Montana Department of
LABOR & INDUSTRY

To: Montana Board of Dentistry
From: Laurie Esau, Commissioner of Labor & Industry
Date: February 11, 2022
Re: Active Supervision of Admin. R. Mont. 24.138.509(5) implementation

I. Introduction

Montana Code Annotated §§ 37-1-121 and -122, authorize the Commissioner of the Montana Department of Labor & Industry to provide oversight and supervision of the duties and authority of the boards administratively assigned to the department. Pursuant to § 37-1-121(1)(d), the Commissioner shall exercise:

> active supervision authority to approve or disapprove any board action identified by the department as restraining or potentially restraining competition in trade or commerce. Subject to the provisions of 37-1-122(6), the commissioner shall determine if the board action is made or taken pursuant to a clearly articulated state policy and if the restraint or potential restraint of trade or commerce is reasonable and necessary to protect the public health, safety or welfare. Any approval or disapproval under this subsection (1)(d) must be in writing, comply with the provisions in 37-1-122, and set forth the particular reasons supporting the determination. A disapproval may include the commissioner's recommended modifications, if any, for the board's consideration.

Montana Code Annotated § 37-1-122 sets forth the procedural requirements for active supervision, including the requirement that the Commissioner notify the affected board of the review to be undertaken, permit the board the opportunity to provide written comments and materials regarding the review, and meet with the board.

Pursuant to this statutory authority and obligation, and by request of the Montana Dental Hygienists' Association, I initiated review of Admin. R. Mont. 24.138.509(5), which implements Mont. Code Ann. § 37-4-405 by designating public health facilities.

Mont. Code Ann. § 37-4-405(3)(c) defines "public health facility" to mean:

> (i) federally qualified health centers; federally funded community health centers, migrant health care centers, or programs for health services for the homeless established pursuant to the Public Health Service Act, 42 U.S.C. 254b; nursing homes; extended care facilities; home health agencies; group homes for the elderly, disabled, and youth; head start programs; migrant worker facilities; local public health clinics and facilities; public institutions under the department of public health and human services; and mobile public health clinics; and
> (ii) other public health facilities and programs identified by the board under subsection (6);

Subsection (6) authorizes the Board to designate further public health facilities and programs:

> The board may identify, by rule, other public health facilities and programs, in addition to those listed in subsection (3)(c), at which services under a limited access permit may be provided.

Montana Code Annotated § 37-4-405(6). The rule, then, designates five facilities under this statutory authority: Dodson School, Great Falls Rescue Mission, Harlem Elementary School, Harlem Junior/Senior High School, and Paris Gibson Education Center. Admin. R. Mont. 24.138.509(5).

II. Active Supervision Procedure

This active supervision process was initiated by public request of the Montana Dental Hygienist Association. On May 5, 2021, I notified the Board of the initiation of active supervision. This notification invited the Board to submit written comments for my consideration "justifying the present selection of public health facilities. . . ."

To facilitate the receipt of public comments, I published a Notice of Public Hearing in the Montana Administrative Register. *See* 12 Mont. Admin. Reg. 731 (June 25, 2021). The notice was distributed to the Board's interested party list. Mont. Code Ann. §2-4-302(2)(b)(iii). This notice was additionally published as a legal notice in the Great Falls Tribune, the Billings Gazette, and the Daily Inter Lake. A public hearing was held on July 29, 2021. Written and verbal comments were received.

On August 13, 2021, I received the Board's Response concerning active supervision. I requested certain supplemental information on August 30, 2021. Additional information was received on September 17, 2021.

On January 13, 2022, I met with the Board. Mont. Code Ann. § 37-1-122(1)(a)(iii). Following the meeting, I met with representatives of the Montana Dental Hygienists' Association (MDHA) on January 20, 2022. I met with representatives of the Montana Dental Association (MDA) on January 26, 2022.[1]

III. Summary of comments received

I have reviewed all written and verbal comments received. The comments are briefly summarized here for the benefit of readers. However, inclusion, exclusion, summary, or consolidation should not be interpreted as lack of receipt or consideration.

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[1] I am additionally in receipt of two communications outside the direct scope of the process, but which are noted in the interest of completeness. Prior to initiation of active supervision but following MDHA's request, the MDA issued a letter on March 3, 2021, to Governor Greg Gianforte expressing its opinion that that Board "has reached a level of dysfunction" relating, in part, to Limited Access Permit work being permitted in schools at all. The letter additionally makes various accusations against Department staff and a Board member, which do not warrant response. On July 16, 2021, counsel for the MDA sent a public record request for information relating to the active supervision process. That request further directed me to preserve any documentation for "potential legal action."

A. Comments from the Board of Dentistry

In response to my notice of active supervision, the Board prepared a written response. The Board did not defend its present identification of public health facilities set forth in Admin. R. Mont. 24.138.509(5). Instead, the Board submitted a new proposed evaluation criteria for the designation of public health facilities.

The new proposal sets forth two elements:

> (1) whether the school is located in a county with a dental Health Professional Shortage Area ("HPSA") score of 17 or greater; and
> (2) whether the school receives school-wide Title I funding pursuant to Title I, Part A of the Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act.

Board Response at 1. If a school meets both elements, the school would be designated a public health facility. The remainder of the response details difficulties had by the Board in reaching a majority vote in favor of a proposal.

The Board additionally submitted a Supplement attachment to its Response. The Supplement expressed concern about the ability to designate schools as public health facilities. Board Response, Supplement at 1-3. It expressed concern about the ability of limited access permit (LAP) hygienists to perform x-rays. Board Response, Supplement at 3-4. The Supplement additionally included three stories from dentists involving detrimental treatment by LAP hygienists. Board Response, Supplement at 6-7. These stories were included to "illustrate why the Board seeks to protect patients from the risk of unsupervised dental practice by hygienists." Board Response, Supplement at 6.

The Supplement went on to propose that the Board might consider a collaborative agreement structure between dentists and hygienists relating to LAP practice. Board Response, Supplement at 7-8. The Board further noted that care is "safest when delivered by a collaborative and informed healthcare team." Board Response, Supplement at 8. Finally, the Board asserted that public education would be insufficient to alleviate the harm of LAP practice. Board Response, Supplement at 8-9.

Following this Response, I requested certain additional information from the Board. First, I inquired about the total number of complaints against LAP hygienists received from 2016 to present. The Board responded that three complaints had been filed—two were dismissed without a cause finding; the third was administratively closed. I additionally requested information regarding the number of schools which would be covered by the Board's proposal, as well as the number of licensed dentists, dental hygienists, and LAPs by county. Finally, I asked whether it was the Board's intention to reevaluate school designations on a periodic basis. The Board responded that there was some interest in periodic reevaluation, but no official position had been taken.

In addition to receiving written comments from the Board, I met with the Board on January 13, 2022. Mont. Code Ann. § 37-1-122(3). The Board stated that it had attempted to create a proposal for a new rule for public health facility designation. I asked the Board how it had arrived at the determination to use the Health Professional Shortage Area (HPSA) score of 17 in its proposal. The Board noted that it had originally used a score of 20, but it seemed to exclude too many schools. One board member stated that they might have gone to a lower score but did not believe they had the votes to pass the proposal with a lower score. The member acknowledged that the score was somewhat arbitrary.

I additionally asked the dental hygienist members of the Board why they had voted against the proposal. Those members argued that too many schools would not receive care, that the HPSA score was arbitrary, and that they had not received a good explanation for the HPSA score chosen. Another member noted that, even in seemingly wealthier areas of Montana, there were still children who did not have access to care.

B. Comments from the Montana Dental Association

In my meeting with the Montana Dental Association (MDA), the Association stated that Montana children are well-taken care of and likely to see dentists. The MDA stated that the dental hygienists simply wanted to make money from LAP practice but did not properly care for kids. An MDA representative told a story of a child he had treated who had received what he believed to be an unnecessary x-ray without referral to a dentist. The MDA asserted that the Health Professional Shortage Area relied upon by the Board were not always beneficial because they relied on county lines; that a county did not have a dentist did not mean that families did not live close to a dentist in another county. The MDA also reiterated its position that schools could not be designated as public health facilities. The MDA expressed that it was concerned for child safety because hygienists were performing x-rays and were permitted to place sealants.

C. Comments from the Montana Dental Hygienists' Association

In my meeting with the Montana Dental Hygienists' Association (MDHA), concern was expressed that there were low-income students who were suffering with untreated tooth decay. The MDHA was concerned that the Board was not working in furtherance of a public need, justifying inaction based on a claim that there were enough dentists. The MDHA noted that no complaints against LAP practice ever had a cause finding. The MDHA asserted there were no actual safety concerns with LAP practice, and that too many children were falling through the cracks and not receiving care.

D. Comments from the public

Public comment in response to this matter fell into two categories: Dentists who commented that LAP practice should not be extended within schools. Dental hygienists who commented that the practice should be expanded. Approximately 31 written comments were received.

IV. Analysis

My statutory obligation is twofold: First, to determine whether board action "is made or taken pursuant to a clearly articulated state policy;" Second, to determine whether a "restraint or potential restraint of trade or commerce is reasonable and necessary to protect the public health, safety, or welfare." Mont. Code Ann. § 37-1-121. It is not within my authority to issue new rules on behalf of an administratively attached board. *See* Mont. Code Ann. § 2-15-121. Instead, I must determine whether the Board's own determination furthers state policy *and* protects public safety.

Admin. R. Mont. 24.138.509(5) meets neither of these tests. The Legislature clearly articulated the state's policy with regard to limited access permit hygienist practice in Montana: that public health facilities—identified directly by the Legislature or by the Board—were permissible zones of practice by dental hygienists who met applicable requirements. The Legislature impliedly recognized, through its legislation establishing LAP practice, that public health is furthered through this form of hygienist practice. The Legislature set forth a specific scope of practice for this practice.

The Legislature vested the Board with the authority to identify public health facilities beyond those it had itself identified. Mont. Code Ann. § 37-4-405(c). This authority is permissive—the board is authorized to establish additional facilities; the Legislature did not mandate such identification. Because the Board's determination is discretionary, it is subject to review. *See N.C. State Bd. Of Dental Exam'rs v. FTC*, 574 U.S. 494, 507 (2015).

A. Access to care remains a continuing issue in Montana

Oral healthcare remains problematic in Montana. Montana Department of Public Health and Human Services, Montana Oral Health: The State of the State's Oral Health (2020) (DPHHS Report). The DPHHS Report found that "[l]ess than half of Medicaid-enrolled children received preventive dental care and only one in six children aged 6 to 9 years received dental sealants in 2018." DPHHS Report at 11. The Report found:

> The prevalence of tooth decay among Montana children has changed very little over the last decade and remained higher than the U.S. rate of 52%. American Indian and low-income children had a significantly higher prevalence of tooth decay in 2017-2018 Montana oral health surveillance. When stratified by participation in the National School Lunch Program, significant differences in decay experience and untreated decay emerged. Schools with high participation in the program had higher experiences of decay and untreated decay.

DPHHS Report at 5. The Report concluded:

> The prevalence of decay experience among Montana children is higher than the national estimates, especially among low-income and American Indian children. Disparities are compounded by the vast geographic nature of the state and

> distribution of dental providers, with fewer providers serving non-core, frontier communities and areas with high-risk populations. Data also indicate low-income residents experienced barriers in accessing dental care related to perception of need and cost.

DPHHS Report at 18. The Report recommended increasing integration of oral health education and preventive care in early childhood programming, comprehensive oral health education programs in schools across Montana, and that the state "[f]oster policies that allow dental providers to deliver services in community-based settings to increase utilization of dental care." DPHHS Report at 18.

In short, the public health concerns which led to creation of the LAP hygienist program remain today. Montana's children are not accessing care as necessary and have trouble doing so. While LAP practice may not be a silver bullet, and while the MDA's desire for all children to have a complete "dental home" would be beneficial, the reality facing Montanans today is that expanded access to care, in more settings, is necessary. This is particularly so when neither the Board, nor the MDA, nor any other commenter produced actual evidence that LAP practice causes detriment.

The Legislature determined to permit LAP practice in Montana in furtherance of public health needs. The Board may not bar the practice through inaction based on policy disagreement with the Legislature.

B. Schools are permissible designees as public health facilities

The Board has expressed reservation during this active supervision process regarding its own authority to recognize schools as public health facilities pursuant to Mont. Code Ann. § 37-4-405(6). Board's Response to Active Supervision, Supplement at 2. This reservation mirrors more forcefully stated assertions from the Montana Dental Association that schools are barred from recognition at public health facilities. MDA relies on amendments to Senate Bill 190 during the 2003 session of the Montana Legislature. MDA claims that, because schools were included as public health facilities in the first draft of the bill, but excluded in the codified version, they are not permitted to be identified as public health facilities. MDA further opines that schools do not fit within a plain meaning of the phrase "public health facilities or programs." These arguments are without merit.

First, a plain reading of the statute permits schools to be identified. Because there is no ambiguity, we need not guess at the Legislature's intent. Montana Code Annotated § 37-4-405(3)(c)(i) identifies a variety of entity types which are, in all instances, public health facilities. Among a variety of typical "health" programs, the statute identifies "head start programs" and "group homes." Montana Code Annotated § 37-4-405(3)(c)(ii) expands the listing of facility types to any identified by the Board. Plainly, some entities identified in subsection (i) are not traditional healthcare facilities, but instead are entity types which most directly evidence a need for expansion of healthcare access. Apparent from the express listing by the Legislature is a desire to serve those in need—not to limit access based on entity type.

Second, MDA asks me to insert what has been omitted into a statute. It is true that the statute nowhere *requires* schools to be public health facilities. However, it is equally true that the statute nowhere *prohibits* schools as public health facilities. Inserting a prohibition where the Legislature chose silence exceeds my authority. *See* Mont. Code Ann. § 1-2-101.

Third, the amendment history of Senate Bill 190 evidences a desire for flexibility, rather than narrow construction. The first draft of Senate Bill 190 included as public health facilities detention centers and the department of corrections. These were removed in the first amendment to the bill. However, concurrent with their removal, present section (c)(ii) was included, vesting the Board with authority to name other public health facilities. These concurrent changes more likely show a legislative intent to permit flexibility. That is, rather than identifying *all* schools, *all* detention centers, and *all* programs under the department of corrections as public health facilities, the Board was entrusted to determine which specific facilities had need of assistance from dental hygienists.

Fourth, during discussion of Senate Bill 190 in the House Committee on Business and Labor, then Executive Director of the Montana Dental Association Mary McCue was asked:

> why "schools" had been crossed out in the bill. Ms. McCue said hygienists, under the law, are permitted to care for schools already. They can go anywhere and give instruction. The current bill now indicates that any public health facilities and programs identified by the Board may have services performed by hygienists.

Minutes, House Committee on Business and Labor (March 13, 2003). In short, the MDA represented to the Committee that schools were permissible public health facilities within the purview of the Board to identify.

Fifth, the history of the administrative rule—and Legislative inaction to modify it—evidences the availability to identify schools as public health facilities. Following passage of Senate Bill 190, the Board undertook administrative rulemaking to define the scope of limited access permit practice. 10 Mont. Admin. Reg. 1186 (May 20, 2004) at New Rules V-VI. While not recognizing any public health facilities at that time, the Board stated the reason for the new rules:

> The dental hygienist will be able to provide such dental hygiene preventative services to patients in public health facilities who, due to age, infirmity, disability, or financial constraints, would be otherwise unable to obtain regular dental care.

Id. at 1198. These rules were adopted as proposed. 16 Mont. Admin. Reg. 1955 (August 19, 2004). Two years later, the Board for the first time identified public health facilities. 14 Mont. Admin. Reg. 1795 (July 27, 2006). The Board identified Dodson School, Harlem Elementary School, and Harlem Junior/Senior High School. *Id.* at 1801. As its reason, the Board stated:

> Following a licensee's request to provide dental hygiene services under a LAP in an alternative setting, the board is amending the rule to specifically delineate three

> additional public health facilities and programs at which services can be provided under a LAP.

Id. The amendment was made apparently without comment in opposition. 1 Mont. Admin. Reg. 42 (January 11, 2007).[2]

This factual background of administrative rulemaking is important because, though some 15 years and eight regular sessions of the Legislature have passed, the Legislature has taken no action to restrain schools from being named as public health facilities. When the Legislature fails to act in contravention of agency rulemaking or statutory interpretation, its inaction is acquiescence to the interpretation. *Baitis v. Dep't of Revenue*, 2004 MT 17, ¶ 24, 319 Mont. 292, 83 P.3d 1278 ("The Legislature has acquiesced in the Department's interpretation of § 15-30-121(1)(b) for over forty years. It has had ample opportunity to correct any misinterpretation by the Department during that time. It has taken no action. We presume from this course of events that the Department has properly interpreted the law as written."); *see also Grenz v. DNRC*, 2011 MT 17, ¶ 41, 359 Mont. 154, 248 P.3d 785 ("Admin. R. M. 36.25.125(6) . . . was in full force and effect at the time that the legislature amended the leasing statute. We presume that the legislature acts with knowledge of the construction of similar statutes or related rules and to have adopted that construction when it amends a statute. . . . Admin. R. M. 36.25.125(6) represents a longstanding rule that has survived multiple amendments to the leasing statutes."); *Lohmeier v. State*, 2008 MT 307, ¶ 28, 346 Mont. 23, 192 P.3d 1137 (holding that Legislative inaction with regard to agency action means the Legislature believes the agency interpretation to be appropriate).

Montana Code Annotated § 37-4-405 has been amended once by the Legislature since the schools designation. During the 2017 Legislature, Senate Bill 120 passed, which made certain amendments to the statute. Public health facility designation was unchanged.

Finally, the Legislature expressly rejected an effort to bar schools from public health facility designation. In 2021, House Bill 344 was introduced by Rep. Jane Gillette.[3] The bill proposed to strike provisions permitting Board designations of public health facilities. In addition, the bill amended Mont. Code Ann. § 37-4-405(3)(c)(ii) to state that "public health facility"

> does not include schools, mobile school clinics, or school-based facilities or programs unless the school,[4] mobile school clinic, or school-based facility or program is a public health facility as specified in this subsection (3)(c).

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[2] It bears noting that Senate Bill 190's sponsor had not faded away following the legislative session in which the bill was passed. Indeed, at the time three schools were designated to be public health facility, Senator John Bohlinger had become Lt. Gov. John Bohlinger.

[3] Rep. Jane Gillette is also a licensed dentist and identified as a Delegate At Large of the 2021-2022 MDA Executive Committee. montanadental.org/who-we-are/mda-governance (last accessed January 31, 2022). Gillette was present as an MDA representative at my meeting with the Association on January 26, 2022.

[4] This amendment impliedly recognizes that at least some schools were recognized as public health facilities in the Montana Code Annotated. Any other interpretation renders this second clause superfluous. Such interpretations are to be avoided. *Mont. Indep. Living Project v. City of Helena*, 2021 MT 14, ¶ 12, 403 Mont. 81, 479 P.3d 961.

This Bill failed to garner support and died in committee.

A second bill, SB 281, introduced by Sen. Jeffrey Welborn, proposed expressly to include elementary and secondary schools, home schools, and outpatient medical facilities as blanket-included public health facilities under Mont. Code Ann. § 37-7-405(3)(c)(i). The bill died on second reading in the Senate.

In short, the Legislature has known for many years about the interpretation of public health facilities which includes schools. The Legislature has acquiesced to this interpretation. Schools are properly identifiable as public health facilities under the statute.

C. The current rule unduly restrains the trade of dental hygienists

No one stated support for the present rule identifying public health facilities. The rule recognizes that schools and other facilities may be identified as public health facilities. However, the rule is devoid of any process by which new facilities might be named. As elaborated upon here, there is further a lack of evidence that the present restraint on dental hygiene LAP practice is necessary to protect public safety and health. Indeed, as outlined in the DPHHS Report, what appears to be clear is that Montanans need more access to care in more places—particularly those where communities already come together.

To be clear, it is not my finding that LAP practice must be unfettered. The Legislature recognized the general requirement that hygienists work with supervision. *See* Mont. Code Ann. § 37-4-405(1). LAP practice is therefore the exception to the rule. However, the Board has failed to justify its current restrictions, and has recognized the need for expansion of the LAP practice through its proposal of a new test for determination of public health facilities.

D. Scope of practice concerns for LAP hygienists

The Board and MDA have expressed concerns regarding the permissible scope of practice for LAP hygienists. In particular, the Board stated that "[i]t is worth emphasizing the dangers of radiation exposure to children." Board Response, Supplement at 6. It further attached various reports of damage associated with x-rays. These concerns were expounded upon during my meeting with the MDA. In addition, the MDA expressed concern with hygienists applying sealants to teeth.

These concerns are outside the scope of active supervision review for at least two reasons. First, this active supervision review solely considers the identification by the Board of public health facilities in which LAP hygienist practice is considered. The scope of practice for hygienists is not presently subject to review.

Second, both areas of concern were specifically addressed by the Legislature. Statute defines LAP hygienist scope of practice:

> (a) A licensed dental hygienist practicing under public health supervision may provide dental hygiene preventative services that include removal of deposits and stains from the surfaces of teeth, the application of topical fluoride, polishing restorations, root planning, placing of sealants, oral cancer screening, exposing radiographs, charting of services provided, and prescriptive authority as allowed under 37-4-401(1)(c).
> (b) A licensed dental hygienist practicing under public health supervision may not provide dental hygiene preventative services that include local anesthesia, denture soft lines, temporary restorations, or any other service prohibited under 37-4-401.

Mont. Code Ann. § 37-4-405(4) (emphasis added).

As a creature of statute, the Board is without authority to eliminate a scope of practice expressly conferred by the Legislature. *See* Mont. Code Ann. § 2-4-305(6)(a). Similarly, my supervisory authority is to determine whether Board action "is made or taken pursuant to a clearly articulated state policy. . . ." Mont. Code Ann. § 37-1-121(1)(d). It is clearly articulated state policy that dental hygienists are permitted to place sealants and expose radiographs. It is similarly clear that, to the extent the Board is, or MDA advocates for, restraining of LAP practice because of its disagreement with statute, such action contravenes clearly articulated state policy and exceeds Board authority.

E. The Board's proposal in response to active supervision

As set forth above, the Board proposed a two-element test to determine new public health facilities. This proposal is outside the scope of the present active supervision process. Nonetheless, my supervisory authority does include the authority to "recommend modifications . . . for the board's consideration." Mont. Code Ann. § 37-1-121(1)(d). As such, I will comment on the proposal only insofar as to provide guidance for any future rulemaking.

Initially, within the proposal and during the meeting with the Board, it is unclear at this time whether the proposal continues to be supported by a majority of the Board. Members referred to the HPSA score setting as "arbitrary." Additionally, within the Board's Response Supplement, the Board averred that a collaborative agreement rule might be of benefit.

Substantively, the Board is reminded that determinations regarding restraint of trade of licensee types must be supported by evidence and express consideration of the public safety and health risks of a failure to restrain trade. Such consideration may not be merely rooted in anecdotes. Further, any proposal from the Board must conform to its statutory obligations. While the Board may disagree with the Legislature's determinations of the scope of practice for LAPs, the Board may not contravene legislative determinations.

V. Conclusion

Pursuant to the duties vested in me as Commissioner of Labor & Industry pursuant to Mont. Code Ann. § 37-1-121 and -122, and for the reasons set forth above:

I DISAPPROVE the Board's implementation of Mont. Code Ann. § 37-4-405 through Admin. R. Mont. 24.138.509(5).

Dated this 11th day of February 2022.

Laurie Esau
Commissioner of Labor & Industry

c. Economic Affairs Interim Committee