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**STATE OF IDAHO**

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

September 15, 2016

Susan Miller, Executive Director  
Idaho Board of Dentistry  
STATEHOUSE MAIL

Re: Authority of the Idaho Board of Dentistry to Issue Emergency Suspension Orders

Dear Ms. Miller:

The Board of Dentistry ("Board") asks whether Idaho Code section 67-5247, standing alone, constitutes a sufficient grant of legislative authority to allow it to conduct emergency suspension proceedings against a dentist licensed and regulated by the Board. Based on our review of this matter, it appears that the provisions of section 67-5247, standing alone, are procedural in nature and do not constitute a specific delegation of legislative authority to take summary action against the dentist. While we realize that the Board's disciplinary authority includes suspension of licenses, suspension orders entered in emergency or summary proceedings are, as explained below, a different issue and require a specific legislative delegation of authority to the individual board.

In arriving at this conclusion, we have reviewed the statutory language, as well as the Board's specific powers and duties, Idaho case law, and supporting authorities. A review of the powers and duties of other boards and agencies lends support for the position that when the legislature intends to grant the power to conduct emergency proceedings, it does so specifically, within the statute of the agency. Our conclusion that the APA does not constitute a grant of authority to conduct emergency proceedings is also supported by the rules of the Board itself, which specifically recognize that the board has the ability to conduct emergency proceedings in matters involving anesthesia licensing.

**I.**  
**EMERGENCY SUSPENSION OF PROFESSIONAL LICENSES**

**A. Idaho Code Section 67-5247**

Codified with the Administrative Procedures Act, section 67-5247 reads as follows:

67-5247. Emergency proceedings. – (1) An agency may act through an emergency proceeding in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action. The agency shall take only such actions as are necessary to prevent or avoid the immediate danger that justifies the use of emergency contested cases.

(2) The agency shall issue an order, including a brief, reasoned statement to justify both the decision that an immediate danger exists and the decision to take the specific action. When appropriate, the order shall include findings of fact and conclusions of law.

(3) The agency shall give such notice as is reasonable to persons who are required to comply with the order. The order is effective when issued.

(4) After issuing an order pursuant to this section, the agency shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

(5) Unless otherwise required by a provision of law, the agency record need not constitute the exclusive basis for agency action in emergency contested cases or for judicial review thereof.

Despite what might appear, this provision does not constitute a legislative delegation of authority intended to empower a board or agency to conduct emergency proceedings. On the contrary, this provision delineates the due process prerequisites which a duly authorized or empowered board or agency must include as part of its emergency proceedings. It details the procedural steps which must be taken to protect property rights of an individual against whom emergency action will be taken: it does not act as a separate authorization of power by which to take emergency actions.

**B. Public Policy and Procedure Reflected in the APA**

Idaho Code section 67-5247 is a statute found within the Idaho Administrative Procedures Act (APA). The APA is codified at title 67, chapter 52, Idaho Code. The APA is a comprehensive compilation of statutes enacted and amended by the Idaho Legislature in 1992 and 1993, respectively, to provide a uniform set of procedural laws, incorporating essential concepts of due process and fair play found in the federal and state constitutions and case law, to govern and guide the administrative decision-making

processes applicable to most state agency interaction with licensees, involved stakeholders, the general public and others.

In enacting the APA, one of the legislative goals was to strike an appropriate balance between the competing interests of public protection and rights or privileges granted individuals who have been issued professional licenses by state agencies. To that end, approximately half of the APA contains provisions regarding contested case proceedings and judicial review thereof. As used in the APA, "A proceeding by an agency, other than the public utilities commission or the industrial commission, that may result in the issuance of an order is a contested case and is governed by the provisions of [the APA], except as provided by other provisions of law."<sup>1</sup> As you know, the provisions of the APA and the Idaho Rules of Administrative Procedure of the

Attorney General ("IRAP"), apply to contested case disciplinary proceedings conducted by the Board.<sup>2</sup>

While due process may be a somewhat flexible principle mandating different requirements depending on the unique circumstances of a particular case, at the very essence or heart of due process are the concepts of notice and opportunity to be heard. In an ordinary or "typical" contested case proceeding against a licensee, the subject of the proceeding is entitled to receive clear notice of (1) the charges, (2) the authority of the agency to commence and prosecute the action, (3) the date and place of an evidentiary hearing on the violations, (4) the right to legal representation, and (5) other essential rights.<sup>3</sup> In addition, and significantly, Idaho Code section 67-5254 states that "an agency shall not revoke, suspend, modify, annul, withdraw or amend a license, or refuse to renew a license of a continuing nature . . . , unless the agency first gives notice and opportunity for an appropriate contested case in accordance with the provisions [of the APA] or other statute."<sup>4</sup> In other words, notice and opportunity for hearing is the norm or general rule and must ordinarily precede agency adverse action against a license.

The reason for these protections is obvious. Absent notice and pre-deprivation opportunity to be heard, the licensee is deprived of a substantial right or privilege without any process. Without an opportunity to contest the allegations and put on evidence refuting the need for an emergency suspension, the livelihood of the licensee will be taken away; as well as the livelihood of employees or others whose paycheck directly depends on the continued viability of the licensee's ability to practice his or her profession. The risk of irreparable harm to the licensee's reputation and financial interest is simply too great to warrant departure from the norm except in the most extreme of cases.

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<sup>1</sup> Idaho Code § 67-5240. Cf. definition of "contested case" found at Idaho Code § 67-5201(6).

<sup>2</sup> Idaho Code § 54-912(6) and (7); IDAPA 19.01.01.003 (Board of Dentistry administrative rules).

<sup>3</sup> See generally, Idaho Code § 67-5242.

<sup>4</sup> Idaho Code § 67-5254(1).

While pre-suspension notice and hearing is the general rule, section 67-5254 continues by saying: "This section does not preclude any agency from: (a) taking immediate action to protect the public interest in accordance with section 67-5247, Idaho Code . . . ."<sup>5</sup> Thus, the APA recognizes the need for deviation from the normal procedure requiring pre-deprivation notice when the test for emergency action is met. But these provisions don't necessarily answer the question of authority raised in your correspondence.

### C. Idaho Case Law Discussing Emergency Suspensions

Because emergency action is so unusual and is reserved for the rarest of cases where public health, safety or welfare is in imminent danger and ordinary due process protections are insufficient to prevent the immediate injury, there is a dearth of reported Idaho case law on the subject. Indeed, only two reported cases were located in the author's research.

In Van Orden v. State Dep't of Health & Welfare, 102 Idaho 663, 637 P.2d 1159 (1981), the Department of Health and Welfare ("Department") had issued a provisional license to the Van Ordens authorizing them to operate a shelter home, pending review of the Van Ordens' application for a full license. When concerns arose regarding the Van Ordens' qualifications for a full license, the Department first notified the Van Ordens that the provisional license would be extended through the completion of a hearing on the allegations, but then on October 12, 1977 and prior to the scheduled hearing, notified the Van Ordens that the provisional license was suspended effective October 17 and that a post suspension hearing was scheduled for October 21.<sup>6</sup> Following a November 1977 hearing, the Department adopted the hearing officer's written opinion that, among other things, the summary suspension of the provisional license was based upon an emergency endangering the safety of residents of the facility and that under these circumstances the prehearing suspension satisfied due process requirements. On appeal, the district court reversed the Department's order.<sup>7</sup> Upon further appeal, the Idaho Supreme Court reversed the district court and reinstated the Department's order.

In ruling for the Department, the Supreme Court commented:

Following an abortive judicial proceeding, the provisional license was in effect revived since the parties stipulated that the center would continue to operate pending a hearing on a suspension of the provisional license and action on the full license.

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<sup>5</sup> Idaho Code § 67-5254(3)(a).

<sup>6</sup> 102 Idaho at 664, 637 P.2d at 1160.

<sup>7</sup> *Id.* at 665, 637 P.2d at 1161.

The interest involved here is the pursuit of a business enterprise dependent upon state licensure and the stability of that business would obviously be harmed if the facility were closed pending a review. In the case at bar, however, there could be no such effect since the provisional license was extended through the date set for the application hearing. Thus, there was no actual deprivation on September 14 and thus, no value in additional or substitute safeguards.<sup>8</sup>

These comments from the Court indicate that no actual emergency suspension had taken place; therefore it was not directly at issue. Notwithstanding this fact, the Court went on to say that assuming for argument's sake that there had been an actual emergency suspension there would be no constitutional violation given the substantial health and safety factors at issue. In so ruling, the Court cited the summary suspension provisions of the APA and the following language found in Section 2-4003-12, a Department administrative rule applicable to shelter homes:

Emergency Action by Director. In the event of an emergency endangering the life or safety of a resident, the Director may summarily suspend or revoke any shelter home license. As soon thereafter as practicable, the Director shall provide an opportunity for a hearing.<sup>9</sup>

Because there had been no actual emergency suspension in effect in Van Orden and because the Department of Health and Welfare had a separate rule authorizing it to take summary action against a license, the Van Orden case is of little if any help in resolving the question of whether Idaho Code section 67-5247, standing alone, grants an administrative agency the authority to initiate an emergency suspension proceeding.

Turning then to the second and final Idaho reported case discussing section 67-5247, in Kuna Boxing Club, Inc. v. Idaho Lottery Com'n, 149 Idaho 94, 233 P.2d 25 (2009), the Idaho Lottery Commission ("Commission") did indeed summarily suspend Kuna Boxing's bingo license without a hearing pursuant to the emergency provisions of section 67-5247.

In reviewing the suspension, the Idaho Supreme Court stated: "Idaho Code § 67-5247(1) governs an agency's power to act through an emergency proceeding . . . ." While it might be argued that this judicial comment might be dispositive of the issue presented, a careful review of the case reveals that whether or not section 67-5247 granted an agency authority to enter an emergency suspension order was not at issue and was not raised by Kuna Boxing. As to the emergency suspension, Kuna Boxing raised only two issues on appeal: "(1) whether the Commission complied with statutory requirements under the APA when it suspended Kuna Boxing's bingo license; and (2) whether the Commission violated Kuna Boxing's right to procedural due process when it

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<sup>8</sup> 102 Idaho at 665-666; 637 P.2d at 1161-1162.

<sup>9</sup> *Id.* at 666, 627 P.2d at 1162.

suspended Kuna Boxing's bingo license."<sup>10</sup> Kuna Boxing argued that there was no danger to the public health, safety or welfare justifying an emergency suspension and that the Commission failed to follow statutory procedures following the suspension. Kuna Boxing did not challenge the Commission's authority to take emergency action under section 67-5247 and, lacking a direct challenge to the statute, the Idaho Supreme Court merely assumed, without deciding, that the statute "governs an agency's power to act through an emergency proceeding." In effect, this was dicta by the Court.

Unfortunately, neither Kuna Boxing nor Van Orden answer the question presented in your letter.

**D. Comments from Recognized Experts in Administrative Law and Procedure**

As mentioned earlier, the APA was enacted effective July 1, 1993. Two of the main participants on the Attorney General's task force that prepared a draft of the APA for use by the legislative interim committee and the full legislature were Professor Dale D. Goble of the University of Idaho College of Law and Deputy Attorney General Michael S. Gilmore. It is fair to say that Professor Goble and DAG Gilmore are recognized and respected experts in administrative law and procedure and were in no small part instrumental in the enactment of the APA and the interpretation and application of its various provisions.

Professor Goble and DAG Gilmore jointly authored an article entitled "The Idaho Administrative Procedure Act: A Primer For The Practitioner" that was published at 30 Idaho L. Rev. 273 (1993/1994, Idaho Administrative Procedure Act Special Edition). In their introductory remarks to this comprehensive work, the authors set the stage for the proper interpretation and application of the APA by noting:

While an administrative procedure act functions like a constitution in limiting agency discretion, it differs from a constitution because it confers no substantive authority. The new Idaho Administrative Procedure Act (APA) merely prescribes limits on the exercise of authority delegated to an agency by another statute.<sup>11</sup>

Later in their work Professor Goble and DAG Gilmore make specific comments regarding the emergency action provisions codified at Idaho Code section 67-5247. The authors stated:

[T]he APA specifies procedures to be employed in emergency proceedings when the agency may issue an order to address a "situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action."

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<sup>10</sup> 149 Idaho at 98, 233 P.2d at 29.

<sup>11</sup> 30 Idaho L. Rev. at 277.

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It has long been recognized that the government possesses the power to act summarily when there is an immediate danger to the public health, safety, or welfare. For example, the director of the Department of Water Resources is empowered to issue an order requiring a cessation of activities that “involve an unreasonable risk of...damage to life or property or subsurface, surface, or atmospheric resources” from the construction or operation of a geothermal or injection well. Quarantines and seizures of adulterated foods are other common examples of this power. The APA provides the procedures that an agency is to employ when it exercises emergency powers over an individual or an individual’s property.

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The protections accorded licensees are subject to two explicit limitations. First an agency may take immediate action against a licensee if the agency is authorized to exercise emergency powers....”<sup>12</sup>

These remarks by Professor Goble and DAG Gilmore make it clear that the APA merely provides the procedure for agency action. The APA “confers no substantive authority.” The substantive authority must be found in other provisions of law, such as specific agency statutes or rules. This includes authority to involve emergency suspension proceedings. To emphasize the point, the authors state: “[A]n agency may take immediate action against a licensee if the agency is authorized to exercise emergency powers.” (Emphasis added.) Obviously, if the APA itself granted or authorized the power for emergency suspensions, there would be no need for this qualifying statement. The only purpose for the statement must be to emphasize that the authority must come from another source.

Finally, to assist deputy attorney generals, and by extension clients, in interpreting and applying the newly enacted APA and the “Idaho Attorney General’s Model Rules of Practice and Procedure,” codified at IDAPA 04.11.01., then Attorney General Larry Echohawk commissioned the publication of a booklet containing the APA and rule provisions, along with accompanying comments.<sup>13</sup> The comments regarding the APA statutes were written by Professor Goble. In discussing the emergency proceedings provisions of the APA, Professor Goble wrote:

The Administrative Procedure Act does not authorize an agency to exercise emergency powers; the power to take such actions must be based

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<sup>12</sup> *Id.* at 331-332. Footnotes by Professor Goble and DAG Gilmore that include citations to Idaho Code have been omitted here.

<sup>13</sup> Printed by The Caxton Printers, Ltd., Caldwell, Idaho (effective July 1, 1993).

upon another statute....Section 67-5248 [now 67-5247] merely specifies the procedures that an agency must follow to exercise such power.<sup>14</sup>

Taken together, these comments from recognized experts in Idaho administrative law and procedure leave little doubt that state agencies, including the Board of Dentistry, cannot rely solely upon the APA as the source of authority for issuing emergency suspension orders. The source must come from Board statutes or rules. A review of some state agencies that have enacted just such authority is instructive.

E. **Examples of Idaho Professional Licensing Board Statutes and Rules Expressly Authorizing Emergency Proceedings**<sup>15</sup>

Clearly not all Idaho state agencies even have the need to issue emergency proceedings. Most agencies, even most licensing agencies, would not encounter a situation where imminent danger to the public exists necessitating immediate agency action to avoid or mitigate the danger.

The Board of Dentistry is clearly within anyone's list of agencies that should have the authority to commence emergency proceedings. Several other agencies on the list have apparently recognized that the APA is not the source of such authority, and, therefore, have seen fit to have legislation or rules enacted to expressly grant them authority to commence such proceedings. A cursory review of Idaho statutory and regulatory law yields the following:

--Board of Pharmacy: "The board may suspend, without an order to show cause, any [controlled substances] registration simultaneously with the institution of proceedings under section 37-2718, Idaho Code, or where renewal of registration is refused, if it finds that there is an imminent danger to the public health or safety which warrants this action."<sup>16</sup>

--Board of Veterinary Medicine: "Whenever it appears that grounds for discipline exist under this chapter and the board finds that there is an immediate danger to the public health, safety or welfare, the board is authorized to commence emergency proceedings for revocation or other action. Such proceedings shall be promptly instituted and processed under the applicable provisions of chapter 52, title 67, Idaho Code."<sup>17</sup>

--Board of Nursing: "If the Board finds that public health, safety, and welfare requires emergency action and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other

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<sup>14</sup> Booklet, p. 32.

<sup>15</sup> The examples given do not purport to be an exhaustive list. There may be other state agencies with particular statutes or rules regarding emergency proceedings.

<sup>16</sup> Idaho Code § 37-2719(b).

<sup>17</sup> Idaho Code § 54-2105(8)(c).



action. Such proceedings shall be promptly instituted and determined as authorized in Title 67, Chapter 52, Idaho Code.”<sup>18</sup>

--Department of Environmental Quality: “If the Director finds the public health, safety or welfare requires emergency action, the Director shall incorporate findings in support of such action in a written notice of emergency revocation issued to the permittee. Emergency revocation shall be effective upon receipt by the permittee . . . .”<sup>19</sup>

--Department of Health and Welfare (Home Health Agencies): “If the Department finds the public health, safety, or welfare imperatively requires emergency action, a license may be summarily suspended pending proceedings for revocation or other action.”<sup>20</sup>

--Department of Health and Welfare (Residential Habitation Agencies): “When the Department finds the public health, safety, or welfare imperatively requires emergency action, a certificate may be summarily suspending pending proceedings for revocation or other action.”<sup>21</sup>

--Department of Health and Welfare (Radiation Control Rules): “If the Radiation Control Program Director finds the public health, safety or welfare requires emergency action, the Director will incorporate findings in support of such action in a written notice of emergency revocation issued to the licensee . . . .”<sup>22</sup>

Of perhaps most particular interest and applicability to the Board of Dentistry and thus the question being analyzed is one of the Board’s own rules codified at IDAPA 19.01.01.064. This rule states:

The Board may, at any time and for just cause, institute proceedings to revoke, suspend, or otherwise restrict an anesthesia a [sic] permit issued pursuant to Sections 060 and 061 of these rules. If the Board determines that emergency action is necessary to protect the public, summary suspension may be ordered pending further proceedings . . . .

While I can only speculate as to the reason the Board enacted this emergency suspension authorization for anesthesia permits but did not do likewise for general licenses, the rule supports the conclusion that the Board recognizes that something more than Idaho Code section 67-5247 is needed to authorize emergency suspension proceedings.

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<sup>18</sup> IDAPA 23.01.01.134.

<sup>19</sup> IDAPA 58.01.17.920.03.

<sup>20</sup> IDAPA 16.03.07.003.06.e.

<sup>21</sup> IDAPA 16.04.17.100.04.g.

<sup>22</sup> IDAPA 16.02.27.053.08.

**II.**  
**INTERPRETATION AND CONCLUSION**

The provisions of the Idaho Administrative Procedures Act are applicable to the Board of Dentistry. The APA establishes the general procedural framework within which contested case proceedings must be conducted. This framework specifies that agency action must ordinarily be preceded by notice and an opportunity to be heard. Under Idaho Code section 67-5247 there is, however, a very narrow exception to this general rule when the statutory test for emergency proceedings is met and the agency has been granted specific emergency action authority under its Practice Act or administrative rules.

Although the Board has seen fit to promulgate a rule authorizing it to take emergency action against an anesthesia permit, it has not done so as to licenses in general. Interpreting and applying the pertinent APA provisions in light of the authorities discussed in this letter leads to the conclusion that section 67-5247, standing alone, is insufficient for the Board to summarily suspend a dentist's license. Since the Board's statutes and rules do not independently provide that authority, the conclusion must be that the authority does not currently exist and the Board is not empowered to enter an emergency suspension order against a dentist's license.

Thank you for contacting the Attorney General's Office with this important issue. If you have any further questions or concerns that you wish to discuss, please do not hesitate to contact me at 334-4111.

Sincerely,



BRIAN KANE  
Assistant Chief Deputy

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