

November 16, 1993

The Honorable Ronald L. Black  
Idaho House of Representatives  
921 Trotter Drive  
Twin Falls, ID 83301

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

Dear Representative Black:

Your letter of November 8, 1993, asks our opinion as to the validity of rules enacted by the Department of Education with regard to alternative high school programs. You indicate two areas in which the department may have violated provisions of the Idaho Administrative Procedure Act (APA). Both problems arise because of the amendments to the APA that took effect on July 1, 1993.

I.

First, you question whether the department's proposed permanent rules were "properly and in a timely manner delivered to the Legislative Council for review." The new APA, like its predecessor, provides opportunity for the Idaho Legislature to comment on proposed rules. The language in the new APA governing transmittal of proposed rules from the agency to the legislature states:

At the same time that notice of proposed rulemaking is filed with the [administrative rules] coordinator, the agency shall provide the same notice, accompanied by the full text of the rule under consideration in legislative format, as well as a statement of the substance of the intended action, to the director of the legislative council.

Idaho Code § 67-5223 (emphasis added). Your concern is triggered by the fact that the department in this instance transmitted its proposed rule to the administrative rules coordinator (ARC) on August 30, 1993, but did not transmit the rule to the legislative council until some two weeks later, on September 14, 1993. On its face, the rule was clearly not transmitted to the two agencies "at the same time," as required by the new APA.

The background for this problem is provided in the memorandum of September 16, 1993, from the legislative council staff to the germane legislative committees:

There has been some confusion within many agencies regarding the submission of rules to the administrative rules coordinator and the transfer of the same promulgation to the director of legislative council for his review and subsequent referral of the material to the germane legislative subcommittees. It has been assumed by several agencies and departments that submission of a promulgation to the administrative rules coordinator is sufficient for all purposes.

In short, because the state's rulemaking functions were centralized in the ARC on July 1, 1993, some agencies thought their responsibilities ended when they sent a proposed rule to the ARC and that it was the duty of the ARC to transmit the proposed rule to the legislative council. (Indeed, some agencies have contracted with the ARC to provide this service.) Such is not the case. It remains the responsibility of each agency to transmit its proposed rule to the ARC and to transmit the same rule at the same time to the legislative council.

Your question is whether this sequence of events violates the APA and renders invalid the department's amended rules on alternative high school programs. We first address the meaning and purpose of the new transmittal statute, Idaho Code § 67-5223. These matters are addressed in Professor Goble's comments to this statute:

This section [67-5223] provides for legislative oversight of agency rulemakings. Subsection (1) requires the agency to provide the legislature with notice of its proposed rules.

Subsection (1) requires the Legislative Council to be provided with the same information required to be provided to the Administrative Rules Coordinator under section 67-5221. In addition, the agency is required to provide a copy of the proposed rule in legislative format.

Subsection (1) changes previous law by deleting the twenty-one (21) day time limit on committee comments so that legislators are able to submit comments throughout the entire public comment period.

Thus, the new statute broadens the legislative review provisions of the APA. The predecessor statute provided the legislature only a narrow window of opportunity (21 days) to comment on proposed rules. The practical result was that the legislative comment period ended before the public review process was actually in full swing. The drafters wanted the legislative review process to overlap most of the public comment period so that legislators could receive input from constituents affected by the proposed rule.

The predecessor statute also provided that agencies were to submit proposed rules to the legislative council prior to the start of the public comment period. The drafters saw no good reason for beginning the legislative comment period before the rule was available to the public. They therefore provided that the proposed rule would be transmitted to the legislative council "at the same time" as to the ARC, rather than at an earlier date. The actual result of this choice of language has been rather odd. Because the ARC must receive proposed rules approximately three weeks before the publication date of the monthly Idaho Administrative Bulletin, the legislative council is still receiving rules long before the public comment period begins.

It is our opinion that the statutory language--"at the same time"--must be complied with because it is clear and unambiguous, even though it does not comport with the intent of the drafters. We do not interpret the language as meaning that transmittal to the legislative council and to the ARC must occur at the identical minute, or hour or day. We expressly approve the practice of those agencies that have contracted with the ARC to handle the responsibility of transmitting the proposed rule to the legislative council, even though that may delay receipt of the rules at the legislative council by a day or two.

One final point must be made clear. The requirement of transmitting rules to the legislative council exists only in the case of a proposed **permanent** rule. There is no parallel requirement for **temporary** rules because, by their nature, temporary rules take effect on an emergency basis and only for a restricted period of time.

Thus, the Department of Education was under no obligation to provide a copy of its temporary rules to the legislative council. The department did have the duty to provide its proposed permanent rules to the legislative council "at the same time" as to the ARC. It failed to do so and thus violated the provisions of Idaho Code § 67-5223.

Nonetheless, the legislative council did transmit the rules to the germane committees some two weeks before the public comment period began. As of October 20, 1993, according to the legislative council memorandum, "no member of either subcommittee has notified the Legislative Service Officer that he wishes to call a meeting." The legislative comment period continues to the present.

It is our opinion that a reviewing court would find that the department rules, if in fact they are adopted, will have been "adopted in substantial compliance with the requirements" of the APA, Idaho Code § 67-5231, despite the two-week delay in transmitting the proposed rule to the legislative council at the outset of the comment period. Thus, the defect in the department's procedure for adoption of the permanent proposed rule will not jeopardize the validity of the final rule once it is adopted.

## II.

We turn next to the question of the validity of the department's temporary rule. You state that the reason given by the department in resorting to temporary rulemaking is that they are "conferring a benefit." You contend, on the contrary, that "in fact they remove many benefits from the Alternative Schools."

Under the new APA, an agency may resort to temporary rulemaking:

If an agency finds that:

(a) it is reasonably necessary to protect the public health, safety, or welfare; or

(b) to comply with deadlines in amendments to governing law or federal programs; or

(c) conferring a benefit;

requires adoption of a rule upon fewer days' notice than that otherwise required . . . .

Idaho Code § 67-5226(1). Thus, there are three situations in which temporary rulemaking is justified. Again, Professor Goble's comments are instructive:

This section modifies existing law by reducing the standard required for a temporary rule. The section recognizes three situations in which a temporary rule is appropriate. First, when it is reasonably necessary for public health and safety. Second, when compliance with deadlines contained in amended statutes or federal programs requires an expedited procedure. Third, when the agency is conferring a benefit and there is no good reason to delay the effectiveness of the benefit for the period required to comply with regular rulemaking.

Thus, the drafters of the new APA did intend to liberalize the circumstances in which temporary rulemaking would be justified. The predecessor statute allowed temporary rulemaking only in situations of "imminent peril to the public health, safety, or welfare . . . ." Idaho Code § 67-5203(b). The actual practice among agencies was to ignore this restriction and to use temporary rulemaking in situations where no other choice existed (*i.e.*, the rule change was dictated by a statutory amendment or change in a federal program) or when there was no good reason to delay the effective date of a rule (*i.e.*, when the agency was conferring a benefit).

Your letter asserts that the department's temporary rule on alternative high schools does not confer a benefit but, in fact, removes many benefits from such schools. That is clearly the case. The department's descriptive summary of its rule states that "there is a fiscal impact on local school districts. These rule changes will reduce the number of state support dollars that go to the districts with alternative high school programs . . . ." At least as to these districts, therefore, the rules do not confer a benefit.

It does not appear that temporary rulemaking could be justified by either of the other two exceptions identified in Idaho Code § 67-5226(1). There was no emergency requiring protection of the public health, safety or welfare. And there was no statutory amendment or change in federal program rules that dictated these changes. Instead, the department simply noted that the program had been in effect for four years and that rule clarification and modification was required. This is a garden variety situation in which ordinary rulemaking is appropriate. There was no justification for resort to temporary rulemaking.

### III.

We note that the department's temporary rulemaking violated the new APA in yet another manner. Idaho Code § 67-5226 goes on to state:

The agency shall incorporate the required finding and a concise statement of its supporting reasons in each rule adopted in reliance upon the provisions of this subsection [on temporary rulemaking].

In short, when an agency resorts to temporary rulemaking, it must make a formal finding that one of the three exceptions exists and must state that finding in its notice of temporary rulemaking. The department did not make such a finding in this instance.

### IV.

The final question thus concerns the validity of the department's temporary rule. The drafters of the new APA provided two mechanisms to prevent abuse by agencies resorting to temporary rulemaking. The first is the limited time frame of temporary rules. Professor Goble's comments state:

Protection against abuse is provided by the limited duration of temporary rules. Temporary rules can remain effective even if extended for the maximum period for little more than six months.

Second, a temporary rule, like any other rule, can be challenged on the ground that it has not been adopted in substantial compliance with the requirements for adopting temporary

rules. It is the opinion of this office that the department's alternative high school rules were not adopted in substantial compliance with those requirements and would thus be "voidable" if challenged in court. Idaho Code § 67-5231.

V.

Our conclusion, as to your first question, is that the department's failure to provide the legislative council with its proposed permanent rule "at the same time" it provided that rule to the administrative rules coordinator will not jeopardize the validity of that rule if and when it is adopted. The germane committees of the legislature have had two months in which to act on the proposed rule. A public hearing will be held. We believe the department, despite its two-week delay in transmitting the rule to the legislative council, has substantially complied with the publication requirements of the new APA.

We conclude, as to your second question, that the department did violate the provisions of Idaho Code § 67-5226 of the APA in resorting to temporary rulemaking without making a formal finding that one of the three statutory justifications was present. Such a violation would render the rule "voidable" if challenged in court pursuant to Idaho Code § 67-5231. As a practical matter, the usefulness of this challenge will lapse as soon as the permanent rule is adopted.

One final comment. This office recognizes that problems have arisen in implementing the provisions of the new APA. We will be meeting with agency deputies and with the administrative rules coordinator in the near future to iron out those problems and to ensure they do not recur.

If I may be of further assistance to you, please contact me.

Sincerely,

JOHN J. MCMAHON  
Chief Deputy