STATE OF IDAHO

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The Honorable Steve Vick, Co-Chair
The Honorable Gary E. Collins, Co-Chair
Administrative Hearing Officer Interim Committee
Idaho State Legislature
Hand Delivered

Re: Proposed Bill Relating to the Administrative Procedures Act

Dear Senator Vick and Representative Collins:

The Bureau of Occupational Licenses, which serves 30 licensure Boards, has had an opportunity to review the draft of a proposed bill ("DRKAG003" dated 9/12/2017) which provides for revisions to the Idaho Administrative Procedures Act as it relates to contested cases. The Bureau would like to provide the Administrative Hearing Officer Interim Committee with the following comments regarding the draft bill:

1. Section 3 (p. 4, ls. 36-38) deletes subparagraph (b) from current Idaho Code § 67-5241 ("Informal Disposition") ("any part of evidence in a contested case may be received in written form if doing so will expedite the case without substantially prejudicing the interests of any party"). Since this deletion may increase costs for the Boards' licensees, we would appreciate clarification of why this subparagraph is being proposed to be deleted.

2. New section 67-5242 ("Presiding Officer" beginning at p. 5, l. 19) appears to require an agency to hire a hearing officer in all cases and prohibits the agency head from hearing a contested case. While the Bureau hires hearing officers to hear cases on behalf of the Boards, we are concerned that this provision may limit licensees' opportunities to address their licensing Boards in certain steps of a case; e.g., mitigation hearings, oral arguments on motions for reconsideration, or cases where a Board may wish oral argument from the parties to assist in its consideration of a case.

3. New section 67-5243 ("Contested Case Procedure"), subparagraph (5) (p. 6, ls. 26-35) requires all parties to consent to a hearing by telephonic or electronic means, or a finding by the presiding officer that such a method "will not impair reliable determination of the credibility of testimony." Since this requirement will increase

costs of hearings, which will be borne by licensees, an explanation of the necessity of this change would be helpful.

4. New section 67-5244 ("Evidence in Contested Cases" beginning at p. 7, l. 18):

   a. Subsection (4) refers to evidence received "in a record." Clarification of "record" would be helpful, i.e., does it include a deposition record?

   b. Subsection (6) allows the presiding officer to conduct a closed hearing or seal part of the hearing record if the record contains information that is confidential. We appreciate the inclusion of this provision because many times a licensee's or patient's protected health information as well as other sensitive and confidential information is part of the record.

5. New section 67-5245 ("Notice in Contested Cases" beginning at p. 8, l. 7):

   a. Subsection (3)(e) states that the notice must contain "[t]he name, official title and mailing address of the presiding officer . . . ." This section, as well as new section 67-5252, appears to require agencies to hire a hearing officer to enter a default order. Currently, the Bureau does not hire a hearing officer until an answer is filed in a contested case, and Boards enter their own default findings of fact, conclusions of law and final orders. Not allowing agencies to enter default is less efficient and more costly than the current process, and increased costs will be borne by licensees.

   b. Subsection (4) states that "the agency" shall give parties notice when a hearing or a prehearing conference is scheduled. Currently, hearing officers schedule prehearing conferences and hearings with the parties, independent of the agency. We believe that this procedure preserves the impartiality of the hearing officer and helps keep costs down.

6. New section 67-5246 ("Hearing Record in Contested Cases" beginning at p. 9, l. 8), subsection (2)(e) requires that "evidence admitted" be part of the hearing record in contested cases. Current Idaho Code § 67-5249 requires "evidence received or considered" be included in the record. We believe that evidence received or considered, and not just admitted, could change the decision in a case.

7. New section 67-5247 ("Emergency Adjudication Procedure" beginning at p. 9, l. 33):

   a. Subsection (2) revises current Idaho Code § 67-5247 by stating that an agency may conduct an emergency adjudication to deal with an "imminent peril"

instead of the current "immediate danger." We would appreciate clarification on this change, why it is needed, and whether there is a substantive difference.

b. Subsection (3) requires an agency to give notice and an opportunity to be heard "if practicable" before issuing an emergency order. The licensing Boards use emergency orders, such as emergency suspensions, in very limited circumstances, such as when the Boards have information that a practitioner is a danger to the public. Frequently, the grounds giving rise to the emergency have not yet been fully investigated, but protection of the public demands that the Board take action (e.g., a health care practitioner has been arrested for molesting patients). Current Idaho Code § 67-5247 requires agencies to "proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger." Forcing licensing Boards to have a hearing before issuing an emergency order, and then another full evidentiary hearing after the investigation is complete, could put the public at harm and increase costs for the Boards' licensees, possibly delaying the Boards' charge of protecting the public.

c. Subsection (7) provides that an emergency order is effective for not longer than 120 days or until the effective date of any order, whichever is shorter. There are times when criminal charges are pending against a licensee or an impaired licensee is in alcohol or drug treatment, and those matters may not be resolved within 120 days. Again, to protect the public, licensing Boards must be able to have the flexibility to ensure adequate public protections are in place (e.g., supervised probation, additional treatment, psychological evaluations, urinalyses, etc.) which may require a Board to wait until an impaired practitioner has completed treatment or criminal charges are resolved. In addition, forcing Boards to take final action within 120 days may limit Boards' ability to work with practitioners (e.g., Boards may work with practitioners to allow them to practice if safeguards to the public are in place while the matter is being resolved, such as practicing under supervision). We feel the 120-day limitation for an emergency order unnecessarily and arbitrarily limits the Boards' ability to protect the public.

8. New section 67-5250 ("Subpoenas" beginning on p. 12, l.1) is ambiguous as to who would have subpoena power; we would appreciate clarification of this section.

9. New section 67-5251 ("Discovery" beginning on p. 12, l. 16):

a. Does this new section authorize discovery where currently there is no authority for discovery?

b. Subsection (2)(b)(iii) allows a party to inspect and copy "investigative reports made by or on behalf of the agency or other party pertaining to the subject matter of the adjudication." We request that "to be offered at hearing" be added to this subsection. Investigative files frequently contain protected health records of witnesses that were obtained under the licensing Boards' exemption to HIPAA authorization requirements for health oversight activities (*see* 45 CFR 164.512(d)) or other protected health information documents that witnesses provided. These records, as well as other records obtained during an investigation, may have no relevance to the charges against a licensee and may not be used at a hearing. The balance between due process and public protection requires that investigative records that will be used at a hearing be provided to the parties; however, other documents should not be disseminated if they are not relevant to the charges.

c. Subsection (6) requires a petition to the presiding officer for an order authorizing additional discovery. We would appreciate clarification if depositions require an order from the presiding officer.

10. New section 67-5252 ("Default" beginning on p. 13, l. 20). As noted above, this section requires a presiding officer to enter a default instead of the agency, which increases costs which will be borne by licensees. In addition, this section appears to remove the current requirement of notifying a licensee of an agency's intent to take a default, which is detrimental to the licensee.

11. New section 67-5253 ("Orders—Initial—Final" beginning on p. 13, l. 45):

a. Subsection (6) states that hearsay evidence "may be used to supplement or explain other evidence but, on timely objection, is not sufficient by itself to support a finding of fact unless it would be admissible over objection in a civil action." The Idaho Supreme Court has found that current Idaho Code § 67-5251 allows hearsay evidence to be admitted in hearings. This change would require more direct evidence instead of hearsay evidence, which in turn would increase costs to Boards and their licensees.

b. Subsection (8) provides that a final order is effective 30 days after its service date unless reconsideration is granted. In other words, under this section, a licensee who has been revoked can continue to practice for 30 days after the service date of the order. We do not feel this is an appropriate protection of the public and, in fact, may put the public in harm's way. Further, Boards currently have the ability to work with practitioners on when an order takes effect to ensure that the potential of public harm is minimized while also providing for a transition for the practitioner when the Board takes action.

c. Proposed section 67-5253 makes no provision for what are now recommended orders under current Idaho Code § 67-5243. The Boards currently hire hearing officers to submit recommended orders after hearings, which are final only after review by the Board, and the recommended orders do not include recommended discipline. Appropriate discipline of a licensee is under the province of the Boards, but the proposed statute does not make it clear if the Boards can have any type of hearing. We would appreciate clarification on what appears to be a change in the Boards' role with regard to discipline in administrative hearings.

12. New section 67-5254 ("Agency Review of Initial Order" beginning on p. 13, l. 37):

a. Subsection (5) states that when reviewing an initial order, "the agency head shall exercise the decision-making power that the agency head would have had if the agency head had conducted the hearing that produced the order, ..." However, as noted in #2 above, new section 67-5242 appears to require an agency to hire a hearing officer in all cases and prohibits the agency head from hearing a contested case.

b. Subsection (6) appears to provide that an agency can no longer correct findings of fact or conclusions of law. However, there may be facts critical to the outcome of the case which have not been addressed because the hearing officer does not possess the expertise of the Board. We would appreciate clarification of this section.

Thank you for the opportunity to review this draft bill and to offer comments. We would appreciate receiving additional information as noted in the comments above so that we may provide it to the Boards we serve so they may fully understand the impact of the proposed changes. If you have any questions or if we can be of assistance to the Committee, please do not hesitate to contact me at (208) 577-2586 or maurie.ellsworth@ibol.idaho.gov.

Sincerely,

Maurice O. Ellsworth
General Counsel