



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

February 16, 2010

The Honorable Ben Ysursa
Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Relating to the Licensure Penalty of Midwifery

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory time frame within which this office must review the petition 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." The petitioners are free to "accept or reject them in whole or in part." The opinions expressed in this review are only those that may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by the proposed initiative.

BALLOT TITLES

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles must 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 titles for the initiative, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

MATTERS OF SUBSTANTIVE IMPORT

The Amendment is Consistent with the Statute

The proposed initiative ("Initiative") seeks to amend the provision pertaining to the unlicensed practice of midwifery in title 54, chapter 55, Idaho Code. At the outset, I

note that there is a citation error in the Initiative. The intent of the sponsors is to amend the provision in the midwifery statute that is captioned "LICENSURE – PENALTY." The sponsors refer to this provision as Idaho Code § 54-5406. The correct reference is to section 54-5506 (emphasis added).

The correction is necessary because chapters 65 and 251 of Session Laws 2009, effective July 1, 2009, each purported to enact a new chapter 54 in title 54. In order to resolve the issue, Session Law 2009, chapter 251 was codified as title 54, chapter 54, while Session Law 2009, chapter 65 was codified as title 54, chapter 55 through the use of brackets. Chapter 65 is the chapter which pertains to the practice of midwifery. The sponsors should correct this citation.

In its entirety, Idaho Code § 54-5506 reads as follows:

54-5506. Licensure - Penalty. (1) The board shall grant a license to any person who submits a completed application, pays the required license fee as established by the board and meets the qualifications set forth in section 54-5407 [sic], Idaho Code.

(2) All licenses issued under this chapter shall be for a term of one (1) year and shall expire on the birthday of the licensee unless renewed in the manner prescribed by rule. Except as set forth in this chapter, rules governing procedures and conditions for license renewal and reinstatement shall be in accordance with section 67-2614, Idaho Code.

(3) It is a misdemeanor for any person to assume or use the title or designation "licensed midwife," "L.M." or any other title, designation, words, letters, abbreviations, sign, card or device to indicate to the public that such person is licensed to practice midwifery pursuant to this chapter unless such person is so licensed. Any person who pleads guilty to or is found guilty of a second or subsequent offense under this subsection (3) shall be guilty of a felony.

(4) Except as provided in section 54-5408 [sic], Idaho Code, on and after July 1, 2010, it shall be a misdemeanor for any person to engage in the practice of midwifery without a license. Any person who pleads guilty to or is found guilty of a second or subsequent offense under this subsection (4) shall be guilty of a felony.

Idaho Code § [54-5506] 54-5406 (Supp. 2009).

The sponsors propose amending this section by eliminating subsection (4) in its entirety. This change would have the effect of eliminating any sanctions for unlicensed practice. It also eliminates any regulatory authority with regard to unlicensed practice, except in the very narrow circumstance in which an unlicensed person held out to the public as a licensed midwife.

This amendment to the penalty provisions of the midwifery statute is inconsistent with the statutory scheme pertaining to the existing regulation of midwifery in title 54,

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chapter 55, Idaho Code. The proposed elimination of the penalty for unlicensed practice will, in effect, change the existing statutory scheme pertaining to licensing from mandatory to voluntary. Although it is contrary to the existing statutory scheme, the proposed change is not impermissible. It is our understanding that there may be legislation proposed during the current legislative session, which would have a similar effect on the existing title 54, chapter 55, Idaho Code.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of the Certificate of Review, deposited in the U.S. Mail to Alanna Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,



LAWRENCE G. WASDEN
Attorney General

Analysis by:

S. KAY CHRISTENSEN
Deputy Attorney General