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To: Mr. Arthur F. Hickham, Jr.
Executive Director
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From: Terrence "Joe" Donahue, Jr.
Louisiana Department of Justice, Civil Division
Occupational Licensing Review Program

Date: August 8, 2023

Subject: OLRP File No. 22-11-OR-0018B
Proposed LAC 46:XXXIII.1509 – Third-Party Anesthesia/Analgesia
Administration

I. Summary

The Louisiana State Board of Dentistry (the "Board") proposes amending the provisions of LAC 46:XXXIII § 1509 with respect to the administration of anesthesia or analgesia in a dental office by third parties. The Board published a Notice of Intent to promulgate the proposed amendment to the regulation in the Louisiana Register on May 20, 2023, and invited written public comments and requests for oral presentation, argument, or a public hearing for a 20-day period ending on June 9, 2022. No comments or requests were received during the public comment period.

Licensing requirements create barriers to market entry for individuals desiring to engage in a profession or occupation, and the proposed amendment to § 1509 is properly considered an occupational regulation with reasonably foreseeable anti-competitive effects.¹ The Board submitted the proposed amendment to the Louisiana Department of Justice's Occupational Licensing Review Program and the Louisiana Attorney General initiated a review on June 13, 2023. The Attorney General invited public comments on the proposed amendments for a 30-day period ending on July 13, 2023, but received no comments. As set forth below, the Attorney General has determined the Board's proposed amendment to § 1509 departs from clearly articulated state policy and therefore disapproves this amendment for adoption as drafted.

II. Analysis

The Dental Practice Act, La. R.S. 37:751 *et seq.*, declares it unlawful for a person not

¹ La. R.S. 49:260(G)(4).

licensed by the Board to practice dentistry or dental hygiene in the state of Louisiana.² The legislature has therefore directed the Board to issue the licenses, certificates, or authorities contemplated in the Dental Practice Act to all applicants who have been found to meet the necessary qualifications.³ The Board is similarly charged with promulgating rules regulating the practice of dentistry by prescribing those acts, services, procedures, and practices which may be performed by dentists and dental hygienists, and by imposing requirements and restrictions upon such performance as are proper and necessary to protect and promote the public health and welfare of Louisiana citizens.⁴

A licensed dentist may administer general and local anesthetics and prescribe drugs or medicines necessary or proper in practicing his profession.⁵ A licensed dentist who has completed the proper training and is qualified as a Board eligible or Board certified maxillofacial surgeon may also perform patient histories and examinations in a hospital setting upon receiving approval from the hospital.⁶ When nitrous oxide inhalation analgesia, enteral moderate sedation, parenteral moderate sedation, deep sedation, or general anesthesia are to be used in a dental practice, Board authorization must first be obtained to ensure these procedures are performed in a properly staffed, designed, and equipped facility capable of handling such procedures, and the potential problems and emergencies incident thereto.⁷ The Board authorizes the performance of sedation and anesthesia procedures by issuing “personal permits” to dentists who administer the sedation or anesthesia and “office permits” for the facilities where the procedures are to be performed.⁸ Both the facilities and the dentist must be permitted for the deepest level of anesthesia or analgesia that will be administered, and must comply with regulations promulgated by the Board.⁹

A personal permit is not statutorily required when a dentist uses the services of a third-party who is: (1) a medical doctor, (2) a doctor of osteopathy specializing in anesthesiology, (3) a certified registered nurse anesthetist, or (4) an oral and maxillofacial surgeon permitted by the Board to administer moderate sedation, deep sedation, and general anesthesia.¹⁰ A third-party anesthetist must remain on the premises of the dental facility until any patient given parenteral drugs is sufficiently recovered and must have been found to comply with the Board’s requirements for the administration of anesthesia in the dental facility as determined by inspection of both the facility and the third-party anesthetist’s equipment in connection with issuance of the “office permit.”¹¹

Chapter 15 of LAC 46:XXXIII contains the regulations promulgated by the Board pertaining to the administration of analgesia and anesthesia. As contemplated in the

² La. R.S. 37:751(11); La. R.S. 37:751(B).

³ La. R.S. 37:760(A)(6).

⁴ La. R.S. 37:760(A)(8).

⁵ La. R.S. 37:772(A)(1).

⁶ La. R.S. 37:772(B)(1).

⁷ La. R.S. 37:793(C)(1).

⁸ La. R.S. 37:793(C)(2) and (3).

⁹ La. R.S. 37:793(C)(3).

¹⁰ La. R.S. 37:793(H)(2).

¹¹ *Id.*

Dental Practice Act, these regulations provide for the issuance of both “personal permits” to Board licensees, and “office permits” for the facilities in which the administration of analgesia or anesthesia is to occur.¹² In order to receive a personal permit, a dentist must demonstrate adequate training and experience with the level of sedation for which the permit is being sought.¹³ Dentists seeking a personal permit for any level of sedation must also provide proof of certification in cardiopulmonary resuscitation.¹⁴

Consistent with the Dental Practice Act, the existing version of § 1509 provides for the administration of sedation or general anesthesia in conjunction with dental work when a dentist utilizes the services of: (1) a Louisiana-licensed physician specializing in anesthesiology, (2) a certified nurse anesthetist, or (3) an oral and maxillofacial surgeon permitted by the Board to administer sedation or anesthesia.¹⁵ The proposed amendment to § 1509 removes the reference to oral and maxillofacial surgeons permitted by the Board and replaces it with a reference to any Louisiana-licensed dentist with an appropriate sedation permit for the level of anesthesia to be achieved.¹⁶ The stated purpose of the amendment is “to clarify that a Louisiana-licensed dentist with a sedation permit can provide third-party sedation.”¹⁷

While the proposed amendment to § 1509 would reduce potential barriers to the provision of third-party sedation or anesthesia by appropriately permitted Louisiana dentists, it fails to adhere to the policies affirmatively expressed and clearly articulated by the Louisiana Legislature in La. R.S. 37:793. Specifically, while La. R.S. 37:793(C) provides for the administration of sedation and anesthesia by any properly permitted Louisiana dentist, the statute places greater limitations upon the individuals who may serve as third-party anesthetists where the dentist performing a procedure lacks the required permits. Pursuant to La. R.S. 37:793(H)(2), only medical doctors, doctors of osteopathy specializing in anesthesiology, certified registered nurse anesthetists, and oral and maxillofacial surgeons may provide third party anesthetist services that will relieve the need for the dentist performing the dental procedure of the necessity to obtain a personal permit. Nothing in the statute suggests that the legislature intended to allow dentists who have not obtained the post-doctoral training needed to qualify as an oral and maxillofacial surgeon to serve as a third-party anesthetist when they are not otherwise engaged in the practice of dentistry in connection with a dental procedure. In addition, the language of La. R.S. 37:793(H)(2) does not delegate to the Board any authority to expand the categories of professionals who may serve as third-party anesthetists, and the proposed amendment to § 1509 therefore departs from the affirmatively expressed state policy embodied in La. R.S. 37:793(H)(2).


III. Determination

While the Attorney General commends the Board’s continuing efforts to reduce existing

¹² LAC 46:XXXIII.1502.A.
¹³ LAC 46:XXXIII.1503.A, B, and C.
¹⁴ LAC 46:XXXIII.1503.D.
¹⁵ LAC 46:XXXIII.1509.A.
¹⁶ Notice of Intent, Louisiana Register Vol. 49, No. 5 at p. 932 (May 20, 2023).
¹⁷ Rule Submission Form dated May 3, 2023 at ¶ 3.

barriers to competition in the practice of dentistry, as stated above, the proposed amendment to LAC 46:XXXIII § 1509 deviates from clearly articulated state policy, and the amendment is therefore disapproved and may not be finally adopted by the Board. Should the Board elect to revise and re-submit the proposed amendment to § 1509, consideration should also be given to whether limiting the provision of third-party anesthetist services to medical doctors specializing in anesthesiology, as provided in the existing regulation, accords with the policies announced in La. R.S. 37:973(H)(2), as the statute only contemplates requiring such specialization for doctors of osteopathy.

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