**MEMORANDUM**

**TO:** Iowa General Assembly

**FROM:** Joe Fraioli, Legal Director, Iowa Board of Medicine

**RE:** Proposed Bill Amending Iowa Code section 272C.6

**DATE:** November 19, 2020

**Section 1.** As the practice currently stands, all 272C Boards are required to have a quorum of members present *in addition* to an administrative law judge at all hearings. The administrative law judge then drafts a proposed decision after conferring with the panel of Board members and presents that to the Board for final approval. However, non-272C Boards, including the Board of Educational Examiners as an example, hold their hearings in front of only an administrative law judge. The ALJ then issues a proposed decision that becomes final after the specified time period unless it is contested by either party, in which case a quorum of the Board reviews it as an appellate body. This is also similar to how DHS runs their registry appeal hearings—hearings are first held in front of ALJs and then only proceed to a director’s review in the event there is a protest to the proposed decision.

This tends to promote an appearance of fairness as well because the Board will be the body that votes to file the statement of charges and then instead of immediately proceeding to act as an adjudicatory body on the same matter, takes on an appellate role instead. However, the manner in which this statute is written still grants Boards the discretion to proceed as they see fit. This does not create a greater burden on ALJs because they’re required to be present in either circumstance and they are already required to draft a proposed decision.

Some Boards struggle to coordinate the schedules of working Board members to meet outside of Board meetings to hear days-long disciplinary contested cases. This would allow licensees to have their cases heard earlier and receive decisions quicker, and would allow Board members to review the details of a hearing at their leisure separately instead of coordinating schedules to hear the case at the same time. Hearings are getting more and more involved, which can sometimes take 3-4 days, so it’s even harder to get the professionals to book that amount of time outside of their regular Board duties. Boards will always have the opportunity to make disciplinary decisions based on proposed decisions.

The second part of this section’s amendment, which deals with the public nature of hearings, merely codifies what’s already the practice of Boards. In the event no selection is made by the licensee about their hearing, the default has always been to favor being more transparent with the public as opposed to less and keep the hearings open. This does not take away any licensee’s choice to ask for a closed hearing.

**Section 3a.** This is another clarification on an existing practice and a removal of the redundancy in the statute. The amendment in this provision formalizes the state’s ability to request subpoenas and removes the redundant language that grants licensees the ability to request subpoenas twice.

**Section 3a(2).** The removal of “of the licensee” is to clarify that it is not only the licensee’s attorney that is prohibited from disclosure of confidential information under 622.10, but any attorney that is a part of the disciplinary hearing, including attorneys of interveners. This expands the protections for licensees.

**Section 4a.** The confidentiality provision has caused the most consternation to Boards, licensees, and the public. The suggested amendments clarify the Boards’ position that a licensee is not entitled any investigative information either until after disciplinary charges have been filed or, if the Board so chooses through rulemaking, at least until after settlement negotiations have begun (which often happen prior to the filing of a statement of charges). We propose this change to make settlement negotiations more fruitful. In recent history, the Board of Medicine has had cases in which the licensee is open to settling and saving the Board and the State the burden of having a hearing, but finds it inherently unfair that they are not entitled to review the investigatory information prior to signing a settlement. Occasionally, the Board has felt that if it could share certain investigative information in its possession with the licensee, a resolution outside of a hearing would be more likely. Again, non-272C boards have done this in practice. But this would also be at the discretion of each Board and only in the event they proceed with rule-making to that effect.

It also clarifies that a licensee receiving the investigatory report through a disciplinary proceeding is the only way an investigative report gets released (except for the exceptions that already existed for other licensing Boards and law enforcement).

A majority of court opinions have ruled that the two interpretations explained above are the correct interpretation of the existing law, which would have historically made such amendments needless. However, a recent District Court opinion ignoring existing precedent and finding to the contrary has led to the conclusion that clearer language is needed to explain the purpose and meaning of this provision of law. This provision continues to come up in litigation and a lot of state resources are spent defending these cases.

Finally, there’s language that changes a Board’s responsibility to report investigative information to law enforcement when there is evidence of a crime from “shall” to “may.” This eases the burden on Boards to report a crime even when contrary to the goals of transparency and trust with licensing authorities. Specifically, there are cases in which licensees have a heightened expectation of privacy, such as when they self-report to impaired practitioner programs. In these circumstances, it’s contradictory for Boards to say participants that self-report and engage in the impaired practitioner program may be able to avoid Board discipline in an effort to promote substance use and mental health counseling in lieu of punishment, while still creating an obligation for the Board to report that same conduct to law enforcement.

**Section 6a.** Reinstatement hearings are the functional equivalent of disciplinary hearings, which means they require the same amount of resources to defend. Time, expense, and resource allocation are essentially equal whether it’s a disciplinary hearing or a reinstatement hearing. Adding reinstatement hearings to the list of hearings the licensee must pay for only ensures that a Board can recoup its expenses without having to raise annual fees for all licensees, something the Boards have strived to avoid. The list of recoverable expenses has been broadened as well for the same reasons.