legislative history for the Public Records Law enacted in 1990 provides some insight into Idaho Code § 9-338(8) and supports our ultimate conclusion. This subsection, along with most of the procedural provisions in the law, was drafted by an interim legislative committee. The committee met on five occasions during the summer and fall of 1989.

It is certain from the minutes of the interim committee that the authority to charge a copying fee was intended to be limited to the actual costs of copying the document. Administrative and labor costs resulting from locating and providing a copy of the public record were definitely not to be included in the fee. The only explanation in the minutes for the language "if another fee is not otherwise provided by law" was the request by the Idaho Association of County Recorders and Clerks that the statutory fees for copying certain records by county clerks and recorders be left intact. (Legislative Council Committee on Public Records Minutes dated 6/28/89; testimony of Ned Kerr.) There is nothing in the minutes to suggest that a municipality, county or state agency could thwart this clear policy by rule or ordinance.

The minutes of the interim committee are consistent with then-existing law where the legislature, in several instances, had already provided a statutory fee schedule for copying charges. For instance, Idaho Code § 31-3201 provides that the clerk of the district court in any county shall charge $1.00 per page for making a copy of any file or record. Similarly, Idaho Code § 31-3205 provides that a county recorder is allowed to charge $1.00 per page for copies of recorded documents. Also, the county auditor may charge 20 er page for copying records. Idaho Code § 31-3207. The legislative history from the

interim committee that drafted this provision supports the conclusion that the legislature intended to preserve these already established fees when it enacted the Idaho Public Records Law. Idaho Code § 9-338(8) accomplishes this goal while preventing conflict with the above-cited code provisions.

4. *Conclusion*

In using the term "law" in Idaho Code § 9-338(8), the legislature did not intend "law" to encompass ordinances. This is particularly true since the legislative history shows a clear intent that "actual cost" was to be the allowable fee charged for making copies of public records and the use of the term "law," if construed broadly, could defeat this intent.

The clear purpose in the Idaho Public Records Law is to open and promote easy access to public records. To allow a city to frustrate this purpose by charging excessive copying fees is clearly not within the intent of the law. To the extent that the literal reading of Idaho Code § 9-338(8) supports the City of Boise's authority to impose fees in excess of actual costs, the literal wording must yield to a reasonable interpretation of the statute. It is, therefore, the opinion of this office that the term "law" in Idaho Code § 9-338(8) references those statutes where the Idaho Legislature had already specifically provided established fees for copying public records, not to fee schedules created by ordinance, resolution or administrative rule.

I hope that this information has been helpful.

Yours very truly,

FRANCIS P. WALKER
Deputy Attorney General

February 10, 1993

Mr. Gary Stivers
Executive Director
Industrial Commission
STATEHOUSE MAIL
Boise, ID 83701

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

Re: *Merger of Idaho Division of Vocational Rehabilitation with the Industrial Commission*

Dear Mr. Stivers:

I am writing in response to your letter dated January 26, 1993, whereby you asked this office to review the viability of the Governor's proposed merger of the Idaho Division of Vocational Rehabilitation with the Industrial Commission. Specifically, you inquired whether the Industrial Commission would satisfy the definition of "sole State agency" pursuant to federal regulation. Satisfying the federal regulation requirements is necessary in order to participate in federal funding of the program.

The congressional authorization for the vocational rehabilitation program is set forth in the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 701, *et seq.*, and is augmented by regulations promulgated and set forth at 34 CFR § 361.1, *et seq.* Program guidance is further set forth in RSA Program Instruction 75-31 and RSA Program Instruction 77-26.

In order to participate in a vocational rehabilitation program funded in part through federal funds, a state is required to propose a plan pursuant to 29 U.S.C. § 721. Within the plan, the state is required to designate a "sole State agency" to administer the plan. 29 U.S.C. § 721(a)(1)(A); 34 CFR § 361.5(a). In order to be designated as a "sole State agency," the state agency must meet the following criteria delineated in 34 CFR § 361.5(b):

> (1) A State agency primarily concerned with vocational rehabilitation, or vocational and other rehabilitation of individuals with handicaps. This agency must be an independent State commission, board,

> or other agency, which has as its major function vocational rehabilitation or vocational or other rehabilitation of individuals with handicaps. The agency must have the authority, subject to the supervision of the Office of Governor, when appropriate, to define the scope of the vocational rehabilitation program within the provision of State and Federal law, and to direct its administration without external administrative controls; or
>
> (2) The State agency administering or supervising the administration of education or vocational education in the State; or
>
> (3) A State agency which includes at least two other major organizational units, each of which administers one or more of the State's major programs of public education, public health, public welfare, or labor.

Currently, the Idaho Division of Vocational Rehabilitation is located under the Idaho State Board of Education. The Idaho State Board of Education meets the requirement of "sole State agency" pursuant to 34 CFR § 361.5(b)(2) as the state agency which administers and supervises the administration of education and vocational education in this state. Clearly, the Industrial Commission would not meet the criteria set forth in 34 CFR § 361.5(b)(2) since it does not, nor will it in the future, administer or supervise the administration of education or vocational education in the state. Thus, if the state is to meet one of the sets of criteria to be a "sole State agency," it must meet the criteria set forth in either § 361.5(b)(1) or § 361.5 (b)(3).

In order to be a "sole State agency" pursuant to § 361.5(b)(1), a state agency must meet the following requirements:

> 1. Be primarily concerned with vocational rehabilitation or vocational or other rehabilitation of individuals with handicaps;
>
> 2. Have the authority, subject to supervision by the Governor, to define the scope of the vocational rehabilitation program within the provisions of state and federal law; and
>
> 3. Have the control necessary to direct its administration without external administrative controls.

The Industrial Commission will have difficulty in meeting the first prong of this definition. As currently organized, the Industrial Commission is statutorily charged with a number of functions, only one of which is providing rehabilitative services to assist injured workers in returning to work. The other functions of the Industrial Commission include, but are not limited to, ensuring employer compliance with workers' compensation laws, processing claims to ensure that benefit providers deliver medical and time-lost benefits to injured workers, and conducting hearings to resolve disputed workers' compensation claims. As currently organized, the rehabilitative services provided by the Industrial Commission would not be the *primary* function of the Commission, but, at best, would be co-equal to the other functions previously delineated. It is unclear at this time whether reorganization of the Industrial Commission would result in rehabilitative services being the primary focus of the Commission as required by § 361.5(b)(1).

With reorganization, the Industrial Commission could meet, depending on federal application and interpretation, the criteria of "sole State agency" pursuant to CFR § 361.5(b)(3). For designation as a "sole State agency" pursuant to this section of the federal regulation, an agency must, in addition to program responsibility for vocational rehabilitation, include "at least two other major organizational units, each of which administers one or more of the State's major programs of public education, public health, public welfare or labor." 34 CFR § 361.5(b)(3). Unfortunately, the term "major program," as used in this regulation, is not defined in the regulation nor does there appear to be any written guidance from the Rehabilitative Service Administration as to what type of state program would qualify as a "major program." However, using a common sense approach, the Industrial Commission's administration of the workers' compensation laws in the State of Idaho should qualify as a major program involving the public welfare and labor. In addition, the administration of the Crime Victims Compensation Act would also appear to be a major program for the public welfare.

For purposes of reorganization to comply with § 361.5(b)(3), the Industrial Commission must comply with a number of federal regulatory requirements, the most significant of which require the following:

> (b) . . . [T]he State plan must assure that the agency (or each agency, where two agencies are designated), includes a vocational rehabilitation bureau, division or other organizational unit which:

> (1) Is primarily concerned with vocational rehabilitation, or vocational and other rehabilitation of individuals with handicaps, and is responsible for the administration of the State agency's vocational rehabilitation program, which includes the determination of eligibility for; the determination of the nature and scope of; and the provision of vocational rehabilitation services under the State plan;
>
> (2) Has a full-time director in accordance with 361.8; and
>
> (3) Has a staff, all or almost all of whom are employed full time on the rehabilitation work of the organizational unit.
>
> (c)(1) Location of designated State unit. The State plan must assure that the designated State unit, specified in paragraph (b) of this section, is located at an organizational level and has an organizational status within the State agency comparable to that of other major organizational units of the agency, or in the case of an agency described in § 361.5(b)(2), the unit must be so located and have that status, or the director of the unit must be the executive officer of the State agency.

34 CFR §§ 361.6(b) and 361.6(c)(1). *See also* 34 CFR §§ 361.5(c), 361.6(a)(2), 361.8, 361.10, and 361.14.

In conclusion, it is our opinion that the Industrial Commission, upon reorganization, should be able to qualify as a "sole State agency" pursuant to the provisions of 34 CFR § 361.5(b)(3). It is not yet clear whether reorganization of the Commission will result in the Commission's meeting the criteria for "sole State agency" set forth in 34 CFR § 361.5(b)(1). Apparently, a primary concern of the Rehabilitation Service Administration is that a merger of the Idaho Department of Vocational Rehabilitation with the Industrial Commission could result in submerging the Vocational Rehabilitation program into the Industrial Commission to the extent that the Vocational Rehabilitation program is reduced in its scope or effectiveness. *See* RSA Program Instruction, 75-31, p. 2. This appears to be the primary reason for the restrictions for designation of "sole State agency." However, strict adherence to the federal regulatory requirements by the Industrial Commission in developing its plan of reorganization should alleviate the concerns of the Rehabilitative Services Administration.

I hope this satisfactorily addresses the issues you have raised. If I can be of further help on this or any other matter, please let me know.

Very truly yours,

TERRY B. ANDERSON
Chief, Business Regulation
and State Finance Division

February 19, 1993

Mr. Steven Berenter
Hawley, Troxell, Ennis & Hawley
P. O. Box 1617
Boise, ID 83701

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

Re: *Idaho Code § 33-313*

Dear Mr. Berenter:

You have requested an opinion from this office regarding the construction and application of Idaho Code § 33-313. Specifically, you ask (1) whether a school board of trustees must appoint a person to serve as trustee for each trustee zone when a rezoning occurs and, if so, (2) whether the appointee serves the remainder of the term designated for each zone.

The answers are (1) yes, the trustees must appoint a trustee from the new zone or zones, and (2) the appointed trustee serves until a duly-elected trustee takes office in July following a May election.

Idaho Code § 33-313 provides the method available to school boards of trustees and patrons to propose to redefine and change trustee zones, *i.e.*, "rezone." Such a proposal can be initiated by the board of trustees or by petition presented to the board of trustees, signed by fifty (50) or more school electors residing in the district. The proposal must contain certain legal descriptions as well as the approximate population in the proposed zones. The State Board of Education reviews the proposal. If the state board approves the proposal the board of trustees must hold an election within a certain timeframe. The question presented to the school district electors is whether the proposal to change trustee zones should be approved.

According to Idaho Code § 33-313, once a rezone of trustee zones is approved by school district electors, a school district board of trustees has two responsibilities. The first is to appoint a trustee from among residents of a new zone and the second is to move forward with an election of trustees from those new zones. Idaho Code § 33-503 provides that the election of school

trustees shall be on the third Tuesday in May; Idaho Code § 33-510 sets the annual meeting of each school district as the date of the trustees' regular July meeting.

In 1984, the Idaho Legislature amended §§ 33-313 and 33-504, Idaho Code, as follows:

> At the next regular meeting of the board of trustees following the approval of the proposal the board shall appoint from its membership or from the patrons resident in each trustee zone, a person from that zone to serve as trustee until the next ~~regularly scheduled trustee election for that zone~~ annual meeting. At the annual election a trustee shall be elected to serve during the term specified in the election for the zone. The elected trustee shall assume office at the annual meeting of the school district next following the election.

Idaho Code § 33-313, am. 1984, ch. 94 § 1, p. 218.

> Any person appointed as herein provided shall serve until the annual ~~election~~ meeting of school district trustees next following such appointment. At ~~such~~ the annual election a trustee shall be elected to complete the unexpired term of the office which was declared vacant and filled by appointment.
>
> The elected trustee shall assume office at the annual meeting of the school district next following the election.

Idaho Code § 33-504, am. 1984, ch. 94 § 2, p. 218.

Whenever a statute is amended by the legislature, it is presumed that the legislature intended to change existing law. *Nebeker v. Piper Aircraft Corp.*, 113 Idaho 609, 747 P.2d 18 (1987). The courts have the responsibility to give force and effect to the legislature's intent and purpose. *Sherwood v. Carter*, 199 Idaho 346, 805 P.2d 452 (1991). The purpose of the 1984 amendments, according to the legislative history as expressed in committee minutes, was to clarify language regarding the length of service of an appointed trustee. House Education Committee, Jan. 25, 1984, Bob Dutton.

Based upon the statutory language, the board of trustees has an obligation to appoint individuals from the rezoned trustee zones to serve until the July

annual meeting. Furthermore, the clarification provided by the 1984 legislative changes definitively provides that trustees from rezoned trustee zones who are elected in May shall take office in July, replacing the appointed trustees.

I hope this response adequately addresses the questions raised in your letter. If the Attorney General's Office can be of further assistance, please feel free to contact me.

Sincerely,

ELAINE EBERHARTER-MAKI
Deputy Attorney General
State Department of Education

March 9, 1993

Ms. G. Anne Barker, Administrator
Department of Public Works
STATEHOUSE MAIL
Boise, ID 83720

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

Re: *Boise City Requirement of an Assembly Permit for the Idaho Historical Museum*

Dear Anne:

You have inquired as to whether the Boise City Fire Department could impose, against the state, provisions of the Uniform Fire Code not adopted by the state and require the state to pay an assessment for an assembly permit. From the facts provided in your letter, it appears that the Boise City Fire Department (BCFD) conducted an inspection of the Idaho Historical Museum and noted various items that require correction to meet the city fire code. The BCFD gave the Historical Society a limited number of days to make the corrections and told the Society that its ability to conduct meetings would be curtailed if the deficiencies were not corrected. In addition, BCFD assessed a fee for an "assembly permit."

As discussed at length in Attorney General Opinion 90-6, in Idaho, municipal corporations are considered creatures of the state and possess no inherent powers other than those powers expressly or impliedly granted. *Sandpoint Water and Light Company v. City of Sandpoint,* 31 Idaho 498, 173 P. 972 (1918); 6A McQuillan *Municipal Corporations* § 24.35 (3d ed.).

The authority for a municipal corporation to enact and enforce building and safety codes is derived from the police powers granted to municipalities in the Idaho Constitution, article 12, section 2. *See Caesar v. State,* 101 Idaho 158, 610 P.2d 517 (1980); *State v. Clark,* 88 Idaho 365, 399 P.2d 955 (1965). Article 12, section 2, of the constitution provides that "any county or incorporated city or town may make and enforce within its limits all such *local* police, sanitary and other regulations as are not in conflict with its charter or with the general laws." (Emphasis added.)

Although the city may have a direct constitutional grant of local police power, that power is limited in certain respects. It has been consistently held that the city cannot act in an area which is so completely covered by general laws as to indicate that it is a matter of state concern. *In re Hubbard*, 396 P.2d 809 (Cal. 1964). Nor may it act in an area where to do so would compete with the state's general laws. *Caesar; State v. Musser*, 67 Idaho 214, 176 P.2d 199 (1946).

The court in *Caesar* determined that the area of state-owned buildings was so completely covered by the general laws as to not be subject to local ordinance control. The court went on to note that it recognized the authority placed in the Boise City Building Inspector would conflict with the authority vested in the Idaho Industrial Commission and the Department of Labor. The court thus held that the local Boise City Building Inspector could not exercise authority over state-owned buildings.

As noted in Attorney General Opinion 90-6, the state's exclusive authority over construction and maintenance of its own buildings remains unchanged and the legal principles set forth in *Caesar* continue to be binding precedence. The Boise City Fire Department is without authority to require the Idaho Historical Museum, as a state-owned and occupied building, to meet city fire codes and to pay an assessed "assembly permit" fee. The opinion previously given by the Attorney General interpreting the holding in *Caesar* applies, and there is simply no basis for local infringement on the state's authority in this area.

I hope this addresses your concerns. If I can be of further assistance on this or any other matter, please let me know.

Very truly yours,

TERRY B. ANDERSON
Chief, Business Regulation
and State Finance Division

March 16, 1993

Honorable Jerry L. Evans
State Superintendent of Public Instruction
650 W. State, Room 200
STATEHOUSE MAIL
Boise, ID 83720

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

Re: *House Bill No. 345*

Dear Superintendent Evans:

This letter is in response to your request of March 12, 1993, for an opinion regarding House Bill 345 which creates a state board of education comprised of two separate councils, one for higher education and one for public schools. The proposal to create two panels to the State Board of Education was also presented in the 1992 legislative session in Senate Bill 1336. With reference to last year's legislation, the Attorney General's Office submitted a legal guideline addressing the issue of whether the separation of the Board of Education into separate bodies violated the provisions of art. 9, § 2, of the Idaho Constitution. A copy of that analysis is provided with this letter for your review.

Although there are minor variations in the legislative proposal submitted in 1992 and H.B. 345, the primary goal of both pieces of legislation is to split the Board of Education into two bodies. After a thorough analysis of the issue last year, this office found that the plain language of art. 9, § 2, of the Idaho Constitution required that the educational affairs of the state be governed by a single board of education.

Article 9, § 2, of the Idaho Constitution states:

> The general supervision of the state educational institutions and public school system of the state of Idaho, shall be vested in a state board of education, the membership, powers and duties of which shall be prescribed by law. The state superintendent of public instruction shall be ex officio member of said board.

In addition, the 1992 guideline noted that Senate Bill 1336 failed to include the Superintendent of Public Instruction as an ex officio member of the body supervising higher education in violation of the provision of art. 9, § 2, requiring that the Superintendent have a voice in the higher education affairs of the state.

House Bill 345 corrects one of the constitutional deficiencies noted in the 1992 legislation by inclusion of the State Superintendent of Public Instruction as an ex officio voting member of both councils. However, the division of the Board of Education into two councils as provided in H.B. 345 cannot be accomplished by legislation. In order to accomplish this goal, the constitution must be amended.

In addition to the constitutional concerns raised by your correspondence, you have requested procedural clarification for splitting the board into two councils as delineated by House Bill 345.

Your first question concerns whether the rule-making authority provided pursuant to the Administrative Procedure Act (APA) would be retained by the State Board of Education. Idaho Code § 67-5203(c) speaks to rule-making authority vesting with the Board of Education. Since there is no statutory recognition of the proposed councils in the APA, rule-making authority is retained by the board.

You have also asked for guidance regarding supervision of programs which are not defined as "public school" nor "higher education" programs, but that are statutorily required to be governed by the Board of Education; *e.g.*, the Division of Vocational Rehabilitation and the State Historical Society. By statutory designation the Division of Vocational Rehabilitation and the State Historical Society are placed under the general supervision and control of the State Board of Education. *See* Idaho Code §§ 33-101; title 33, ch. 23; and 67-4123. The proposed language in House Bill 345 would not change the requirement that the board, sitting as a whole, be responsible for administering the powers and duties of not only the Division of Vocational Rehabilitation and the State Historical Society, but any agency or institution required by statute to be governed by the board.

Your final question is whether the councils for higher education and public education would be subordinate to the State Board of Education.

House Bill 345 provides that the State Board of Education will convene as a whole for the supervision, governance and control of the general educational programs of common access to both higher education and the public school system. There is no provision establishing the board as a superior to the councils with respect to issues specifically relating to higher education or public schools. As such, there is no provision delineated in the bill for resolution of conflicts between the two councils.

In conclusion, division of the Board of Education into two councils through legislation is unconstitutional. In order to accomplish the intent of the drafters of House Bill 345, art. 9, § 2, of the Idaho Constitution must be amended.

I hope this letter answers your concerns. If I can be of any further assistance, please call.

Very truly yours,

TERRY B. ANDERSON
Chief, Business Regulation
and State Finance Division

April 6, 1993

Ms. Carmen Westberg, Bureau Chief
Bureau of Occupational Licenses
STATEHOUSE MAIL
Boise, ID 83720

Ms. Jan Chase, Vice Chairman
Idaho Cosmetology Board
1209 S. Phillippi
Boise, ID 83705

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

Dear Carmen and Jan:

This letter is in response to your request for an opinion regarding the enforceability of the provisions contained in Idaho Code § 54-812. This statute regulates the endorsement certification procedure for cosmetologists and distinguishes, for reciprocity purposes, between cosmetologists currently licensed in another state who have previously been licensed in Idaho from cosmetologists currently licensed in another state who have never been licensed in Idaho. Because this classification allocates the benefits and burdens of the statute differently among the categories of persons affected, the primary question is whether it violates the equal protection clauses of the U.S. and Idaho Constitutions.

The equal protection clauses of the state and federal constitutions embrace the principle that all persons in like circumstances should receive the same benefits and burdens of the law. Equal protection issues focus upon classifications within statutory schemes that allocate benefits or burdens differently among the categories of persons affected. *State v. Reed,* 107 Idaho 162, 686 P.2d 842 (Ct. App. 1984). The first step in an equal protection analysis is to identify the classification under attack. The second is to articulate the standard under which the classification will be tested. The third is to determine whether the standard has been satisfied. *State v. Breed*, 111 Idaho 497, 725 P.2d 201 (Ct. App. 1986).

Cosmetology Statutes

Idaho Code § 54-812 provides in pertinent part as follows:

> ENDORSEMENT CERTIFICATION. The board . . . may issue a license without examination to any person who is at least eighteen

> (18) years of age and of good moral character and temperate habits and who has completed two (2) years of high school or its equivalent and who either:
>
> 1. Holds a certificate of qualification or license issued to him by the proper authority of any state . . . provided that the requirements for license under which the certificate was issued are of a standard not lower than those specified in this chapter, or
>
> 2. Holds a certificate of qualification or license issued to him by the proper authority of any state . . . and upon proof that said person has practiced the pursuit for which the license is requested for at least three (3) years immediately prior to such application. The board shall evaluate the applications for license by reciprocity. No reciprocal license shall be issued except by the board. *This section shall not apply to any individual who is or has been licensed in the state of Idaho.*

(Emphasis added.)

Idaho Code § 67-2614 governs the procedure for licensing a cosmetologist who is currently or has previously been licensed in the State of Idaho. It provides in pertinent part as follows:

> RENEWAL OR REINSTATEMENT OF LICENSE. All persons required to procure licenses from the bureau of occupational licenses as a prerequisite for engaging in a trade, occupation, or profession must annually renew the same on July first of each year. In case of failure so to renew a license, the bureau shall cancel the same, October first, following the date of delinquency: provided[,] however, that the bureau may reinstate any license cancelled for failure to renew the same on payment of twenty-five dollars ($25.00), together with all fees delinquent at the time of cancellation and the renewal fee for each year thereafter up to the time of reinstatement.
>
> Provided further, that where a license has been cancelled for a period of more than five (5) years, the person so affected shall be required to make application to the bureau, using the same forms and furnishing the same information as required of a person originally applying for a license, and pay the same fee that is required of a per-

> son taking the examination in the particular profession in which said person holds a cancelled Idaho license. Said applicant shall appear in person before the bureau at any regular or special meeting for an examination, the nature of which shall be determined by the bureau. If[,] after an examination, the bureau is of the opinion that the person examined is the bona fide holder of the cancelled license, is of good moral character and, is found capable of again practicing in this state the profession for which the original or cancelled license was granted, the license shall be reinstated and the holder thereof entitled to practice subject to the laws of this state.

The effect of Idaho Code § 54-812 is that a cosmetologist previously licensed in Idaho, currently licensed in another state, and seeking re-licensing in Idaho is not entitled to the same reciprocity as other cosmetologists currently licensed in another state.

Standard of Review

To determine whether a statutory classification scheme violates the equal protection guarantee, the Idaho Supreme Court has recognized three standards of review. *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977). Where the classification is based upon a suspect classification or involves a fundamental right, the "strict scrutiny" test is employed. Where the discriminatory character of a challenged statutory classification is apparent on its face and where there is also a patent indication of a lack of relationship between the classification and the declared purpose of the statute, the "means focus" test is applicable. In other cases the "rational basis" test is employed. *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990) (citing *Johnson v. Sunshine Mining Co.*, 106 Idaho 866, 870, 688 P.2d 268, 271 (1984)).

Clearly, there is neither a suspect class nor fundamental right involved in the question here. Thus, either the "means focus" or the "rational basis" test will apply. The Idaho case of *Jones v. State Bd. of Medicine* provides guidance in choosing between the "means focus" and "rational basis" tests:

> In the usual and ordinary case where a statutory classification is to be tested in the context of equal protection, judicial policy has been, and continues to be, that the legislation should be upheld so long as its actions can reasonably be said to promote the health, safety and wel-

> fare of the public. Nevertheless, where the discriminatory character of a challenged statutory classification is apparent on its face and where there is also a patent indication of a lack of relationship between the classification and the declared purpose of the statute, then a more stringent judicial inquiry [means focus] is required beyond that mandated by McGowen [rational basis].

97 Idaho at 871, 555 P.2d at 411.

A. *Means Focus Test*

Under this test, two questions are posed. First, whether the statutory classification is discriminatory and, second, whether the legislative means substantially further some specifically identifiable legislative end. *Jones,* 97 Idaho at 867, 555 P.2d at 407. If the classification is discriminatory and furthers no legitimate legislative end, the classification will be found to be in violation of the Equal Protection Clause.

It is apparent from the face of the statute that a discriminatory classification is created based upon whether a cosmetologist was previously licensed in the State of Idaho. Idaho Code § 54-812 confers a benefit upon those who have never been licensed in the State of Idaho by granting them reciprocity in licensing and burdens those cosmetologists who were previously licensed in Idaho by requiring them to pay additional fees when the license has been cancelled for less than five years, or to make application, pay an examination fee and pass an examination when the Idaho license has been cancelled for more than five years, in order to obtain a current cosmetology license in the State of Idaho.

Idaho Code § 54-812 was amended in 1980 to include, "[t]his section shall not apply to any individual who is or has been licensed in the state of Idaho." 1980 Idaho Sess. Laws 168. The statement of purpose for this amendment provides no information explaining the purpose of the amendment, other than "to improve the administration of the Cosmetology Laws."

Although there is no statement of legislative purpose concerning excluding application of Idaho Code § 54-812 to cosmetologists previously licensed in Idaho, it is patent that the principal concern of the legislature in enacting the statute was for the protection of the health, safety and welfare of the public. Such an interpretation of legislative intent finds support in language found in

Idaho Code § 54-801, which delineates the state's objective in enacting title 54, chapter 8, of the Idaho Code:

> In order to safeguard the public health, safety and welfare, every person practicing or offering to practice cosmetology, as hereinafter defined, shall submit evidence of his qualifications and be licensed as hereinafter provided . . . .

There is no information indicating that granting a reciprocal license to cosmetologists previously licensed in the state of Idaho threatens the health, safety or welfare of the public. In the absence of some showing that a safety factor or other exigency requires such a distinction, the distinction is arbitrary, unreasonable and without a substantial relation to the purpose of protecting the health, safety and welfare of the public. Therefore, the statutory classification violates art. 1, §§ 2 and 13, of the Idaho Constitution, and the Fourteenth Amendment of the U.S. Constitution. *Sterling H. Nelson & Sons, Inc. v. Bender,* 95 Idaho 813, 816, 520 P.2d 860, 863 (1974).

B. *Rational Basis Test*

If for any reason a court should find an analysis under the "means focus" test inappropriate and apply the rational basis test, the same conclusion would result.

The rational basis test is generally used when reviewing statutes which impact social or economic areas. In *Stucki v. Loveland,* 94 Idaho 621, 495 P.2d 571 (1972), the Idaho Supreme Court stated that the "rational basis" test, under the Fourteenth Amendment to the United States Constitution and under art. 1, § 2, of the Idaho Constitution, contains two elements. The court found that a statutory classification will fail the "rational basis" test if it cannot be construed to reflect a reasonably conceivable, legitimate public purpose, or if it fails to reasonably relate to the ascribed purpose. *Stucki,* 94 Idaho at 623, 495 P.2d at 573.

The classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Thompson v. Hagan,* 96 Idaho 19, 21, 523 P.2d 1365, 1367 (1974). The Equal Protection Clause is offended if the classification is based solely on reasons unrelated to the pursuit of the

state's goals and only if no grounds can be advanced to justify those goals. *Olsen,* 117 Idaho at 717, 791 P.2d at 1289.

As discussed above, this statutory classification between cosmetologists previously licensed in Idaho and cosmetologists who have never been licensed in Idaho does not further any legitimate legislative purpose or reasonably relate to the ascribed purpose of protecting the health, safety and welfare of the public. The statutory classification contained in Idaho Code § 54-812 violates the Equal Protection Clause under the rational basis test as well.

Severability

Idaho Code § 52-825 provides:

> Severability. If any section, subdivision, sentence or clause of this chapter is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this chapter.

In *Lynn v. Kootenai County Fire Protective Dist. #1*, 97 Idaho 623, 550 P.2d 126 (1976), the Idaho Supreme Court was presented with a similar situation. The court found an amendment to a statute to be unconstitutional and addressed the issue of severability as to that portion:

> This court in the absence of evidence of contrary legislative intent, can presume that the legislature intended the previously enacted severability clause to apply to the amendments. Where possible, this court will recognize the legislative intent expressed by the severability clause.

97 Idaho at 627, 550 P.2d at 130 (citation omitted).

If the unconstitutional section does not in and of itself appear to be an integral or indispensable part of the chapter, then it may be stricken. *Lynn,* 97 Idaho at 625, 550 P.2d at 128. Striking the offending portion of Idaho Code § 54-812 leaves the statute as it was before the amendment. The requirements for reciprocity in licensing would apply equally among all cosmetologists currently licensed out of state. Because this statute was valid before the amendment, this section is not indispensable to the act.

The 1980 amendment to Idaho Code § 54-812 stating, "[t]his section shall

not apply to any individual who is or has been licensed in the state of Idaho," should be severed from Idaho Code § 54-812 and the remaining portion of the statute given effect.

Very truly yours,

TERRY B. ANDERSON
Chief, Business Regulation
and State Finance Division

April 6, 1993

Mr. Robin Dunn
Jefferson County Prosecuting Attorney
P.O. Box 276
Rigby, ID 83442

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

Dear Mr. Dunn:

QUESTIONS PRESENTED

1. Whether persons under the age of 21 may enter and remain at an establishment that serves as a bar and as a restaurant.

2. Does Idaho Code § 23-944(b) require that the bar be partitioned from the restaurant portion of the establishment?

3. Can the City of Ririe impose an ordinance requiring partitioning of the establishment?

CONCLUSION

1. Yes. Provided that the liquor license is endorsed that the license has been issued to a restaurant.

2. No.

3. No.

BRIEF SYNOPSIS OF FACTS

Located in Ririe, Jefferson County, Idaho, is an establishment that has served as a bar for a number of years. Recently, the bar has added a grill in order to serve hamburgers and other grilled foods. Installing the grill allowed the establishment to obtain a restaurant license. Since obtaining the restaurant license, the bar has removed its signs restricting entrance to individuals under the age of 21 and no longer restricts entrance to the establishment. As a result,

many individuals under the age of 21 years of age, including many high school students, frequent the establishment.

ANALYSIS

Question No. 1:

Idaho law prohibits persons under 21 years of age from being in, or loitering about, bars, cocktail lounges and taprooms. The effective provisions are found in the liquor code at Idaho Code §§ 23-941 to 23-946. These provisions call bar rooms a "place" and prohibit persons under 21 years of age from being in the "place," further requiring the "place" to be posted to prevent entry of persons under 21 years of age.

Idaho Code § 23-943 prohibits persons under 21 years of age from entering, or remaining in, or loitering in or about any prohibited "place":

> Persons under specified ages forbidden to enter, remain in or loiter at certain licensed places.— No person under the age of twenty-one (21) years shall enter, remain in or loiter in or about any place, as herein defined...nor shall any licensee of either such place, or any person in charge thereof, or on duty while employed by the licensee therein, permit or allow any person under the age specified with respect thereto to remain in or loiter about such place . . . .

Idaho Code § 23-943 (Supp. 1992). The code defines "place" as follows:

> Definitions.— The following definitions shall apply in the interpretation of the enforcement of this act:
>
> . . . .
>
> (b) "Place," as used in this act, means any *room of any premises* licensed for the sale of liquor by the drink at retail wherein there is a bar and liquor, bar supplies and equipment are kept and where beverages containing alcoholic liquor are prepared or mixed and served for consumption therein, and *any room of any premises* licensed for the sale of beer for consumption on the premises wherein there is a bar and beer, bar supplies

> and equipment are kept and where beer is drawn or poured and served for consumption therein.

Idaho Code § 23-942 (1977) (emphasis added). As can be seen from the underlined portions, "place" is defined as a subpart of a "premises" which is defined elsewhere in the liquor code.[1] A "place" is "room" within the licensed premises that meets the other requirements of the definition such as containing stored liquor, supplies and equipment.

An exception is made for restaurants where persons under 21 may enter, even if the room would be otherwise considered a "place." Idaho Code § 23-944 provides certain exceptions to the prohibition of 23-943, including an exception for "restaurants":[2]

> Exceptions from restriction on entering or remaining.— It shall not be unlawful for, nor shall section 23-943, Idaho Code, be construed to *restrict,* any person under the age of twenty-one (21) years from entering or being:
>
> > (a) upon the *premises* of any restaurant, as herein defined . . . notwithstanding that such premises may also be licensed for the sale of liquor by the drink or for the sale of beer for consumption on the premises or that alcoholic beverages, or beer, or both, are prepared, mixed or dispensed and served and consumed therein.

Idaho Code § 23-944 (Supp. 1992) (emphasis added). Subsection (a) provides an exception for "restaurants" as they are defined in the code and permits underage persons to be on the "premises" of the restaurant even if it is otherwise defined as a "place." Thus, the prohibition against the entry of underage persons in the "place" does not apply to premises which fit the definition of restaurant.

This conclusion is supported by other parts of the statute. Idaho Code § 23-946 provides for the endorsement on an alcohol beverage license for premises being operated as a restaurant:

> Statement made by licensees of premises operated as restaurants — Indorsement upon license.— (a) Every applicant for a state license for the sale of liquor by the drink or for the sale of beer for consumption

> on the premises claiming that the *premises* for which such license is sought constitute and are operated as a restaurant, as herein defined, shall, on each application for state license and on each application for renewal of license, state that such *premises* constitute or are operated as such restaurant. Upon issuance of state license for the sale of liquor by the drink or for the sale of beer for consumption on the premises, for *premises* constituting and operated as a restaurant, the licensee of which has made the proper statement on the application, *the director shall indorse on the face of the license the fact that it has been issued to a restaurant as herein defined. Unless such statement shall have been filed with the director and his said indorsement shall appear on the face of the license, the restrictions contained in section 23-943, Idaho Code, shall apply,* notwithstanding that such premises may in fact constitute and be operated as a restaurant, and the posting of signs as provided for in section 23-945, Idaho Code, shall be required . . . .

Idaho Code § 23-946 (Supp. 1992) (emphasis added). The underlined portion of the section above states that restrictions of § 23-943 apply *unless* the licensee has received a license containing a "restaurant" endorsement. The clear intent seems to be to draw a bright line as to establishments which must post signs and enforce the restrictions of § 23-943, and those which do not. Restaurants do not.

Further, the purpose of these sections is described in a policy statement included in the code:

> Declaration of public policy. — It is hereby declared that the intent of this act is to restrict persons under the ages herein specified from entering, remaining in or loitering in or about certain places, as herein defined, which are *operated and commonly known as taverns, barrooms, taprooms and cocktail lounges and which do not come within the definition of restaurant* as herein contained and are not otherwise expressly exempted from the restrictions herein contained.

Idaho Code § 23-941 (1977) (emphasis added). Thus, the intent of the statutory provisions is that underage persons will be excluded from licensed premises which do not fall within the definition of a restaurant.

In practice, this policy means that licensed premises with a restaurant

endorsement are not required to prohibit entry by persons under 21 years of age. Persons under 21 years of age can freely enter and remain in such an establishment.

Question No. 2:

Does Idaho Code § 23-944(b) require that the bar be partitioned from the restaurant portion of the establishment? Idaho Code 23-944 states:

> Exceptions from restriction on entering or remaining.— It shall not be unlawful for, nor shall section 23-943, Idaho Code, be construed to *restrict,* any person under the age of twenty-one (21) years from entering or being:
>
> . . . .
>
> (b) in any building, a part or portions of which is used as a place, as herein defined, provided such place is separated or partitioned from the remainder of said building and access to such place through a doorway or doorways or other means of ingress can be controlled to prevent persons under the ages specified with respect thereto in section 23-943, Idaho Code, from entering therein.

(Emphasis added.) Subsection (b) permits *any* building to be so partitioned as to separate the "place" from other areas of the building. For example, a hotel can designate a room or rooms as the "place" and restrict access to the "place" without having to restrict access to other "common" areas in the building, such as the convention center, meeting rooms or other similar rooms.

If subsection (b) were read to require a partitioning of the place from the rest of the premises, then subsection (a), providing a blanket exception for "restaurants," is superfluous. The legislature cannot be presumed to have created superfluous statutory provisions.

Construing the two provisions together gives purpose to the statute and avoids any ambiguity. Therefore, subsection (b) cannot be construed to require a bar to be partitioned from the restaurant portion of the premises.

Question No. 3:

Can the City of Ririe impose an ordinance requiring partitioning of the establishment? Idaho Code § 23-916 states:

> COUNTY AND CITY LICENSES. In addition to the licensing and control herein provided for the retail sale of liquor by the drink, each county and incorporated city in the state of Idaho is hereby authorized and empowered to license the sale of liquor by the drink at retail within the corporate limits of such city. . . . The governing authority for such city may provide further regulations for the control of such business, and the board of county commissioners of any county may fix the fee for, and may regulate and control the use of, any license issued for the sale of liquor by the drink at retail in any licensed premises not situate within the incorporated limits of any city, not in conflict with the provisions of this act.

This statute is in harmony with the Idaho Constitution, art. 12, sec. 2, which authorizes a municipality to pass ordinances that are not in conflict with state law. A municipality does have authority to regulate the sale of liquor by the drink at retail within its municipal boundaries. Would this authority allow it to require an establishment to partition the alcohol storage and serving area from the restaurant portion of the premises?

It would appear that any ordinance requiring the partition of the premises would go beyond and conflict with the state statute. *Envirosafe Serv. of Idaho v. Cty. of Owyhee*, 112 Idaho 687, 735 P.2d 998 (1987); *Caesar v. State*, 101 Idaho 158, 610 P.2d 517 (1980).

Idaho Code § 23-944 provides an exception from restriction for the premises of a restaurant, even though the premises is also "licensed for the sale of liquor by the drink or for the sale of beer for consumption on the premises or that alcoholic beverages, or beer, or both, are prepared, mixed or dispensed and served and consumed therein." The state statute does not require a partition. Any attempt to make further requirements in the nature of a partition would conflict with the statute.

An ordinance of this type would also conflict with the stated purpose of the statute, which specifically states that restaurants are exempted from the requirement of restricting access on the account of age.

Therefore, it appears that any municipal ordinance requiring a partition would be conflicting and would therefore be unconstitutional.

Very truly yours,

CLAYNE S. ZOLLINGER, JR.
Deputy Attorney General
Department of Law Enforcement

[1] Idaho Code § 23-902(k).

[2] "Restaurant" is also defined in Idaho Code § 23-942:

> "Restaurant," as used in this act, means any restaurant, cafe, hotel dining room, coffee shop, cafeteria, railroad dining car or other *eating establishment* having kitchen and cooking facilities for the preparation of food and where hot meals are regularly served to the public.

(Emphasis added.)

June 25, 1993

Honorable Lydia Justice Edwards
Idaho State Treasurer
STATEHOUSE MAIL
Boise, ID 83720-1000

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

Re: *Fish and Game Contract with Stylart*

Dear Lydia:

I have conducted an investigation into the procedures surrounding the contract with Fish and Game and Stylart. It appears that Stylart is, as the newspaper articles indicated, taking applications for controlled hunts over the phone and accepting fees for the application and tags by credit card. In addition, Stylart is charging a service fee of $4.00 per call plus 3% of the transactual amount per phone call. The service fee going to Stylart is taken off the top and the remainder of the fee is ultimately placed into the Treasurer's sweep account.

Once the drawing for the controlled hunt has been completed, Fish and Game anticipated Stylart providing the names and amounts paid by the applicants who did not receive a permit or tag in the draw to be provided to Fish and Game. Fish and Game would then request one refund check for all credit card applicants be given to Stylart for purposes of making the refunds to those applicants. Stylart is not bonded to protect the state if the refund owed to the hunter by the state is not paid by Stylart.

With reference to this contract, the questions you have asked us to address are:

1. Did Fish and Game have authority to enter into a contract with Stylart for the services being provided?

2. Is it appropriate for the state to tender all refunds on credit card applications to Stylart for disbursement by Stylart to hunters owed reimbursement?

With reference to the first question, we reviewed the authority of the Department of Fish and Game to undertake this type of program with Stylart. Pursuant to Idaho Code § 36-104(b)(5)(C), the Department of Fish and Game is precluded from charging a fee to any individual for submitting an application to participate in a controlled hunt which exceeds the permit fee delineated by statute.

The Department of Fish and Game contends that Stylart is not authorized to sell licenses. Therefore, Idaho Code § 36-306 allowing authorized persons to charge a commission of $1.00 upon all licenses, tags and permits for which there is a fee does not apply to Stylart. However, there is no additional statutory authority which would allow them to charge the fee being assessed for the service that they are providing. And, in fact, the provision of Idaho Code § 36-104(b)(5)(C), discussed above, strictly precludes it.

In reference to the second question, it would be my opinion that the state should not transfer refunds through Stylart for ultimate repayment to hunters not obtaining a tag in the draw. Fish and Game has not required Stylart to obtain a bond to protect the state in the event that Stylart failed to make appropriate distribution of the refund monies to the hunters. Fish and Game contends that it has no statutory right to demand a bond from Stylart and, technically, it is right, because Fish and Game has no statutory authority to enter into a contract with Stylart to provide these types of services. As noted by you in our conversation, the duty of the state is to refund the money to the hunter who has paid for the permit and not had his name drawn. *See generally* Idaho Code §§ 67-1001, 67-1011. Payment by the state to anybody but that individual, without authority from statute or the party owed the refund, would be inappropriate.

In conclusion, it would appear that Fish and Game and Stylart are acting in violation of statutory authority by charging a service fee on applications taken by telephone. Further, the state cannot issue refunds to a third party for repayment to the sportsman to whom the state owes a refund without appropriate waivers from the individual hunters or specific statutory authority.

I hope this letter adequately addresses your questions. If you have any further concerns, please give me a call.

Very truly yours,

TERRY B. ANDERSON
Chief, Business Regulation
and State Finance Division

July 6, 1993

Ms. Laura Gleason, Senior Planner
Planning, Employment & Training Programs
Idaho Department of Employment
317 Main Street
STATEHOUSE MAIL
Boise, ID 83735

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

Re: *Private Industry Councils and the Idaho Open Meeting Law*

Dear Ms. Gleason:

You have asked whether private industry councils are subject to the provisions of the Idaho Open Meeting Law, Idaho Code §§ 67-2340 through 67-2347 (1989 and 1992 Supp.). Additional questions are whether private industry councils, if subject to the provisions of the law, may legally hold meetings by means of telephone conference calls, and whether they may reach final decisions by means of ballots distributed to council members in the mail.

CONCLUSION

Private industry councils are subject to the Idaho Open Meeting Law, and therefore must, with only limited exceptions, conduct their business at meetings open to the public. As entities subject to the law, these councils must also comply with requirements such as notice to the public of meetings and agendas.

Private industry councils may conduct their meetings by telephone conference calls. Such a procedure complies with the Open Meeting Law, provided that the public is notified of and given full access to the meeting.

The Idaho Open Meeting Law prohibits a governing body of a public agency from voting by "secret ballot," *see* Idaho Code § 67-2342(1), and the Attorney General has interpreted this provision to require that votes of governing bodies of public agencies must be "conducted in public." *See* Idaho Atty. Gen. Op. 85-9 (1985). Thus, private industry councils may not take

votes by mailed-in ballots and should only take votes at meetings open to the public.

ANALYSIS

A. *Background on Private Industry Councils*

Private industry councils are local/regional governmental entities that have a unique identity. They are created and authorized under the provisions of the federal Job Training Partnership Act; however, they are operated and their members are appointed by state and local governments. Job Training Partnership Act of 1982, Pub. L. No. 97-300, § 103(a), 96 Stat. 1322 (1982), codified as amended at 29 U.S.C. § 1513(a). Each private industry council is responsible "to provide policy guidance for, and exercise oversight with respect to, activities under the job training plan for its service delivery area in partnership with the unit or units of general local government within its service delivery area." *Id.* In accordance with an agreement with a service delivery area's chief local elected officials (such as county commissioners and city council members), a private industry council develops the area's biannual job training plan, selects a grant recipient and administrative entity to administer the job training plan, and procures job training services from service providers in the area to carry out the plan. *See* JTPA §§ 103 and 104.

A private industry council is composed of representatives of private sector businesses, organized labor, community-based organizations, and governmental agencies that are located in each JTPA service delivery area. JTPA § 102(a). The chief elected officials of the units of general local government, by agreement, appoint the members of a private industry council. JTPA § 102(d). In the absence of such an agreement, the governor of the state has authority to appoint the members of the area's private industry council. *Id.* The governor must also certify that the composition and appointments of a private industry council are consistent with the JTPA before it is allowed to function. JTPA § 102(g).

The JTPA allows private industry councils to be incorporated. JTPA § 103(e). In Idaho, all private industry councils have incorporated as nonprofit corporations.

B. *Applicability of the Idaho Open Meeting Law to Private Industry Councils*

1. *Preemption Doctrine Analysis*

Before the substantive provisions of the Idaho Open Meeting Law are analyzed for their applicability to private industry councils, a threshold issue must be addressed. As the preceding section has shown, private industry councils are the creation of federal, not state, law. Although local county and city elected officials, and in some cases the state's governor, appoint private industry council members, the councils themselves are created and governed by the provisions of the JTPA.

The question of whether the Idaho Open Meeting Law applies to a governmental entity that is created pursuant to a federal statute is one of first impression. No reported court case has addressed the issue before.[1] Given the lack of specific guidance from case law on open meeting law provisions, this issue requires a general interpretation of the Supremacy Clause of the United States Constitution. That provision states that the "Constitution and the Laws of the United States shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

In interpreting the Supremacy Clause, the federal courts apply the "preemption doctrine" which requires that whenever Congress has exercised its authority to regulate in an area, concurrent conflicting state legislation may be challenged as having been superseded or overruled by the federal legislation. *See* J.E. Nowak, R.D. Rotunda & J. N. Young, *Handbook on Constitutional Law,* 267 (1978). The courts usually invoke the preemption doctrine only in cases "where there is an actual conflict between the two sets of legislation such that both cannot stand, for example, if federal law forbids an act which state legislation requires." *Id.*

The traditional test for determining whether state legislation is preempted under the Supremacy Clause is whether the "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52 (1941). In *Hines,* the United States Supreme Court held that Congress had, with the passage of the Alien Registration Act of 1939, preempted Pennsylvania from enacting its own alien registration statute that conflicted with the federal law. 312 U.S. at 67.

A comparison of the JTPA and the Idaho Open Meeting Law demonstrates no actual conflict between the express provisions of the two pieces of legisla-

tion. The JTPA does not explicitly forbid states from enacting open meeting laws that are applicable to private industry councils authorized under the Act. On the contrary, Congress provided a "savings clause" in the JTPA that allows state legislatures to adopt legislation "providing for the implementation . . . of the programs assisted" under the Act. JTPA § 126. *See also* S. Rep. No. 97-469, 97th Cong., 2nd Sess. (1982), reprinted in 1982 U.S.C.A.N. 2636, 2638 (legislative history of the Job Training Partnership Act) (concept of "federalism" as allowing for mutual roles of federal, state and local governments under the JTPA). The existence of such a "savings clause" in federal legislation is often interpreted to preclude a preemption problem under the Supremacy Clause. *See Handbook on Constitutional Law* at 267.

An analysis of the respective purposes of the JTPA and the Idaho Open Meeting Law is helpful in revealing any conflicts between the two pieces of legislation that might indicate a preemption problem. The JTPA provides that private industry councils shall make decisions regarding the selection of service providers and the procurement of job training services within their respective service delivery areas. JTPA § 103(a). Additionally, the JTPA requires state and local governments to ensure that "procurements shall be conducted in a manner providing full and open competition" and that the state's procurement standards will "ensure fiscal accountability and prevent fraud and abuse." JTPA § 164(a)(3).

The purpose of the Idaho Open Meeting Law is to ensure that the "formulation of public policy" is "public business" and "shall not be conducted in secret." Idaho Code § 67-2340. Given the JTPA goals of ensuring "open" procurement processes and preventing "fraud and abuse," the applicability of the state's open meeting law to a private industry council would appear not only compatible with, but an enhancement to, the JTPA.

Thus, based upon the above analysis, federal preemption is not a barrier to the applicability of the Idaho Open Meeting Law to private industry councils.

2. *Coverage Provisions of the Idaho Open Meeting Law*

The Idaho Open Meeting Law requires that "all meetings of a governing body of a public agency shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided" by the law. Idaho Code § 67-2343(1). The operative terms in this provision are "governing body" and "public agency." A "governing body" is defined as "the mem-

bers of any public agency which consists of two (2) or more members, with the authority to make decisions for or recommendations to a public agency regarding any matter." Idaho Code § 67-2341(5). A "public agency" is defined in the following categories:

> (a) any state board, commission, department, authority, educational institution or other state agency which is created by or pursuant to statute, other than courts and their agencies and divisions, and the judicial council, and the district magistrates commission;
>
> (b) any regional board, commission, department or authority created by or pursuant to statute;
>
> (c) any county, city, school district, special district, or other municipal corporation or political subdivision of the state of Idaho;
>
> (d) any subagency of a public agency which is created by or pursuant to statute, ordinance, or other legislative act.

Idaho Code § 67-2341(4).

An entity must meet the statutory definitions of both a "governing body" and a "public agency" to be covered by the requirements of the Idaho Open Meeting Law. As the policy-making entity composed of more than one person, a private industry council has authority under the JTPA to both make "decisions" and "recommendations" regarding the delivery of job training services in its service delivery area. JTPA §§ 103 and 104. Based upon the provisions of the JTPA, a private industry council meets the definition of a "governing body" contained in Idaho Code § 67-2341(5).

To determine whether private industry councils fit the definition of a "public agency" contained in Idaho Code § 67-2341(4), it must first be determined whether they are actually public rather than private in nature. The word "private" in the phrase "private industry council" raises a concern that such councils may not be public agencies but rather private entities that merely receive government funding under the JTPA program. Furthermore, Idaho's private industry councils are incorporated as nonprofit corporations, and corporations are ordinarily not considered to be public agencies.

The fact that private industry councils are incorporated, however, is not a

barrier to considering them "public" in nature if they meet the test for a public corporation. The test for a public corporation is whether the government has the sole right to regulate, control and direct the corporation. *See* Idaho Atty. Gen. Op. 89-7 at 8 (1989), citing *Trustees of Columbia Academy v. Board of Trustees,* 262 S. Ct. 117, 202 S.E.2d 860, 864 (1974).

Private industry councils are subject to extensive and complete governmental control and, therefore, meet the test of a public corporation. Not only are the members of the councils appointed by either the local elected officials of their service delivery area or the governor, but the job training plan they are required by the JTPA to develop every two years must be submitted to and approved by the local elected officials and the governor. JTPA §§ 103 and 104. The governor has the authority to "certify" private industry councils and may withhold certification if the appointments to the council made by local elected officials do not conform to the requirements of the JTPA. JTPA § 102(g). All responsibilities of private industry councils are subject to the oversight and review of the state job training council appointed by the governor and its staff/administrative entity (in Idaho, the Department of Employment). JTPA § 122. Ultimately, private industry councils, like all other JTPA grantees, are accountable to the U.S. Department of Labor which, as the federal grantor agency for the JTPA program, has oversight and monitoring authority for all JTPA programs. JTPA §§ 163, 164 and 165.

Having determined that private industry councils are public rather than private in nature, we turn to the definition of a "public agency" in Idaho Code § 67-2341(4). Private industry councils fit into at least two of the four categories of public agencies defined in that section. First, as the governing body of its service delivery area, a private industry council is a "regional board, commission, department or authority created by or pursuant to statute," Idaho Code § 67-2341(4)(b), because a statute (the JTPA) has created it to be the authority in a specific region (the service delivery area). JTPA §§ 103 and 104. Second, because the members of a private industry council are appointed by the local elected officials (including city councils and county commissions) in their service delivery area, the members are, in a sense, a subagency of those public agencies which are themselves subject to the provisions of the Idaho Open Meeting Law. Thus, one could view a private industry council as a "subagency" of a public agency, and conclude that it meets the definition of a public agency contained in Idaho Code § 67-2341(d).

In conclusion, private industry councils meet the definitions of both a "gov-

erning body" and a "public agency" contained in the Idaho Open Meeting Law. *See* Idaho Code § 67-2341. Therefore, they must comply with the procedural requirements of the law contained in Idaho Code §§ 67-2342 through 67-2345. The specific procedural requirements of the law are discussed below.

C. *Procedural Requirements of the Idaho Open Meeting Law*

1.) *Meetings*

The most important procedural requirement of the Idaho Open Meeting Law is that all meetings of a governing body of a public agency must be open to the public, *see* Idaho Code § 67-2342(1), unless there is a specific reason allowed by the law for holding an executive session. *See* Idaho Code 67-2345.[2] Governing bodies of public agencies subject to the law must make final decisions at meetings open to the public, and cannot make decisions by "secret ballot" or in executive sessions. Idaho Code §§ 67-2341(1) and 67-2345(3). Furthermore, a public agency subject to the law must comply with specific notice requirements concerning when and where its meetings will be held, and the notice must contain the agenda items "known at the time" the notice is given "to be probable items of discussion" at the meeting. Idaho Code § 67-2343. Finally, the law requires that minutes must be recorded for all meetings. Idaho Code § 67-2344.

2.) *Teleconference Meetings*

Nothing in the Idaho Open Meeting Law specifically prohibits meetings held by telephone conference call. Thus, this kind of procedure is permissible. *See* Office of the Idaho Attorney General, *Idaho Open Meeting Law Handbook*, 15-16 (4th ed. 1992). Nevertheless, a public agency that holds meetings by telephone cannot dispense with the mandatory procedural requirements of the law concerning openness to the public, notice, executive sessions, etc. *Id.* When a private industry council holds meetings by telephone conference, therefore, the public must be allowed to participate and have full access. *Id.*

3.) *Mail-In Ballots*

If a private industry council makes final decisions by means of ballots mailed in by its members rather than at meetings open to the public, however, such a procedure would be a violation of the "secret ballot" prohibition con-

tained in Idaho Code § 67-2342(1). In interpreting this provision in an opinion issued in 1985, the Attorney General concluded that it means that "all voting on a public agency's decisions must be done in public." *See* Idaho Atty. Gen. Op. 85-9 (1985) at 55. Even if the decision that is the subject of a mailed-in balloting is discussed at an open meeting prior to the balloting, it is difficult to reconcile such a practice with the requirement that the final vote must be held in public. A vote taken by ballots through the mail cannot be viewed in any manner as "public." Thus, private industry councils should refrain from making final decisions by ballots mailed in by their members, and should only hold votes at meetings that are open to the public.

SUMMARY

Private industry councils, which are created and authorized under the provisions of the federal Job Training Partnership Act but appointed and controlled by local elected officials and the governor, are covered by the requirements of the Idaho Open Meeting Law. Idaho Code § 67-2340 *et seq.* These agencies must comply with all procedural requirements of the law, including holding meetings in public, giving notice, making final decisions at public meetings, etc. The meetings of private industry councils may be held by telephone conference call provided that the public is notified and given full access. Because the law's prohibition on "secret ballots" requires public agencies to make final decisions at meetings open to the public, private industry councils should not make final decisions by means of ballots mailed in by council members.

If additional clarification is required, please do not hesitate to contact me.

Sincerely,

JOHN C. HUMMEL
Deputy Attorney General
Department of Employment

[1] A review of the reported appellate cases construing the Idaho Open Meeting Law indicates that none have involved the issue of the applicability of the law to a governmental entity that is authorized by a federal statute. Additionally, we have not found any cases in which other states' open meeting laws have been interpreted to apply to a public agency created by a federal statute, or in which other states' private industry councils have been the subject of open meeting law litigation.

[2] Public agencies may hold "executive sessions" as follows:

(a) To consider hiring a public officer, employee, staff member or individual agent. This paragraph does not apply to filling a vacancy in an elective office;

(b) To consider the evaluation, dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member or individual agent, or public school student;

(c) To conduct deliberations concerning labor negotiations or to acquire an interest in real property which is not owned by a public agency;

(d) To consider records that are exempt from disclosure as provided in chapter 3, title 9, Idaho Code;

(e) To consider preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations;

(f) To consider and advise its legal representatives in pending litigation or where there is a general public awareness of probable litigation;

(g) By the Commission of Pardons and Parole, as provided by law.

Idaho Code § 67-2345(1). "Labor negotiations" may also be conducted in executive session if either side requests a closed meeting. I.C. § 67-2345(2).

August 11, 1993

Mr. Everett T. Wohlers
Deputy Secretary of State
Commercial Affairs
STATEHOUSE MAIL
Boise, ID 83720

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

Re: *National Trust for Historic Preservation in the United States*

Dear Everett:

I am in receipt of your June 22, 1993, correspondence to this office inquiring as to the ability of the state to require a federally chartered non-profit organization to meet state requirements to transact business in the state. As I understand it, the National Trust for Historic Preservation (NTHP) in the United States applied to the Idaho Secretary of State for a certificate of authority to transact business in the state as a non-profit organization. Your office is not sure whether NTHP has to meet qualification requirements since it is a federally chartered organization.

In order to transact business in the State of Idaho, foreign corporations must apply for a certificate of authority through the Secretary of State's office. Idaho Code § 30-1-110 specifies:

> A foreign corporation, in order to procure a certificate of authority to transact business in this state, shall make application therefor to the Secretary of State . . . .

A foreign corporation is "a corporation organized under laws other than the laws of this state." Idaho Code § 30-1-2(b). This definition appears to include federally incorporated organizations since they are not organized under the laws of the State of Idaho. However, in *Federal Land Bank of Spokane v. Parsons,* 116 Idaho 545, 777 P.2d 1218 (Ct. App. 1989), the court stated that a

federal land bank was not a foreign corporation because it was a federally chartered instrumentality of the United States.

> Federal land banks are "federally chartered instrumentalities of the United States." 12 U.S.C. § 2011. The Idaho Supreme Court has held that an "instrumentality of the United States . . . is not a foreign corporation."

(Quoting *Home Owner's Loan Corp. v. Stookey*, 59 Idaho 267, 278, 81 P.2d 1096 (1938).)

The NTHP, like the federal land banks, is a federally chartered instrumentality of the United States (16 U.S.C. § 468) and, therefore, is not a foreign corporation within the meaning of Idaho Code § 30-1-110. Even if NTHP could be determined to be a foreign corporation within the meaning of Idaho Code § 30-1-110, the state cannot mandate that it fulfill the qualification requirements because states are precluded by the Supremacy Clause from exercising that type of control over the federal government.

> States cannot regulate or control the functioning of the Federal Government within their boundaries in any way which will to any extent impede, burden, or prevent the accomplishment of the Federal Government's constitutional powers.
>
> . . . [The U.S. Supreme C]ourt state[d]: "A state is without power by reason of the Supremacy Clause to provide the conditions on which the Federal Government will effectuate its policies."

Chester J. Antieau, *Modern Constitutional Law: The States and the Federal Government* at 137-138 (1969).

In conclusion, a federally chartered corporation is not subject to the state's requirement that foreign corporations obtain a certificate of authority in order to transact business within the state for two reasons. First, federally chartered corporations are not considered foreign corporations pursuant to the definition provided in Idaho Code § 30-1-110, and second, the Supremacy Clause of the United States Constitution precludes states from exercising that kind of power or control over the federal government.

I hope this sufficiently addresses your question. If I can be of further assistance, please let me know.

Very truly yours,

TERRY B. ANDERSON
Chief, Business Regulation
and State Finance Division

August 17, 1993

Mr. Henry R. "Hank" Boomer
376 Roosevelt
P.O. Box 70
American Falls, ID 83211

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

Dear Hank:

By letter dated June 14, 1993, you requested an opinion of the Office of the Attorney General regarding bond settings during stays of execution of sentence in misdemeanor cases pending appeal, and whether they are controlled by the provisions of Idaho Code § 19-3941. This question is answered by Idaho Criminal Rule 54.5, which states that a stay of execution *shall* occur upon a defendant's compliance with Idaho Code § 19-3941.

DISCUSSION

In 1941, the legislature recognized the rule-making power of the Supreme Court of Idaho by enacting Idaho Code § 1-212. This statute reads: "The inherent power of the Supreme Court to make rules governing procedure in all the courts of Idaho is hereby recognized and confirmed." The Supreme Court of Idaho, in *Sherwood and Roberts v. Riplinger,* stated that "the courts have inherent power to establish reasonable rules to manage their own affairs and achieve the orderly and expeditious disposition of cases." 103 Idaho 535, 540, 650 P.2d 677, 682 (1982).

At first blush it would seem that this matter would be governed by the Misdemeanor Criminal Rules since driving without privileges is a misdemeanor. However, M.C.R. 17 states that "an appeal to the district court from a judgment of conviction . . . for a criminal offense may be taken within the time and processed in the manner prescribed for appeal from the magistrate division to the District Court by the Idaho Criminal Rules." This matter is, therefore, controlled by the Idaho Criminal Rules.

Idaho Criminal Rule 54.5 establishes the powers of magistrates to stay execution of the sentence pending appeal. It reads in part:

> (a) Stay in Criminal Appeal. Execution of the sentence, if any, imposed by the trial court, *shall* be stayed upon compliance with the provisions of section 19-3941, Idaho Code, *or* when ordered by the magistrate or by the district as provided in Rule 46 and this rule.

(Emphasis added.)

The Idaho Supreme Court applied the rules of statutory construction to the Idaho Rules of Civil Procedure in *Davison's Air Service v. Montierth*, 119 Idaho 991, 812 P.2d 298 (1991). There are also numerous cases in other jurisdictions which expressly hold that the rules of statutory construction apply to rules of procedure promulgated by the courts.[1]

A fundamental rule of construction is that a statute or rule will be given its plain and ordinary meaning unless it is ambiguous. *Sherwood v. Carter*, 119 Idaho 246, 805 P.2d 452 (1991). The plain meaning of the language of I.C.R. 54.5 states that a stay of execution of sentence "shall" occur on the happening of either of two events: the defendant's compliance with Idaho Code § 19-3941 or by court order pursuant to I.C.R. 46. Idaho Code § 19-3941 reads in pertinent part:

> The party appealing may, at any time thereafter, if he desires to be released from custody during the pendency of the appeal, or desires a stay of proceedings under the judgment until the appeal be disposed of, enter into a recognizance, with two (2) sufficient sureties to be approved by the judge or justice, in an amount to be fixed by the judge or justice, but not exceeding one thousand dollars ($1,000) in any case, for the payment of any judgment, fine and costs that may be awarded against him on the appeal . . . .

The statute limits the magistrate's discretion to set bail not to exceed $1,000 even if the judge has reason to believe that this amount will not be adequate to secure the defendant's appearance. While the Idaho Supreme Court has held that it controls court procedures, in I.C.R. 54.5 it has, nonetheless, incorporated by reference the more inhibiting legislative standards imposed by Idaho Code § 19-3941.

I.C.R. 54.5 also allows a stay of sentence in a criminal appeal when ordered by the judge pursuant to I.C.R. 46. Subsection (b) of I.C.R. 46 reads in part: "A defendant may be admitted to bail or released on his own recognizance by

the court in which he was convicted pending an appeal upon consideration of factors set forth in subsection (a) of this rule . . . ." Subsection (a) of I.C.R. 46 reads in pertinent part:

> (a) The determination of whether a person should be released upon his own recognizance or admitted to bail, and the determination of the amount and conditions of bail, if any, can be made after considering any of the following factors:
>
> (1) His employment status and history and his financial condition;
>
> (2) The nature and extent of his family relationships.
>
> (3) His past and present residences;
>
> (4) His character and reputation;
>
> (5) The persons who agree to assist him in attending court at the proper time;
>
> (6) The nature of the current charge and any mitigating or aggravating factors that may bear on . . . possible penalty;
>
> (7) His prior criminal record, if any, and, if he had previously been released pending a trial or hearing, whether he appeared as required;
>
> (8) Any facts indicating the possibility of violation of law if he is released without restriction;
>
> (9) Any other facts tending to indicate that he has strong ties to the community and is not likely to flee the jurisdiction; and
>
> (10) What reasonable restrictions, conditions and prohibitions should be placed upon his activities, movements, associations and residences.

Consideration of the factors set forth in I.C.R. 46 would allow a judge to set a bond amount in excess of $1,000. However, I.C.R. 54.5 first states that a

stay shall occur upon compliance by the defendant with Idaho Code § 19-3941. This statute gives the party appealing the ability to effect a stay by posting a small bond with two sufficient sureties. It is, therefore, clear that if a defendant complies with the provisions of this statute, the judge must grant a stay of execution of sentence or release the defendant from custody pending appeal.

CONCLUSION

Applying the plain meaning of I.C.R. 54.5 requires the magistrate or district judge to release the defendant from custody or stay the proceedings if the defendant complies with the provisions of Idaho Code § 19-3941.

If you have further questions on this, please call me.

Very truly yours,

STEVE TOBIASON
Chief, Legislative &
Public Affairs Division

[1] *Barassi v. Matison,* 636 P.2d 1200 (Ariz. 1981); *International Satellite Communications v. Kelley Services,* 749 P.2d 488 (Colo. App. 1987); *Morgan v. State*, 675 P.2d 473 (Okla. 1984); *State of Washington v. McIntyre*, 600 P.2d 1009 (Wash. 1979).

August 19, 1993

The Honorable Gary J. Schroeder
Idaho State Senate
1289 Highland
Moscow, ID 83843

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

Dear Senator Schroeder:

This is in response to your letter in which you ask for legal guidance regarding the residency statute for purposes of student fees and tuition, Idaho Code § 33-3717. Attached to your letter was a copy of a letter from the ASUI President and Attorney General in which the assertion is made that the statute creates an irrebuttable presumption that if a student enters the state primarily for educational purposes, he or she must forever be classified a nonresident. It also suggests that the statute is impermissibly vague.

In our opinion, the statute does not create any such irrebuttable presumption nor is it unconstitutionally vague. During the 1992 legislative session, Idaho Code § 33-2717 was amended such that the focus of the test for qualifying for resident student status is domiciliary intent rather than physical presence alone. The statute, patterned after that adopted in other states (*e.g.*, RCWA § 28.B.15.012), states in part:

> The establishment of a new domicile in Idaho by a person formerly domiciled in another state has occurred if such person is physically present in Idaho primarily for purposes other than educational and can show satisfactory proof that such person is without a present intention to return to such other state or to acquire a domicile at some other place outside of Idaho. Institutions determining whether a student is domiciled in the state of Idaho primarily for purposes other than educational shall consider, but shall not be limited to the following factors:
>
> (a) Registration and payment of Idaho taxes or fees on a motor vehicle, mobile home, travel trailer, or other item of personal property

> for which state registration and the payment of a state tax or fee is required.
>
> (b) Filing of Idaho state income tax returns.
>
> (c) Permanent full-time employment or the hourly equivalent thereof in the state of Idaho.
>
> (d) Registration to vote for state elected officials in Idaho at a general election.

Idaho Code § 33-3717(4).

According to the statute, once a student has met any applicable durational requirement (*e.g.*, Idaho Code § 33-3717(2)(b), continuous residence in state for 12 months prior to opening day of semester), he or she may attempt to offer "satisfactory proof" that his or her domicile has changed to Idaho. This is done by demonstrating compliance with the factors listed in the statute as well as others which reflect domiciliary intent. The ultimate factual determination is whether the student's *primary* purpose for presence in Idaho is other than educational. The statute does not preclude a student who initially enters the state primarily for educational purposes from later demonstrating a change in the primary purpose for remaining in the state. While the burden of proof is with the student to overcome the presumption which arises from the initial classification as a nonresident, this does not amount to an irrebuttable presumption.

Again, there is nothing in the statute which precludes a student "who is physically present in Idaho" from meeting the applicable durational requirements and from attempting to overcome the presumption by offering "satisfactory proof" of domiciliary intent. Contrary to the statutory scheme struck down in *Vlandis v. Kline*, 412 U.S. 451, 93 S. Ct. 2230 (1973), Idaho Code § 33-3717 does not prevent a student "from ever rebutting the presumption of nonresidence during the entire time that he remains a student, no matter how long he has been a bona fide resident of the state for other purposes." 93 S. Ct. at 2237, n.9. As the *Vlandis* Court further stated:

> The state can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide res-

> idents of the state, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.

93 S. Ct. at 2237.

While there is no decision by an Idaho court on the current statute, after the *Vlandis* decision, various statutory and regulatory schemes which are similar to Idaho's have been sustained against attack on constitutional or statutory grounds. *See Peck v. University Residence Committee*, 807 P.2d 652, 661-63 (Kan. 1991) (regulations which consider various factors in determination of "domiciliary resident" for purposes of tuition upheld against vagueness and equal protection challenge); *DeCecco v. Board of Regents, University of Wisconsin*, 442 N.W.2d 585, 588-90 (Wis. App. 1989) (statute creating a presumption that one "who enters and remains in [the] state *primarily to obtain an education* is presumed to continue to reside outside [the] state" held "not to create the presumption declared unconstitutional in *Vlandis*" (emphasis added)); *Hauslohner v. Regents of the University of Michigan*, 272 N.W.2d 154 (Mich. App. 1978) (university rules referring to "primary or sole purpose of attending the university, rather than to establish a domicile in Michigan" applied; no irrebuttable presumption found); *Podgor v. Indiana University*, 381 N.E.2d 1273 (Ind. 1978) (university rules which permit university officials to consider various factors in determining "whether a non-resident student's predominant purpose in coming to Indiana has changed," *Id.* at 1279, upheld as providing ascertainable standards and as consistent with equal protection clause, *Id.* at 1283-85). *See also Lister v. Hoover*, 655 F.2d 123 (7th Cir. 1981); *Hooban v. Boling*, 503 F.2d 648 (6th Cir. 1974); *Hayes v. Board of Regents of Kentucky State University*, 495 F.2d 1326 (6th Cir. 1974); *Kelm v. Carlson*, 473 F.2d 1267 (6th Cir. 1973); *Arizona Board of Regents v. Harper*, 495 P.2d 453 (Ariz. 1972); *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd* 401 U.S. 985, 91 S. Ct. 1231 (1971).

In summary, it is our view that the Idaho courts would not view Idaho Code § 33-3717 as violating the *Vlandis v. Kline* proscription against creating an irrebuttable presumption of non-residency.

In answer to your other questions, each situation must be evaluated on a case-by-case basis. The determination of residency in a given case depends on a review of the specific facts and circumstances presented, and further depends upon whether a student is able to meet durational requirements and to present satisfactory proof of domicile in Idaho. You are correct in your assess-

ment that the determination is primarily dependent upon the intent of the student as evidenced by various factors such as full-time employment, payment of state taxes, etc.

You also asked whether a distinction in residency based upon marriage to an Idaho resident would be illegal. We have not found any cases which have struck down a student residency classification based upon the "marital privilege."

I hope you will find this information helpful.

Sincerely,

BRADLEY H. HALL
Deputy Attorney General
State Board of Education

September 17, 1993

Fritz A. Wonderlich
Twin Falls City Attorney
Benoit, Alexander, Sinclair,
Harwood & High
P.O. Box 366
Twin Falls, ID 83303-0366

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

Re: Calcuttas

Dear Fritz:

You have requested an opinion from this office regarding "calcuttas" and whether this type of gaming activity is prohibited by state law. For the reasons set forth below, it is the opinion of this office that "calcutta wagering" on sporting events such as golf tournaments is contrary to the public policy of Idaho as set forth in art. 3, § 20, Idaho Constitution, and is prohibited by Idaho Code § 18-3801.

A "calcutta" or "auction pool" is a form of wagering on the outcome of events such as golf tournaments, horse races, or cock fights. See *Kilpatrick v. State*, 265 P.2d 978 (N.M. 1953); *Matthews v. Powers*, 425 P.2d 479 (Okla. 1967); 52 A.L.R. 74. This type of betting has been codified and defined by the Wyoming Legislature:

> "Calcutta wagering" means wagering on the outcome of amateur contests, cutter horse racing, professional rodeo events or professional golf tournament[s] in which those who wager bid at auction for the exclusive right to "purchase" or wager upon a particular contestant or entrant in the event and when the outcome of the event has been decided the total wagers comprising the pool, less a percentage "take-out" by the event's sponsor, is distributed to those who "purchased" or wagered upon the winning contestants or entrants.

Wyo. Stat. § 6-7-101.

This definition is consistent with the common usage of the term. For example, with respect to a golf tournament, prior to the tournament an auction is held wherein the right to wager upon a particular contestant is sold to the highest bidder. The money wagered through the auction is pooled and then divided among the "owners" of the top finishing contestants.

With respect to Idaho law and the legality of calcutta wagering, Idaho's public policy regarding gambling is established in art. 3, § 20 of the Idaho Constitution and title 18, chapter 38, Idaho Code. Art. 3, § 20, sets forth the limited scope of gaming that may be authorized by the legislature. This provision provides in relevant part:

> (1) Gambling is contrary to public policy and is strictly prohibited except for the following:
>
> a. A state lottery which is authorized by the state if conducted in conformity with enabling legislation; and
>
> b. Pari-mutuel betting if conducted in conformity with enabling legislation; and
>
> c. Bingo and raffle games that are operated by qualified charitable organizations in the pursuit of charitable purposes if conducted in conformity with enabling legislation.
>
> (2) No activities permitted by subsection (1) shall employ any form of casino gambling including, but not limited to, blackjack, craps, roulette, poker, baccarat, keno and slot machines, or employ any electronic or electromechanical imitation or simulation of any form of casino gambling.

Germane to our analysis is art. 3, § 20(1)(b), which does permit a form of "betting" as opposed to a particular gaming activity. It is important to note that pari-mutuel betting is distinguishable from calcutta wagering or auction pools. Pari-mutuel betting allows patrons to select a contestant and place a wager upon that contestant, generally a horse or dog. Rather than one patron bidding against the other for the right to wager on a particular contestant, every patron is allowed to wager on the contestant of choice. The money wagered is pooled and odds are computed based upon the amount of money wagered on one contestant in relation to the other contestants in the race. The

odds then determine how much money is paid to successful patrons. *See Oneida County Fair Board v. Smiley,* 86 Idaho 341, 386 P.2d 374 (1963).

As described above, calcutta wagering is quite different than pari-mutuel wagering. Admittedly, both involve pooling money that has been wagered, but there is no sound basis to ignore the literal language set forth in art. 3, § 20(1)(b), or to construe the provision expansively to include all forms of betting pools. *Sherwood v. Carter,* 119 Idaho 246, 805 P.2d 452 (1991). Pari-mutuel betting has distinct characteristics that have been recognized by numerous courts, including the Idaho Supreme Court in *Oneida County Fair Board.* If the legislature intended to permit calcutta wagering, it could have expressly provided for such when it proposed the amendment to art. 3, § 20, in 1992. Thus, in our opinion, calcutta wagering does not come within the scope of art. 3, § 20(1)(b), and the Idaho Legislature cannot enact legislation to permit calcutta wagering.

The next question to be answered is whether the actual gambling prohibitions set forth in title 18, chapter 38, criminalize calcutta wagering. Idaho Code § 18-3801 defines gambling. Idaho Code § 18-3802 provides the criminal penalty for engaging in gambling activity. Idaho Code § 18-3801 provides:

> "Gambling" *means risking any money,* credit, deposit or other thing of value *for gain contingent in whole or in part upon* lot, chance, the operation of a gambling device or the happening or *outcome of an event, including a sporting event,* the operation of casino gambling including, but not limited to, blackjack, craps, roulette, poker, baccarat or keno, but does not include:
>
> (1) Bona fide contests of skill, speed, strength or endurance in which awards are made only to entrants or the owners of entrants; or
>
> (2) Bona fide business transactions which are valid under the law of contracts; or
>
> (3) Games that award only additional play; or
>
> (4) Merchant promotional contests and drawings conducted incidentally to bona fide nongaming business operations, if prizes are awarded without consideration being charged to participants; or

(5) Other acts or transactions now or hereafter expressly authorized by law.

(Emphasis added.)

Idaho Code § 18-3802 provides:

(1) A person is guilty of gambling if he:

(a) Participates in gambling; or

(b) Knowingly permits any gambling to be played, conducted or dealt upon or in any real or personal property owned, rented, or under the control of the actor, whether in whole or in part.

(2) Gambling is a misdemeanor.

It is clear from the first portion of Idaho Code § 18-3801 that wagering money on a sporting event in order to gain a prize is gambling. This includes calcuttas. There are, however, two exceptions to this prohibition. Neither exception applies to calcutta wagering. The first exception is pari-mutuel betting on horse, dog, or mule races if done in conformity with title 54, chapter 25, Idaho Code. The second exception is "bona fide contests of skill, speed, or endurance in which awards are made only to entrants or the owner of entrants." Idaho Code § 18-3801(2). This provision permits contestants to pay a fee to enter a contest, such as a golf tournament, and gain a prize or award depending on the contestant's performance. This exception clearly encompasses events such as professional golf tournaments or the "buyouts" made by entrants in tournaments referenced in your letter.

This subsection also allows owners of animals to claim purses or awards based upon the performance of their animals. Idaho Code § 18-3801(2) does not extend to someone who "owns" the exclusive right to bet on a contestant through a calcutta auction. Rather, to come within the exemption, one must "own" the entrant. As such, it applies only to prizes awarded, for example, to horse or dog owners or race car owners. In terms of legislative history of Idaho Code § 18-3801, we note that the Senate State Affairs Committee specifically discussed calcuttas and the committee intended that they be prohibited. Further, given our conclusion that the Idaho Legislature is not authorized to legalize calcutta wagering, it follows that Idaho Code § 18-3801(2)

must be construed literally to the actual owners of contestants such as race-horses, greyhounds, or race cars.

In conclusion, it is the opinion of this office that calcutta wagering on events such as golf tournaments is *not* a permitted exception to Idaho's public policy prohibiting gambling as articulated in art. 3, § 20 of the Idaho Constitution and is prohibited by Idaho Code § 18-3801. Further, betting at a calcutta auction is criminally punishable as a misdemeanor pursuant to Idaho Code § 18-3802.

Yours very truly,

FRANCIS P. WALKER
Deputy Attorney General

October 19, 1993

Mr. Scott B. McDonald
Executive Director
Association of Idaho Cities
3314 Grace Street
Boise, ID 83703

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

Dear Mr. McDonald:

On October 1, 1993, you requested an opinion from the Attorney General on behalf of members of the Association of Idaho Cities concerning the legality of the drinking water fees established in the *Idaho Rules for Public Drinking Water Systems.* This letter responds to the questions raised in your October 1, 1993, letter.

BACKGROUND

On September 7, 1993, the Board of Health and Welfare, in Docket No. 0108-9301, promulgated the *Idaho Rules for Public Drinking Water Systems,* IDAPA §§ 16.01.08000 through 16.01.08999 (hereinafter referred to as "the rules").

The rules were promulgated by the board to meet minimum federal standards required under the Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-11, as interpreted by the United States Environmental Protection Agency and to ensure continued state primacy by the Idaho Department of Health and Welfare to administer and enforce federally mandated drinking water standards. The rules require public water systems[1] to initiate monitoring and testing of drinking water for various contaminants, treatment of drinking water, establishment of maximum contaminant levels for drinking water, and establishment of maximum level guidelines to be achieved in the future. The rules also provide for a mechanism by which the department can waive the potentially costly monitoring requirements for public water systems. IDAPA § 16.01.08100.07.

In administering the rules and the drinking water program in general, the

department provides a variety of services to public water systems. For example, the department works with public water systems to ensure compliance with minimum requirements, conducts sampling surveys and on-site visits to prevent public health problems, reviews water system plans and specifications, conducts training sessions, holds public information meetings, loans specialized monitoring equipment, publishes a coordinated training calendar and informational bulletins and issues monitoring waivers.

In order to pay for the cost of the services rendered by the department to public water systems, the board adopted a fee schedule under the rules. IDAPA § 16.01.08010.[2] The fee structure requires each public water system to pay an annual fee based upon the number of connections within the drinking water system. *Id.* The number of connections within each drinking water system determines the amount of fee per connection. *Id.* Public water systems (community and nontransient noncommunity) with 1 to 20 connections pay a flat fee of $100.00; public water systems with 21 to 184 connections pay an annual $5.00 per connection fee; public water systems with 185 to 3,663 connections pay an annual $4.00 per connection fee; and public water systems with greater than 3,663 connections pay an annual $3.00 connection fee. The justification for reducing the fees per connection as the system increases in size was that smaller community and nontransient public water systems generally require more department services to remain in compliance with the minimum requirements under the rules. Transient public water systems pay an annual $25.00 fee because such systems are subject to less stringent monitoring requirements and therefore require less department services. In light of this background, I can now address the questions raised in your letter.

Question No. 1:

Is it legal for Idaho cities to collect a flat rate fee or are these fees really a tax?

Response:

A. *It is Legal for Municipalities to Charge Users of Public Water Systems the Cost Incurred by the Municipalities in Paying the Fees*

The rules do not require Idaho cities or private operators of public water systems to collect a flat rate fee or, indeed, any fee at all. The rules assess the fee against the public water systems, but are silent as to how the public water

system will finance payment of the fee. The Idaho Revenue Bond Act, Idaho Code §§ 50-1027 *et seq.*, permits municipalities that operate water systems for domestic use or purposes to charge "reasonable rates, fees, tolls or charges" to remain "self-supporting." Idaho Code § 50-1032. The rates, fees, tolls or charges must produce revenue sufficient "to pay when due all bonds and interest thereon" and to provide "for all expenses of operation and maintenance" of public water systems. *Id.* The fees assessed by the department against operators of public water systems, including municipalities, are lawfully imposed pursuant to state law. As such, the cost incurred by the municipal public water system in paying the fees is a legitimate and lawful "operation and maintenance" expense to the public water system pursuant to Idaho Code § 50-1032. Therefore, municipalities that operate public water systems may pass through the cost of payment of the fees to users of the systems in the form of "reasonable rates, fees, tolls or charges." *Id.*

B. *If Municipalities Comply with the Idaho Revenue Bond Act in Passing Through the Costs of Paying the Department Fees, it Will not be Considered a Tax*

The assessment of reasonable rates, fees, tolls or charges by municipalities pursuant to the Idaho Revenue Bond Act has been consistently upheld by the Idaho Supreme Court as appropriate and not a prohibited tax. *See Schmidt v. Village of Kimberly*, 74 Idaho 48, 256 P.2d 515 (1953); *Alpert v. Boise Water Corp.*, 118 Idaho 136, 795 P.2d 298 (1990); *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991). In *Schmidt*, the court upheld the validity of provisions of the Idaho Revenue Bond Act permitting municipalities to charge reasonable rates, fees, tolls and charges for operation of public works, including public water systems. The court concluded that the disconnection and reconnection fees assessed by the municipality were lawful under the Idaho Revenue Bond Act and not a tax, since such fees were calculated to cover only the costs of the service rendered and were not used as a source of general revenue for the municipality. 74 Idaho at 64.

In *Alpert*, the court addressed the issue of whether a public utility's attempt to pass through a validly assessed franchise fee by a municipality, to users of the public water system, was a tax or a fee. The court held that such a franchise fee was a proper "cost of business that is then passed on to consumers of the utility." 118 Idaho at 145. Since the fee was passed through to consumers of the public service and was not a forced contribution by the public at large, it was not a tax but a proper fee.

In *Loomis,* the court upheld the validity of a $1,800 water connection fee assessed by the city of Hailey to new users of the system as a proper fee under the Idaho Revenue Bond Act, and not a tax. Specifically, the court stated:

> Thus, when the rates, fees and charges conform to the statutory scheme set forth in the Idaho Revenue Bond Act . . . the charges are not construed as taxes. . . . However, if the rates, fees and charges are imposed primarily for revenue raising purposes, they are in essence disguised taxes and subject to legislative approval and authority.

119 Idaho at 438 (citations omitted); *see also Snake River Homebuilders Ass'n v. City of Caldwell,* 101 Idaho 47, 607 P.2d 1321 (1980) (where fee assessed by city was for the purpose of recovering costs to the system, the fee was a proper exercise of the city's police power and not considered a tax).

Thus, *Schmidt, Alpert* and *Loomis* stand for the proposition that a municipality may properly assess fees, charges, rates or tolls for purposes of collecting an expense to the public water system pursuant to the Idaho Revenue Bond Act without the risk of having such a fee or charge being considered a tax. Accordingly, so long as a municipality complies with the Idaho Revenue Bond Act in passing through the department fees, such an effort will not be considered a tax.

Any concern with the legality of the department-assessed fee in light of *Brewster v. City of Pocatello,* 115 Idaho 502, 768 P.2d 765 (1988), is misplaced. In *Brewster,* there was no statutory authorization for the city to assess the fees in question and the fees were for the purpose of raising revenue for the city. Here, the department is statutorily authorized to assess fees. *See* Idaho Code § 39-119. Further, municipalities are themselves statutorily authorized to assess fees, charges, reasonable rates or tolls for the purpose of paying for the expense of operating a public water system. *See* Idaho Code § 50-1032. Finally, the municipalities' efforts to collect the cost of the department fees are not for the purpose of raising revenues for the municipalities. Clearly, the assessment of the fees or charges to users of public water systems to cover the costs of the department-imposed fees cannot be construed as revenue raising devices, since municipalities are simply passing the fee through to the department.

Question No. 2:

Do the provisions of Idaho Code, title 37, chapter 21, and title 39, chapters 1 and 18, grant specific authority to the DEQ to require the cities to collect the fees in the manner contemplated by the DEQ regulation?

Response:

The rules do not require or contemplate that municipalities or private operators of public water systems collect fees in any particular manner. The rules only require that operators of public water systems pay a fee to the department. The manner in which the operator funds the payment is within the discretion of the operator.

Question No. 3:

Does the three-tiered fee structure established by DEQ meet the requirements of Idaho Code § 39-119 governing Health and Welfare's authority to collect fees?

Response:

The Idaho Legislature has specifically authorized the department to collect reasonable fees for any services rendered by the department. Specifically, Idaho Code § 39-119 provides:

> The department of health and welfare is hereby authorized to charge and collect reasonable fees, established by standards formulated by the board of health and welfare, for any service rendered by the department. The fee may be determined by a sliding scale according to income or available assets. The department is hereby authorized to require information concerning the total income and assets of each person receiving services in order to determine the amount of fee to be charged.

Under Idaho Code § 39-119, the department may collect fees from any "person" receiving services. The definition of "person" under Idaho Code § 39-103(13) clearly includes municipalities.

The fees to support the drinking water program are generally split into two

main categories, transient public water systems and all other public water systems (community and nontransient noncommunity). Transient public water systems need not be monitored as frequently nor for as many contaminants as the community and nontransient noncommunity public water systems. Accordingly, the services provided by the department to transient public water systems are relatively minimal, thereby justifying an annual fee per system of $25.00. Community and nontransient noncommunity public water systems must be monitored frequently for the full range of contaminants, which requires the department to provide more services to such public water systems. Accordingly, fees are assessed against community and nontransient noncommunity public water systems based upon the number of connections within each system. The fees per connection per year are reduced as public water systems increase in size.

The legislature, under its police powers, may mandate that citizens must accept certain services and then require a fee for receipt of those services. *Kootenai County Property Ass'n v. Kootenai County,* 115 Idaho 676, 679, 769 P.2d 553 (1989); *Schmidt v. Village of Kimberly,* 74 Idaho 48, 256 P.2d 515. As noted, the legislature has authorized the department to collect fees for services rendered by the department. *See* Idaho Code § 39-119. A fee structure need only be reasonably related to the benefits conveyed. *Kootenai County Property Ass'n v. Kootenai County,* 115 Idaho at 680; *City of Glendale v. Trondsen,* 48 Cal. 2d 93, 308 P.2d 1 (1957). Under the reasonable relation test adopted by the court in *Kootenai County Property Ass'n v. Kootenai County,* the department's fee structure is valid. The board's rule approximates the amount of services the department would render to different classes of public water systems based upon the size of the system. As noted, the larger the system, the less the amount of services per each connection.

It is not necessary for the department's fee to exactly approximate the costs of services provided to each public water system; all that is required is reasonable approximation. 115 Idaho at 679. While a fee schedule could conceivably be created to assess each public water system for the precise cost of services rendered by the department, such a fee schedule is not mandated. As noted by the court in *Kootenai County Property Ass'n v. Kootenai County:*

> A fee system whereby every member of the general public would be charged only for his exact contribution of waste presumably could be established, but the system would be cumbersome and perhaps

> prohibitively expensive to maintain. The law only requires that the fee be reasonably related to the benefit conveyed.

115 Idaho at 680.

Since the fees assessed by the department are reasonably related to the services rendered, the fee structure set forth in the rules is lawful and may be properly assessed against municipalities that operate public water systems.

Question No. 4:

Does the legislature or any administrative agency of the state have the authority to require a municipality to levy and collect a tax for the purposes of the state?

Response:

The question does not pertain to the facts of this case. As noted above, the assessment of a fee by the department against operators of public water systems pursuant to the rules is lawful under Idaho Code § 39-119. The collection of that fee by municipalities from users of the public water system in accordance with the Idaho Revenue Bond Act will not be considered a tax.

If you have any questions or comments, please feel free to contact me.

Sincerely,

JOHN J. MCMAHON
Chief Deputy Attorney General

[1] A public water system is defined as "a system for the provision to the public of piped water for human consumption, if such system has at least fifteen (15) service connections or regularly serves an average of at least twenty-five (25) individuals daily at least sixty (60) days out of the year." IDAPA § 16.01.08003.35. Public water systems further are either "community water systems" or "noncommunity water systems." *Id.* Noncommunity water systems are further identified as either "nontransient" (serving at least twenty-five (25) of the same persons over six (6) months per year), IDAPA § 16.01.08003.28, or "transient" (a system which does not serve at least twenty-five (25) of the same persons over six (6) months per year), IDAPA § 16.01.08003.42.

[2] In prior years, the department's cost of providing services under the drinking water program was funded from the Water Pollution Control Account. In 1993, the legislature authorized the department to expend revenues generated from fees to fund these services.

November 16, 1993

The Honorable Ronald L. Black
Idaho House of Representatives
921 Trotter Drive
Twin Falls, ID 83301

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

Dear Representative Black:

Your letter of November 8, 1993, asks our opinion as to the validity of rules enacted by the Department of Education with regard to alternative high school programs. You indicate two areas in which the department may have violated provisions of the Idaho Administrative Procedure Act (APA). Both problems arise because of the amendments to the APA that took effect on July 1, 1993.

I.

First, you question whether the department's proposed permanent rules were "properly and in a timely manner delivered to the Legislative Council for review." The new APA, like its predecessor, provides opportunity for the Idaho Legislature to comment on proposed rules. The language in the new APA governing transmittal of proposed rules from the agency to the legislature states:

> *At the same time* that notice of proposed rulemaking is filed with the [administrative rules] coordinator, the agency shall provide the same notice, accompanied by the full text of the rule under consideration in legislative format, as well as a statement of the substance of the intended action, to the director of the legislative council.

Idaho Code § 67-5223 (emphasis added). Your concern is triggered by the fact that the department in this instance transmitted its proposed rule to the administrative rules coordinator (ARC) on August 30, 1993, but did not transmit the rule to the legislative council until some two weeks later, on September 14, 1993. On its face, the rule was clearly not transmitted to the two agencies "at the same time," as required by the new APA.

The background for this problem is provided in the memorandum of September 16, 1993, from the legislative council staff to the germane legislative committees:

> There has been some confusion within many agencies regarding the submission of rules to the administrative rules coordinator and the transfer of the same promulgation to the director of legislative council for his review and subsequent referral of the material to the germane legislative subcommittees. It has been assumed by several agencies and departments that submission of a promulgation to the administrative rules coordinator is sufficient for all purposes.

In short, because the state's rulemaking functions were centralized in the ARC on July 1, 1993, some agencies thought their responsibilities ended when they sent a proposed rule to the ARC and that it was the duty of the ARC to transmit the proposed rule to the legislative council. (Indeed, some agencies have contracted with the ARC to provide this service.) Such is not the case. It remains the responsibility of each agency to transmit its proposed rule to the ARC and to transmit the same rule at the same time to the legislative council.

Your question is whether this sequence of events violates the APA and renders invalid the department's amended rules on alternative high school programs. We first address the meaning and purpose of the new transmittal statute, Idaho Code § 67-5223. These matters are addressed in Professor Goble's comments to this statute:

> This section [67-5223] provides for legislative oversight of agency rulemakings. Subsection (1) requires the agency to provide the legislature with notice of its proposed rules.
>
> Subsection (1) requires the Legislative Council to be provided with the same information required to be provided to the Administrative Rules Coordinator under section 67-5221. In addition, the agency is required to provide a copy of the proposed rule in legislative format.
>
> Subsection (1) changes previous law by deleting the twenty-one (21) day time limit on committee comments so that legislators are able to submit comments throughout the entire public comment period.

Thus, the new statute broadens the legislative review provisions of the APA. The predecessor statute provided the legislature only a narrow window of opportunity (21 days) to comment on proposed rules. The practical result was that the legislative comment period ended before the public review process was actually in full swing. The drafters wanted the legislative review process to overlap most of the public comment period so that legislators could receive input from constituents affected by the proposed rule.

The predecessor statute also provided that agencies were to submit proposed rules to the legislative council prior to the start of the public comment period. The drafters saw no good reason for beginning the legislative comment period before the rule was available to the public. They therefore provided that the proposed rule would be transmitted to the legislative council "at the same time" as to the ARC, rather than at an earlier date. The actual result of this choice of language has been rather odd. Because the ARC must receive proposed rules approximately three weeks before the publication date of the monthly Idaho Administrative Bulletin, the legislative council is still receiving rules long before the public comment period begins.

It is our opinion that the statutory language—"at the same time"—must be complied with because it is clear and unambiguous, even though it does not comport with the intent of the drafters. We do not interpret the language as meaning that transmittal to the legislative council and to the ARC must occur at the identical minute, or hour or day. We expressly approve the practice of those agencies that have contracted with the ARC to handle the responsibility of transmitting the proposed rule to the legislative council, even though that may delay receipt of the rules at the legislative council by a day or two.

One final point must be made clear. The requirement of transmitting rules to the legislative council exists only in the case of a proposed *permanent* rule. There is no parallel requirement for *temporary* rules because, by their nature, temporary rules take effect on an emergency basis and only for a restricted period of time.

Thus, the Department of Education was under no obligation to provide a copy of its temporary rules to the legislative council. The department did have the duty to provide its proposed permanent rules to the legislative council "at the same time" as to the ARC. It failed to do so and thus violated the provisions of Idaho Code § 67-5223.

Nonetheless, the legislative council did transmit the rules to the germane committees some two weeks before the public comment period began. As of October 20, 1993, according to the legislative council memorandum, "no member of either subcommittee has notified the Legislative Service Officer that he wishes to call a meeting." The legislative comment period continues to the present.

It is our opinion that a reviewing court would find that the department rules, if in fact they are adopted, will have been "adopted in substantial compliance with the requirements" of the APA, Idaho Code § 67-5231, despite the two-week delay in transmitting the proposed rule to the legislative council at the outset of the comment period. Thus, the defect in the department's procedure for adoption of the permanent proposed rule will not jeopardize the validity of the final rule once it is adopted.

II.

We turn next to the question of the validity of the department's temporary rule. You state that the reason given by the department in resorting to temporary rulemaking is that they are "conferring a benefit." You contend, on the contrary, that "in fact they remove many benefits from the Alternative Schools."

Under the new APA, an agency may resort to temporary rulemaking:

> If an agency finds that:
>
> (a) it is reasonably necessary to protect the public health, safety, or welfare; or
>
> (b) to comply with deadlines in amendments to governing law or federal programs; or
>
> (c) conferring a benefit;
>
> requires adoption of a rule upon fewer days' notice than that otherwise required . . . .

Idaho Code § 67-5226(1). Thus, there are three situations in which temporary rulemaking is justified. Again, Professor Goble's comments are instructive:

> This section modifies existing law by reducing the standard required for a temporary rule. The section recognizes three situations in which a temporary rule is appropriate. First, when it is reasonably necessary for public health and safety. Second, when compliance with deadlines contained in amended statutes or federal programs requires an expedited procedure. Third, when the agency is conferring a benefit and there is no good reason to delay the effectiveness of the benefit for the period required to comply with regular rulemaking.

Thus, the drafters of the new APA did intend to liberalize the circumstances in which temporary rulemaking would be justified. The predecessor statute allowed temporary rulemaking only in situations of "imminent peril to the public health, safety, or welfare . . . ." Idaho Code § 67-5203(b). The actual practice among agencies was to ignore this restriction and to use temporary rulemaking in situations where no other choice existed (i.e., the rule change was dictated by a statutory amendment or change in a federal program) or when there was no good reason to delay the effective date of a rule (i.e., when the agency was conferring a benefit).

Your letter asserts that the department's temporary rule on alternative high schools does not confer a benefit but, in fact, removes many benefits from such schools. That is clearly the case. The department's descriptive summary of its rule states that "there is a fiscal impact on local school districts. These rule changes will reduce the number of state support dollars that go to the districts with alternative high school programs . . . ." At least as to these districts, therefore, the rules do not confer a benefit.

It does not appear that temporary rulemaking could be justified by either of the other two exceptions identified in Idaho Code § 67-5226(1). There was no emergency requiring protection of the public health, safety or welfare. And there was no statutory amendment or change in federal program rules that dictated these changes. Instead, the department simply noted that the program had been in effect for four years and that rule clarification and modification was required. This is a garden variety situation in which ordinary rulemaking is appropriate. There was no justification for resort to temporary rulemaking.

III.

We note that the department's temporary rulemaking violated the new APA in yet another manner. Idaho Code § 67-5226 goes on to state:

> The agency shall incorporate the required finding and a concise statement of its supporting reasons in each rule adopted in reliance upon the provisions of this subsection [on temporary rulemaking].

In short, when an agency resorts to temporary rulemaking, it must make a formal finding that one of the three exceptions exists and must state that finding in its notice of temporary rulemaking. The department did not make such a finding in this instance.

IV.

The final question thus concerns the validity of the department's temporary rule. The drafters of the new APA provided two mechanisms to prevent abuse by agencies resorting to temporary rulemaking. The first is the limited time frame of temporary rules. Professor Goble's comments state:

> Protection against abuse is provided by the limited duration of temporary rules. Temporary rules can remain effective even if extended for the maximum period for little more than six months.

Second, a temporary rule, like any other rule, can be challenged on the ground that it has not been adopted in substantial compliance with the requirements for adopting temporary rules. It is the opinion of this office that the department's alternative high school rules were not adopted in substantial compliance with those requirements and would thus be "voidable" if challenged in court. Idaho Code § 67-5231.

V.

Our conclusion, as to your first question, is that the department's failure to provide the legislative council with its proposed permanent rule "at the same time" it provided that rule to the administrative rules coordinator will not jeopardize the validity of that rule if and when it is adopted. The germane committees of the legislature have had two months in which to act on the proposed rule. A public hearing will be held. We believe the department, despite its two-week delay in transmitting the rule to the legislative council, has substantially complied with the publication requirements of the new APA.

We conclude, as to your second question, that the department did violate the provisions of Idaho Code § 67-5226 of the APA in resorting to temporary

rulemaking without making a formal finding that one of the three statutory justifications was present. Such a violation would render the rule "voidable" if challenged in court pursuant to Idaho Code § 67-5231. As a practical matter, the usefulness of this challenge will lapse as soon as the permanent rule is adopted.

One final comment. This office recognizes that problems have arisen in implementing the provisions of the new APA. We will be meeting with agency deputies and with the administrative rules coordinator in the near future to iron out those problems and to ensure they do not recur.

If I may be of further assistance to you, please contact me.

Sincerely,

JOHN J. MCMAHON
Chief Deputy

December 2, 1993

The Honorable Roger Madsen
Idaho State Senate
7842 Desert Avenue
Boise, ID 83709

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

Re: *Judicial Council Involvement in Selecting Judges*

Dear Senator Madsen:

In your letter to this office, you asked two questions regarding the Judicial Council. First, you inquired whether the Idaho Judicial Council's involvement in selecting judicial candidates violates any Idaho constitutional provisions. You then asked a secondary question—whether there is a constitutional problem with the Chief Justice of the Idaho Supreme Court acting as the presiding member of the Judicial Council.

Upon review, this office concludes that there is no constitutional problem either with the Judicial Council's involvement in selecting judicial candidates or with the Chief Justice's role as the presiding member of the Judicial Council. This correspondence will address each of your questions in turn.

1. *The Role of the Judicial Council*

As background, a description of the Judicial Council's role in selecting judicial candidates may be useful. The Judicial Council is created by Idaho Code § 1-2101. It consists of "seven (7) permanent members, and one (1) adjunct member." *Id.* Of the seven members, there are "three (3) permanent attorney members, one (1) of whom . . . [is] a district judge" and "three (3) permanent non-attorney members." Idaho Code § 1-2101(1). The "seventh member and chairman of the judicial council" is the "chief justice of the Supreme Court." *Id.*

The Judicial Council has a number of duties, including conducting studies for the improvement of the administration of justice, making reports to the Idaho Supreme Court and legislature, and recommending the removal, disci-

pline and retirement of judicial officers. Idaho Code § 1-2102. Most important, for the purposes of this analysis, when there is a "vacancy in the office of justice of the Supreme Court, judge of the court of appeals, or district judge," the Judicial Council must "submit to the governor the names of not less than two (2) nor more than four (4) qualified persons," and the governor must make his appointment from this list. *Id.* Thus, while the governor does still retain the ultimate appointment power, when there is a vacancy in the office of justice of the Idaho Supreme Court, judge of the Idaho Court of Appeals, or district court judge, the governor's appointment power is, nevertheless, limited by Idaho Code § 1-2102's requirement that the governor select a candidate from the list provided by the council.

2. *Governor's Appointment Power*

You first ask whether this limit on the governor's appointment power over these judicial officers violates the Idaho Constitution. It is this office's opinion that it does not.

The governor's appointment power is found in art. 4, sec. 6, of the Idaho Constitution, which provides:

> Governor to appoint officers.—The governor shall nominate and, by and with the consent of the senate, appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for. If during the recess of the senate, a vacancy occurs in any state or district office, the governor shall appoint some fit person to discharge the duties thereof until the next meeting of the senate, when he shall nominate some person to fill such office. If the office of a justice of the supreme or district court, secretary of state, state auditor, state treasurer, attorney general, or superintendent of public instruction shall be vacated by death, resignation or otherwise, it shall be the duty of the governor to fill the same by appointment, as provided by law, and the appointee shall hold his office until his successor shall be selected and qualified in such manner as may be provided by law.

Importantly, the appointment power given to the governor under art. 4, sec. 6, is not absolute. As a preliminary matter, the Idaho Supreme Court has held that if an office is *not* provided for by the constitution but is, instead, created by the legislature, the legislature, in the absence of a constitutional provision

to the contrary, may provide the method for filling that office and may also limit the power of the chief executive in making those appointments. In *Ingard v. Barker*, 27 Idaho 124, 147 P. 293 (1915), for example, the supreme court reviewed a statute which provided that the State Horticulture Association should make non-binding recommendations to the governor for appointments to the State Board of Horticulture. Examining this scheme under the provision of art. 4, sec. 6, that "the governor . . . appoint all officers whose offices . . . may be created by law, and whose appointment or election is not otherwise provided for," the court upheld the statute, stating:

> The framers of the constitution could not forsee what offices might be created by laws subsequently enacted and so they provided that such offices should be filled by the Governor *unless the appointment or election should be otherwise provided for*. The legislature, in enacting the statute in question, has exercised its constitutional right in naming and designating the officer or officers who shall make these particular appointments.
>
> . . . .
>
> The power to create an office, unless otherwise provided by the constitution, is vested in the legislative department of the government. *The method of filling the office is to be determined by the legislature in the absence of constitutional provisions.*

27 Idaho at 130-31 (emphasis added). Thus, at a minimum, under art. 4, sec. 6, an office created by the legislature may also be filled, absent an express constitutional provision to the contrary, according to the legislature's directive.

Unlike the supreme court and district courts, the Idaho Court of Appeals is not created by the Idaho Constitution, but is, instead, established by statute. *See* Idaho Code § 1-2403. Consequently, unless there is an express constitutional provision to the contrary, the legislature has the power to determine how vacancies on the court of appeals are to be filled. The constitution does not speak to vacancies on the court of appeals and, therefore, the legislature does have the authority to determine how appointments to that court should be made. It has done so by providing for the Judicial Council's involvement in the appointment process. *See* Idaho Code §§ 1-2102(3) and 1-2404.

According to supreme court precedent, this procedure does not violate the governor's appointment power under art. 4, sec. 6.

Unlike the court of appeals, the supreme court and district courts are constitutionally established. *See* art. 5, secs. 6 and 11, Idaho Constitution. Moreover, art. 4, sec. 6, expressly addresses vacancies on these courts, stating "[i]f the office of a justice of the supreme or district court . . . shall be vacated by death, resignation or otherwise, it shall be the duty of the governor to fill the same by appointment, *as provided by law* . . . ." (Emphasis added.) It is the opinion of this office that this provision of art. 4, sec. 6, authorizes the legislature to limit the governor's appointment power over vacancies on the supreme and district courts. This the legislature has done by enacting the Judicial Council provisions of Idaho Code § 1-2102.

Art. 4, sec. 6, did not always allow the legislature to limit the governor's appointment authority over supreme and district court vacancies. As originally adopted, this constitutional provision stated that "[i]f the office of a justice of the supreme or district court . . . shall be vacated by death, resignation or otherwise, it shall be the duty of the governor to fill the same by appointment . . . ." The phrase "as provided by law" was *not* included in the original provision.

This was a significant omission. In *Budge v. Gifford,* 26 Idaho 521, 144 P. 333 (1914), the Idaho Supreme Court reviewed a statute shortening the term limit for a supreme court justice appointed by the governor to fill a vacancy on the court. The court first noted that art. 5, sec. 19, of the Idaho Constitution stated that vacancies in judicial offices are to be "filled as provided by law." The court reasoned that if art. 5, sec. 19, were the only constitutional provision involved, the legislature would have "plenary power" to fill supreme court vacancies in any manner it chose. However, the court went on to hold that art. 4, sec. 6, was an *absolute* grant of appointment power to the governor over supreme and district court vacancies and was controlling of the issue. The court held that art. 4, sec. 6, was self-enacting and served to invalidate the term restriction statute:

> Under that provision of the constitution, whenever a vacancy occurs in the office of the justice of the supreme court, it becomes the duty of the governor to fill the same by appointment. This is an *absolute grant* of appointive power to the governor by the constitution itself and *does not depend upon legislative action or legislative sanction.* That power given the governor is not limited or controlled in any

> manner by the provisions of said section 19 of art. 5. If that were so, the legislature might provide that when a vacancy occurs in the office of a justice of the supreme court, or any other office named in said section 6, such vacancy should be filled by special election or by the legislature or in any other manner than by appointment by the governor, and thus deprive him of that power, the exercise of which is not merely permitted but is made mandatory by the provisions of said section.

26 Idaho at 529 (emphasis added). Thus, the governor originally did have absolute appointment power over supreme and district court vacancies, and had the Judicial Council provisions of Idaho Code § 1-2102 been enacted when the original art. 4, sec. 6, was in effect, they probably would have been unconstitutional as to supreme and district court appointments.

However, art. 4, sec. 6, was amended in 1968, and the phrase "as provided by law" was added to the governor's appointment authority. This key language now allows the legislature to circumscribe the process by which appointments to supreme and district court vacancies shall occur. The legislature has done this by providing for Judicial Council participation and recommendations. This Judicial Council involvement does not violate the governor's appointment power under art. 4, sec. 6, as that power is no longer constitutionally absolute.

In short, the Judicial Council's involvement in the appointment process of supreme court justices and court of appeals and district court judges does not violate the governor's appointment power under the Idaho Constitution.

2. *Separation of Powers*

As a subsidiary question you have also asked whether it violates the separation of powers principles contained in art. 2, sec. 1, of the Idaho Constitution to have the Chief Justice of the Idaho Supreme Court acting as the presiding member on the Judicial Council. It is not surprising that you find this arrangement unusual. Certainly, when we consider our federal system, we could not imagine Chief Justice Rehnquist recommending to President Clinton who should serve on the United States Supreme Court. Moreover, separation of powers is always an important consideration, as the accumulation of all powers—legislative, executive and judiciary—in the same hands can easily lead to abuse and tyranny. For that reason, we have a separation of powers provision

in the Idaho Constitution, art. 2, sec. 1, and the Idaho Supreme Court has always applied this constitutional protection carefully. *See, e.g., Jewett v. Williams,* 84 Idaho 93, 369 P.2d 590 (1962).

Nevertheless, it is our opinion that the Chief Justice's position on the Judicial Council does not raise separation of powers concerns. Importantly, the Idaho Supreme Court has held that the appointment power does not properly belong to any one branch of government. In *Elliot v. McCrea*, 23 Idaho 524, 130 P. 785 (1913), the court upheld against a separation of powers attack a statute providing that a district judge should make appointments to the drainage commission. Later, in *Ingard v. Barker,* 27 Idaho at 131, the supreme court elaborated upon its *Elliot* holding, stating:

> Primarily the rule is well settled by numerous authorities that in the absence of a constitutional provision to the contrary, any one of the three departments of government may, under the authority of the statute, appoint for any class of office in any of the three governmental departments.

Thus, in Idaho, while the appointment power *may* be vested in the executive branch, any of the three branches may exercise the appointment power if the legislature so provides and if there is no express constitutional provision to the contrary. Here, as noted, art. 4, sec. 6, of the Idaho Constitution allows the legislature, by statute, to circumscribe the appointment process over supreme court, court of appeals and district court vacancies. The legislature's decision to statutorily involve the Chief Justice of the Idaho Supreme Court in the appointment process is within the constitutional authority granted to it under art. 4, sec. 6, and violates no separation of powers principles.

3. *Conclusion*

Your letter correctly notes that Idaho's system for appointing judicial officers to fill vacancies is strikingly different from the federal system. More than anything, this appears to be an anomaly of history. The drafters of the Idaho Constitution seem to have envisioned a system whereby judicial officers would, for the most part, be elected. The reality is that most are initially appointed and are only rarely challenged at general elections. Along with this development is the 1968 amendment to art. 4, sec. 6, allowing the legislature to circumscribe the appointment procedure. Almost by default, because of the modern practice not to challenge judicial officers through election, the legisla-

tively created Judicial Council has garnered significant influence and power through its statutory involvement in the appointment process. This system is constitutional. The process is largely controlled by the legislature and can also be changed by the legislature. The legislature, under art. 4, sec. 6, remains free to determine the process by which the governor shall fill vacancies on the supreme court, court of appeals and district courts.

Currently, the legislature has established a Judicial Council with the Chief Justice of the Idaho Supreme Court acting as the presiding member. This legislatively established system does not violate any Idaho constitutional provisions.

I hope this information is of assistance. Please let me know if you have further questions.

Yours very truly,

MARGARET R. HUGHES
Deputy Attorney General

December 28, 1993

Honorable Max Black
Idaho House of Representatives
3731 Buckingham Drive
Boise, ID 83704

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

Dear Representative Black:

You have asked the Attorney General's Office to provide legal guidance regarding the scope of the regulatory powers of the Idaho Board of Registration of Professional Engineers and Professional Land Surveyors insofar as the board regulates the practice of engineering. Specifically, you ask:

> Could the Board of Professional Engineering interpret the activity of in-house engineers, working on their own equipment, as falling within the [purview] of "wherein the public welfare or the safeguarding of life, health, or property is concerned or involved, when such service is rendered in a professional capacity and requires the application of engineering principles and data"?

The quotation is from the statutory definition of the "practice of engineering," Idaho Code § 54-1202(c), and your question, in effect, asks whether the board may deem in-house engineers to be engaged in the "practice of engineering" whenever their work impacts "the public welfare or the safeguarding of life, health, or property." So stated, the answer to the question does not address your announced concern, which is "the certification of in-house engineers." We have, therefore, taken the liberty of rephrasing your question as follows:

> Does the activity of an in-house engineer who is engaged in the "practice of engineering" as that term is defined in Idaho Code § 54-1202(c) constitute the "practice of professional engineering" as that term is defined in Idaho Code § 54-1201 and therefore subject the engineer to the board's registration requirements?

Our conclusion is that the statute is ambiguous and that plausible arguments can be made to support or to reject the board's authority to regulate all

those engaged in the "practice of engineering" in an in-house capacity. Our further conclusion is that because a statute with criminal sanctions must be construed narrowly and, because the better arguments support the conclusion that the board may regulate only the "practice of *professional* engineering," the board does not have authority to require registration by in-house engineers who are engaged in the practice of engineering but who do not hold themselves out to be "professional engineers."

ANALYSIS

A. *Statutory Construction*

Chapter 12 of title 54 of the Idaho Code creates the Board of Registration of Professional Engineers and Professional Land Surveyors, defines its jurisdiction and powers, and prescribes standards and qualifications for, among other things, the practice of "professional engineering" in the State of Idaho. At the outset, the "Declaration of Policy" states that it is:

> [U]nlawful for any person to practice or offer to practice professional engineering . . . in this state, or to use in connection with his name or otherwise assume, use or advertise any title or description tending to convey the impression that he is a registered or licensed engineer . . . unless such person has been duly registered . . . .

Idaho Code § 54-1201. Thus, it is clear that no one may engage in the practice of professional engineering in Idaho without being duly registered by the board. Unfortunately, the term "practice of professional engineering" is not included in the "definitions" section of the statute. However, the term "practice of engineering" is defined:

> The term "practice of engineering" within the intent of this act shall mean any service or creative work, such as consultation, investigation, evaluation, planning, designing, teaching upper division engineering design subjects, and the supervision of inspection observation of construction *[sic]* in connection with any public or private utilities, structures, buildings, machines, equipment, processes, works, or projects, wherein the public welfare or the safeguarding of life, health, or property is concerned or involved, when such service is rendered in a professional capacity and requires the application of engineering principles and data. A person shall be construed to practice or offer to

> practice engineering within the meaning and intent of this act who practices any of the branches of the profession of engineering or who, by verbal claim, sign, advertisement, letterhead, card, or in any other way represents himself to be a professional engineer or through the use of some other title implies that he is a professional engineer or that he is registered under this act, or holds himself out as able to perform or who does perform any engineering service or work or any other service designated by the practitioner which is recognized as engineering.

Idaho Code § 54-1202(c).

The fundamental ambiguity of the statute is its use of the terms "engineering" and "professional engineering." If the Idaho Legislature intended that the two terms be used interchangeably, then everyone who practices "engineering" in the State of Idaho must be registered or licensed by the Board of Registration of Professional Engineers and Professional Land Surveyors. If the two terms are intended to carry distinct meanings, as they must under basic principles of statutory construction, then it is only "professional engineers" who must be registered, not everyone who engages in the "practice of engineering."

As noted, a plausible argument can be made that the Idaho Legislature intended the board to regulate all those who engage in "the practice of engineering," regardless of whether they are employed by an engineering firm, a private corporation, or a governmental entity. The announced purpose of the statute is "to safeguard life, health and property." As a matter of public policy, it can therefore be argued that the board should be authorized to regulate all those who apply their training in engineering principles to projects of such magnitude that "the public welfare or the safeguarding of life, health, or property is concerned or involved." Idaho Code § 54-1202(c).

Such a reading, however, violates the basic principles of statutory construction. The meaning of a statute must be determined from a literal reading of the statute as a whole without separating one provision from another. *George W. Watkins Family v. Messenger,* 118 Idaho 537, 539-40, 797 P.2d 1385, 1387-88 (1990). Taken as a whole, it appears clear that the Idaho Legislature intended to distinguish between "engineering" and "professional engineering" and that only the latter is subject to the board's registration requirements.

The fact that the Idaho Legislature intended to distinguish between the terms "engineering" and "professional engineering" is best appreciated against the background of the amendments to this statute in 1986. Prior to 1986, the definition quoted in your question read:

> (c) Practice of Engineering *and Professional Engineering.* The terms "practice of engineering" *and "professional engineering"* include . . .

(Emphasis added.) Thus, prior to 1986, the two terms were used interchangeably and synonymously. In 1986, however, the legislature struck the underlined words, thereby driving a wedge between the term "practice of engineering" and the term "practice of professional engineering." The purpose of the amendments, among other things, was to "redefine who may practice engineering . . . and under what conditions." Statement of Purpose, S.B. 1386 (RS 12421)(1986).

As a result of these amendments, the statute now provides a narrow definition of the term "professional engineer" as "a person who has been duly registered or licensed as a professional engineer by the board under this act." Idaho Code § 54-1201(b). By contrast, an "engineer" is not one who is registered or licensed, but is broadly defined as anyone "who is qualified to practice engineering by reason of his special knowledge and use of mathematical, physical and engineering sciences, and the principles and methods of engineering analysis and design, acquired by professional education and engineering experience." Idaho Code § 54-1202(a). The separate definitions for the terms "professional engineer" and "engineer" would have no purpose if the legislature intended no significance in the use of the modifying word "professional." In arriving at a determination of legislative intent, every word and provision must be given effect if possible. *Matter of Permit No. 36-7200,* 121 Idaho 819, 823, 828 P.2d 848, 852 (1992).

The remainder of the statute makes it clear that the Idaho Legislature consistently distinguishes between a "professional engineer," who must be registered or licensed, and an "engineer," who need not be so registered. A "consulting engineer," for example, must be a "professional engineer." Idaho Code § 54-1202(d). The board itself has four members who must be "registered as professional engineers." Idaho Code § 54-1203.

The examination and licensing of "professional engineers" is spelled out in

detail, as is that of "engineers-in-training." Idaho Code § 54-1212. Noteworthy is the fact that a minimum of eight years of progressive experience in engineering work is required before one is qualified to be a "professional engineer." Similarly, an "engineer-in-training" must have four years of "progressive experience in engineering work of a grade and character satisfactory to the board and indicating that the applicant is competent to enroll as an engineer-in-training." *Id.* An engineer-in-training is forbidden from practicing as a "professional engineer." Idaho Code § 54-1215(4). Thus, the statute requires four years of "engineering work" even before one is qualified to enroll as an engineer-in-training en route to becoming a registered professional engineer. The entire system, in short, appears to envision years of actual work as an engineer prior to qualifying for even the lowest certification the board can bestow.

The Idaho Legislature has not short-changed the public safety and health by requiring registration only of those who hold themselves out as professional engineers. The statute makes it very clear that only a "professional engineer" is qualified to receive a "certificate of registration" and a "seal" demonstrating that status. Idaho Code §§ 54-1215(1) and (3). The professional engineer's "seal and signature must be placed on all specifications, land surveys, reports, plats, drawings, plans, design information and calculations, whenever presented to a client or any public or governmental agency." Idaho Code § 54-1215(3)(b). All governmental entities are strictly forbidden to "engage in the construction of any public work when the public health or safety is involved unless the plans and specifications and estimates have been prepared by, and the construction reviewed by a registered professional engineer." Idaho Code § 54-1218.

Further protection of the public safety and health is provided by the requirement, again and again, that the planning, construction and inspection of significant projects be under the control of a registered professional engineer. See, for example, Idaho Code § 31-4407A (solid waste disposal facilities); Idaho Code § 39-118 (sewage treatment plants); Idaho Code § 39-118A (ore-processing by cyanidation); Idaho Code § 39-7403 (solid waste facilities); Idaho Code §§ 42-217a and 42-1712 (dams and reservoir sites); Idaho Code § 42-1721 (tailing impoundment structures).

The legislature also knows how to insist that a given governmental position be filled by a licensed, registered professional engineer when it so intends. For example, the legislature expressly mandated, in creating the "office of the

chief engineer" of the Idaho Department of Transportation that "the chief engineer shall be a registered professional engineer, holding a current certificate of registration in accordance with the laws of this state." Idaho Code § 40-503.

In sum, the statutory analysis demonstrates that, in Idaho, the requirement of registration does not apply to all those who engage in "the practice of engineering" but only to those who hold themselves out as "professional engineers" and thus are able to perform those functions that only professional engineers may perform.

B. *Other Considerations*

Several other considerations bolster the conclusion from the above statutory analysis that the Idaho Legislature intended that only "professional engineers" need be registered by the board.

First, it is common knowledge that numerous unlicensed engineers work in-house throughout Idaho in private corporations and in state and local governmental entities. The board has worked within the confines of this system for many years without taking action against any of these engineers. Thus, the agency's interpretation of its own organic statute is that a license is required only when engaging in the type of conduct statutorily specified as limited to registered professional engineers. A reviewing court would give credence to long-established agency practice in construing its own statute. *Simplot v. Idaho State Tax Com'n*, 120 Idaho 849, 820 P.2d 1206 (1991).

Second, violations of the Professional Engineers and Professional Land Surveyors Act are criminal in nature. Such statutes are narrowly construed so that clear notice is given to those who must comply with them and inadvertent violations do not occur. *State v. Thompson,* 101 Idaho 430, 437, 614 P.2d 970, 977 (1980).

Finally, it is also noteworthy that the board attempted to amend its statute during the 1993 legislative session. The proposed amendments to Idaho Code § 54-1201 would have deleted the word "professional" from the Declaration of Policy and made it unlawful for *anyone* to engage in the practice of engineering without being licensed and registered by the board. Similarly, the definition of "practice of engineering" would have added the term "engineer" alongside the term "professional engineer" each time the latter term is used,

thus making the two terms interchangeable. Idaho Code § 54-1202(c). Further, the penalties section of the statute would have been amended to delete the word "professional" and thus make it a misdemeanor for anyone to "practice engineering" without being registered by the board. For the reasons outlined above, it was proper for the board to seek legislative approval before embarking upon such a major expansion of its regulatory powers and such a major departure from its own prior practice. However, the 1993 legislature did not see fit to approve the proposed amendments.

CONCLUSION

It is the conclusion of this office that the Idaho Board of Registration of Professional Engineers and Professional Land Surveyors Act, taken as a whole, cannot be read to impose registration requirements and criminal sanctions for violations thereof on in-house engineers who are engaged in "the practice of engineering" as that term is defined in Idaho Code § 54-1202(c). The registration requirements apply only to those who hold themselves out as "professional engineers" as that term is defined in Idaho Code § 54-1201 and who wish to exercise the powers and privileges that "professional engineers" alone possess under Idaho's statutory scheme. It is only a violation of the latter provisions that subjects a person to the criminal sanctions of Idaho Code § 54-1218.

Very truly yours,

JOHN J. McMAHON
Chief Deputy

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and

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