IDAHO ATTORNEY GENERAL'S ANNUAL REPORT

OPINIONS

SELECTED INFORMAL GUIDELINES

AND

CERTIFICATES OF REVIEW

FOR THE YEAR

1998

Alan G. Lance
Attorney General

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1998 Idaho Att'y Gen. Ann. Rpt. 97

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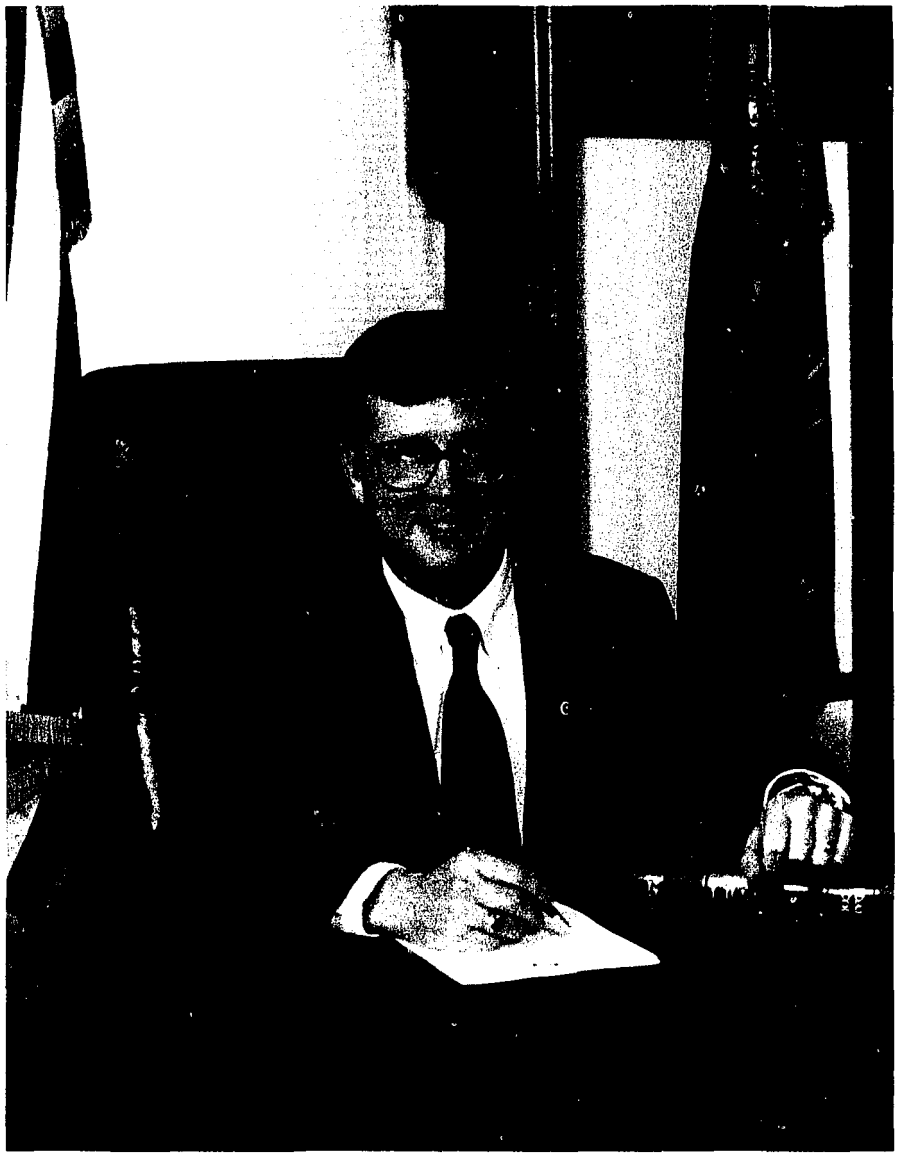


Alan G. Lance
Attorney General

INTRODUCTION

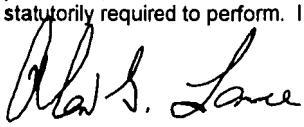
Dear Fellow Idahoans:

I present to you the Idaho Attorney General's Annual Report for 1998. This volume contains the legal guidelines, certificates of review and Attorney General Opinion 98-1, which were issued during 1998 by my office at the request of the client-entities we represent.

The Attorney General is an elected state official and a constitutional officer within the executive branch of state government. Similar to county prosecutors and city attorneys at the local levels of government, the Attorney General is required to represent state departments, boards and commissions, and state elected officials. The Attorney General is also a member of the Board of Land Commissioners and the State Board of Examiners. The legal powers and duties of my office are enumerated in the Idaho Constitution at article 4 and article 9, section 7, and in the Idaho Code, generally in Idaho Code sections 67-1401 through 67-1409. The Attorney General's specific duties and powers are detailed in 353 Idaho laws.

The contents of this volume represent only a small fraction of day-to-day duties and responsibilities handled by the professional legal staff. The Attorney General's six divisions provide legal defense of state laws, taxpayer dollars, and the legal rights of the State of Idaho. Examples of major legal projects and victories during 1998 include: (1) the settlement reached with the tobacco industry, which will bring $711 million into Idaho over the next 25 years and $30 million per year in perpetuity; (2) the core team of legal experts who have assisted the Legislature to understand the complexities of electric deregulation and restructuring; (3) forcing the United States Forest Service to pay attorney fees and costs to the State of Idaho for failing to supply necessary information to our county assessors; (4) winning a judgment against the United States Fish and Wildlife Service's claims to Snake River water, ending the threat that over a million acres of farmland would have to go out of production and ensuring that water will be available in the future for our cities and citizens; and (5) continuing the increased services to local government, including 154 new criminal prosecutions, 27 criminal investigations, and answering approximately 50 civil law inquiries per month from local elected officials. These successes would not be possible without the skillful and experienced attorneys and legal staff who have chosen to use their legal education and law license for the betterment of Idaho. In my experience, the Office of the Attorney General is a top-notch law office!

As I embark on my second term as your Attorney General, I can guarantee that this office will continue to be managed as a professional law office. The complex and weighty issues that we must defend and enforce involve your tax dollars, your legal rights and the policy decisions made by the elected policymakers, the legislature and governor that you selected. In the law profession, there can be no higher honor or duty than that which I am constitutionally and statutorily required to perform. I look forward to a successful 1999.



ALAN G. LANCE
Attorney General

OFFICE OF THE ATTORNEY GENERAL
ALAN G. LANCE
ATTORNEY GENERAL

1998 STAFF ROSTER

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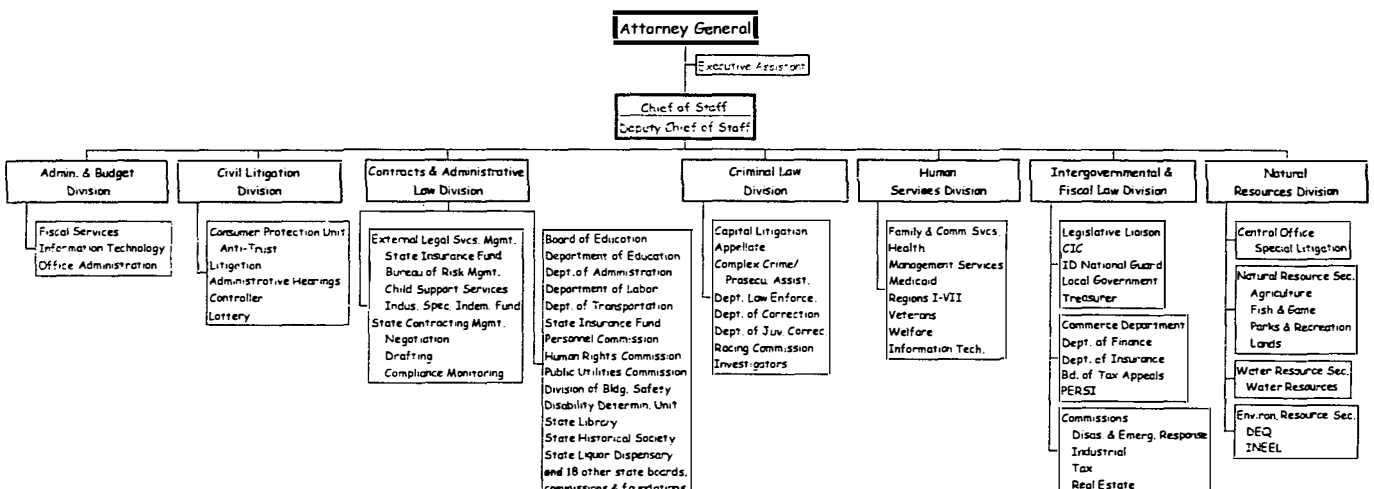
Office of the Idaho Attorney General
Organizational Chart - 1998



OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR 1998

ALAN G. LANCE
ATTORNEY GENERAL
STATE OF IDAHO

ATTORNEY GENERAL OPINION NO. 98-1

The Honorable John H. Tippets
Idaho House of Representatives
Idaho State Legislature
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED

1. What are the standards expressed by the United States Supreme Court regarding a state's ability to regulate abortion?

2. Do Idaho's statutes regulating abortion conform with the United States Supreme Court's standards?

3. Do any of the draft bills that the Idaho Legislature may consider during the 1998 session pertaining to abortion resolve potential constitutional problems with the current Idaho statutes or create additional constitutional problems?

4. Does the Idaho Constitution create any rights or limits that pertain to the state's ability to regulate abortion?

CONCLUSION

1. The United States Supreme Court has held that a woman has a constitutional right to obtain a pre-viability abortion and a state may not place an undue burden on this right. After fetal viability, a state may proscribe abortion except where it is necessary in appropriate medical judgment for the preservation of the life or health of the mother. The Supreme Court has upheld a 24-hour waiting period and an informed consent provision requiring the giving of truthful, nonmisleading information about the nature of the abortion procedure, about attendant health risks of abortion and childbirth, and about probable gestational age of the fetus. The provisions upheld contained medical emergency exceptions. The Court has also upheld a one-parent con-

sent requirement for a minor seeking an abortion that included an adequate judicial bypass procedure. Further, the Court has upheld reasonable recordkeeping and reporting provisions as long as the confidentiality of the woman is protected and the increased reporting costs do not become a substantial obstacle to a woman's right to obtain a pre-viability abortion. Finally, the Court has invalidated any spousal notification or consent requirement.

2. There are some constitutional problems with Idaho's current abortion statutes. To begin, the requirement contained in Idaho Code §18-608 that second-trimester abortions be performed in a hospital is unconstitutional. In addition, Idaho statutes do not contain a health exception for the ban on third-trimester abortions. Further, the definition of viability in Idaho Code §18-604(7) is broader than the definition provided by the United States Supreme Court and thus correspondingly narrows the woman's ability to obtain an abortion prior to viability. Also, the parental notification provision contained in Idaho Code §18-609(6) does not contain a bypass procedure, judicial or otherwise. Finally, it is not entirely clear whether the legislature intended the informed consent requirements of Idaho Code §18-609 to carry criminal penalties.

3. a. Idaho Abortion Statute Amendments Draft Bill: This draft bill deletes the second-trimester hospitalization requirement contained in the current statute but does not add a health exception to the post-viability abortion ban. Likewise, it retains the problematic definition of "viability." The bill contains a two-parent consent requirement; authority is split on whether a state can require a two-parent consent, even with a judicial bypass. In addition, the bill specifies that a violation of the current informed consent provision is a misdemeanor; however, it has not provided a clear enforcement mechanism to the additional duties it imposes upon physicians. Additionally, concerning the proposed misdemeanor language, there could be circumstances in which a physician could be found to be in violation of the informed consent provision without a *scienter* requirement. This could unconstitutionally chill the willingness of physicians in the state to

perform abortions. Regarding the reporting requirements, it is imperative that the confidentiality of the woman be protected, and precedent indicates that the physician's identity should be protected from public disclosure as well. This bill protects the identity of the woman but, because it is not clear whether the reports are available to the public, it is not clear whether the physician's identity is protected from public disclosure.

b. Partial Birth Abortion Draft Bill: Partial birth abortion prohibitions have been challenged in several states. Thus far, reviewing courts have invalidated them primarily on the ground that a woman cannot be required to use a different and potentially riskier procedure. Women's Medical Professional Corporation v. Voinovich, 130 F.3d 187 (6th Cir. 1997); Planned Parenthood of Southern Arizona, Inc. v. Woods, No. 97-385-TUC-RMB, 1997 WL 679921 (D. Ariz. Oct. 27, 1997); Carhart v. Stenberg, 972 F. Supp. 507 (D. Neb. 1997); Evans v. Kelley, 977 F. Supp. 1283 (E.D. Mich. 1997). Ohio has filed a petition for a writ of *certiorari* on this issue with the United States Supreme Court, which has not yet been denied or granted.[1]

c. Parental Consent to Abortion Draft Bill: In addition to requiring that a minor obtain the consent of one parent, this draft bill would require that a pregnant woman who has had a guardian or conservator appointed after a finding of disability, incapacity or mental illness obtain the consent of her guardian or conservator before having an abortion. While there is an absence of case law on this issue, a reviewing court might not conclude that such a woman is in the same situation as a minor and might find this provision troubling under some circumstances. The judicial bypass provision contained in this bill appears ge nerally sound; however, the drafters may want to consider including a specific timetable for court hearings and decisions. Further, while providing for civil liability, the bill does not specify whether anyone beyond the physician would be liable nor does it limit the

amount of recovery or whether guardians and conservators have standing to sue in addition to parents. As with the Idaho Abortion Statute Amendments bill, it is not clear whether the identity of the physician is protected from public disclosure under the reporting requirements.

4. Some state supreme courts have construed their state constitutions as providing broader protection for abortion than does the federal Constitution. The Idaho Supreme Court, while it has held that the Idaho Constitution can be construed more broadly than the federal Constitution, has not yet addressed this issue specifically. One state district court held that the Idaho Constitution provides "broader protection than the federal constitution" when addressing an abortion issue. However, this remains an open question at the state appellate level.

ANALYSIS

Question No. 1:

You have asked what standards the United States Supreme Court has established regarding a state's ability to regulate abortion. The most significant recent statement from the United States Supreme Court concerning abortion is Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). In that opinion the Court reaffirmed earlier decisions, holding that a woman has a constitutional right to obtain a pre-viability abortion, and a state may not place an undue burden on this right. A regulation imposes an undue burden if it places a substantial obstacle in the path of a woman who seeks to abort a nonviable fetus.

The Casey Court went on to hold that state regulations designed to foster the health of a woman who seeks an abortion before fetal viability are valid if they do not constitute an undue burden on that right. *Id.* at 878. In addition, a state has a "profound interest in potential life" and "throughout pregnancy, the state may take measures to ensure that the woman's choice is informed." *Id.* The measures designed to advance this interest will not be invalidated as long as they are truthful and not misleading and they do not place "an undue burden" on the woman's right to obtain a pre-viability abortion. *Id.* at 878, 882. However, unnecessary regulations that have the pur-

pose or effect of presenting a substantial obstacle to a woman who seeks an abortion before viability impose an undue burden on that right and are invalid. *Id.*

After fetal viability, a state may proscribe abortion except where it is necessary, in appropriate medical judgment, for preservation of the life or health of the mother. *Id.* at 878. Viability is the point in time at which there is a realistic possibility of maintaining and nourishing a life outside the womb. *Id.* at 870. The United States Supreme Court has noted that viability can occur as early as 23 to 24 weeks. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 160, 93 S. Ct. 705, 730, 35 L. Ed. 2d 147 (1973).

In Casey, the Supreme Court upheld several types of abortion regulations. For example, the Supreme Court upheld an informed consent provision that required the giving of truthful, nonmisleading information about the nature of the abortion procedure, about attendant health risks of abortion and of childbirth, and about probable gestational age of the fetus, holding that this requirement did not impose an undue burden on the woman's right to choose to terminate her pregnancy. *Id.* at 881. Likewise, the Court upheld a 24-hour waiting period. *Id.* at 884. Importantly, both of these requirements contained medical emergency exceptions. *Id.* at 879. It is clear from reading the Casey decision that the informed consent provision and 24-hour waiting period would not have been upheld without the medical emergency exception. *Id.* at 885. Further, the Court observed that the Pennsylvania statute at issue also provided that the doctor did not have to comply with the informed consent provision if he or she reasonably believed that furnishing the information would have a severely adverse effect on the physical or mental health of the patient. *Id.* at 883-84.

The Supreme Court also upheld a one-parent consent requirement for a minor seeking an abortion that included an adequate judicial bypass procedure allowing a court to authorize the performance of an abortion if the minor was mature and capable of giving informed consent or if the abortion was in her best interest. *Id.* at 899. The Supreme Court held it unconstitutional to require a woman to notify her spouse or obtain his consent prior to an abortion. *Id.* at 895.

In Casey, the Supreme Court went on to uphold reasonable record-keeping and reporting provisions, as long as the confidentiality of the woman was protected. *Id.* at 900-901. The Court held that recordkeeping and reporting provisions are reasonably directed to the preservation of maternal health, but that they must properly respect a patient's confidentiality and privacy. The Court then noted that the requirements it was reviewing did not impose a substantial obstacle to a woman's choice because the increase in the cost of the abortions would be slight. *Id.* at 901. The Court left open the possibility that at some point increased reporting costs could become a substantial obstacle, but stated there was no showing of this on the record before it. *Id.* The Court did, however, strike down one particular reporting provision which required that a married woman provide her reason for failing to notify her husband about the abortion. *Id.*

Hopefully these basic principles and black letter law will be useful as abortion issues are considered.

Question No. 2:

Your second question concerns Idaho's current abortion statutes and whether these statutes conform to the constitutional standards set forth by the United States Supreme Court. Idaho's current abortion statutes are found at Idaho Code § § 18-601, *et seq.* It is worth noting that title 18 deals primarily with criminal matters and is entitled "CRIMES AND PUNISHMENTS." Copies of these statutes are enclosed with this opinion. I have also enclosed the 1993 Attorney General's Opinion reviewing the constitutionality of these statutes. 1993 Idaho Att'y Gen. Ann. Rpt. 5.

As a preliminary matter, this opinion notes that Idaho's abortion statutes have not been judicially challenged. Statutes are entitled to a presumption of constitutionality, unless the constitutional issue raised by the statute has already been judicially resolved. *See, e.g.*, Bon Appetit Gourmet Foods, Inc. v. State, Dept. of Employment, 117 Idaho 1002, 793 P.2d 675 (1989). As discussed below, some issues raised by Idaho statutes have been judicially resolved by the United States Supreme Court and some have not. As to those issues which have not been resolved, the Attorney General has a duty to defend the state statutes pursuant to Idaho Code § 67-1401.

Because Idaho's abortion statutes were enacted prior to the Casey decision, the statutes are drafted under the trimester construct articulated in Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). Idaho Code § 18-608 permits first-trimester abortions and, also, second-trimester abortions if the second-trimester abortions are performed in a hospital. Idaho Code § 18-608(3) prohibits third-trimester abortions unless the abortion "is necessary for the preservation of the life of [the] woman or, if not performed, such pregnancy would terminate in birth or delivery of a fetus unable to survive."

There are three constitutional problems with Idaho Code § 18-608. First, the United States Supreme Court has held that a state may not require that second-trimester abortions be performed in a hospital. Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 103 S. Ct. 2481, 76 L. Ed. 2d 687 (1983). Medical science has advanced so that some second-trimester abortions can be safely performed without hospitalization. Consequently, the Supreme Court has concluded that requiring hospitalization for all second-trimester abortions is unreasonable and unconstitutional. *Id.*

Second, as discussed above, under the Casey decision, while a state may prohibit post-viability abortions, it can only do so if the life or health of the mother is not jeopardized. At least one federal circuit court of appeals has held that "health" encompasses not only a severe non-temporary physical health problem, but also severe non-temporary mental and emotional harm. *See* Women's Medical Professional Corporation v. Voinovich, 130 F.3d 187 (6th Cir. 1997). Idaho's statute contains an exception to the third-trimester prohibition if the life of the mother is endangered. It does not, however, contain an exception if her health is jeopardized. The omission of any health exception in Idaho's ban on third-trimester abortions creates an additional constitutional problem.

A third constitutional problem may be raised when the third-trimester abortion prohibition is read in conjunction with the statute's definitions of the "third trimester of pregnancy" and of viability. Idaho Code § 18-604(6) defines the third trimester of pregnancy as "that portion of a pregnancy from and after the point in time when the fetus becomes viable." Idaho Code § 18-604(7) defines a viable fetus as "a fetus potentially able to live outside the

mother's womb, albeit with artificial aid." This definition of viability departs from the definition provided by the United States Supreme Court. The United States Supreme Court has held that viability is the time at which there is a "realistic possibility of maintaining and nourishing a life outside the womb." *See* Casey, 505 U.S. at 870. Should a case arise under this portion of the statute, a court might conclude there is a difference between a "realistic possibility" of maintaining and nourishing a life outside the womb and a "potential" ability to live outside the womb. A broader definition of viability which correspondingly narrows or restricts the woman's ability to obtain an abortion prior to viability conflicts with the Casey decision.

Under Idaho Code § 18-609(2), the Idaho 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 a 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. *See* Idaho Code § 18-609(4). Idaho Code § 18-609(3) provides that these materials should be provided to the pregnant patient, if reasonably possible, at least 24 hours before the performance of the abortion. Idaho Code § 18-609(4) further provides that disclosure of the materials is not required if the physician reasonably determines that disclosure of the materials would have a severe and long-lasting detrimental effect on the health of the woman.

In the 1993 Attorney General's Opinion, this office concluded that this informed consent provision and 24-hour waiting period were probably constitutional under the Casey decision. However, this office also observed that it was not entirely clear whether the informed consent provision carried with it any criminal penalties. This office's analysis on this point is fairly lengthy and will not be restated in detail here. As noted, the opinion containing that analysis is enclosed with this opinion. The office ultimately concluded that while reasonable arguments could be raised on both sides of the issue, the more persuasive argument was probably that criminal penalties had not been intended.[2]

This office also reviewed the parental notification provision contained in Idaho Code § 18-609(6). This notification provision does not contain a judicial bypass procedure. The opinion of this office was that while the statute would probably survive a facial challenge, it was potentially vulnerable to a constitutional attack under certain factual circumstances because of the absence of a bypass procedure, judicial or otherwise.

Question No. 3:

Your third question concerns the proposed abortion draft bills presently before the Idaho Legislature. The draft bills are RS07560, RS07503, and a document entitled "Idaho Abortion Statute Amendments." You have asked whether any of these draft bills resolve constitutional problems with the current statutes or raise additional constitutional problems.

We have reviewed three draft abortion bills which we understand will be considered by the Idaho Legislature. This opinion will not discuss policy implications of those draft bills, as that is the prerogative of the legislature. The purpose of this opinion and the proper role of this office is to discuss any possible constitutional problems in these draft bills and refer you to relevant case law. It is the duty of the Office of the Attorney General to give an opinion in writing, when required, to senators and representatives upon questions of law. Idaho Code § 67-1401(7).

A. Idaho Abortion Statute Amendments

The first draft bill this opinion will discuss is entitled "Idaho Abortion Statute Amendments." This proposal provides a list of definitions, deletes the second-trimester hospitalization requirement contained in the current law, provides a section requiring that a minor seeking an abortion obtain the consent of both parents or judicial authorization, amends Idaho Code § 18-609(3) to clarify that a physician who does not comply with the informed consent provisions of the current statute will be subject to misdemeanor criminal penalties, sets forth physician's duties when performing an abortion on a woman who is carrying an unborn child of 20 or more weeks gestational age, and imposes certain recordkeeping and reporting requirements on physicians. The draft bill also contains a severability provision.

Section I of the draft bill sets forth a list of definitions. The definition of viability is the same as that in the current abortion statute. As discussed above, this definition could be construed as broader than the definition set forth by the Supreme Court in Casey.

Under Section II of the draft bill, the hospitalization requirement of Idaho Code § 18-608(2) is deleted, correcting that constitutional defect in Idaho's current statute. The other constitutional defect of Idaho Code § 18-608, discussed above, the absence of a health exception for the prohibition on third-trimester abortions, has not been corrected by this draft bill. Consequently, even if this draft bill is passed, that constitutional defect in the current abortion statute would remain.

Section III of the draft bill contains the parental consent provision for a minor seeking to obtain an abortion. This portion of the draft bill also includes a judicial bypass procedure, a procedure which, as discussed, is missing from the parental notification provision in Idaho's current abortion statute. The bill provides that the attending physician performing an abortion must obtain the informed written consent of the minor and the minor's "parent or guardian." In the definitions contained at Section I of the bill, "parent" is defined as meaning "both parents." This bill is not a one-parent consent bill, but instead requires the consent of both parents. As noted, the United States Supreme Court has upheld laws which require a minor to obtain the consent of one parent before obtaining an abortion, as long as those laws contain an adequate judicial bypass procedure. Casey, 505 U.S. at 899. However, this bill requires the consent of both parents. Research discloses a split of authority on whether a state may require the consent of both parents. For example, in Planned Parenthood League of Massachusetts, Inc. v. Attorney General, 677 N.E.2d 101 (Mass. 1997), the Supreme Court of Massachusetts invalidated a law requiring a pregnant unmarried minor to obtain the consent of both parents, holding that it violated her constitutional rights under the federal Constitution. In reaching that decision, the court noted that, "of the states that have a two-parent consent provision, almost all do not enforce it or have been enjoined from enforcing it." *Id.* at 107, n.11. However, the Fifth Circuit Court of Appeals upheld a statute requiring the consent of two parents in Barnes v. State of Mississippi, 992 F.2d 1335 (5th Cir.), *cert. denied*, 510 U.S. 976, 114 S. Ct. 468, 126 L. Ed. 2d 419 (1993). There is legal precedent on both sides of this issue. Idaho, however, is in the Ninth Circuit, which may

be more likely than other federal circuits to overturn a two-parent consent provision.[3]

Section IV of the draft bill amends Idaho Code § 18-1609(3) to make clear that a physician who fails to comply with the informed consent provisions of Idaho's current law is subject to a misdemeanor penalty and may also be disciplined for unprofessional conduct. However, the bill does not clearly identify an enforcement mechanism for the additional duties it imposes.

As discussed, this draft bill imposes a series of new duties upon physicians; viability testing before aborting a fetus of 20 or more weeks gestational age, the presence of two physicians when a viable unborn child is aborted, the submission of tissue for a pathology test, and various record-keeping and reporting requirements. The draft bill does not expressly provide whether a physician or abortion provider would also be criminally liable for violating or failing to perform any of the additional duties imposed by the draft bill. The additional duties created by this draft bill raise the same ambiguity as the current informed consent provision of Idaho Code § 18-609. The new misdemeanor provision only applies to Idaho Code § 18-609(3). Under the law already in place, Idaho Code § 18-605 makes it a felony for anyone to produce an abortion "except as permitted by this Act." The question arises as to whether the felony provision of Idaho Code § 18-605 would apply to the new requirements of the Act or whether no penalty was intended.

Added to this is the Eighth Circuit's opinion in Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452 (8th Cir. 1995), *cert. denied*, --U.S. —, 116 S. Ct. 1582, 134 L. Ed. 2d 679 (1996), in which the Eighth Circuit held that it was unconstitutional for the state of South Dakota to impose criminal liability against physicians who violate abortion laws without also including a *mens rea* or *scienter* requirement. *"Mens rea"* and *"scienter"* are legal terms for a defendant's guilty state of mind or guilty knowledge. The Eighth Circuit Court of Appeals concluded that a strict criminal liability statute would have a profound chilling effect on the willingness of physicians to perform abortions and would thus create a substantial obstacle to a woman's right to have an abortion. The felony provision of Idaho Code § 18-605 does not contain a *scienter* requirement. If Idaho Code § 18-605 were deemed to apply to the new duties and requirements created by this draft bill, a court could conclude the bill creates a chilling effect on the willingness of physi-

cians to perform abortions in this state. It may well be that the authors of this draft bill do not intend for any criminal penalties to apply to the new duties. However, because this bill is drafted so as to be placed within the criminal code, it would be advisable for the authors to clarify this issue.

A second problem concerns the misdemeanor language the draft bill adds to the current informed consent provision. While this new language contains a *scienter* requirement, this requirement would not apply in all circumstances. The draft bill states that if the "attending physician's agent" fails to perform one of the requirements of the informed consent section, the "attending physician" is guilty of a misdemeanor. A situation could arise where a physician is unaware that his agent failed to fulfill the informed consent requirements and, yet, pursuant to the bill, the physician could still be held criminally liable for the agent's acts. This transferred responsibility, as it were, again creates strict criminal liability on the part of the attending physician. While the drafters of this bill may be concerned that physicians should exercise proper control over their agents, the principles articulated by the Eighth Circuit appellate court in Miller still need to be considered. With that opinion in mind, and considering the close scrutiny given such statutory language by the courts, the drafters may wish to avoid the creation of a strict liability criminal offense in the abortion context. The drafters may want to consider including a gross negligence *scienter* requirement for those instances when a physician has not properly supervised his or her agent, and the agent knowingly violates the requirements of Idaho Code § 18-609(3).

Section V of the draft bill imposes a series of physician duties. These duties include viability testing if the fetus is 20 or more weeks gestational age, a requirement that, when a viable fetus is to be aborted, a second physician be present in order to seek to preserve that unborn child's life, and a requirement that sample tissue removed at the time of the abortion be submitted to a board-certified pathologist for examination. These provisions are similar in language to provisions which have been upheld by the United States Supreme Court in Planned Parenthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft, 462 U.S. 476, 103 S. Ct. 2517, 76 L. Ed. 2d 733 (1983), and Webster v. Reproductive Health Services, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989). Because identical language to that in the draft bill has already been upheld by the United States Supreme Court, in my opinion these provisions do not violate the federal Constitution.

Section VI contains a reporting requirement. It requires that a report of each abortion performed be made to the Idaho Department of Health and Welfare. These reports do not identify the individual patient by name. They would include the identity of the physician who performed the abortion, the second physician as required by subsection 18-616(B), the pathologist as required by subsection 18-616(C), the facility where the abortion was performed and the referring physician's agency or service, if any; the county and state in which the woman resides; the woman's age; the number of prior pregnancies and prior abortions of the woman; the viability and gestational age of the unborn child at the time of the abortion, including tests and examinations and the results thereof upon which the viability determination has been made; the type of procedure performed or prescribed and the date of the abortion; preexisting medical conditions of the woman which would complicate pregnancy, if any, and if known, any medical complication which resulted from the abortion itself; if applicable, the basis for the medical judgment of the physician who performed the abortion that the abortion was necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman; the weight of the aborted child; the basis for any medical judgment that a medical emergency existed which excused the physician from compliance with any provision in the chapter; and whether the abortion was performed upon a married woman. In addition, every facility in which an abortion is performed within the state must file with the department a report showing the total number of abortions performed within the facility during that quarter year. This report must also show the total abortions performed during the quarter according to each trimester of pregnancy. If the facility receives public funds, this report is available for public inspection and copying.

These reporting requirements are similar to the requirements at issue in Planned Parenthood v. Casey. The reporting requirements at issue in Casey were upheld by the United States Supreme Court against a federal constitutional challenge with one narrow exception. The statute in Casey contained a requirement, at subsection 12, that the facility report whether the abortion "was performed upon a married woman and, if so, whether notice to her spouse was given." If no notice to her spouse was given, the report was also to "indicate the reason for the failure to provide notice." The Supreme Court invalidated this provision because it required a woman, as a condition of obtaining an abortion, to provide the state with the precise information that,

as the court had already recognized, many women have "pressing reasons not to reveal." This draft bill has essentially included the first part of subsection 12, "whether the abortion was performed upon a married woman," but deleted the second part of that subsection, whether the married woman gave notice to her spouse and, if not, why. While the Court focused upon only a portion of subsection 12, it bears noting that the Court's holding may have invalidated all of that subsection.

Further, when the Third Circuit Court of Appeals reviewed the reporting requirements in Casey, it noted that the reports were "concededly confidential." Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682, 716 (3rd Cir. 1991). It also noted that the United States Supreme Court had struck down similar reporting requirements because they were not confidential in that they made public information about both the woman and about her physician. *Id.* at n.29. It is not clear whether these reports are intended to be made available to the public. Under existing law, the reports would probably be exempt from disclosure pursuant to Idaho Code § 9-340(3)(m) of the Public Records Act. However, the drafters may want to clarify this issue to avoid possible constitutional problems.[4]

B. Partial Birth Abortion Prohibition

The next draft bill this opinion will address is RS 07503, which prohibits partial birth abortions unless the woman's life is endangered. Pursuant to the draft bill, a physician who performs a partial birth abortion would be subject to felony prosecution and civil liability. The bill defines partial birth abortion as an abortion "in which the person performing the abortion partially vaginally delivers a living fetus, or a substantial portion of the fetus, for the purpose of performing a procedure the physician knows will kill the fetus, and which kills the fetus."

Partial birth abortion bans are a recent development in the abortion law area. Approximately 17 states have sought to ban these types of abortions. There have been several judicial challenges which have successfully enjoined the bans or had them declared unconstitutional.

"Partial birth abortion" is not a medical term. Usually, what legislators seek to ban when using this term is what is called a dilation and extrac-

tion (D&X) abortion. However, these bans have been construed to also encompass a dilation and evacuation (D&E) abortion. *See* Women's Medical Professional Corporation v. Voinovich, *supra.* The D&E procedure is the most common method of abortion in the second trimester. The D&X procedure, while apparently less common, is also sometimes used in the second trimester. In addition, partial birth abortion bans have been construed to ban the induction method of abortion. *See* Planned Parenthood of Southern Arizona, Inc. v. Woods, No. 97-385-TUC-RMB, 1997 WL 679921 (D. Ariz. Oct. 27, 1997).

Courts reviewing partial birth abortion bans have invalidated them primarily on the grounds that they potentially endanger the woman's health. Courts have reasoned that a particular abortion procedure cannot be banned if the alternative method would increase the health risks to the mother. *See, e.g.,* Voinovich, *supra*, and Carhart v. Stenberg, 972 F. Supp. 507 (D. Neb. 1997). Courts have also invalidated these bans on the theory that they are void for vagueness and overbroad. *See* Woods, *supra*, and Evans v. Kelley, 977 F. Supp. 1283 (E.D. Mich. 1997). These courts have concluded that it is not clear precisely what type of abortion procedure is being banned, and, therefore, physicians are not given fair notice regarding what is prohibited. As noted above, Ohio is seeking Supreme Court review of the Sixth Circuit Court of Appeals opinion striking down Ohio's law. The Supreme Court has not yet granted or denied review.

Idaho is in the Ninth Circuit, which is more likely than other circuits to follow a rationale similar to that applied by the Sixth Circuit. Consequently, particular attention should be paid to the Sixth Circuit opinion.

C. Parental Consent to Abortion

The third draft bill this opinion will address is entitled "Parental Consent To Abortion." This draft bill requires that before a physician performs an abortion on an unemancipated minor, the physician must secure the written consent of one parent of the minor. In addition, the consent of a guardian or conservator must be secured if one has been appointed because the pregnant woman has been found disabled, incapacitated or mentally ill pursuant to title 15, chapter 5, or title 66, chapter 3, Idaho Code. The draft

bill contains a judicial bypass provision, criminal and civil penalties and recordkeeping and reporting requirements.

As discussed, the United States Supreme Court has upheld one-parent consent requirements. This draft bill, however, also appears to apply to adult women who have been found disabled, incapacitated or mentally ill and for whom a guardian or conservator has been appointed. Research discloses little precedent on this specific issue. Usually, legal cases involving a pregnant disabled, incapacitated or mentally ill woman entail an effort by a third party to sterilize the woman or force an abortion, rather than a situation where the woman might seek an abortion while her legal guardian or conservator objects. *See* Lefebvre v. North Broward Hospital District, 566 So. 2d 568 (Fla. Ct. App. 1990) (trial court authorization allowing hospital to terminate pregnancy over mental patient's objection reversed). A court might not view a child and an adult woman who is incapacitated, disabled or mentally ill as being in identical situations. Title 66, chapter 3 may be particularly problematic. Under title 66, chapter 3, a court can find a woman "lacks capacity" if, because of her mental illness, she is not able to make an informed decision about treatment for her mental illness. *See* Idaho Code § 66-317(i). However, this woman may not have been adjudicated as incompetent. An incompetency adjudication is an entirely separate proceeding. *See* Idaho Code § 66-355. Idaho Code § 66-322 provides for the "appointment of [a] guardian for individuals lacking capacity to make informed decisions about treatment," and gives this guardian the narrow authority to "consent to treatment, including treatment at a facility." Idaho Code § 66-322(j). Idaho Code § 66-346 provides that mental patients retain all "civil rights . . . unless limited by prior court order." If this draft bill were enacted and judicially challenged, a court might be troubled by the prospect of a woman who has been found lacking capacity for the narrow purpose of making decisions about her treatment for a mental illness being required to obtain a guardian's consent or to seek judicial authorization before she can exercise her right to end a pregnancy.

The draft bill provides for a judicial bypass. The United States Supreme Court has held that a judicial bypass provision must meet four criteria: (i) allow the minor to bypass the consent requirement if she establishes that she is mature enough and well enough informed to make the abortion decision independently; (ii) allow the minor to bypass the consent requirement if she establishes that the abortion would be in her best interests; (iii) ensure the minor's anonymity; and (iv) provide for expeditious bypass proce-

dures. *See* Lambert v. Wicklund, — U. S. —, 117 S. Ct. 1169, 137 L. Ed. 2d 464 (1997).

The bypass provision in this draft bill is modeled upon the one upheld in Hodgson v. Minnesota, 497 U.S. 417, 110 S. Ct. 2926, 111 L. Ed. 2d 344 (1990). Under the bypass provision a judge "shall" authorize the abortion without parental consent if the judge concludes that that pregnant female is mature and capable of giving informed consent or the judge determines the abortion without parental consent would be in her best interests. The pregnant female may participate in the proceedings and she has the right to court-appointed counsel. The proceedings in court are confidential and the pregnant female has the right to an expedited confidential appeal if her petition is denied. Further, "to protect the identities of persons involved, records contained in court files regarding judicial proceedings . . . are exempt from disclosure pursuant to section 9-340D, Idaho Code."[5] No filing fees are required of the pregnant female at the trial or at the appellate level.

Generally, this bypass procedure appears sound. One minor point concerns the expediency of the hearings. The draft bill provides that the proceedings shall be "given precedence" over other pending matters and that the judge shall render his decision "promptly." It goes on to provide for an "expedited" appeal. Further, the bill provides that access to the courts "shall be afforded the pregnant female twenty-four (24) hours a day, seven (7) days a week." However, the bill does not contain a specific time frame within which the courts must conduct hearings and render their decisions. The judicial bypass provision upheld in Hodgson also did not contain specific time frames, but it provided not only that the judge had to reach a decision promptly, but also that it had to be "without delay." Since Hodgson, one appellate court has held that a bypass procedure that allowed for "summary proceedings," but which did not set forth a specific timetable did not meet constitutional requirements. *See* Causeway Medical Suite v. Ieyoub, 109 F.3d 1096 (5th Cir. 1997). The court in this case cited an earlier Ninth Circuit opinion, Glick v. McKay, 937 F.2d 434 (9th Cir. 1991), as authority. Glick v. McKay has since been criticized by the Supreme Court on other grounds. *See* Wicklund, *supra.* Regardless, because Idaho is situated in the Ninth Circuit, it would do no harm to add a specific timetable.

The draft bill further provides that "performance of an abortion in knowing or reckless violation of this act shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied the right to consent." The draft bill does not specify precisely who would be liable—the physician or also his or her agents. I mention this because in a recent title challenge to an abortion initiative, the Idaho Supreme Court interpreted a provision that stated that the "mother, the father (and if the mother or father has not attained the age of 18 at the time of the abortion, any parent of such minor), may in a civil action obtain appropriate relief." Matter of Writ of Prohibition, 128 Idaho 266, 269, 912 P.2d 634, 637 (1995). The Idaho Supreme Court construed this provision as allowing for a civil action against anyone who violated the terms of the initiative, not just the "medical abortion provider." If the drafters intended to limit liability to the physician, it would be well to specify this.

I would also briefly note that the draft bill does not place any limit on the amount of civil damages which may be recovered. Further, under its terms, it would seem that a guardian or conservator, as well as a parent, could initiate a civil suit. Considering the admonishment from appellate courts since Casey that states not "chill" the willingness of physicians to perform abortions, these are details that the drafters of this bill may want to consider adding.

The draft bill also provides reporting requirements. As noted, in Casey, the Supreme Court upheld reasonable reporting requirements that protected the identity of the woman. Further, as discussed above, there is some precedent for the proposition that the identity of the physician should be protected from public disclosure as well. This draft bill shields the identity of the woman. While the physician's identity can undoubtedly be required on a reporting form submitted to the state, there may be constitutional problems if the physician's identity is then revealed to the public. This bill does not appear to require that the physicians' names be protected by the department when the department compiles statistical data available for public inspection. Again, the Public Records Act may protect the physician's name, Idaho Code § 9-340(3)(m), but this issue could be clarified.[6]

Question No. 4:

Your final question concerns the Idaho Constitution. You have asked whether the Idaho Constitution creates any rights or limits that pertain to the state's ability to regulate abortion.

This office, in its 1993 Attorney General Opinion, touched briefly on this issue, discussing whether the Idaho Supreme Court might construe the Idaho Constitution as being more restrictive of the legislature's ability to enact abortion legislation than the federal Constitution has been construed to be. The Idaho Supreme Court has 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, 122 Idaho 981, 842 P.2d 660 (1992). Since the Casey decision was issued, there have been several state supreme courts that have construed their state constitutions as providing broader abortion rights, and, consequently, less legislative discretion, than does the United States Constitution. For example, the California Supreme Court has held that a statute requiring a pregnant minor to secure parental consent or judicial authorization before obtaining an abortion violates the right of privacy guaranteed by the California Constitution. American Academy of Pediatrics v. Lungren, 940 P.2d 797 (Cal. 1997). The Supreme Court of Minnesota has held that medical assistance and general assistance statutes that permit the use of public funds for child-related medical services, but prohibit similar use of public funds for medical services related to therapeutic abortions impermissibly infringe on a woman's fundamental right of privacy under the Minnesota Constitution. *See* Women of the State of Minnesota v. Gomez, 542 N.W.2d 17 (Minn. 1995). However, there are other states which have not followed this course. For example, in Mahaffey v. Attorney General, 564 N.W.2d 104 (Mich. Ct. App. 1997), the Court of Appeals of Michigan held that the Michigan Constitution does not guarantee a right to abortion that is separate and distinct from the federal right.

These cases highlight the point that the Idaho Supreme Court, should an abortion issue be raised before it, will not necessarily conclude that it must follow federal precedent. I note that one state district court judge, when addressing an abortion issue, held that the Idaho Constitution provides "broader protection than the federal constitution." *See* Roe v. Harris, No. 96977 (Idaho Fourth District for Ada County, Feb. 1, 1994). Whether the

Idaho Supreme Court would reach the same conclusion remains an open question.

AUTHORITIES CONSIDERED

1. Idaho Code:

§ 9-340(3)(m).
Title 15, chapter 5.
§ 18-601, *et seq.*
§ 18-604(6).
§ 18-604(7).
§ 18-605.
§ 18-608.
§ 18-608(2).
§ 18-608(3).
§ 18-609.
§ 18-609(2).
§ 18-609(3).
§ 18-609(4).
§ 18-609(6).
§ 18-1609(3).
§ 39-3801.
§ 39-4302.
Title 66, chapter 3.
§ 66-317(i).
§ 66-322.
§ 66-322(j).
§ 66-346.
§ 66-355.
§ 67-1401.
§ 67-1401(7).

2. Idaho Cases:

Bon Appetit Gourmet Foods, Inc. v. State, Dept. of Employment, 117 Idaho 1002, 793 P.2d 675 (1989).

Matter of Writ of Prohibition, 128 Idaho 266, 912 P.2d 634 (1995).

Roe v. Harris, No. 96977 (Idaho Fourth District for Ada County, Feb. 1, 1994).

State v. Guzman, 122 Idaho 981, 842 P.2d 660 (1992).

3. **Federal Cases:**

Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 103 S. Ct. 2481, 76 L. Ed. 2d 687 (1983).

Barnes v. State of Mississippi, 992 F.2d 1335 (5th Cir.), *cert. denied*, 510 U.S. 976, 114 S. Ct. 468, 126 L. Ed. 2d 419 (1993).

Carhart v. Stenberg, 972 F. Supp. 507 (D. Neb. 1997).

Causeway Medical Suite v. Ieyoub, 109 F.3d 1096 (5th Cir. 1997).

Evans v. Kelley, 977 F. Supp. 1283 (E.D. Mich. 1997).

Glick v. McKay, 937 F.2d 434 (9th Cir. 1991).

Hodgson v. Minnesota, 497 U.S. 417, 110 S. Ct. 2926, 111 L. Ed. 2d 344 (1990).

Lambert v. Wicklund, — U. S. —, 117 S. Ct. 1169, 137 L. Ed. 2d 464 1997).

Planned Parenthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft, 462 U.S. 476, 103 S. Ct. 2517, 76 L. Ed. 2d 733 (1983).

Planned Parenthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft, 655 F.2d 848 (8th Cir. 1981).

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682 (3rd Cir. 1991).

Planned Parenthood of Southern Arizona, Inc. v. Woods, No. 97-385-TUC-RMB, 1997 WL 679921 (D. Ariz. Oct. 27, 1997).

Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452 (8th Cir. 1995), *cert. denied,* — U.S. —, 116 S. Ct. 1582, 134 L. Ed. 2d 679 (1996).

Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

Webster v. Reproductive Health Services, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989).

Women's Medical Professional Corporation v. Voinovich, 130 F.3d 187 (6th Cir. 1997).

4. Other Cases:

American Academy of Pediatrics v. Lungren, 940 P.2d 797 (Cal. 1997).

Lefebvre v. North Broward Hospital District, 566 So. 2d 568 (Fla. Ct. App. 1990).

Mahaffey v. Attorney General, 564 N.W.2d 104 (Mich. Ct. App. 1997).

Planned Parenthood League of Massachusetts, Inc. v. Attorney General, 677 N.E.2d 101 (Mass. 1997).

Women of the State of Minnesota v. Gomez, 542 N.W.2d 17 (Minn. 1995).

5. Other Authorities:

1993 Idaho Att'y Gen. Ann. Rpt. 5.

IDAPA 16.02.08.451.

Dated this 26th day of January, 1998.

Sincerely,

ALAN G. LANCE
Idaho Attorney General

Analysis by:

Margaret R. Hughes
Deputy Attorney General

William A. von Tagen
Deputy Attorney General

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[1] Because this is an important constitutional issue which needs to be resolved one way or the other by the United States Supreme Court, this office is joining in an *amicus* effort by the state of Arizona asking the Supreme Court to resolve the issue.

[2] This office notes that it has never been contacted to prosecute an individual under the statutes which carry criminal penalties.

[3] It is absolutely imperative that any bypass procedure protect the confidentiality of the minor. Lambert v. Wicklund, — U. S. —, 117 S. Ct. 1169, 137 L. Ed. 2d 464 (1997). The draft bill provides that the minor shall file her petition in the judicial bypass proceeding using her initials. While language similar to that contained in this draft bill was upheld in Planned Parenthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft, 462 U.S. 476, 103 S. Ct. 2517, 76 L. Ed. 2d 733 (1983), it might be well to specify within the draft bill that both the trial and appellate procedures must be confidential and that court documents are not public records. In addition, for purposes of further clarification, the drafters may want to define what is meant by "notice" in Section III, specifically, (6)(b)(i). An earlier version of the statute at issue in Ashcroft contained a provision that notice be provided to the minor's parents regarding the bypass hearing. This provision was struck down by the Eighth Circuit in Planned Parenthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft, 655 F.2d 848, 874 (8th Cir. 1981), and the state of Missouri did not raise this issue on appeal and appears to have dropped that provision in its current statute. Bearing in mind the origins of the word "notice," clarification by the drafters might be considered.

[4] Current rules promulgated by the Department of Health and Welfare protect a physician's identity when reports of "induced abortion" are released for public use. IDAPA 16.02.08.451. The draft bill does not provide whether the department should continue this confidentiality policy with regard to the reporting requirements contained in the draft bill.

[5] Proposed section 39-1704(3) appears to include a typographical error. The drafters may have intended just 9-340, or some other specific section under that statute.

"This opinion notes one final issue regarding both the draft bills which require parental consent. Idaho does not require parental consent for medical treatment for minors "14 years of age or older" who may have come into contact with infectious, contagious or communicable disease that are required by law to be reported to the local health officer. *See* Idaho Code § 39-3801. Idaho Code § 39-4302 allows persons to consent to their own care if they are of "ordinary intelligence and awareness sufficient for him or her generally to comprehend the need for, the nature of and the significant risks ordinarily inherent in any contemplated hospital, medical, dental or surgical care, treatment or procedure." The code does not appear to require that minors obtain parental consent prior to medical procedures. The United States Supreme Court has never held that a state must require parental consent for other medical procedures before it can require a one-parent consent to an abortion procedure. Nevertheless, if a challenge were made based on the Idaho Constitution, a court, should it construe the Idaho Constitution more broadly than the U.S. Constitution (see discussion below), could find this distinction relevant.

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ATTORNEY GENERAL'S SELECTED INFORMAL GUIDELINES FOR THE YEAR 1998

ALAN G. LANCE
ATTORNEY GENERAL
STATE OF IDAHO

February 10, 1998

The Honorable Ron Black
Idaho House of Representatives
STATEHOUSE MAIL
Boise, ID 83720

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Legal Relationship Between the Office of the Superintendent of Public Instruction and the State Board of Education

Dear Representative Black:

On January 27, 1998, you submitted a number of questions concerning the legal relationship between the office of the superintendent of public instruction and the state board of education. Each of your questions is restated in bold below and followed by an answer.

1. **While Idaho Code § 33-101 refers to art. 4 sec. 20, dealing with the 20 departments, the language in Idaho Code § 33-101 gives the board of education status not granted by the Idaho Constitution, art. 4 sec. 1, describing the executive department. Therefore, is the board of education in fact not an executive department of Idaho state government, rather according to art. 4 sec. 20, one of its administrative departments (67-2402) or an agency (67-5201 . . . "all state boards are agencies")?**

This question raises the point that the term "department" is used in the Idaho Constitution to refer to what are more frequently described as the "branches" of state government. For example, art. 2, sec. 1, states that "[t]he powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial" (emphasis added). These separate departments are also frequently referred to as "branches." *See, e.g.*, Malmin v. Oths, 126 Idaho 1024, 895 P.2d 1217 (1995) (referring to the "executive branch" and "judicial branch" of state government).

Each of the three "departments" set out in art. 2, sec. 1, are further subdivided by other provisions in the Idaho Constitution. As this question demonstrates, art. 4, sec. 1, states that the executive "department," or "branch," is headed by a number of statewide elected officials, including the superintendent of public instruction. Each elected official is charged to "perform such duties as are prescribed by this Constitution and as may be prescribed by law."

Idaho Code § 33-101 states:

> For the purposes of section 20, article IV, of the constitution of the state of Idaho, the state board of education and all of its offices, agencies, divisions and departments shall be an executive department of state government.

The reference to art. 4, sec. 20, is important because art. 4, sec. 20, states that, with the exception of those officers specifically enumerated in art. 4, sec. 1, the executive department may consist of only "twenty departments." The use of the word "departments" in conjunction with the word "twenty" is clearly a reference to the "administrative officers, agencies, and instrumentalities" making up the executive department or "branch." The phrase "twenty departments" does not mean that there are twenty "branches" of government. This interpretation is bolstered by the fact that the "State board of education" is listed in Idaho Code § 67-2402 under the title, "Structure of the executive branch of Idaho state government" (emphasis added).

2. Why then is the board of education not under the superintendent of public instruction as one of the 20 administrative departments? (Art. 4, sec. 20 . . . "the departments shall be allocated by law.") Where is it allocated . . . in what section of code or the constitution?

The constitutional distribution of powers between the superintendent of public instruction and the board of education can best be understood by reviewing art. 4, sec. 1, and art. 9, sec. 2 of the Idaho Constitution, and the proceedings and debates of the Constitutional Convention. Art. 9, sec. 2 of the Idaho Constitution, as adopted in 1890, provided:

> The general supervision of the public schools of this state shall be vested in a board of education, whose powers and duties shall be prescribed by law; the superintendent of public instruction, the secretary of state and attorney-general, shall constitute the board of which the superintendent of public instruction shall be president.[1]

This provision made it clear that the "general supervision" of the public schools would be vested in the board of education. Art. 4, sec. 1, provides that the superintendent of public instruction was constitutionally designated as the executive officer. Reading the two constitutional provisions together, it appears the board of education is charged with the "general supervision" of the public schools, but the superintendent of public instruction executes state law and board policy relating to public schools.

This conclusion is supported by the proceedings and debates of the Constitutional Convention. What was intended can be seen from the debates set forth at pp. 644-46 of the Proceedings and Debates of the Constitutional Convention of Idaho, 1889. The debate relative to the distribution of these powers was generated by a motion made by Mr. Morgan to amend the proposed sec. 2. The proposed amendment would have provided:

> The general supervision of the public schools of this state shall be vested in a superintendent of public instruction, whose duties shall be prescribed by law.

Mr. Morgan argued that it would be better to have one officer setting education policy and argued that the secretary of state and the attorney general would not have adequate time to perform such a function. However, Mr. Morgan's proposed amendment was not adopted, based upon the arguments made by those who favored a board of education. In this regard, Mr. Hasbrouck argued:

> I think it is placing too much responsibility and even too much power in a matter that is of such importance as this is, in one man, and I think he needs this advisory board.

Mr. McConnell made a similar argument:

> I think there would be no harm in his having some advisors. I can't see any harm in it. It is a common custom to have a state board of education in some states. But I don't believe in leaving it to one man, the entire management and control of schools, any more than I would the management of a university entirely in the hands of one man.

Mr. Mayhew summarized the debate as follows:

> I do not care about entering into any discussion of this question, but I have observed this, so far as the discussion has gone, that there is but one question in it at all, in every argument advanced by the gentlemen, and that is this: Are three heads better than one, or three heads better than two? I think they are and therefore should be accepted.

While the debate referred to the board of education as an "advisory board," the actual language of the amendment clearly contemplates that the board will have the power of "general supervision of the public schools" and not merely the power to advise the superintendent. Nevertheless, the debates do not even hint at an intent to take from the superintendent of public instruction the executive function of executing the laws and policies as determined by the legislature and the board of education. Moreover, the language of art. 9, sec. 2, giving the board only the power of "general supervision" rather than the power to directly execute law and policy in particular cases, supports the conclusion that the board would generally supervise rather than execute education law and policy.

Art. 9, sec. 2 of the Idaho Constitution was amended in 1912 to provide:

> 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.

This amendment had the effect of placing the board of education in charge of higher education as well as the public school system. However, the amendment did not change the constitutional role of the board of education. It retained the language that the "general supervision" of the public school system would be vested in the board of education. Accordingly, the constitution vests in the board of education the authority to determine policy and generally supervise the public schools consistent with state law. Furthermore, the constitution vests in the superintendent of public instruction the power and duty to execute the laws of the state and the policies of the board of education with respect to public schools.

3. Does art. 9, sec. 2, in fact indirectly designate the superintendent of public instruction as the only elected constitutional officer and *ex officio* member of the board, as the presiding officer?

The plain language of art. 9, sec. 2, states that the "state superintendent of public instruction shall be ex officio member of" the state board of education. There is no indication that the superintendent of public instruction should serve as the presiding officer of the board. In fact, a 1912 amendment to the Idaho Constitution specifically removed the superintendent of public instruction from acting as president of the board. *See* art. 9, sec. 2, Compiler's Notes. The fact that there was a change in language from the original implies a different construction under rules of statutory and constitutional construction.

4. "General" is commonly defined as "not confined by specialization." Does not the extensive writing by the board of education of specific rules, regulations, and code which detail individual requirements contradict the "general" adjective of art. 9, sec. 2?

The plain language of art. 9, sec. 2, states that "the membership, powers and duties of" the board of education "shall be prescribed by law." There is no indication that the use of the term "general" is intended to limit the clear delegation of authority to the legislature to specify the "membership, powers and duties" of the board through subsequent legislative enactments. General

authority is the broadest authority because it is not limited or special authority.

5. If the board of education is over the department of education, where in fact is the constitutional office of the state superintendent of public instruction containing (art. 4, sec. 1) the public records, books and papers?

This question is very similar to your second question in that it seeks clarification of the constitutional relationship between the board of education and the superintendent of public instruction. The analysis and conclusions set out in answer to your earlier question apply equally to this question. The superintendent of public instruction is a distinct constitutional office whose office holder is also a member of the state board of education. The superintendent's public records, books and papers are legally located in that constitutional office, not in the office of the board of education.

I hope this letter is helpful. If you have any additional questions or comments, please feel free to contact me.

Sincerely,

Matthew J. McKeown
Deputy Attorney General
Intergovernmental and
Fiscal Law Division

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[1] This language no longer reflects the current version of art. 9, sec. 2.

March 10, 1998

Representative W. W. Deal
House of Representatives
State of Idaho
STATEHOUSE MAIL

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: House Bill No. 774

Dear Representative Deal:

The Idaho Legislature is currently considering House Bill No. 774 (the "Bill"). The following responses are provided for your guidance in answer to the 14 legal questions you posed in your March 5, 1998 letter, which was received by this office on March 9, 1998. For purposes of these responses, I have assumed that the Bill will be enacted in its original form without amendments, additions or deletions. The responses herein do not deal with certain proposed amendments to the Bill in the Idaho House of Representatives that are set out in Exhibit A (attached). The proposed amendments raise additional serious legal ramifications that are not addressed herein.

ANALYSIS AND CONCLUSIONS

Question No. 1:

As an "independent body corporate politic," will the Fund still be considered an instrumentality of the state such that it will continue to be exempt from federal taxes on its income?

Response:

It is unclear whether the State Insurance Fund (the "Fund"), as an independent body corporate politic, would continue to be exempt from federal income taxes by the Internal Revenue Service ("IRS"). Absent a statutory

mandate by the U.S. Congress, it is unlikely that the IRS will pursue the Fund for income taxes. From its inception, the Fund has never paid federal income tax on its earnings, nor has it ever been requested to pay tax by the IRS. The Fund has always assumed that it was exempt from federal income taxes because it was a state agency performing an essential government function. As an independent body corporate politic, the Fund might be regarded differently by the IRS. However, under the doctrine of "implied statutory immunity," it is unlikely that the IRS would pursue the Fund for income taxes in the future without a "plain statement" of the U.S. Congress imposing such a tax. Should the IRS attempt to collect income taxes from the Fund, tax exempt status could be achieved by making the Fund the "insurer of last resort." The Bill does not make the Fund the "insurer of last resort." For further discussion of the import of the language "independent body corporate politic," and variations thereof, please see the response to Question No. 6, footnote 14 below.

Question No. 2:

Will the Fund, as restructured by the Bill, meet the requirements of art. 3, sec. 19, and art. 11, sec. 2 of the Idaho Constitution?

Response:

It is probable the Fund, as an independent body corporate politic, would be viewed by the courts as a permissible entity. Case law has held that the state may create independent bodies corporate politic which are neither prohibited corporations nor state agencies subject to all the restrictions of the Idaho Constitution. The Idaho Supreme Court, in State v. Musgrave, 84 Idaho 77, 370 P.2d 778 (1962), held the Fund, under existing law, to be an entity of this type. The court held that the Fund is not a corporation within the meaning of art. 3, sec. 19 of the Idaho Constitution, nor was it granted a charter under a special law in violation of art. 11, sec. 2. The Idaho Supreme Court also held, in Board of Commissioners v. Idaho Health Facilities Authority, 96 Idaho 498, 531 P.2d 588 (1975), that the main restrictions between a prohibited corporation and a permissible independent body corporate politic are: (1) the absence of control by private parties; and (2) the inability of private parties to change the fundamental structure and public purpose of the entity as set out in the law creating it.

Question No. 3:

Will property owned by the Fund be exempt from taxation?

Response:

Art. 7, sec. 4 of the Idaho Constitution provides that property of the state and other municipal corporations is exempt from taxation. As an independent body corporate politic, the Fund would not qualify as a municipal corporation exempt from taxation. Although the Musgrave court held the Fund to be a state agency, it is likely this Bill would alter that status to the extent Fund property would be subject to taxation. (The Fund presently pays property taxes on its Boise office building and Ada County is seeking to collect ad valorem property taxes on the building owned by the Fund located at 954 West Jefferson in Boise, which is currently occupied by the State of Idaho Department of Lands). Absent legislation setting forth a tax exempt status similar to those contained in the statutes creating the state housing authority and state building authority, the Fund could well be liable for ad valorem property tax on its property.

Question No. 4:

Will the Bill have any impact on the ownership of real property by the Fund, such as the 954 Jefferson Street building?

Response:

The Fund presently owns the property it uses as its office building on State Street in Boise and maintains a leasehold interest in the property located at 954 West Jefferson. Under this Bill, the Fund, pursuant to Idaho Code § 72-912, would be allowed to invest its surplus and reserves in a manner similar to other insurers in this state. Idaho Code § 41-728 allows Idaho insurers to acquire, invest in, own, maintain, alter, furnish, improve, manage, lease, and convey land and buildings, so long as the real estate investments are limited to 10% of the insurer's assets for property used for its home office and accommodation, 5% of its assets for property held for production of income, and so long as the total real estate investments of the insurer do not exceed 20% of the insurer's assets. The Fund's current real estate investments appear

to comply with Idaho Code § 41-728. Please see the response to Question No. 3, above, regarding taxability of the Fund's real property assets.

Question No. 5:

Will the Bill exempt the Fund from the public records and the open meeting laws of the State of Idaho?

Response:

Public Records Act

It is unclear what effect the Bill would have on the operation of the Public Records Act as it applies to the Fund. The law presumes that all public records are open for inspection at all reasonable times. Idaho Code § 9-338 provides that the public has a right to examine the records of this state unless otherwise exempted. As an independent body corporate politic, the Fund would be neither an agency of the state nor a political subdivision of the state. Idaho Code § 9-340(2)(g) makes it clear under current law that certain information contained within the underwriting and claims files maintained by the Fund are exempt from disclosure. This implies other Fund records are subject to public inspection now, and that would not change under the Bill.

Open Meetings

The Fund currently is not subject to the Open Meeting Law because it has no governing body that makes decisions on its behalf. The Open Meeting Law, Idaho Code § 67-2342, provides that all meetings of a governing body of a public agency are to be open to the public. Idaho Code § 67-2341(4) defines a public agency such that the board of directors of the Fund appears to fall within the definition of a public agency. Subject to the discussion of the meaning of "independent body corporate politic" in the response to Question No. 6, footnote 1, below, if the Bill passes, the meetings of the board of directors may well be subject to the state's open meeting laws.

Question No. 6:

Will the Bill entitle the Fund to the immunities and limitations of liability set forth in the Idaho Tort Claims Act?

Response:

A definite answer cannot be given. The Bill does not provide a clear answer and a court would be the final arbiter of the issue. However, the characteristics of the Fund, under the Bill, suggest that the Fund might not constitute a governmental entity afforded the immunities and liability limitations of the Tort Claims Act. Idaho Code § 6-901, *et seq.* Further, since one purpose of the Tort Claims Act is the protection of the public purse, and since the Fund, under the Bill, would not jeopardize the public purse, a major reason to afford Tort Claims Act protection is not present. It is also unclear whether the board of directors of the Fund would qualify as a board covered by the Tort Claims Act. However, to the extent that the board would be conducting the business of the Fund, if the Fund were not covered, there is an argument that the board would not be covered.

The Tort Claims Act applies to and provides certain immunities and limitations of liability to "governmental entities." "Governmental entities" include the "state" and "political subdivisions." The term "state" is defined to include "any office, department, agency, authority, commission, board, institution, hospital, college, university or other instrumentality thereof." The term "political subdivision" is defined to include "any county, city, municipal corporation, health district, school district, irrigation district, special improvement or taxing district or any other political subdivision or public corporation." Idaho Code § 6-902.

The Fund, under the Bill, does not fit squarely into any of the enumerated entities listed under the definition of "state" in the Tort Claims Act since it is not an office, department, agency, authority, commission, board, institution, hospital, college or university. The Fund could be entitled to Tort Claims Act protection if it were an "instrumentality" of the state. The term "instrumentality" is not defined. Alternatively, if the Fund were a "political subdivision," it could be afforded protection under the Tort Claims Act, but not through the state. The Fund, under the Bill, does not fit into any of the

enumerated entities in the definition of political subdivision. In particular, although it is a corporation, it is not a "public corporation" and thus appears not to be a political subdivision entitled to Tort Claims Act protection.

The leading case on "instrumentality" status is Duffin v. Idaho Crop Improvement Association, 126 Idaho 1002 (1995). In that case, the Idaho Supreme Court considered the term "instrumentality" in the Tort Claims Act. In Duffin, the court considered whether the Idaho Crop Improvement Association ("Association"), a private non-profit involved in seed certification, was entitled to Tort Claims Act protection as an "instrumentality" of the state. The court's focus for this determination was on the "nexus" between the state and the entity in question and "whether the entity truly operates independently of the state." In holding that the Association was not an instrumentality of the state, the court noted that the Association's directors were elected by its members; the state did not exercise control over day-to-day operations; the Association performed activities in addition to its purported state function of seed certification; the Association's employment decisions were not state supervised; and the Association had obtained its own liability insurance. *Id.* at 1009. *See also*, Bott v. State Building Authority, 122 Idaho 471, 479 (1992) (court will look beyond statutory denomination of a particular entity to powers given to it to determine if entity should benefit from a statutory definition).

In addition, however, and of some importance to the court, was the fact that the state did not appropriate any moneys to the Association and that the Association's revenues did not become part of the general fund. The court noted that "[b]ecause [the Association] receives no appropriations and does not contribute its revenues to the state, we are not compelled to deem it an 'instrumentality' in order to achieve" the preservation of the public purse, which is one of the purposes of the Tort Claims Act. Finally, the court noted that the mere fact that the Association performed a "governmental" activity was not enough to convert it into a governmental entity for purposes of the Tort Claims Act. Duffin, 126 Idaho at 1009.

The reasoning of the court in Duffin reflects that the court applied a balancing approach to the factors present to determine "instrumentality" status. However, the court did not provide a bright-line test as to what factors, if any, are dispositive. Thus, where a balancing approach is used, a clear res-

olution may not be readily apparent because the factors on each side may seem equal in number or significance.

Certainly, the Fund, under the Bill, has some characteristics that could support "instrumentality" status under Duffin. The Fund is a statutorily created entity, like many state agencies. Thus, it could be legislated out of existence. Its board members would be appointed by the governor, unlike the directors in Duffin, who were member-elected. However, these characteristics are relatively limited in number.

On the other hand, the balancing approach prescribed by Duffin reveals a number of characteristics in the Fund, under the Bill, to suggest a true independence from the state. The Fund, under the Bill, would be an independent body politic corporate.[1] The Bill specifically states that the Fund's board is to assure that the Fund is run as an "efficient insurance company." This independent status and analogy to an insurance company suggests a purposeful separation from the state. This separateness is reinforced by the fact that the Fund receives no state money and that the state has no liability for the Fund. In addition, the Fund serves a proprietary and not a governmental function. Musgrave, 84 Idaho at 85. Further, although a governmental function does not guarantee instrumentality status, the lack of a governmental function appears to further distance the Fund from instrumentality status.

To the extent it is possible to identify a factor of particular importance to the court in Duffin, it appears that the court would emphasize the purposes behind the Tort Claims Act and whether deeming an entity as an "instrumentality" promotes or undermines those purposes. The Fund's characteristics in this regard do not strongly support instrumentality status. The Fund's employees, under the Bill, would be outside the merit system, a fact that undermines Tort Claims Act coverage since one purpose of the Tort Claims Act is to enable persons to recover for the tortious acts of state employees. Sterling v. Bloom, 111 Idaho 211, 214 (1986) (purpose of Tort Claims Act is to provide relief to those suffering injury from negligence of government employees).

Further, the court in Duffin specifically noted that a purpose of the Tort Claims Act was the protection of the state purse. *See also*, Friel v. Boise City Housing Authority, 126 Idaho 484 (1994) (purpose of the Tort Claims

Act is to save needless expense and litigation by providing opportunity for amicable resolution of the differences between parties, to allow authorities to conduct full investigation into the cause of an injury to determine the extent of the state's liability, if any, and to allow the state to prepare its defenses). The Bill provides that the Fund shall be administered "without liability on the part of the state." To the extent that the public purse is not put at risk by any act of the Fund, there is no compelling reason, under Duffin, to deem the Fund an instrumentality of the state. The Bill gives no specific insight into the limitation on state liability or whether the Bill intends that the Fund be protected by the Tort Claims Act.

Finally, it is not clear whether the board of directors of the Fund, separate from the Fund, would be entitled to Tort Claims Act protection. The Bill itself provides no insight. The term "board" is included in the itemized list of entities afforded protection under the Tort Claims Act. Arguably, however, that term applies to state boards included within the Executive Department of Self-Governing Agencies. Further, to the extent that the board is transacting the business of the Fund, if the Fund were not covered, there is an argument that the board would not be covered.

In sum, under the Bill, the Fund would have a limited number of characteristics to suggest instrumentality status. However, under the Bill, the Fund's characteristics more strongly suggest an independence from the state. These characteristics could undermine instrumentality status and negate any claimed right to Tort Claims Act protection. However, as the Bill does not specifically address this matter, it would be one of statutory interpretation and a court would be the final arbiter of this issue.

Question No. 7:

Will the Fund be provided and entitled to risk management coverage through the Department of Administration, Office of Insurance Management?

Response:

A definite answer cannot be given. The Bill does not give a clear answer and a court would be the final arbiter of the issue. However, it appears that the Fund, under the Bill, may not constitute an entity that must be afford-

ed risk coverage by the Department of Administration ("Department"). Whether the Fund's board of directors could be covered is also unclear. If the board is doing the business of the Fund and the Fund is not covered, there is at least an argument that the board also is not entitled to coverage.

The Department is obligated by the Tort Claims Act, Idaho Code § 6-919, and by Idaho Code § 67-5773, to determine the need for and to provide risk coverage to state departments, agencies, commissions, offices, divisions, boards, instrumentalities, and operations of the government and to consult with departments, agencies, commissions, and instrumentalities regarding comprehensive liability coverage.

The Fund, under the Bill, is not an office, department, agency, authority, commission, board, institution, hospital, college, university, division or board and would not be entitled to coverage as such. The Fund could be provided coverage by the Department if it were an "instrumentality" or "operation" of the state. *See* Bott, 122 Idaho at 479 (although the title "building authority" was not included in the descriptive terms chosen by the legislature to define agency for Idaho Code § 12-117, the court "must examine what powers have been bestowed on the Authority" to determine agency status or lack thereof). *But see* Brizendine v. Nampa Meridian Irrigation District, 97 Idaho 580, 588 (1976) (where the legislature has enumerated both generic and specific categories in the Tort Claims Act and irrigation districts were not included in either, the legislature must have intended not to include them within the Tort Claims Act).

Where an entity does not fit squarely into the enumerated categories, the balancing approach applied by the Idaho Supreme Court in Duffin to the "instrumentality" analysis probably requires a case by case determination since a particular entity would have individualized powers and characteristics affecting the analysis. As discussed above, the instrumentality analysis is inconclusive, but there are a number of factors to suggest non-instrumentality status.

The term "operations" also is not defined. Research revealed no cases interpreting the phrase "operation of the state" as that phrase is used in Idaho Code § 67-5773 or in another context. A court would likely apply a balancing approach similar to that used in the instrumentality analysis of Duffin to

determine whether an entity constitutes an "operation" of government. Assuming a balancing approach, the same characteristics weighing against instrumentality status would likely weigh against operation status. However, the term "operation" arguably connotes a closer relation than that of "instrumentality." It appears to assume more direct control over an entity than does the term "instrumentality," which seems to allow for some level of separation. Accepting this, the Fund's independent status and financial independence could undermine an argument that it is an "operation" of the state. In sum, whether the Fund would be an "operation" of the state for coverage purposes is not clear.

The issue is further muddied by the fact that Idaho Code § 67-5773, which imposes on the Department the obligation to determine the nature and extent of needs for risk coverage, is specifically limited to the risk needs of "all offices, departments, divisions, boards, commissions, institutions, agencies, and operations of the government of the state of Idaho the premiums on which are payable in whole or in part from funds of the state." (Emphasis added.) As discussed above, the Fund does not receive any state funds. Thus, under a strict interpretation of this language, the Fund cannot be included in the obligation imposed by that section because any premium the Fund would pay would not be payable in whole or part from state funds.

The Bill also creates a board of directors to transact the business and exercise the powers and functions of the Fund. The term "board" is included in the itemized list of entities covered by the Tort Claims Act and risk management statutes. Whether the board, separate and apart from the Fund, could be covered is not clear. The Bill itself provides no insight. If the board is exercising the powers of the Fund and the Fund is not covered, there is at least an argument that the board is not covered.

In sum, there are factors present in the statutory make-up of the Fund under the Bill that suggest that the Fund is not an entity that the Department is obligated to cover as it may not be deemed an "instrumentality" or "operation" of the state. Whether the drafters of the Bill intended that the Fund or its board be afforded coverage by the Department is not clear from the language of the Bill. As such, a court would be the final arbiter of this issue.

Question No. 8:

Will the Fund be subject to the purchasing statutes of title 67, chapter 57, and the rules promulgated pursuant thereto?

Response:

Most likely not, although the Bill does not provide a clear answer and a court would be the final arbiter of this issue.

The purchasing statutes and rules promulgated thereunder apply to the acquisition of property by state agencies. Idaho Code §§ 67-5714, *et seq.* Idaho Code § 67-5716(15) defines "agency" as "all officers, departments, divisions, bureaus, boards, commissions and institutions of the state, including the public utilities commission, but excluding other legislative and judicial branches of government, and excluding the governor, the lieutenant-governor, the secretary of state, the state controller, the state treasurer, the attorney general, and the superintendent of public instruction." By its terms, the Bill does not make the Fund an "office, department, division, bureau, board, commission or institution." Currently, the Department of Administration, Division of Purchasing ("Purchasing") does act as the statutory purchasing agent for the Fund, except in matters implicating the Fund's fiduciary duties.[3]

Research revealed no cases interpreting this definition of "agency." In Attorney General Opinion No. 77-17, the Attorney General stated that the University of Idaho was excluded from this definition of "agency." That opinion was based on Idaho Supreme Court cases holding that the university is a constitutional corporation of independent authority equal to that of the legislature and not generally subject to the control or supervision of any branch of state government. 1977 Idaho Att'y Gen. Ann. Rpt. 129, 134-35. The Fund is not a constitutional entity akin to the University of Idaho, and that analysis is not applicable to this question.

The Bill's Statement of Purpose specifically provides that the Bill will make the Fund an entity like the Idaho Housing Authority. The Housing Authority's statute specifically provides that it "is not, and has not been since its inception, a state or local agency for purposes of Idaho law . . . ." Idaho Code § 67-6226. The Housing Authority does not use Purchasing as its pur-

chasing agent, nor does it operate under Purchasing's statutes or rules. The Bill contains no provision comparable to Idaho Code § 67-6226. However, to the extent that the Bill is intended to make the Fund an entity like the Housing Authority, it appears that the Bill is intended to deny the Fund agency status for any purpose of Idaho law. Assuming such intent, it seems probable that the Fund, under the Bill, would not be subject to the purchasing statutes and rules applicable to state agencies. However, as the Bill is silent on this specific issue, it would ultimately be an issue of statutory interpretation for a court to determine.

Assuming that the Fund, under the Bill, would not constitute a state agency for purposes of the purchasing statutes and rules, it seems probable that the Fund would not constitute a "state agency" as that term is defined in Idaho Code § 67-5745, *et seq.*, governing telecommunications and information, including acquisitions. Idaho Code § 67-5745C requires, among other things, that state agencies receive approval of the Information Technology Resource Management Council ("ITRMC") for large technology projects. ITRMC is also charged with reviewing and evaluating information technology and telecommunication systems presently used by state agencies. Idaho Code § 67-5745A defines "state agencies" as "all state agencies or departments, boards, commissions, councils and institutions of higher education, but shall not include the elected constitutional officers and their staffs, the legislature and its staffs or the judiciary." The Bill would appear to remove the Fund from any oversight or review by ITRMC.

Question No. 9:

Will the Fund be afforded group health insurance coverage for its employees through the Department of Administration, Office of Insurance Management?

Response:

A definite answer cannot be given. The Bill does not provide an explicit answer to this question and, as such, a court would be the final arbiter of the issue. However, it appears that the Fund may not constitute an entity that must be afforded group coverage. If the board is doing the business of

the Fund and the Fund is not covered, there is at least an argument that the board is not covered.

Idaho Code § 67-5761 imposes on the Department of Administration the obligation to "determine the nature and extent of needs for group life insurance, group annuities, group disability insurance, and group health care service coverages with respect to personnel, including elected or appointed officers and employees, of all offices, departments, divisions, boards, commissions, institutions, agencies and operations of the government of the state of Idaho . . . ."

For the reasons set forth in the response to Question No. 8, above, there is a question as to whether the Fund and the board constitute an entity eligible for group coverage. In addition, the purpose of the group insurance coverage statutes is to cover state employees. *See also* Idaho Code §§ 67-5762, 67-5763, and 67-5768(1). Three of the board members would be from private industry and not state employees otherwise entitled to coverage. Without clear statutory direction, a court would have to interpret the applicable statutory provisions to determine this issue.

Question No. 10:

Does the Fund's current classified staff have property interests related to employment which would preclude their removal from state service?

Response:

The nature of public employment relationships in Idaho is discussed in the Informal Guideline of September 9, 1996 (1996 Idaho Att'y Gen. Ann. Rpt. 203, 204). Generally, state employees fall into two categories: non-classified employees and classified employees. The Idaho Personnel System Act ("Act"), Idaho Code § 67-5301, *et seq.*, provides that all employees in state government are considered to be classified unless they are specifically listed as non-classified. Idaho Code § 67-5303. Non-classified employees are not subject to the provisions of the Act and in the absence of a contract or other agreement limiting the reasons for which they can be dismissed, are "at-will" employees. Classified employees are hired under the provisions of the Act and their employment relationship with the state is governed by its terms. By

virtue of their classified status, these employees enjoy a property interest in their continued employment, and can only be dismissed or disciplined for specific, limited reasons. Further, classified employees are entitled to notice and an opportunity to be heard before a decision to dismiss or discipline them is made. Arnzen v. State, 123 Idaho 899, 904-05, 854 P.2d 242, 247-48, (1993), citing Harkness v. City of Burley, 110 Idaho 353, 715 P.2d 1283 (1986).

These property rights to continued employment are not absolute. These property interests cannot, and do not extend so far as to prevent the legislature from reorganizing a state department, or even abolishing it completely. Neither do they prevent an agency director from exercising the statutory authority to abolish positions, reorganize, and order reductions in force to properly manage an agency within the applicable fiscal restraints. This is recognized in the Act and the rules promulgated pursuant to it, which provide for "a system of service ratings and the use of such ratings by all departments in connection with promotions, demotions, retentions, *separations*, and reassignments." Idaho Code § 67-5309, IDAPA 28.01.01.140-147 (emphasis added).

The Bill proposes, in effect, to sever the Fund from state government. All reference to the Act is stricken from the text of the amended statute, and the bill provides an alternative personnel and compensation scheme in section 3:

> The personnel policies and compensation schedules for employees shall be adopted by the board of directors and shall be comparable in scope to other insurance companies doing business in the state and the region.

Removing the Fund from the umbrella of state government and the provisions of the Act will subject the Fund's classified employees to an involuntary, non-disciplinary separation from state employment. It is not unlike a layoff or reduction in force, except that it involves all of the agency employees. Such an involuntary, non-disciplinary separation is not appealable under the Act. Idaho Code § 67-5316. Neither does it give rise to a right to notice and an opportunity to respond. Idaho Code § 67-5315.

In summary, while classified employees are offered certain protections by virtue of their property interest in their continued employment, those property interests are primarily aimed at ensuring fair and equal treatment of employees. They do not extend so far as to trump the ultimate authority of the legislature to define the shape of state government.

Question No. 11:

What rights or privileges, if any, will current classified staff have upon their involuntary non-disciplinary separation from state classified service?

Response:

As discussed above, upon enactment as written the current classified employees of the Fund will become former classified state employees. Former classified employees of the Fund would, in all respects, be treated as would any classified employee who voluntarily left state service in good standing. This includes the handling of benefits such as sick leave and accrued annual leave, deferred compensation, and medical benefits. This also includes eligibility for reinstatement as provided by IDAPA 28.01.01.125. In summary:

A. Former employees are eligible for reinstatement to a class in which they held permanent status, or to another class of equal or lower pay grade under the following conditions:

i. Reinstatement must occur within a period equal to the length of the employee's service;

ii. The former employee's separation must have been without prejudice;

iii. The former employee must meet the current minimum qualifications of the class to which reinstatement is desired.

B. Reinstatement is not allowed if there is a departmental layoff register for the class with eligibles who are willing to accept reemployment.

C. The state personnel director may require the former employee to pass an examination for the class to which reinstatement is desired.

D. Employees of the Fund may have certain additional rights under federal law. The Work Adjustment and Retraining Notification Act, 29 U.S.C. § 2101, *et seq.*, and the regulations at 20 CFR 639.3 define employer. This definition includes the state, if the state entity is engaging in a business activity and employs more than 100 employees. The Fund is providing a proprietary function (a business) according to the Musgrave court. It is our understanding the Fund has more than 100 employees.

Question No. 12:

Will the Bill impact existing contracts between the Fund and its insureds?

Response:

Idaho Code § 72-918 requires that every employer insuring in the Fund receive a contract or policy of insurance from the manager. The Idaho Constitution, art. 1, sec. 16, prohibits any law impairing the obligation of contracts. Adoption of the Bill can not legally negate or change any existing insurance policy.

However, adoption of the Bill creates a new legal entity as an independent body corporate politic. The Bill is silent on the transfer or assignment of assets and obligations. Thus, the new legal entity has not succeeded to the obligations or assets of the prior entity.

Administratively, the new independent body corporate politic would have to enter into novation agreements with the employers or accept an assignment of the policies, assuming the current policies allow for an assignment. Otherwise, the new body corporate politic would have to issue new policies of insurance.

Question No. 13:

Will the Fund be exempt from the legislative appropriation process?

Response:

The Idaho Supreme Court, in Musgrave, held that the revenue of the Fund was not the property of the state, nor monies constituting part of the general fund held within the state's treasury for purposes of the statutory provisions governing the appropriation and expenditure of state funds. The court had found that the language of Idaho Code §§ 72-901, 72-902 and 72-927 was sufficient to constitute a continuing appropriation for the payment of all compensation, expenses or other obligations incurred in carrying out the worker's compensation law.[4] The Bill amends Idaho Code §§ 72-901 and 72-902. The impact of the amendment is unknown. Arguably, the same rationale utilized by the court in Musgrave would apply. Therefore, the Fund would not need a legislative appropriation because Idaho Code §§ 72-901, 72-902 and 72-927 would be considered a continuing appropriation.

However, Idaho Code § 72-910 remains unchanged by the Bill. Idaho Code § 72-910 requires the state treasurer to be the custodian of the state insurance fund. This section allows the state treasurer to deposit any portion of the fund not needed for immediate use, in the manner and subject to all the provisions of law respecting the deposit of "other state funds." (The holding and investment of the state insurance fund by the state treasurer is yet another factor to consider in determining whether the Fund is an "instrumentality of the state.")

Question No. 14:

The Bill also makes certain amendments to the Petroleum Clean Water Trust Fund ("PSTF") statutes, Idaho Code §§ 41-4901, *et seq.* Section 41-904(5) states that the PSTF personnel costs, operating expenditures, and capital outlay budget shall be subject to review and approval in the appropriation of the Fund. If there is no appropriation to the Fund, how can the PSTF budget be reviewed?

Response:

The Bill is silent as to any appropriation process required for the proposed new independent body corporate politic. As discussed in the response to Question No. 13 above, the holding in Musgrave may apply. The court in

Musgrave found that Idaho Code §§ 72-901, 72-902 and 72-927 constituted a continuing appropriation. As a practical matter, if the new Fund's continuing appropriation is never reviewed by the legislature, then the legislature would never have an opportunity to set the budget for PSTF. Therefore, it seems appropriate to review this part of the Bill to make certain the legislative intent is clearly met. This is particularly true if it is the intent to transfer PSTF to the control of a new trustee. The duties of the new trustee should be clearly identified by the legislature.

I hope this letter adequately addresses your inquiry. If you have any further questions regarding this matter, please do not hesitate to contact me.

Sincerely,

Terry E. Coffin
Division Chief
Contracts & Administrative
Law Division

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[1] Research revealed no Idaho statute creating an "independent body politic corporate." There are a limited number of statutorily created entities denominated as an "independent public body corporate and politic." Only three are included in title 67 (State Government and State Affairs). These three are the Idaho Housing Association, the Idaho State Building Authority and the Food Quality Assurance Institute. The remaining entities created as "independent public bod(ies) corporate and politic" are found in the Idaho Code in title 31 (Counties), title 50 (Municipal Corporations), title 33 (Education, Junior Colleges) and title 41 (Insurance).

The Statement of Purpose for the Bill states that the Fund would become an entity like the Idaho Housing Authority. However, a review of the statutes and cases involving the Housing Authority and a comparison to the Fund do not provide much insight if the purpose of such is to determine whether the Fund is an "instrumentality" of the state in the context of the Tort Claims Act. The statutes and cases involving "independent public bodies corporate and politic" are not directly applicable to risk issues and do not provide an analysis readily applicable to this issue.

Idaho Code § 67-6226 specifically provides that the Housing Authority "is not, and has not been since its inception, a state or local agency for purposes of Idaho law including [the Public Records Act]." Research revealed no cases interpreting this provision. However, by its terms, it suggests an intent to deny agency status. *See* State *ex rel.* Warren v. Nusbaum, 208 N.W.2d 780, 801 (Wis. 1973) (the Wisconsin Housing Authority, denominated an independent public body corporate and politic, has the power to sue and be sued; to make contracts; to acquire real and personal property; and to disburse its own funds, all of which support the legislative declaration that the Authority is an independent entity. "To the extent that the words [independent public body corporate and politic] denote interdependence and a common identity, the Authority is neither an arm nor agent of the State").

The Idaho Building Authority, created in Idaho Code § 67-6403, is another independent public body corporate and politic. The statute provides that the authority is "constituted a public instrumentality exercising public and essential governmental functions and the exercise by the authority of the powers conferred by this act shall be deemed and held to be the performance of an essential governmental function of the state." The Building Authority was found not to be a state agency for purposes of Idaho Code § 12-117(3) involving the award of attorneys' fees against a state agency. Bott v. Idaho State Building Authority, 122 Idaho 471, 479-80 (1992).

The Idaho Food Quality Assurance Institute was created by Idaho Code § 67-8301 as an independent public body corporate and politic. Recently, the Institute's status under the Tort Claims Act was analyzed and it was concluded that there was some question as to whether the Institute could be protected by the Tort Claims Act. The Institute is currently seeking legislation to clarify its right to such protection.

Research revealed one entity identified in Idaho statutes as a "public body politic and corporate." This entity is the Idaho Health Facilities Authority. In Board of County Commissioners of Twin Falls County v. Idaho Health Facilities Authority, 96 Idaho 498 (1974), the Idaho Supreme Court held that the Health Facilities Authority was not a constitutionally prohibited corporation. The court held that the state may create an entity that is neither a corporation nor a state agency subject to all restrictions of the Idaho Constitution. The case did not address whether the Health Facilities Authority was an instrumentality under the Tort Claims Act.

[3] The Department of Administration currently does provide risk coverage to the Fund. The Bill's Statement of Purpose provides that the Fund under the Bill will be like the Idaho Housing Authority. The Department of Administration does not currently provide risk coverage to the Idaho Housing Authority.

[4] Under the holding in State of Idaho v. Musgrave, 84 Idaho 77 (1962), the Fund is treated as a state agency.

[5] These sections of Idaho Code have remained unchanged since the Musgrave decision.

April 28, 1998

Retirement Board
Public Employee Retirement System of Idaho
607 N. Eighth Street
Boise, ID 83702

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

To the Members of the Retirement Board:

This is in response to your request for legal guidance on the issue of whether public school superintendents fall within the exceptions of Idaho Code § 59-1347. That section generally requires that PERSI members have five years of credited service before becoming vested (*i.e.*, eligible for a retirement benefit). However, there are three exceptions to this general rule.

As set forth in the statute, the exceptions are for inactive members, who at the time of separation from service either: (1) held an office to which they had been elected by popular vote or having a term fixed by the constitution, statute or charter or were appointed to such office by an elected official ("fixed term" exception); (2) were the head or director of a department, division, agency, statutory section or bureau of state government ("head of state agency" exception); or (3) were employed on or after July 1, 1965, by an elected official of the State of Idaho and occupied a position exempt from the provisions of title 67, chapter 53, Idaho Code ("non-classified state employee" exception).

The position of school district superintendent clearly does not fall into the "fixed term" exception because it is neither an elected office nor an office with a fixed term. It also fails clearly to meet the "non-classified state employee" exception since that applies only to non-classified positions within the state personnel system. The question is whether a school district superintendent falls within the "head of state agency" exception—a head or director of a state department, division, agency, statutory section or bureau.

It has previously been suggested, based on a trilogy of Idaho Supreme Court cases between 1931 and 1954, that school districts are generally "agencies of the state" and, therefore, are also "agencies" for purposes of Idaho Code § 59-1347.[1] However, before that conclusion can be drawn, it is first necessary to look at what the court meant by "agency of the state" in its decisions, and then to determine how it affects, if at all, what was intended in section 59-1347. With this in mind, the question is more accurately restated as whether a school district superintendent is the head or director of a state department, division, agency, statutory section or bureau for purposes of Idaho Code § 59-1347.

ANALYSIS

A. "Agency" as Used by the Court

The previous opinions of the Idaho Supreme Court do not support the proposition that school districts are generally "agencies of the state." Instead, they support the proposition that school districts are agencies of the state in a limited sense applicable to specific and limited purposes. For instance, in the first case, Common School District No. 61 v. Twin Falls Bank & Trust, 50 Idaho 711, 4 P.2d 342 (1931), the question was whether the school district was engaged in a governmental function when it countersigned a forged warrant which was in turn cashed by the bank. In rejecting the bankís argument that the school district was estopped from recovering from the bank, the court held that the doctrine of estoppel could not be asserted since the school district was "a subdivision of the state exercising governmental functions."[2] 50 Idaho at 718, 4 P.2d at 344. Therefore, in this decision, the court held only that the school district was an "agency of the state" for purposes of applying estoppel; that it was a governmental entity, performing governmental functions authorized by statute.

In the second case, Independent School Districts v. Common School District 1, 56 Idaho 426, 55 P.2d 144 (1936), several districts filed suit claiming that certain funds were misapportioned, resulting in less funding than they were entitled to receive. In concluding that the school districts had the right, indeed, the duty, to seek the misapportioned funds, the court cited the first case of Twin Falls Bank & Trust for the proposition that:

> [T]he school district is a mere agency of the state . . . charged with the sovereign duty of maintaining the schools within its particular territory of the state and of receiving funds and property and managing, controlling and expending the same in the interest of public education. In this respect and for *this purpose* the school district is the agent of the state in its particular territory.

56 Idaho at 432, 55 P.2d at 146. Here, the court puts in context the statement made in Twin Falls Bank & Trust and explicitly recognizes that school districts are "agencies of the state" in a limited sense.

Similarly, in the third case, Bullock v. Joint Class "A" School Dist. No. 241, 75 Idaho 304, 272 P.2d 292 (1954), the court cited the second case of Independent School Districts for the proposition that defendant school district was "an agency of the state." In deciding whether an action in tort could lay against the school district for allegedly improperly reassigning and then discharging a teacher, the court concluded that since the board was acting within the scope of its authority conferred by law in performing a "governmental function" for the state, no action in tort would lie against the board. 75 Idaho at 311, 292 P.2d at 296. Once again, the court uses "agency" in the limited sense that the school district existed under statutory authority and served a governmental function. This gave it effective immunity from tort liability but did not make it an agency of the state for all purposes. This view is consistent with recent case law and statutory provisions.

In Smith v. Meridian Joint School Dist. No. 2, 128 Idaho 714, 918 P.2d 583 (1996), the court addressed whether school board decisions were subject to the Idaho Administrative Procedure Act (APA). The question turned on whether a school district was an "agency" as defined by the act. According to the court, the two essential elements of that definition were (1) that the actor be a state board, commission, department or officer, and (2) that the actor be authorized by law to make rules or to determine contested cases. 128 Idaho at 721, 918 P.2d at 590. In concluding that a school district did not meet the elements of the definition, the court stated:

> A school district, once validly organized and in existence, is a "body corporate and politic" and may sue or be sued, may

> acquire, hold, and convey real and personal property, and may incur debt as provided by law. I.C. Section 33-301. The board of trustees of each school district is authorized by statute to perform administrative and organizational tasks for the school district. I.C. Sections 33-303, -304, -307, -308, -309, -310. While a school district, through its board of trustees may work with state boards , commissions, or departments, the school districts and boards of trustees are separate entities and do not constitute a state board, commission, department, or officer under I.C. Section 67-5201.

128 Idaho at 721, 722, 918 P.2d at 590, 591 (emphasis added).

Interestingly, the court then reviewed its earlier trilogy of cases dealing with school districts as "agencies of the state," further emphasizing that school districts are "agencies of the state" only in a limited sense and for limited purposes:

> In cases pre-dating the adoption of the APA, the Court concluded that school districts were agencies of the state for purposes of operating a school district, *Common Sch. Dist. No. 61 v. Twin Falls Bank & Trust Co.*, 50 Idaho 711, 716, 4 P.2d 342, 343 (1931), carrying out its duties of maintaining the schools within its district, *Independent Sch. Dists. v. Common Sch. Dists.*, 56 Idaho 426, 432, 55 P.2d 144, 146 (1936), and establishing tort duties of the school district, *Bullock v. Joint Class "A" Sch. Dist. No. 241*, 75 Idaho 304, 311, 272 P.2d 292, 296 (1954); *Anneker v. Quinn-Robbins Co.*, 80 Idaho 1, 8, 323 P.2d 1073, 1077 (1958). However, since the Idaho legislature's enactment of the APA in 1965, 1965 Sess. Laws, S.B. No. 238, Ch. 273, p. 701, no Idaho cases have held that a school district is an "agency" for purposes of APA review.

128 Idaho at 722, 918 P.2d at 591 (emphasis added).

This is also consistent with statutory law. Idaho Code § 67-2402(1) sets forth the organizational structure of state government consistent with art.

4, sec. 20 of the Idaho Constitution. It provides that all "offices, agencies and instrumentalities" of the state (except those assigned to elected constitutional officers) are "allocated among and within" nineteen specified departments. School districts are not "among" those listed. In fact, in 1978 this provision was amended, not to include school districts, but to provide only that school districts were "civil departments of state government" for the limited purpose of purchasing state endowment land at appraised prices. 1978 Idaho Sess. Laws 519.

Although it is clear that school districts are not "among" those listed, it has been suggested that they are "within" the listed departments, namely, the state board of education. However, that argument is severely undercut by the 1978 amendment. If school districts were already agencies of the state by virtue of being "within" the state board of education, there would have been no need to amend the provision to give them limited authority—they would have already had the authority. It is also inconsistent with Smith v. Meridian Joint School Dist. No. 2, cited earlier, which rejected the same argument in holding that despite the general supervision of the state board, school districts are not a part of the state board of education. 128 Idaho at 722, 918 P.2d at 591.

Instead, it was recognized that school districts were not agencies of the state in the general sense and, as a result, specific statutory authority was needed to exempt them from the competitive bidding requirements for purchase of state endowment lands. Consequently, it appears that the law is, and always has been, that school districts generally are not "agencies of the state" except in the narrow sense that they are instrumentalities of the state performing governmental functions and as such are sometimes treated as "agencies of the state" for limited and specific purposes.

B. "Agency" as Used in Idaho Code § 59-1347

When PERSI was originally established, there were no exceptions to the vesting requirement. The law simply required that:

> An inactive member is eligible for vested retirement if he has at least ten years of membership service and is within ten years of the date he would have been eligible for service retirement had he remained an active member.

1963 Idaho Sess. Laws 997.

Two years later, the law was amended to add the "fixed term" and "head of state agency" exceptions and was designated as Idaho Code § 59-1310(4).[3] Although there is no legislative history to shed additional light on what was intended, the language itself is quite narrow and limiting. For instance, the "fixed term" exception applies only to individuals who have either been elected or appointed to an office which is either an elected office or one with a term fixed by law or charter.[4] This exception applies primarily to elected officials (for which it is all inclusive), but also to a limited group of appointed officials who have fixed terms, primarily members of state boards and commissions.[5]

When viewed in context, the "head of state agency" exception is also very narrow. This is apparent in the PERSI statutes which make a clear distinction between the "state" and its political subdivisions. For example, where all employees of the "state" were included in PERSI, "political subdivisions" of the state had to elect to include their employees. Additionally, "State" is defined as the "State of Idaho" whereas "employer" is defined as both the "State of Idaho or any political subdivision which has elected to come into the system." Idaho Code §§ 59-1302(15) and 59-1302(35). Consequently, by definition, "State of Idaho," as used in the PERSI statutes, does not include its political subdivisions. Viewed in this context, it is clear that the "head of state agency" exception was intended to include only appointed "heads" within the organizational structure of state government—not within its political subdivisions.

This view is supported by the fact that the exception would not have been relevant to participating political subdivisions at the time it was adopted. They included primarily cities, counties and other taxing districts, which are all headed by elected, not appointed, officials. It is also supported by the further restriction that to qualify under these exceptions an employee must be nonclassified.[6] Finally, at that time, school districts were not participants in PERSI but, instead, had their own retirement system.[7] This clearly demonstrates there was no intent to include school districts in this exception and is further indication of the limited application of the "head of state agency" exception. Therefore, when this exception was adopted, there was only one group of PERSI members that came under its umbrella and that was state employees who were heads or directors in the executive branch of govern-

ment. Although the provision in question has been subsequently amended to include a third exception,[8] reduce the length of service for vesting from ten years to five years,[9] and to redesignate the provision as section 59-1347,[10] nothing has expanded the scope of the "head of state agency" exception to include political subdivisions.

CONCLUSION

Although the Idaho Supreme Court has held that school districts are "agencies of the state" for limited and specific purposes, they are not generally agencies of the state. The "head of state agency" exception in Idaho Code § 59-1347 is applicable only to organizational units of state government and not to political subdivisions of the state. Consequently, school district superintendents do not fall within that exception or any other exception that would allow them to vest with less than five years of service.

This guideline letter replaces and supersedes any previous letter opinions issued by this office on the same subject.

Very truly yours,

William A. von Tagen
Deputy Attorney General
Director, Intergovernmental
and Fiscal Law Division

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[1] The series of cases include Common School District No. 61 v. Twin Falls Bank & Trust, 50 Idaho 711, 4 P.2d 342 (1931); Independent School Districts v. Common School District 1, 56 Idaho 426, 55 P.2d 144 (1936); and Bullock v. Joint Class "A" School Dist. No. 241, 75 Idaho 304, 272 P.2d 292 (1954). Each case is separately addressed in the body of this guideline.

[2] Traditionally, the doctrine of estoppel has had limited application to governmental entities.

[3] As amended, the law then read as follows:

An inactive member is eligible for vested retirement if he has at least ten years of membership service and is within ten years of the date he would have been eligible for service retirement had he remained an active member, *except that an inactive member, who at the time of his separation from service held an office to which he had been elected by popular vote or having a term fixed by the constitution, statute or charter or was appointed to such office by an elected official, or was the head or director of a department, division, agency, statutory section or bureau of the state, is eligible for vested retirement*

regardless of length and type of service, unless covered by a merit system for employees of the state of Idaho 1965 Idaho Sess. Laws 324, 325 (H.B. 255).

[4] This would include, for example, individuals appointed to an elected office due to a vacancy.

[5] Many of these offices are enumerated in Idaho Code § 67-2601.

[6] As written, this restriction applies to all exceptions. However, arguably, the restriction was intended to apply only to the second exception since it has no practical application to the first. That class of employees normally would be exempt anyway due to the nature of the positions held.

[7] It was not until 1967 that legislation was passed which abolished the school retirement system and transferred school district retirement to PERSI. The transfer was effective July 1, 1967. 1967 Idaho Sess. Laws 222 (H.B. 144).

[8] 1967 Idaho Sess. Laws 1191, 1192 (S.B. 172).

[9] 1971 Idaho Sess. Laws 114 (S.B. 1022).

[10] 1971 Idaho Sess. Laws 114 (S.B. 1022).

July 30, 1998

Patrick A. Takasugi, Director
Idaho State Department of Agriculture
2270 Old Penitentiary Road
Boise, ID 83712

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Idaho Code § 22-110 as it Relates to the Disposal of Crop Residue Through Burning

Dear Mr. Takasugi:

You have asked the Office of the Attorney General whether Idaho Code § 22-110 gives the Director of the Idaho State Department of Agriculture (ISDA) the authority to regulate the disposal of crop residue through burning. If so, you indicated that ISDA intends to promulgate rules that would establish statewide guidelines for crop residue burning, mandatory training and licensing related to the crop residue burning, and a system to investigate complaints received as a result of crop residue burning. You also asked how such intended rules would interface with Idaho's Smoke Management Act found at Idaho Code §§ 39-2301, *et seq.* A review of state and federal law is required to answer your question.

As you are aware, Idaho Code § 22-110(1) states in pertinent part that "the director of the state department of agriculture shall have authority to regulate agricultural solid waste, agricultural composting and other similar agricultural activities to safeguard and protect animals, man and the environment."

Idaho's Smoke Management Act states:

> The legislature finds that current knowledge and technology support the practice of burning grass seed fields to control disease, weeds, and pests and the practice of burning cereal crop residues where soil has inadequate decomposition capacity. It is the intent of the legislature to promote

> those agricultural activities currently relying on field burning and minimize any potential effects on air quality. It is the further intent of the legislature that the department [of Health and Welfare (IDHW)] shall not promulgate rules and regulations relating to a smoke management plan, but rather that the department cooperate with the agricultural community in establishing a voluntary smoke management program.

Idaho Code § 39-2301. In Kootenai and Benewah counties registration with IDHW of each field to be burned is required pursuant to Idaho Code § 39-2305. For many years the Idaho Department of Health and Welfare, Division of Environmental Quality (DEQ), has entered into a voluntary Smoke Management Plan Agreement with stakeholders in Kootenai and Benewah counties.[1]

The Idaho Environmental Protection and Health Act (EPHA) gives the director of IDHW the power and duty (1) to formulate and recommend to the board rules related to air pollution (Idaho Code § 39-105(2)), (2) to supervise and administer "a system to safeguard air quality and for limiting and controlling the emission of air contaminants" (Idaho Code § 39-105(3)(j)), and (3) to enforce all laws relating to environmental protection and health (Idaho Code § 39-105(3)(n)). Idaho Code § 39-108 requires the director to ensure regular or periodic investigations of air contaminant sources are conducted. Idaho Code § 39-112 grants the director and board of the IDHW emergency order authority, "any other provision of the law to the contrary notwithstanding," if a generalized condition of air pollution exists and such condition creates an emergency requiring immediate action to protect human health or safety.

The Rules for Control of Air Pollution in Idaho (Rules), promulgated pursuant to the EPHA, allow open burning in a few limited circumstances. *See* IDAPA 16.01.01.600 through 616. These Rules are part of Idaho's federally approved state implementation plan (SIP) pursuant to section 110 of the Clean Air Act. 42 U.S.C. § 7410. IDAPA 16.01.01.614, which addresses Smoke Management Plans for Prescribed Burning,[2] states in pertinent part that, "any person who conducts or allows prescribed burning shall meet all conditions set forth in a Smoke Management Plan for Prescribed Burning." Failure by the state to conform to the SIP could result in the U.S.

Environmental Protection Agency's (EPA) promulgating a federal implementation plan (FIP) for the state. *See* 42 U.S.C. § 7410(c).

In summary, ISDA has the general authority to regulate agricultural solid waste. The Smoke Management Act prohibits IDHW from promulgating mandatory rules relating to a smoke management plan, but, instead, requires IDHW to work cooperatively with the agricultural community in establishing a voluntary smoke management program. The EPHA imposes on IDHW the duty to protect air quality and the authority to issue emergency orders prohibiting open burning. The Rules promulgated pursuant to the EPHA require prescribed burning to conform to a Smoke Management Plan developed by IDHW. Pursuant to the Smoke Management Act, such plan shall be developed in cooperation with the agricultural community. Failure to implement and abide by a Smoke Management Plan could result in EPA's promulgating and enforcing a FIP.

While Idaho law grants ISDA the general authority to regulate agricultural waste, unlike the Smoke Management Act, it does not address the specific issue of burning crop residue. Similarly, while ISDA has the authority to regulate agricultural waste, it is not given the specific duty to ensure adequate protection of air quality. When "two statutes deal with the same subject matter, the more specific will prevail." State v. Betterton, 127 Idaho 562, 903 P.2d 151 (1995), *citing* State v. Wilson, 107 Idaho 506, 508, 690 P.2d 1338, 1340 (1984). *See also*, Tomich v. City of Pocatello, 127 Idaho 394, 901 P.2d 501 (1995); City of Sandpoint v. Sandpoint Indep. Highway Dist., 126 Idaho 145, 879 P.2d 1078 (1994); Ausman v. State, 124 Idaho 839, 864 P.2d 1126 (1993); Richardson v. One 1972 GMC Pickup, 121 Idaho 599, 826 P.2d 1311 (1992). There is a presumption that the legislature is aware of existing law relating to the same subject when creating new statutes. State v. Betterton, 127 Idaho 562, 903 P.2d 151 (1995); State v. Long, 91 Idaho 436, 423 P.2d 858 (1967). The legislature is presumed not to overturn or impliedly repeal established principles of law without a clear expression of intent. Watkins Family v. Messenger, 118 Idaho 537, 797 P.2d 1385 (1990). And, there cannot be an implied repeal unless new legislation is irreconcilable with preexisting legislation. Cox v. Mueller, 125 Idaho 734 (1994).

Idaho Code § 22-110 can be reconciled easily with the authorities under the EPHA by resolving that the legislature did not intend the ISDA to

begin regulation of smoke management or other air quality legislation that is specifically delegated to IDHW. The EPHA and the Smoke Management Act are more specific and unambiguous in their delegation. Thus, the specific language in the Smoke Management Act, which prohibits promulgation of rules relating to the burning of crop residue, and IDHW's duty under the EPHA to protect air quality, including the issuance of emergency orders requiring cessation of air pollution emissions, govern over ISDA's general authority to regulate agricultural waste.

That said, "separate statutes dealing with the same subject matter should be construed harmoniously, if at all possible, so as to further legislative intent." State v. Seamons, 126 Idaho 809, 811-812, *citing* State v. Malland, 124 Idaho 537, 540. ISDA, IDHW and members of the agricultural community could enter into a memorandum of understanding, or other sort of agreement, wherein the respective state agencies and members of the agricultural community agree on statewide guidelines for burning crop residue, training and investigation of complaints. This in turn could become part of the Smoke Management Plan pursuant to the Smoke Management Act and section 614 of the Rules. Specific emergency order powers and the duty to protect air quality would remain with IDHW.

I hope this analysis is of assistance to you. If you have any questions, please feel free to contact me.

Sincerely,

Lisa J. Kronberg
Deputy Attorney General

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[1] It is my understanding that DEQ is presently developing a Smoke Management Plan similar to the Kootenai and Benewah counties plan for southern Idaho.

[2] IDAPA 16.01.01.608 and 613 allow for limited open burning to control weeds, protect orchard crops and dispose of orchard clippings. Additionally, IDAPA 16.01.01.611 allows for open burning of residential solid waste in limited circumstances. IDAPA 16.01.01.603.02 prohibits open burning during any stage of an air pollution episode declared by the IDHW in accordance with IDAPA 16.01.01.551, 557 and 561.

November 23, 1998

Keith Bumsted, Acting Director
Department of Transportation
P. O. Box 7129
Boise, ID 83707-1129

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Design of the Idaho Snowskier Special License Plate

Dear Mr. Bumsted:

This letter is in response to your letter dated November 5, 1998 requesting legal guidance on issues related to the proposed issuance of the Idaho snowskier special license plate ("snowskier plate"). You have asked whether the proposed design of the snowskier plate complies with Idaho Code and whether the Idaho Transportation Department ("ITD") took the appropriate steps to approve the snowskier plate.

It is my conclusion that the proposed design of the snowskier plate does comply with the relevant provisions of Idaho Code and that the ITD took appropriate measures to approve the snowskier plate in accordance with the provisions of Idaho law.

I.

ANALYSIS

The proposed design of the snowskier plate features a downhill skier on a red, white and blue background. The registration numbers on the plate are blue. At the top of the plate are the words "Ski Idaho" and at the bottom are the words "Winter Wonderland." The term "Famous Potatoes" does not appear on the proposed plate. At the root of this inquiry is whether the words "Famous Potatoes" must appear on the snowskier plate.

My response to the questions posed requires the analysis and interpretation of Idaho Code §§ 49-402C, 49-419 and 49-443. Idaho Code § 49-

443 is a general provision that establishes the basic requirements for the form and content of Idaho license plates. Idaho Code § 49-402C addresses the "special license plate programs" and standardizes the appearance of any new or redesigned special license plate authorized or redesigned after July 1, 1998. (Effective as of July 1, 1998, 1998 Idaho Session Laws, H.B. 699, as amended, ch. 405, § 1.) Idaho Code § 49-419 establishes the specific requirements for the snowskier plate. (Effective January 1, 1999, 1998 Idaho Session Laws, H.B. 581, Ch. 129, § 2.)

A. Does the Proposed Design of the Snowskier Plate, Without the Term "Famous Potatoes," Comply with the Requirements of Idaho Code?

Each of the statutes referenced above discusses, to varying degrees, the design and appearance requirements for Idaho license plates. Idaho Code § 49-443, the most general of the three provisions, requires that all Idaho license plates issued on or after January 1, 1992 have a color and design that is comparable to the color and design of the statehood centennial license plate. That is, the plates must have blue numbers on a multicolored red, white, and blue background. Idaho Code § 49-443(1). The plate must have the registration number for the vehicle and the word "Idaho" on the plate. *Id.* In addition, "[e]ach license plate must bear upon its face the inscriptions 'Famous Potatoes' and 'Scenic Idaho.'" *Id.* These requirements have remained unchanged since the statute was first enacted by the 1992 legislature.

Idaho Code § 49-402C, which was enacted by the 1998 Idaho Legislature and took effect July 1, 1998, is intended by the legislature to standardize the appearance of new or redesigned special license plates so that Idaho plates are readily identifiable and more cost-effective. Idaho Code § 49-402C(1). Accordingly, any new or redesigned special license plate that is authorized or redesigned after July 1, 1998, must use a red, white, and blue background, comparable to Idaho's statehood centennial plates. Idaho Code § 49-402C(2). Section 49-402C requires that the word "Idaho" be on the plate, but, in contrast to § 49-443, § 49-402C specifically allows for the omission of the term "Scenic Idaho" from the plate. Idaho Code § 49-402(2)(b), (c). Section 49-402C makes no provision for including the term "Famous Potatoes." It does require that "[n]o slogan shall be used that infringes upon, dilutes or compromises, or could be perceived to infringe upon, dilute or com-

promise, the trademarks of this state of Idaho, including, but not limited to Idaho Potatoes®, Grown in Idaho®, Famous Idaho Potatoes™, or Famous Potatoes™.'" Idaho Code § 49-402C(2)(d).

The third statutory provision, Idaho Code § 49-419, sets forth the requirements for the snowskier plates. Consistent with the provisions of sections 49-443 and 49-402C, section 49-419 requires that the plate be comparable to the Idaho statehood centennial plate, and the word "Idaho" must appear on the plate. However, the provision is completely devoid of any reference to "Famous Potatoes." Nothing in the statute indicates that "Famous Potatoes" must appear on the plate. The provision does state, however, that the design and slogans on the plate must be acceptable to the Idaho Ski Areas association and approved by the Idaho Transportation Department. Idaho Code § 49-419(4).

The construction and interpretation of statutes begins with the literal words of the statute. City of Boise v. Industrial Comm'n, 129 Idaho 906, 935 P.2d 169 (1997). If the statute is unambiguous, there is no need for the application of the rules of construction, and the language of the statute is to be given its plain and ordinary meaning. *Id.* In construing statutes, the goal is to ascertain and give force and effect to the clear and expressed intent of the legislature, based on the whole act and every word contained therein. Ada County v. Roman Catholic Diocese, 123 Idaho 425, 849 P.2d 98 (1993). In determining legislative intent, in addition to looking at the language of the statute, consideration should be given to the reasonableness of proposed interpretations and the policy behind statutes so that all applicable sections can be construed together. State v. Seamons, 126 Idaho 809, 892 P.2d 484 (1995). Legislative intent can also be ascertained from the legislative history of the statute. Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983). However, unless the interpretation is contrary to purposes clearly indicated, ordinary words are to be given their ordinary meaning. Ada County, 123 Idaho 425, 849 P.2d 98 (1993).

It is clear from the plain language of the above-referenced statutes that the over-all design of the snowskier plate is in compliance with Idaho law. The express terms of all three of the statutes addressed above require that the snowskier plate contain the term "Idaho" and be of comparable appearance and design to the Idaho statehood centennial plate. Idaho Code §§ 49-402(C)(2), 49-419(4) and 49-443(1). The snowskier plate, as designed, satis-

fies these requirements. The plate has the word "Idaho" at the top of the plate, and it has blue numbers on a red, white, and blue background, similar to the statehood centennial plate. The snowskier plate design satisfies the legislature's explicit statement of intent in Idaho Code § 49-402C that special plates be readily recognizable as Idaho plates. Idaho Code § 49-402C(1).

The more difficult question is whether the snowskier plate's design, which does not include the term "Famous Potatoes," complies with the requirements of Idaho Code. I conclude that it does. Of the three statutes discussed above, only section 49-443 specifically requires that the term "Famous Potatoes" be on a plate. The other two statutes do not address whether the term must be on the plate or whether it may be omitted. In construing separate statutes that deal with the same subject matter, the statutes should be construed harmoniously, if possible, to further legislative intent. Seamons, 126 Idaho 809, 892 P.2d 484 (1995).

The legislature set up the license plate statutes so that the provisions would be read together. This intent is evidenced by section 49-402C's cross-reference to section 49-443. Section 49-419 specifically refers to section 49-443 to specify the requirement that all new and redesigned special plates have the same color scheme and general appearance. Idaho Code § 49-402C(2). After establishing the general appearance requirements, section 49-419 then sets forth additional requirements for what must be, what may be, and what must not appear on the special plates. The special license plates requirements are independent from the otherwise standard requirements of the basic Idaho license plate. By contrast to section 49-443's general requirements, section 49-402C specifically requires that for special plates:

(a) The identification of the county shall be omitted;

(b) The word "Idaho" shall appear on every plate;

(c) The inscription "Scenic Idaho" may be omitted;

(d) No slogan shall be used that infringes upon, dilutes or compromises, or could be perceived to infringe upon, dilute or compromise, the trademarks of the state of Idaho, including. . . . "Famous Potatoes™."

Idaho Code § 49-402C(2) (emphasis added). Reference to the words Famous Potatoes is absent from the list. The legislature certainly knew how to expressly state what must be and what must not be on the special plates. Had the legislature wanted to specifically exclude or include "Famous Potatoes" on the plates, it would have so stated. Without a clear statement as to whether "Famous Potatoes" is to be omitted from or included on the snowskier plate, it is a reasonable interpretation to conclude that the decision to include or exclude the term is a discretionary one for the ITD.

Further evidence that the legislature could have required "Famous Potatoes" to be on the plates if it so chose, is contained in Idaho Code § 49-418A (1997). In that provision, the legislature required that the Idaho public college and university plates have the standard red, white, and blue background, just as in the snowskier plate provision. But, in addition, the legislature specifically required that "the word 'Idaho' and 'Famous Potatoes' shall appear on every [public college and university] plate." Idaho Code § 49-418A (emphasis added). No comparable provision or requirement exists for the snowskier plate. Idaho Code § 49-419. It is contrary to the rules of statutory interpretation to read additional terms into the statute that were not included or intended by the legislature. City of Boise v. Industrial Comm'n, 129 Idaho 906, 909, 935 P.2d 169, 172 (1997) (holding that the legislature intended different interpretations and different results where it included a provision in one section, but not in another).

This interpretation is further supported by a review of the legislative history of section 49-402C. During the 1998 legislative session, the provision was amended before being enacted. Prior to the amendments, the bill contained a provision stating that "the inscriptions 'Famous Potatoes' and 'Scenic Idaho' may be omitted." During the amendment process, the legislature deleted the reference to "Famous Potatoes" and the current subsection (2)(d) was added regarding the prohibitions on the use of Idaho's trademarks. The removal of the provision indicates that the legislature deliberately omitted any specific reference to the term in the statute.

This legislative history should be read in conjunction with the legislative history of section 49-419 that was enacted during the same 1998 legislative session. During the legislative committee meetings on H.B. 581 (Idaho Code § 49-419), discussions were held on whether the term "Famous

Potatoes" would be on the snowskier plate. Among the suggestions presented to the senate committee was the option of either having "Famous Potatoes" on the plate or not to have any other slogan that would "play off the Famous Potatoes slogan." During the legislative session, a prototype for the snowskier plate was presented to the legislature, showing the phrase "Famous Skiing" in place of "Famous Potatoes." The concerns raised over that proposed design and the language used addressed what effect the legislation would have on an on-going trademark lawsuit, not over the absence of the term "Famous Potatoes." The legislature made its choice between the two options and chose to amend section 49-402C to include additional protections for Idaho's trademark and not to require that "Famous Potatoes" be on the snowskier plate.

Further guidance on this issue is found in the statutory framework of the other special license plate programs. Idaho Code authorizes 21 special license plate programs other than the snowskier plate program. Of the 21 special plates, 17 do not contain the term "Famous Potatoes." Of those 17, four special plates were designed after or during the same legislative session where section 49-443 became law in 1992. Despite section 49-443's requirement that all plates after January 1, 1992 "shall bear upon its face the inscriptions 'Famous Potatoes' and 'Scenic Idaho,'" the veteran plate, the timber plate, and the wildlife plates (both the bluebird plate and the elk plate) do not contain the term "Famous Potatoes." Of further note is that in 1998, all of the special plate provisions were amended by the Idaho Legislature. If the legislature was concerned with any or all of the special plates that do not use the term "Famous Potatoes," it easily could have amended those provisions during the 1998 legislative session. Likewise, if the legislature intended to change the ITD's current practice of issuing special plates without the term "Famous Potatoes," it would have made a clear declaration of its intent either when it enacted section 49-443 in 1992 or when it amended all of the special plate provisions in 1998. No such declaration of intent or amendment to the relevant provisions was made. Instead, the legislature's intent in enacting section 49-443, as expressly stated in language of Idaho Code § 49-402C(1), is as follows:

> It is the intent of the legislature that special license plates issued by the [Idaho Transportation] department be readily recognizable as plates from the state of Idaho without losing the uniqueness for which the special plate was designed and

> purchased. In addition, the legislature finds that the [Idaho Transportation] department can operate in a more efficient, cost-effective manner by conforming special plates to a basic color and design.

Idaho Code § 49-419(1). There is no indication in this statement of intent that the legislature wanted to preserve the "Famous Potatoes" slogan on the special plates. Rather, the stated intention of the legislature was to establish a uniform and standardized appearance for the special plates and allow for the more efficient operation of the ITD.

There is logic in the legislature's requirements of what may be included or excluded from the special plates. Generally, special plates have different slogans, designs or images on the plate. *See* Idaho Code § 49-404A (requiring the word "RESERVIST" along the bottom edge of the plate); Idaho Code § 49-408 (requiring the inscription "Street Rod," the term "Idaho," and a picture of a 1929 highway roadster on the plate); Idaho Code § 49-415 (requiring the words "Former Prisoner of War" and a declaration of the period of service on the plate); Idaho Code § 49-415B (requiring "Pearl Harbor Survivor" on the plate); Idaho Code § 49-418 (requiring the designation of the applicable branch of the military, the word "VETERAN," and the name of the conflict or war period on the plate). If all of the language required in section 49-443 were placed on the plates along with the special slogans and images for the respective special plate, the plate would be too cluttered to be readable or useful. The legislature clearly recognizes that there is limited space on a license plate and attempted to keep the special plates uncluttered and readily identifiable as an Idaho license plate. *See* Idaho Code § 49-419 (requiring the omission of the county designator in order to provide room for designs and slogans for the snowskier plate).

Based on the above analysis of the relevant statutes, the legislative history, and the legislative intent, the proposed design of the snowskier plate satisfies the intent of the legislature and otherwise complies with the provisions of Idaho Code.

B. Did the ITD Comply with the Provisions of Idaho Code in Approving the Snowskier Plate?

Idaho Code § 49-419 provides that the designs and slogans to be placed upon the snowskier plate are to be acceptable to the Idaho Ski Areas Association and approved by the ITD. Likewise, the official Statement of Purpose, published with H.B. No. 581, which enacted Idaho Code § 49-419, states that the legislation authorizes the ITD to issue the snowskier license plate. In going through the approval process of the snowskier plate design, the ITD sought and obtained the approval of the Idaho Legislature, the Idaho Ski Areas Association, and the Office of the Governor. The ITD fully complied with the requirements of Idaho Code § 49-419 in giving approval of the proposed design of the snowskier plate.

CONCLUSION

The Idaho snowskier plate meets the design requirements of Idaho Code, and the process through which the design was approved was also in compliance with the provisions of Idaho law.

Very truly yours,

Terry E. Coffin
Division Chief
Contracts & Administrative Law Division

[1] In addition to the snowskier plate, the Idaho Legislature has authorized 21 other special license plate programs. Idaho Code § 49-403 (disabled veterans plates); Idaho Code § 49-403A (purple heart recipient license plates); Idaho Code § 49-404 (national guard member license plates); Idaho Code § 49-404A (members of the armed forces reserve license plates); Idaho Code § 49-405 (radio amateurs license plates); Idaho Code § 49-406 (Idaho old timer license plates); Idaho Code § 49-406A (Idaho classic license plates); Idaho Code § 49-407 (year of manufacture plates); Idaho Code § 49-408 (street rod license plates); Idaho Code § 49-409 (personalized license plates); Idaho Code § 49-410 (special license plates and cards for persons with disabilities); Idaho Code § 49-414 (legislative license plates); Idaho Code § 49-415 (former prisoner of war license plates); Idaho Code § 49-415A (Congressional Medal of Honor license plates); Idaho Code § 49-415B (Pearl Harbor survivor license plates); Idaho Code § 49-416 (statehood centennial license plates); Idaho Code § 49-417 (Idaho wildlife license plates); Idaho Code § 49-417A (Idaho timber license plates); Idaho Code § 49-418 (veterans license plates); Idaho Code § 49-418A (Idaho public college and university license plates); Idaho Code § 49-420 (Idaho snowmobile plates).

[2] The use of Idaho's trademarks, such as "Famous Potatoes," may be authorized by statute, *see* Idaho Code §§ 49-418A and 49-443, or by the Idaho Potato Commission, Idaho Code § 22-1207 (1998) (granting the Idaho Potato Commission the power to authorize the use of or prevent the unauthorized use

of Idaho potato trademarks or trade certificates); *see also* IDAPA 29.01.02, *et seq.*; Idaho Potato Comm'n v. Washington Potato Comm'n, 410 F. Supp. 171 (D. Idaho 1975).

[3]Idaho Code § 49-402C contains a typographical error. The provision references Idaho Code § 49-433, when the reference should be to Idaho Code § 49-443.

[4]By contrast, when the legislature authorized the snowmobile special license plate program in 1998 (virtually at the same time that it enacted the snowskier plate program), it made a specific entry in the Senate Journal, declaring:

> It is the intent of the Legislature that the final design of this specialty plate not infringe upon, dilute or compromise the trademarks of the State of Idaho. . . . It is further the intent of the Legislature that the final design of the plate include the phrase "Famous Potatoes"™ and conform to the standardized color format of the State of Idaho.

No similar language was inserted in the snowskier plate legislation.

[5]An earlier version of the Statement of Purpose stated that the final design of the snowskier plate was to be agreeable to the Idaho Ski Areas Association (ISAA) and the Idaho Potato Commission (IPC). However, the references to the ISAA and the IPC were not included in the Statement of Purpose published with the bill, while the statement in the code section itself regarding the approval of the ISAA and the ITD remained in the law.

November 25, 1998

Dr. Thomas E. Dillon, President
State Board of Education
P.O. Box 83720
Boise, ID 83720-0037

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Dear Dr. Dillon:

You have asked the Attorney General's Office to provide legal guidance regarding the application of the Cassia County School District No. 151 to declare the Newcomer's Center a "hardship school" pursuant to Idaho Code § 33-1003(2)(b). Specifically, you ask whether the board could determine that the limited English proficiency program of the school qualifies as a "hardship" contemplated by Idaho Code § 33-1003(2)(b).

Our conclusion is that the Newcomer's Center does not qualify as a hardship elementary school. It would be contrary to legislative intent to classify a language barrier as a hardship to the school so as to enable the Newcomer's Center to be counted as a separate elementary school.

ANALYSIS

A. Governing Statutes

Idaho Code § 33-1003 designates five instances where variances in the educational support program will be allowed. Subsection (2)(b) governs the application of the educational support program to separate schools in a given school district when, in the discretion of the state board of education, a school may be eligible for additional support based on "hardship." Idaho Code § 33-1003(2)(b) states:

> Upon application of the board of trustees of a school district, the state board of education is empowered to determine that a given elementary school or elementary schools

> within the school district, not otherwise qualifying, are entitled to be counted as a separate elementary school as defined in section 33-1001, Idaho Code, when, in the discretion of the State Board of Education, special conditions exist warranting the retention of the school as a separate attendance unit and the retention results in a substantial increase in cost per pupil in average daily attendance above the average cost per pupil in average daily attendance of the remainder of the district's elementary grade school pupils.

Separate elementary schools are defined in Idaho Code § 33-1001(8) as:

> a school which measured from itself, traveling on an all-weather road, is situated more than ten (10) miles distance from both the nearest elementary school within the same school district and from the location of the office of the superintendent of schools of such district, or from the office of the chief administrative officer of such district if the district employs no superintendent of schools.

Because the question presented arises from conditions not expressly contemplated by these statutes, the legislative intent is controlling in the analysis.

B. Legislative Intent

In the instant case, the school district removed students from other schools where they were receiving language proficiency assistance, placed them at one location with other students with limited English proficiency, and now seeks to qualify under a "hardship" exception to become eligible for additional funding. In essence, the Cassia County school district created its own financial "hardship" by establishing the school and then, based on the circumstance so created, urged an interpretation of "hardship" under Idaho Code § 33-1003(2)(b) that was consistent with the circumstance created. It is our interpretation that both Idaho Code §§ 33-1001(8) and 33-1003(2)(b) were intended to address circumstances beyond the control of the district that caused an increase in the cost of operating the school in question. Thus, the statutes provide for additional support for schools that need additional fund-

ing to meet basic operating costs, due to circumstances beyond the control of the district. Nothing in the legislative history indicates that the intent of the legislation would allow a school district to make itself eligible for additional funding by shifting its own enrollment and thereby incurring an increase in operating costs.

Further analysis of the legislative intent of the statute shows that the factors that allow the state board to find a hardship must be related to the school, or schools, in question. In the instant case, the underlying "hardship" is a significant population base with limited English proficiency. However, this is a district-wide issue that is not addressed by Idaho Code § 33-1003(2)(b). The statute states that the board may "determine that a given elementary school . . . [may] be counted as a separate elementary school [when] special conditions exist warranting the retention of the school . . . ." Given this operative language, the "hardship" must be related specifically to the school and not to a district-wide demographic problem.

CONCLUSION

Idaho Code § 33-1003(2)(b) was not intended to allow separate elementary school status under the hardship provision under the facts and circumstances urged by Cassia County school district #151. A review of the legislative history and an examination of the intent of the statute do not support a hardship determination where the financial hardship was self-created by the district. The legislative history also does not permit an interpretation of a district-wide demographic condition as a factor that would entitle a particular school to be designated a separate elementary school as defined in Idaho Code § 33-1001(8).

Very truly yours,

Terry E. Coffin
Division Chief
Contracts & Administrative Law Division

December 18, 1998

Yvonne S. Ferrell, Director
Idaho Department of Parks and Recreation
STATEHOUSE MAIL
Boise, ID 83730

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Use of Money in State Waterways Improvement Fund for Road Repairs

Dear Director Ferrell:

The Department of Parks and Recreation ("Department") has asked for reconsideration of Attorney General Opinion No. 89-11 that concluded, inter alia, that the Idaho Waterways Improvement Fund ("WIF") could not be used for the construction and/or maintenance of roads. Your request for reconsideration relates to a factually specific stretch of road giving access to the Freeman Creek Unit of Dworshak State Park. Your request indicates that approximately 50% of the motorists utilizing this 4.5-mile section of roadway do so to access boating facilities at the Freeman Creek Unit of Dworshak State Park. This section of the roadway is undeveloped, causing rough, dusty driving conditions. These conditions may cause unsafe driving conditions for motorists towing watercraft. You also have indicated that your attempts to obtain contributions from other funding sources for the maintenance of this road have been unsuccessful, in part due to the significant percentage of use by boaters and lack of use by the general public.

Based upon the facts presented, I conclude the expenditure of monies for improvement of the Freeman Creek Unit road falls within the enumerated purposes contained in Idaho Code § 57-1501.

ANALYSIS

Idaho Attorney General Opinion No. 89-11 addressed, inter alia, the permissible uses for WIF fundings as well as some impermissible uses. This

opinion recited the permissible uses contained in Idaho Code § 57-1501 as follows:

(1) Protection and promotion of safety;
(2) Waterways improvements;
(3) Development/improvement of boating related parking;
(4) Development/improvement of boat ramps;
(5) Development/improvement of boat moorings;
(6) Waterways marking;
(7) Search and rescue; and
(8) Anything incident to the enumerated uses, including the purchase of property both real and personal.

1989 Att'y Gen. Ann. Rpt. 93, 96. The Opinion concluded that the touchstone for determining whether a project falls within the expenditures contemplated by the legislature was whether "these items are primarily for the benefit of boaters engaging in boating activities." *Id.*

Attorney General Opinion No. 89-11 concludes that road building and/or maintenance of roads is not a legislatively authorized use of the WIF:

> The expenditure of WIF monies on the construction and/or maintenance of roads is repugnant to the WIF funding scheme. The WIF was created specifically because of the inequity of spending marine fuel revenues for non-marine uses. Currently, only a small percentage of gas tax revenue (less than one percent (1%) goes to the WIF) with the bulk of gas tax revenue going to roads. To spend the small proportion of gas tax revenues going to the WIF on roads would be a step back to the days before 1963 when boaters received no benefits from their boating-generated tax dollars. This result would be clearly contrary to the existing statutory scheme.

Id. This conclusion is logical. The expenditure of the gas tax intended to benefit boaters for road construction/maintenance activities seems contrary to the intent to segregate a portion of gas tax revenues from general road maintenance to be used for marine/boating purposes.

Attorney General Opinion No. 89-11 did not contemplate the specific factual circumstance presented in the Idaho Department of Parks and Recreation's request to reconsider that opinion. In this instance, the roadway for which maintenance funding is requested primarily benefits boaters. Approximately 50% of the motorists who use this section of roadway do so exclusively to access the Freeman Creek Unit of the Dworshak State Park for boating purposes.

Moreover, this expenditure of funds will address purposes specifically enumerated in Idaho Code § 57-1501, which authorizes purchases that promote the protection and safety of boaters. The current rough condition of the roadway presents safety considerations for motorists towing watercraft. The expenditure of funds to improve this roadway will advance this statutory purpose of the WIF.

The conclusion reached in Attorney General Opinion No. 89-11, that WIF cannot be used for roadway maintenance, is not based on an express statutory ban. Rather, the conclusion reached is logical, based upon the structure of the WIF contrasted with the expenditure of the remainder of gas taxes. In the limited factual circumstance presented by this request for reconsideration, I conclude that the primary benefit of improvement of this roadway will accrue to the boaters and, therefore, WIF funds may be used to improve the roadway. This expenditure also will help the Department obtain cooperative participation from other entities responsible for road maintenance to accumulate the total funds necessary to improve and maintain this section of roadway.

Sincerely,

C. Nicholas Krema
Deputy Attorney General
Natural Resources Division

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and

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ATTORNEY GENERAL'S CERTIFICATES OF REVIEW FOR THE YEAR 1998

ALAN G. LANCE
ATTORNEY GENERAL
STATE OF IDAHO

February 25, 1998

The Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

Re: Certificate of Review
Initiative Regarding Minimum Wage Law

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on February 12, 1998. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. It must be stressed that, given the strict statutory timeframe in which this office must respond and the complexity of the legal issues raised in this petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part."

BALLOT TITLE

Following the filing of the proposed initiative, our office will prepare short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares the titles, if petitioners would like to propose language with these standards in mind, we would recommend that they do so and their proposed language will be considered.

MATTERS OF SUBSTANTIVE IMPORT

Idaho Code §§ 44-1501, *et seq.*, is the Idaho Minimum Wage Law ("IMWL"). This law regulates minimum wage and sets standards for hours worked similar to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.* The FLSA applies to employees of federal, state and local governments, employees engaged in or producing goods for interstate commerce,

and employees in certain other enterprises. It does not apply to private employers who are not engaged in interstate commerce and who have annual gross sales of less than $500,000.

The initiative would make two changes to the current version of Idaho Code § 44-1502. First, the initiative would add a new clause to Idaho Code § 44-1502(1) that would set the minimum wage at $10.00 per hour, commencing on December 1, 2000. Second, the initiative would change the introductory training wage provision contained in Idaho Code § 44-1502(4) by lowering the age of applicability from twenty (20) to eighteen (18) and raising the minimum training wage to $7.50 per hour during the first ninety days of employment, commencing on December 1, 2000. The initiative would add certain safeguards to section 44-1502(4) to prevent existing employees from being replaced by employees receiving the lower introductory training wage.

Upon review, it is the opinion of this office that there is no constitutional or statutory impediment to the petitioner's proposed changes to the Idaho Minimum Wage Law. Moreover, the FLSA has a specific savings clause that allows states to enact more generous minimum wage laws. 29 U.S.C. § 218 provides in relevant part:

> (a) No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum.

Thus, Idaho may enact a more generous minimum wage and maximum workweek law that would not be preempted by the FLSA. Pacific Merchant Shipping Ass'n v. Aubry, 918 F.2d 1409 (9th Cir.), *cert. denied* 112 S. Ct. 2956, 119 L. Ed. 2d 578 (1990); Baxter v. M.J.B. Investors, 876 P.2d 331 (Ore. Ct. App. 1994); Berry v. KRTV Communications, Inc., 865 P.2d 1104 (Mont. 1993). If enacted, the proposed initiative would not contravene state or federal statutory or constitutional law.

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style and matters of substantive import and that the recommenda-

tions set forth above have been communicated to petitioner Thomas M. Sanner by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

ALAN G. LANCE
Attorney General

Analysis by:

Matthew J. McKeown
Deputy Attorney General

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