

BEFORE THE BOARD OF DENTISTRY
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 24.138.509 pertaining to dental)
hygiene limited access permit)

TO: All Concerned Persons

1. On December 22, 2023, the Board of Dentistry (agency) published MAR Notice No. 24-138-84 regarding the public hearing on the proposed changes to the above-stated rule, at page 1782 of the 2023 Montana Administrative Register, Issue No. 24.

2. On January 16, 2024, a public hearing was held on the proposed changes to the above-stated rule via the videoconference and telephonic platform. Comments were received by the deadline.

3. The agency has thoroughly considered the comments received. A summary of the comments and the agency responses are as follows:

Comment 1: Several commenters believe that the board's proposed rule is a significant expansion of care without a great amount of data to support the expansion.

Response 1: The board respectfully disagrees with the commenter, and notes that it is following the 2022 active supervision decision of the commissioner.

Comment 2: One commenter suggested the board review the schools where LAP practice has been occurring to see if it has been successful.

Response 2: The board is not charged with determining success of a particular program. It licenses individuals to minimum standards of competency and is charged with determining where LAPs may practice, not with determining the success of access to care issues.

Comment 3: Several commenters suggested that cooperative patient care agreements between hygienists and dentists would be successful and protect public safety.

Response 3: LAPs are statutorily allowed to practice in public health facilities and programs without a cooperative patient care agreement. The commenters' request requires a statute change and cannot be addressed through rule. The board understands that stakeholders are working together to review the issue.

Comment 4: Several commenters believe allowing LAPs to identify where they can practice using criteria set in rule is too broad.

Response 4: The 2022 Active Supervision Decision issued by the Commissioner of the Department of Labor and Industry indicates that the board has no framework by which it judges which additional public health facilities to allow LAPs to practice in. The board is therefore setting criteria, based on the statute allowing the practice, so LAPs can understand where practice is allowed and not allowed. See also response to Comment 3.

Comment 5: One commenter believes the board's proposal will make medical care available without parental involvement and will circumvent informed parental consent.

Response 5: Informed consent is still required for children to obtain care provided by an LAP. LAPs have been providing care in specific public schools, group homes for youth, head start programs, and other public health facilities where parents may not be immediately present for more than a decade, and in that time, the board has not received any complaints relating to a lack of informed consent from a parent.

Comment 6: One commenter supports the rule as drafted, stating that LAPs have been safely practicing in Montana for 20 years with no disciplinary action taken against an LAP.

Response 6: The board appreciates all comments received during the rulemaking process.

Comment 7: One commenter believes the board's proposed rule will invade the private lives of children, and that there is no way to guarantee a student's HIPAA rights by having an LAP perform services in a school.

Response 7: The board respectfully disagrees with the commenter and notes the parents still make the decision on whether to have their child receive services. LAPs are subject to HIPAA requirements.

Comment 8: One commenter believes the proposed rule will lead to children being manipulated by an LAP without a parent present.

Response 8: The board understands the commenter's concern but notes that LAP practice is an opt-in practice, meaning parents must affirmatively consent to having their children seen.

Comment 9: Several commenters believe the expansion goes beyond what the legislature intended.

Response 9: The board disagrees with the commenters, noting that the legislature has had ample opportunity to exclude schools if it disagreed with the board's

rulemaking. It has not done so. The legislature remains free to amend the statute if it disagrees with the board.

Comment 10: One commenter believes there should be some professional supervision of LAPs by a dentist.

Response 10: The legislature has set the scope of practice of an LAP, including that they may practice under public health supervision, meaning no dentist need be involved. The commenter's suggestion requires a statute change.

Comment 11: One commenter notes that 95% of children in Montana have a dental home, and that Montana is doing a very good job of providing dental care to children.

Response 11: The commenter does not cite to a source that 95% of children have a dental home. The board requests the commenter provide the data to the board for further review.

Comment 12: One commenter asks why dentists could not set up a clinic in these facilities to treat the children.

Response 12: Dentists are able to work in public health facilities.

Comment 13: One commenter notes that in speaking with pediatric dentists, the dentists have relayed that an LAP is performing services that duplicate the dental care provided by a dentist.

Response 13: The board appreciates all comments received during the rulemaking process.

Comment 14: One commenter notes the legislature gave authority to the board to identify other facilities, not "designate" them.

Response 14: The board is identifying facilities based on an objective standard, rather than individually evaluating and naming facilities in rule, to allow consistent application of the rules.

Comment 15: One commenter notes the legislature has discussed the topic at length, and voted against expanding services in public schools. The commenter suggests that the board seek legislation to specifically include schools.

Response 15: The board notes that bills both adding schools and prohibiting schools have been attempted and failed as legislative proposals. The board's authority remains in statute to identify additional public health facilities, and the board's current rule has raised concerns that it is infringing on the trade of hygienists. Therefore, the board is proposing this rule to address the restraint of

trade concern, while being respectful of the objection raised by the Economic Affairs Interim Committee. The legislature remains free to amend the statute as it sees fit.

Comment 16: One commenter opposes the lack of oversight of LAPs and requests the board require LAPs to refer to a dentist that can provide dental care.

Response 16: The board already has this requirement. Section 37-4-405 (4)(a)(i), MCA requires LAPs to refer to a dentist when the patient requires care beyond what the LAP can provide.

Comment 17: One commenter requests the board consider the fiscal cost to taxpayers for the proposed expansion.

Response 17: This is outside the scope of the proposed rulemaking.

Comment 18: One commenter suggests the board's proposal will lead to a larger "Nanny State."

Response 18: The board appreciates all comments received during the rulemaking process.

Comment 19: One commenter notes regulatory industries have been captured by the industries they are supposed to be regulating and can no longer be trusted to protect the best interests of people.

Response 19: This comment is outside the scope of the proposed rulemaking.

Comment 20: One commenter suggests vaccines and fluoridation are outdated public health practices and are not safe or effective.

Response 20: This comment is outside the scope of the proposed rulemaking.

Comment 21: One commenter questions whether parents and guardians will be providing fully informed consent for children receiving care.

Response 21: LAP practice requires informed consent before a child is treated.

Comment 22: One commenter asks whether it is even practical for LAPs to practice in homeless and family violence centers.

Response 22: The LAP wishing to provide services in the facilities is responsible for ensuring the practice meets health and safety standards.

Comment 23: One commenter asks if there will be dedicated locations to practice in the facilities and how instruments will be sterilized between patients.

Response 23: See response to Comment 22.

Comment 24: One commenter asks how LAP hygienists will be insured.

Response 24: This is outside the scope of the proposed rulemaking.

Comment 25: One commenter asks if these rule changes will be a gateway for health professionals to have further access to all public health facilities.

Response 25: The board believes this to be outside the scope of this rulemaking process.

Comment 26: One commenter disagrees with the board's determination that the rule changes will not have a significant and direct impact on Montana small businesses.

Response 26: The board disagrees with the commenter.

Comment 27: One commenter noted that children especially need to see a dentist to identify disease early.

Response 27: The board does not disagree with the commenter, but notes that many children in Montana do not, for a variety of reasons, see a dentist. LAPs may be able to identify children who have not previously seen a dentist and refer those children who require dental care to a dentist.

Comment 28: One commenter has concerns that without a cooperative agreement, parents or patients will believe that they have received more care than they have.

Response 28: LAPs are statutorily allowed to practice in public health facilities and programs without a cooperative patient care agreement. The commenter's request requires a statute change and cannot be addressed through rule. Further, the LAP is responsible for communicating to the patient the care provided.

Comment 29: Several commenters note that other states require a collaborative agreement for LAP practice and suggest Montana follow that requirement as well.

Response 29: LAP practice does not require a collaborative agreement in Montana, and the commenters' suggestions require a statute change.

Comment 30: One commenter suggests the board take more time to find out where LAPs are currently practicing and how well it is working before deciding to include more schools.

Response 30: The board appreciates all comments made during the rulemaking process. See also response to Comment 2.

Comment 31: One commenter suggests the board consult with a work group formed by the Montana Dental Association and the Montana Dental Hygienists' Association to resolve the issue.

Response 31: The board is responding to an active supervision decision issued by the commissioner in 2022 in identifying facilities where an LAP may practice. The board looks forward to learning about the findings from the workgroup. Given that the LAPs have been safely practicing in schools for 16 years without disciplinary action, the board determined that schools were an acceptable place for LAPs to work.

Comment 32: Several commenters note that the proposed rule may not resolve the active supervision issue identified by the commissioner.

Response 32: The board is currently working to resolve the active supervision issue raised by the commissioner.

4. The agency has amended ARM 24.138.509 as proposed.

BOARD OF DENTISTRY
ALLEN CASTEEL, LD, CHAIR

/s/ QUINLAN L. O'CONNOR
Quinlan L. O'Connor
Rule Reviewer

/s/ SARAH SWANSON
Sarah Swanson, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State June 11, 2024.