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Economic Affairs Interim Committee

68th Montana Legislature

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May 10, 2024

Sarah Swanson
Commissioner, Montana Department of Labor and Industry
1315 Lockey Ave
PO Box 1728
Helena, MT 59624-1728

Dear Commissioner Swanson,

A majority of the members of the Economic Affairs Interim Committee (EAIC) have objected to a portion of Montana Administrative Register (MAR) Notice No. 24-138-84 (Rule Notice). The Rule Notice proposes to amend the Board of Dentistry's (Board) rules relating to dental hygienists and limited access permits.

To briefly summarize the committee's rule review history with the Board's Rule Notice, the EAIC objected under section 2-4-305(9), MCA, at its January and March 2024 meetings. These objections generally prohibited the department from adopting the Rule Notice until the last publication date before the 6-month notice and adoption period had expired.

At its May 7, 2024, meeting, the EAIC then objected to the Rule Notice under section 2-4-406, MCA. This section permits a committee to object if it believes a rule notice has not been adopted in substantial compliance with provisions in the Montana Administrative Procedure Act (MAPA):

2-4-406. Committee objection to violation of authority for rule — effect. (1) Subject to 2-4-112, if the appropriate administrative rule review committee objects to all or some portion of a proposed or adopted rule because the committee considers it not to have been proposed or adopted in substantial compliance with 2-4-302, 2-4-303, and 2-4-305, the committee shall send a written objection to the agency that promulgated the rule. The objection must contain a concise statement of the committee's reasons for its action. [...]

This objection statute requires the committee to inform the Board with "a concise statement of the committee's reasons for its actions." This letter constitutes notice of the EAIC's objection and a concise statement of the committee's reasons for its action.

The Rule Notice is not in substantial compliance with section 2-4-305, MCA, because the expansion of the definition of a “public health facility” or “program” to additional schools is not consistent and in conflict with the enabling statute, section 37-4-405, MCA.

The EAIC objected to the proposed rule amendments creating subsection (2)(a) and (2)(b) in Admin. R. Mont. 24.138.509 that would expand where a limited access permit may be used by a dental hygienist. Specifically, the Rule Notice sought to further define “public health facilities” and “programs” to: “(a) schools that receive federal funds under Title I of the Elementary and Secondary Education act;” and “(b) schools in which at least 65% of the student population is eligible for free or reduced price lunch under federal guidelines.”¹

The statutory grant allowing dental hygienists to practice under a limited access permit provides for a restricted scope of practice:

37-4-405. Dental hygienist to practice under supervision of licensed dentist — exceptions — definitions. (1) A licensed dental hygienist may:

(a) with the permission of the supervising dentist, practice in the office of a licensed and actively practicing dentist under the general supervision of a licensed dentist; or

(b) provide dental hygiene preventative services in a public health facility under the general supervision of a licensed dentist or, subject to the provisions of subsection (4), under public health supervision.

(2) A dental hygienist may give instruction in oral hygiene without the direct supervision or general supervision of a licensed dentist in a public or private institution or hospital or extended care facility or under a board of health or in a public clinic.

(3) For the purposes of this section, the following definitions apply:

(a) "direct supervision" means treatment by a dental auxiliary or licensed dental hygienist provided with the intent and knowledge of the dentist. The treatment must be performed while the dentist is on the premises.

(b) "general supervision" means treatment by a licensed dental hygienist provided with the intent and knowledge of the dentist licensed and residing in the state of Montana. The supervising dentist need not be on the premises.

(c) "public health facility" means:

(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); and

¹ The current version of Admin. R. Mont. 24.138.509, which has been effective for over 15 years, only provides that a limited access permit may be used at the Dodson School, Harlem Elementary School, Harlem Junior/Senior High School, and Paris Gibson Education Center. The EAIC did not object to proposed insertions of subsections (2)(c) (hospice facilities); (2)(d) (family violence shelters); and (2)(e) (homeless shelters).

(d) "public health supervision" means the provision of limited dental hygiene preventative services without the prior authorization or presence of a licensed dentist in a public health facility.

(4) (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 planing, 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.

(c) A licensed dental hygienist practicing under public health supervision shall provide:

(i) for the referral to a licensed dentist of any patient needing treatment outside the scope of practice authorized for a licensed dental hygienist under this subsection (4); and

(ii) treatment based upon medical and dental health guidelines adopted by rule by the board.

(5) (a) A dental hygienist practicing under public health supervision shall obtain a limited access permit from the board.

(b) The board shall adopt rules:

(i) defining the qualifications necessary to obtain a limited access permit; and

(ii) providing a process for obtaining a limited access permit.

(c) The provision of services under a limited access permit is limited to patients or residents of facilities or programs who, due to age, infirmity, disability, or financial constraints, are unable to receive regular dental care.

(6) 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.

This statute allows licensed dental hygienists to provide limited dental hygiene preventative services under "public health supervision" in a "public health facility" after obtaining a "limited access permit" by the Board.

Section 37-4-405(3)(c), MCA, specifically defines what the legislature considers as a "public health facility." Here, the legislature has specifically identified institutions ranging from nursing homes, to home health agencies, to mobile public health clinics. Importantly, the statute fails to identify schools – let alone a large array of schools meeting certain financial guidelines as determined under federal guidelines – of any sort. Had the legislature intended to include schools in the definition, it would have done so.

Importantly, subsection (5)(c) further illustrates the legislature's limitation of the limited access permit. This subsection requires that the provision of services "is limited to *patients or residents* of facilities or programs who, due to age, infirmity, disability, or financial constraints, are unable to receive regular dental care." It simply exceeds the statutory authority to consider a child attending a school as a "patient" or "resident."

Additionally, while subsection (6) allows the board to “identify, by rule, other public health facilities and programs,” these other public health facilities are nevertheless subject to the limited definition provided by the legislature as a “public health facility.” To that end, the legislature requires the Board to “identify” other public health facilities and programs through rulemaking – which is ultimately subject to legislative review. In the instant case, the Board has “identified” other public health facilities and programs through rule and the EAIC has objected accordingly.

Thus, the EAIC objects to the Board’s Rule Notice on the basis that it is not in substantial compliance with section 2-4-305, MCA, because the proposed rule is in conflict with and is not consistent with section 37-4-405, MCA. Expanding the scope of the rule to a large category of schools exceeds the statutory authority granted by the legislature to the Board in section 37-4-405, MCA. The limited access permit is intended to be restricted in nature and only for limited public health purposes. The Rule Notice is outside the scope of the scope of authority laid out by the legislature.

Thank you for your attention in this matter.

Sincerely,

/s/

Representative Josh Kassmier, Presiding Officer