

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the the Proposed
Amendments to Permanent Rules of the
Minnesota Board of Dentistry Relating to
Dentists, Dental Therapists, Dental
Hygienists, and Licensened Dental
Assistants

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

This matter came before Administrative Law Judge Jim Mortenson (ALJ) for a rulemaking hearing on November 6, 2014. The public hearing was held in Conference Room A of the University Park Plaza, 2829 University Avenue SE, Minneapolis, Minnesota.

The Minnesota Board of Dentistry (Board) proposes to amend its rules regarding: 1) the training required for advanced cardiac life support (ACLS) and cardiopulmonary resuscitation (CPR); 2) providing proper notification for reinstatement of license; 3) notifying the Board of nitrous oxide form for dental therapists; 4) changing the audit fee; 5) adding new duties regarding informed consent and retraction material for dental hygienists and licensed dental assistants; and 6) including the task of informed consent by allied dental personnel within the record keeping regulations.

The Board's proposals are not controversial. Only the proposal regarding the training required for ACLS and CPR generated negative comments and the request for hearing.

The hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act. The Minnesota Legislature has designed this process so as to ensure that state agencies and regulatory boards have met all of the requirements that the legislature has established for adopting administrative rules.

The hearing was conducted so as to permit Board representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. The hearing process provides the general public an opportunity to review, discuss, and critique the proposed rules.

The Board must establish that the proposed rules are necessary and reasonable; the rules are within the Board's statutory authority; and any modifications that the Board

may have made after the proposed rules were initially published in the *State Register* are within the scope of the matter that was originally announced.[†]

The Board panel at the public hearing included: Marshall Shragg, MPH, Executive Director, Minnesota Board of Dentistry; Jennifer Middleton, Assistant Attorney General; and Kathy Johnson, Paul Walker, Nancy Kearn, Teri Youngdahl, Allen Rasmussen, Amy Johnson, and Michelle Schroeder, all of the Minnesota Board of Dentistry.^{††}

Two people attended the hearing and signed the hearing register. Following statements from Board members, the proceedings continued until all interested persons, groups, or associations had an opportunity to be heard concerning the proposed rules. One member of the public, from the Minnesota Dental Hygienists Association, made statements during the hearing.

After the close of the hearing, the Administrative Law Judge kept the rulemaking record open for another 20 calendar days until November 26, 2014, to permit interested persons and the Board to submit written comments. Following the initial comment period, the hearing record was open an additional five business days so as to permit interested parties and the Board an opportunity to reply to earlier-submitted comments. The hearing record closed on December 5, 2014.

SUMMARY OF CONCLUSIONS

The Board has established that it has the statutory authority to adopt the proposed rules, that it complied with applicable procedural requirements, and that the proposed rules are necessary and reasonable.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. Regulatory Background to the Proposed Rules

1. The proposed amendments to the permanent rules relating to dentists, dental hygienists, and licensed dental assistants modify existing language in the following areas: clarifying the appropriate training required for ACLS and CPR; providing proper notification for reinstatement of license; notifying the Board of nitrous oxide form for dental therapists; changing the audit fee; adding new duties regarding informed consent and retraction material for dental hygienists and licensed dental assistants; and including the task of informed consent by allied dental personnel within the record keeping regulations.¹

[†] See, Minn. Stat. §§ 14.05 and 14.50 (2014).

^{††} See, DIGITAL RECORDING, OAH Docket No. 5-0902-31791 (November 6, 2014); Rule Hearing Register.

¹ Ex. A at 1003; Ex. D at 1; Ex. E; Ex. F at 342; Ex. G; Ex. H at 3; Ex. K-1; Ex. L at 1.

2. The proposed amendments affect the following rules: Minnesota Rules parts: 3100.0100, 3100.0300, 3100.1100, 3100.1150, 3100.1160, 3100.1200, 3100.1300, 3100.1400, 3100.1850, 3100.3300, 3100.3400, 3100.3500, 3100.3600, 3100.5100, 3100.5300, 3100.7000, 3100.8500, 3100.8700, and 3100.9600.²

II. Rulemaking Authority

3. The Board has the authority to promulgate rules as necessary to carry out and make effective the provisions and purposes of Minn. Stat. §§ 150A.01-.12. The Board's rules may specify the training and education necessary for administering general anesthesia and intravenous conscious sedation.³

4. The Administrative Law Judge concludes that the Board has the statutory authority to amend the permanent rules relating to dentists, dental therapists, dental hygienists, and licensed dental assistants.⁴

III. Procedural Requirements of Chapter 14

A. Publications and Filings

5. On January 3, 2014, the Board posted a draft copy of the proposed rule changes on the Board's website at www.dentalboard.state.mn.us.⁵

6. On January 8, 2014, the Board posted a copy of the Request for Comments for publication in the *State Register* on the Board's website at www.dentalboard.state.mn.us.⁶

7. On January 8, 2014, the Board posted a draft copy of the Statement of Need and Reasonableness (SONAR) on the Board's website at www.dentalboard.state.mn.us.⁷

8. On January 9, 2014, the Board e-mailed the Request for Comments to all persons on the Board's rulemaking mailing list.⁸

9. On January 9, 2014, the Board contacted the Minnesota Dental Association, the Minnesota Dental Hygienists' Association, and the Minnesota Dental Assistants Association with a request to publish in each organization's newsletter or post on each organization's website the information regarding the proposed rule amendments.⁹

² Ex. A at 1003; Ex. C; Ex. D at 1; Ex. E; Ex. F at 342; Ex. G; Ex. H; Ex. K-1; Ex. K-2; Ex. L at 1.

³ Minn. Stat. § 150A.04, subd. 5.

⁴ *Id.*

⁵ Ex. H at 1; Ex. K-1 at 5.

⁶ *Id.*

⁷ *Id.*

⁸ Ex. H at 2; Ex. K-1 at 5.

⁹ *Id.*

10. On January 13, 2014, the Board's request for comments was published in the *State Register*, requesting that all comments be submitted to the Board by March 14, 2014.¹⁰

11. On January 29, 2014, the Board e-mailed nearly 10,000 licensees including dentists, dental therapists, dental hygienists, and licensed dental assistants, providing information about the proposed amendments.¹¹

12. By March 14, 2014, the end of the 60-day Request for Comments period, the Board had received comments from only two organizations, the Health and Safety Institute (HSI) and the Dental Assisting National Board (DANB). The HSI opposed the Board's proposed elimination of the phrase "equivalent course" under the rules for CPR and ACLS. The DANB informed the Board about the Isolation Exam, offered by DANB, consisting of isolation procedures, including gingival retraction.¹²

13. On August 8, 2014, the Board posted a copy of its proposed rules dated April 22, 2014, and a final copy of its SONAR dated August 8, 2014, on the Board's website.¹³

14. On August 8, 2014, the Board consulted with the Commissioner of Minnesota Management and Budget by mailing a letter seeking review. The letter included: 1) the Governor's Office Proposed Rule and SONAR form; 2) the April 22, 2014 Revisor's draft of the proposed rules; and 3) the August 8, 2014 copy of the SONAR.¹⁴

15. By way of an Order dated August 20, 2014 Administrative Law Judge Jim Mortenson approved the Board's Additional Notice Plan and Dual Notice.¹⁵

16. On or about September 9, 2014, the Board e-mailed the Dual Notice of Intent to Adopt Rules to everyone on the Board's rulemaking mailing list.¹⁶

17. On September 9, 2014, the Board e-mailed its SONAR to the Legislative Reference Library to meet the requirement set forth in Minn. Stat. §§ 14.131, .23 (2014).¹⁷

18. On September 9, 2014, the Board mailed a copy of the Dual Notice, SONAR, and draft language to the interested legislators and the Legislative Coordinating Commission.¹⁸

¹⁰ Ex. H at 2; Ex. K-1 at 6.

¹¹ Ex. H at 3; Ex. K-1 at 6

¹² Ex. H at 3; Ex. K-1 at 6-7.

¹³ Ex. H at 3; Ex. K-1 at 7.

¹⁴ Ex. K-2.

¹⁵ Ex. H.

¹⁶ Ex. G.

¹⁷ Ex. E.

¹⁸ Ex. K-1.

19. On September 15, 2014, the Board published in the *State Register* a Request for Comments seeking comments on the following proposed rules: 3100.0100, 3100.0300, 3100.1100, 3100.1150, 3100.1160, 3100.1200, 3100.1300, 3100.1400, 3100.1850, 3100.3300, 3100.3400, 3100.3500, 3100.3600, 3100.5100, 3100.5300, 3100.7000, 3100.8500, 3100.8700, and 3100.9600.¹⁹

20. The Dual Notice of Intent to Adopt Rules, published in the September 15, 2014 *State Register*, noticed October 15, 2014, as the deadline to submit comments or request a hearing.²⁰

21. The Board received one hearing request, on October 15, 2014, from Michael Ahern, on behalf of 30 individuals requesting a public hearing on the published proposed rules.²¹ The name and address of each person requesting the hearing was included in an attachment to the hearing request.²² The request included the portions of the rule to which they were objecting.²³

22. The Dual Notice identified the date and location of the hearing in this matter.²⁴

23. At the hearing on November 6, 2014, the Board filed copies of the following documents, as required by Minn. R. 1400.2220 (2013):

- (a) the Board's Request for Comments as published in the *State Register* on January 13, 2014;²⁵
- (b) the proposed rules dated April 22, 2014, including the Revisor's approval;²⁶
- (c) the SONAR;²⁷
- (d) the Certificate of Mailing the SONAR to the Legislative Reference Library on September 9, 2014;²⁸
- (e) the Dual Notice as mailed and as published in the *State Register* on September 15, 2014;²⁹
- (f) the Certificate of Mailing the Dual Notice to the rulemaking mailing list on September 9, 2014;³⁰

¹⁹ *Id.*; Ex. F.

²⁰ Ex. F at 342-343.

²¹ Ex. I.

²² *Id.*

²³ *Id.*

²⁴ Ex. F.

²⁵ Ex. A.

²⁶ Ex. C.

²⁷ Ex. D.

²⁸ Ex. E.

²⁹ Ex. F.

- (g) the Certificate of Giving Additional Notice Pursuant to the Additional Notice Plan;³¹
- (h) the written comments on the proposed rules that the Board received during the comment period that followed the Dual Notice;³²
- (i) the Certificate of Sending the Dual Notice and the Statement of Need and Reasonableness to Legislators on September 9, 2014,³³ and
- (j) a memorandum from the Minnesota Management and Budget Office dated October 14, 2014.³⁴

B. Additional Notice Requirements

24. Minn. Stat. §§ 14.131 and 14.23 require that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule; or alternatively, the agency must detail why these notification efforts were not made.³⁵

25. On August 19, 2014, the Board provided the Dual Notice of Intent to Adopt in the following manner, according to the Additional Notice Plan approved by the Office of Administrative Hearings on August 20, 2014:

- (a) Over the last few years, the Executive Committee, the Policy Committee, the Professional Development Committee, and the Allied Dental Education Committee of the Board have held frequent public meetings to discuss and to develop these proposed rules. The Board has disseminated official notice of these public meetings to all licensed dental professionals, association representatives, and the general public. Drafts of the proposed rules have been distributed and reviewed during these public meetings by all individuals in attendance and input has been invited.
- (b) On January 3, 2014, the Board posted a draft copy of the proposed rule changes on the Board's website at www.dentalboard.state.mn.us making it accessible to the following individuals: all dentists; dental therapists; dental hygienists; dental assistants; state legislators; other health boards; professional associations; and members of the general public. This draft copy

³⁰ Ex. G.

³¹ Ex. H.

³² Ex. I.

³³ Ex. K-1.

³⁴ Ex. K-2.

³⁵ See Minn. Stat. §§ 14.23, .131.

identified the Board rules that will be affected by the Board's proposed rule changes.

- (c) On January 8, 2014, the Board posted a copy of the Request for Comments for publication in the State Register on the Board's website at www.dentalboard.state.mn.us. This website is accessible to the following individuals: all dentists; dental therapists; dental hygienists; dental assistants; state legislators; other health boards; professional associations; and members of the general public.
- (d) On January 8, 2014, the Board posted a draft copy of the SONAR on the Board's website at www.dentalboard.state.mn.us.
- (e) On January 9, 2014, the Board mailed the Request for Comments to all persons on the Board's rulemaking mailing list by sending an electronic copy via e-mail to all persons on the list.
- (f) On January 9, 2014, the Board contacted the representatives of the Minnesota Dental Association (Dentists), the Minnesota Dental Hygienists' Association (Dental Hygienists), and the Minnesota Dental Assistants Association (Dental Assistants) with a request to publish in each organization's newsletter or post on each organization's website for its members the following information:

MINNESOTA BOARD OF DENTISTRY - NEW PROPOSED RULES

RE: Proposed Amendments to Permanent Rules Relating to Dentists, Dental Therapists, Dental Hygienists, and Licensed Dental Assistants, *Minnesota Rules* 3100.0100, 3100.0300, 3100.1100, 3100.1150, 3100.1160, 3100.1200, 3100.1300, 3100.1400, 3100.1850, 3100.3300, 3100.3400, 3100.3500, 3100.3600, 3100.5100, 3100.5300, 3100.7000, 3100.8500, 3100.8700, and 3100.9600

The Minnesota Board of Dentistry is considering some amendments to its existing rules. The amendments that are under consideration in the Board's proposed rules focus on the following areas: advanced cardiac life support; CPR; reinstatement of license; nitrous oxide form from dental therapists; audit fee; new duties regarding informed consent and retraction material for dental hygienists and licensed dental assistants; and record keeping. The proposed rules also include amendments that are "housekeeping" in nature and do not make any substantive changes to requirements for licensure or renewal.

Please check the Board's website at www.dentalboard.state.mn.us for the entire text of these proposed rules and to review the Statement of Need and Reasonableness (SONAR) for these proposed rules.

- (g) On January 13, 2014, the Board's Request for Comments was published in the *State Register*, requesting that all comments be submitted to the Board by March 14, 2014. All comments received by the Board regarding the proposed rules shall be reviewed and any suggested changes shall be considered by the Board.
- (h) On January 29, 2014, the Board sent an electronic mailing to nearly 10,000 licensees including dentists, dental therapists, dental hygienists, and licensed dental assistants, containing the following information:

MINNESOTA BOARD OF DENTISTRY - NEW PROPOSED RULES

RE: Proposed Amendments to Permanent Rules Relating to Dentists, Dental Therapists, Dental Hygienists, and Licensed Dental Assistants, *Minnesota Rules* 3100.0100, 3100.0300, 3100.1100, 3100.1150, 3100.1160, 3100.1200, 3100.1300, 3100.1400, 3100.1850, 3100.3300, 3100.3400, 3100.3500, 3100.3600, 3100.5100, 3100.5300, 3100.7000, 3100.8500, 3100.8700, and 3100.9600

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Please check the Board's website at www.dentalboard.state.mn.us for the entire text of these proposed rules and to review the Statement of Need and Reasonableness (SONAR) for these proposed rules.

- (i) By March 14, 2014, the end of the 60-day Request for Comments period, the Board had received only two comments regarding its proposed rules. One from the Health and Safety Institute opposing elimination of the phrase "equivalent course" for CPR and ACLS, and another from the Dental Assisting National Board with information about their examination for isolation procedures, including gingival retraction.
- (j) On August 8, 2014, the Board posted a copy of its proposed rules dated April 22, 2014 (latest version) and a final copy of its SONAR dated August 8, 2014, on the Board's website making this information accessible to the following individuals: all dentists; dental therapists; dental hygienists; dental assistants; state legislators; other

health boards; professional associations; and members of the general public.

- (k) Prior to publication of the Dual Notice in the State Register, the Board will send by electronic mail a copy of the Dual Notice of Intent to Adopt Rules, the Proposed Rules, and the Statement of Need and Reasonableness to the representatives of the Minnesota Dental Association, the Minnesota Dental Hygienists' Association, the Minnesota Dental Hygiene Educators Association, the Minnesota Dental Assistants Association, and the Minnesota Educators of Dental Assistants.³⁶

C. Notice Practice

1. Notice to Stakeholders

26. On September 9, 2014, the Board provided a copy of the Dual Notice of Intent to Adopt to its official rulemaking list (maintained under Minn. Stat. § 14.14 (2014)), and to stakeholders identified in its Additional Notice Plan.³⁷

27. The comment period on the proposed rules expired at 4:30 p.m. on October 15, 2014.³⁸

28. There are 36 days between September 9, 2014 and October 15, 2014.

29. The Board fulfilled its responsibilities under Minn. R. 1400.2080, subp. 6, to send the Dual Notice to Stakeholders “at least 33 days before the end of the comment period”

2. Notice to Legislators

30. On September 9, 2014, the Board sent a copy of the Notice of Hearing and the Statement of Need and Reasonableness to Legislators, as required by Minn. Stat. § 14.116 (2014).³⁹

31. Minn. Stat. § 14.116 requires the Board to send a copy of the Notice of Intent to Adopt and the SONAR to certain legislators on the same date that it mails its Notice of Intent to Adopt to persons on its rulemaking list and pursuant to its Additional Notice Plan.⁴⁰

32. The Board fulfilled its responsibilities to send the Dual Notice to legislators “at least 33 days before the end of the comment period”

³⁶ Ex. H.

³⁷ Ex. G.

³⁸ *Id.*

³⁹ Ex. K-1.

⁴⁰ See Minn. Stat. §§ 14.116 (2014).

3. Notice to the Legislative Reference Library

33. On September 9, 2014, the Board electronically mailed a copy of the SONAR to the Legislative Reference Library.⁴¹

34. Minn. Stat. § 14.23 requires the Board to send a copy of the SONAR to the Legislative Reference Library when the Notice of Intent to Adopt is mailed.⁴²

35. The Board fulfilled its responsibilities to send the Dual Notice to the Legislative Reference Library “at least 33 days before the end of the comment period”

D. Impact on Farming Operations

36. Minn. Stat. § 14.111 (2014) imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the *State Register*.⁴³

37. The proposed rules do not impose restrictions or have an impact on farming operations. The Board was not required to notify the Commissioner of Agriculture.⁴⁴

E. Statutory Requirements for the SONAR

38. The Administrative Procedure Act obliges an agency adopting rules to address eight factors in its SONAR. Those factors are:

- (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
- (2) the probable costs to the Board and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the Board and the reasons why they were rejected in favor of the proposed rule;

⁴¹ Ex. E.

⁴² See Minn. Stat. §§ 14.23 (2014).

⁴³ See Minn. Stat. §§ 14.111 (2014).

⁴⁴ Exs. C, D.

- (5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;
- (6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals;
- (7) an assessment of any differences between the proposed rule and existing federal regulations, and a specific analysis of the need for and reasonableness of each difference; and
- (8) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule and reasonableness of each difference.⁴⁵

1. The Board's Regulatory Analysis

- (a) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.**

39. The Board asserts that the classes of people who will likely be affected by the proposed rules are the general public and the following regulated dental professionals: dentists; dental therapists; dental hygienists; and licensed dental assistants.⁴⁶

- (b) The probable costs to the Board and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.**

40. The Board asserts that it will not incur any increased costs beyond those currently associated with operation under existing rules. The Board does not anticipate any costs to any other agency in the implementation and enforcement of the proposed rules. The Board does not anticipate any net effect on state revenues.⁴⁷

⁴⁵ Minn. Stat. § 14.131.

⁴⁶ Ex. D at 2.

⁴⁷ *Id.*

(c) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

41. The Board asserts there are no less costly or intrusive methods for achieving the purpose of the proposed rules.⁴⁸ The Board has shown that the proposed rules will improve its efficiency by eliminating the necessity to attempt to discern “equivalency” regarding CPR, ACLS, and Pediatric Advanced Life Support (PALS) courses.⁴⁹

(d) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the Board and the reasons why they were rejected in favor of the proposed rule.

42. The status quo was considered and determined to be insufficient. The proposal was based on collaborative discussions between the professional associations representing the professionals regulated, and additional alternatives were not considered that would be effective at achieving the purpose of the proposal.⁵⁰

(e) The probable costs of complying with the proposed rules.

43. The Board asserts that most of the proposed rule changes simply add clarity. For the new duty of placing nonsurgical retraction material, the dental hygienists and licensed dental assistants who choose to pursue specific training to perform this duty will be responsible for the educational costs, which are unknown. Certain businesses may incur minimal costs associated with affiliating with the American Heart Association and the American Red Cross for certifying dental professionals in CPR and ACLS.⁵¹

(f) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

44. The Board maintains that the probable consequences of not adopting the proposed rules include keeping outdated and confusing language in the rules, which causes confusion for licensees, staff, and the general public.⁵² The Board also demonstrated that failing to update the rules on CPR, ACLS, and PALS courses will result in licensees risking paying for and participating in courses that are not appropriate

⁴⁸ *Id.* at 3.

⁴⁹ Testimony of Marshall Shragg; Test. of Paul Walker; Test. of Teri Youngdahl.

⁵⁰ Ex. D at 3.

⁵¹ *Id.*

⁵² *Id.*

and may need to be retaken through another provider. In addition, without the changes to the rules, Board staff will continue to struggle to make determinations about “equivalency” where there are no regulations or other guidance to use for that process.⁵³

(g) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.

45. The Board asserts there are no federal regulations relating to the proposed rules and that regulation of professionals is primarily a function of state government.⁵⁴

(h) An assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.

46. The Board asserts that the proposed rules cover areas that are not addressed by federal law or other Minnesota state laws.⁵⁵

2. Performance-Based Regulation

47. The Administrative Procedure Act requires an agency to describe how it has considered and implemented the legislative policy supporting performance-based regulatory systems whenever feasible. A performance-based rule is one that emphasizes superior achievement in meeting the agency’s regulatory objectives and maximum flexibility for the regulated party and the Board in meeting those goals.⁵⁶

48. The Board considered and implemented the legislative policy of developing rules and a regulatory program by including in its rule-by-rule analysis regarding the Board’s objectives and flexibility.⁵⁷

3. Consultation with the Commissioner of Minnesota Management and Budget (MMB)

49. As required by Minn. Stat. § 14.131, by letter dated October 14, 2014, the Executive Budget Officer of the MMB Susan Melchionne responded to a request by the Board to evaluate the fiscal impact and benefit of the proposed rules on local units of government. MMB reviewed the Board’s proposed rules and concluded that “[t]hese rule changes will have no fiscal impact on local governments.”⁵⁸

⁵³ Ex. D at 9; Test. of M. Shragg.

⁵⁴ Ex. D at 4.

⁵⁵ *Id.*

⁵⁶ Minn. Stat. §§ 14.002, 14.131 (2014).

⁵⁷ Ex. D at 4 and 9 through 17.

⁵⁸ Ex. K-2.

4. Summary

50. The Board has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems, and the fiscal impact on units of local government.

F. Cost to Small Businesses and Cities under Minn. Stat. § 14.127 (2014)

51. Minn. Stat. § 14.127 requires an agency to “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.” The Agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.⁵⁹

52. The Board determined that minimal costs will be associated with compliance of the proposed rules, and the cost of complying with the proposed rule changes will not exceed \$25,000 for any small business or small city.⁶⁰

53. The Board has made the determinations required by Minn. Stat. § 14.127 and approves those determinations.

G. Adoption or Amendment of Local Ordinances

54. Under Minn. Stat. § 14.128, an agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.⁶¹

55. The Board has determined that local units of government will not be required to adopt or amend an ordinance or regulation because the proposed rules do not require local implementation.⁶²

56. The Board has made the determination required by Minn. Stat. § 14.128 and that determination is hereby approved.

IV. Rulemaking Legal Standards

57. The Administrative Law Judge must make the following inquiries: Whether the Board has statutory authority to adopt the rule; whether the rule is

⁵⁹ Minn. Stat. § 14.127.

⁶⁰ Ex. D at 9.

⁶¹ Minn. Stat. § 14.128, subd. 1.

⁶² Ex. D at 8.

unconstitutional or otherwise illegal; whether the Board has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government officials; whether the rule constitutes an undue delegation of authority to another entity; and whether the proposed language meets the definition of a rule.⁶³

58. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100 (2013), the Board must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the Board may rely upon materials developed for the hearing record. The Board may also rely on “legislative facts” (namely, general and well-established principles that are not related to the specifics of a particular case, but which guide the development of law and policy) and the Board’s interpretation of related statutes.⁶⁴

59. A proposed rule is reasonable if the Board can “explain on what evidence it is relying and how the evidence connects rationally with the agency’s choice of action to be taken.”⁶⁵

60. By contrast, a proposed rule will be deemed arbitrary and capricious where the agency’s choice is based upon whim, is devoid of articulated reasons or, “represents its will and not its judgment.”⁶⁶

61. Consequently, the Administrative Law Judge does not “vote” for a particular policy, or select a policy the Judge considers to be in the best interest of the public or the regulated parties.⁶⁷

62. An important corollary to these standards is that when proposing new rules, an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one. Thus, while reasonable minds might differ as to whether one or another particular approach represents “the best alternative,” the agency’s selection will be approved if it is one that a rational person could have made.⁶⁸

⁶³ See Minn. R. 1400.2100.

⁶⁴ See *Mammenga v. Agency of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 240-44 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991); see also, *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976).

⁶⁵ *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

⁶⁶ See *Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm’n*, 251 N.W.2d 350, 357-58 (Minn. 1977).

⁶⁷ *Manufactured Hous. Inst.*, *supra*, at 244-45 (“the agency must explain on what evidence it is relying and how that evidence connects with the agency’s choice of action to be taken ... We do not substitute our judgment for that of the Department of Health”).

⁶⁸ *Peterson v. Minn. Dep’t of Labor & Indus.*, 591 N.W.2d 76, 79 (Minn. Ct. App. 1999); *Minnesota Chamber of Commerce*, 469 N.W.2d at 103.

V. Rule by Rule Analysis

A. Minn. R. 3100.0100, subp. 2a – DEFINITIONS - Advanced cardiac life support or ACLS

63. The existing regulations provide that an “ACLS certificate must be obtained through the America Heart Association, the American Red Cross, or an equivalent course.”⁶⁹

64. In this proceeding, the Board proposes to remove the reference to “the American Red Cross, or an equivalent course.”⁷⁰

65. The Board seeks this amendment because it has learned the American Red Cross (ARC) does not offer an ACLS course.⁷¹ The Board also determined that the provision for an “equivalent course” has created confusion by regulated parties about what courses they may take to meet the requirement, that the Board lacks the means or standards by which to determine what is an “equivalent course,” and that the reliance on a “single, nationally-recognized standard ensures clarity and consistency.”⁷²

66. This change has been challenged. The challenges are addressed below in Section N.

B. Minn. R. 3100.0100, subp. 8 – DEFINITIONS - Commission on accreditation

67. The Board seeks to repeal this provision because the organization stands alone as the Commission on Dental Accreditation and shall not be associated as an organization under the corporate business structure of the American Dental Association.⁷³

68. With this repeal, a minor editorial change will be made by adding “Dental” to various other parts or subparts throughout Chapter 3100 to properly identify the Commission on Dental Accreditation, and to ensure that there is consistency throughout Board rules and statutes.⁷⁴ The other parts are: 3100.1100, subp 1; 3100.1150, subp. 1; 3100.1160, subps. 1 and 2; 3100.1200; 3100.1300; 3100.1400; 3100.3300, subp. 4a; 3100.3400, subp. 3a; 3100.3500, subp 2a; 3100.3600, subps. 2, 4, and 5; 3100.7000, subp. 2; 3100.8500, subp. 1a and 1b; and 3100.8700, subp. 1 and 2a.⁷⁵

69. This change has not been challenged.

⁶⁹ Ex. C, at 1.

⁷⁰ *Id.*; Ex. D at 9.

⁷¹ Ex. D at 9.

⁷² *Id.*

⁷³ Ex. D at 10.

⁷⁴ *Id.*

⁷⁵ Ex. C.

C. Minn. R. 3100.0100, subp. 9a - DEFINITIONS - CPR

70. The Board has proposed to add the term “hands-on” to describe the requirements for a CPR course, as well as remove the reference to “an equivalent course.”⁷⁶

71. It was determined that requiring a hands-on component to a CPR course is necessary for participants to gain the experience and exposure to actually perform the act of CPR and prepare them for an emergency.⁷⁷

72. The removal of the reference to an “equivalent course” is to eliminate the challenges the Board has in reviewing every alternative course.⁷⁸ The inclusion of “equivalent course” has led to confusion be licensees as to what the Board would accept for regulatory purposes, sometimes resulting in license applicants taking an unacceptable course and being required to take a different, approved course.⁷⁹ The focus on a nationally-recognized standard offered through the American Heart Association (AHA) or the ARC provides ready availability, and ensures clarity and consistency.⁸⁰

73. This change has been challenged and is addressed below in Section N.

D. Minn. R. 3100.0100, subp. 15c – DEFINITIONS - Pediatric advanced life support or PALS

74. The reference to an “equivalent course” has been removed for the same reasons it has been removed from other definitions in the rule.⁸¹

75. This change has been challenged and is addressed below in Section N.

E. Minn. R. 3100.0300, subp. 4 – MEETINGS - Parliamentary procedure

76. The Board has proposed to remove the reference to the *Sturgis Standard Code of Parliamentary Procedure* for conducting business meetings of the Board and replace it with a reference to the *American Institute of Parliamentarians Standard Code of Parliamentary Procedure*.⁸²

77. The Board is proposing this change because the *Sturgis* code has been revised and renamed the *American Institute of Parliamentarians Standard Code of Parliamentary Procedure*.⁸³

⁷⁶ *Id.*; Ex. C at 1.

⁷⁷ Ex. D at 10.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Ex. C. at 1-2; *Id.*

⁸² *Id.*

⁸³ Ex. D at 10.

78. This change has not been challenged.

F. Minn. R. 3100.1850, subp. 1 – REINSTATEMENT OF LICENSE – Requirements

79. The Board has proposed changes to this rule to provide the Board with greater discretion for determinations on reinstatement of licenses for licensees who have lost licenses.⁸⁴

80. The Board also has added an appeal procedure for an applicant seeking reinstatement where the Board has denied the application for reinstatement.⁸⁵

81. This change has not been challenged.

G. Minn. R. 3100.3600, ADMINISTRATION OF GENERAL ANESTHESIA, DEEP SEDATION, MODERATE SEDATION, MINIMAL SEDATION, AND NOTROUS OXIDE INHALATION ANALGESIA

82. The Board has proposed, in subparts 2 and 3 of this rule, to remove the phrase “an appropriate dental sedation/anesthesia emergency management course such as” and “dental sedation/anesthesia emergency management” to require the ACLS or PALS course and maintain “advanced” certification.⁸⁶

83. The Board has proposed, in subpart 5, to remove the options for “an equivalent course” with regard to ACLS or PALS training, to be consistent with similar changes in these rules.⁸⁷

84. These changes create specific acceptable options, in light of changes made in other parts of the rules that specify that only ARC and AHA courses are acceptable.⁸⁸

85. The Board has also proposed, in subpart 5, changing the requirement for how licensees demonstrate they have taken a CPR course when renewing their licenses. Rather than submitting a statement of the most recent course completed the change requires attesting “to maintaining consecutive and current CPR certification at the time of each license renewal.”⁸⁹

86. This change is proposed because the Board is now using a computerized renewal system, and the “attestation” is simply a different form of notice to the Board than the statement, which works more simply with the computerized system.⁹⁰

⁸⁴ Ex. C at 5-6; Ex. D at 10-11.

⁸⁵ Ex. C at 6.

⁸⁶ Ex. C at 8-9.

⁸⁷ *Id.* at 10; Ex. D at 11.

⁸⁸ Ex. D at 11.

⁸⁹ Ex. C at 10.

⁹⁰ Ex. D at 10-11.

87. The Board has proposed adding a requirement in subpart 5 for dental therapists when initially submitting certain information to the Board regarding their training on the administration of nitrous oxide and CPR.⁹¹

88. This change was made to eliminate the submission of unnecessary paperwork to the Board.⁹²

89. The Board has proposed changes to subpart 9a to remove the options for “an equivalent dental sedation/anesthesia emergency management course” with regard to ACLS or PALS training, to be consistent with similar changes in these rules.

90. These changes create specific acceptable options, in light of changes made in other parts of the rules that specify that only ARC and AHA courses are acceptable.⁹³

91. This change has been challenged and is addressed below in Section N.

H. Minn. R. 3100.5100, PROFESSIONAL DEVELOPMENT

92. The Board has proposed, in subparts 3 and 4, to remove the option for “an equivalent” CPR course, card, or certificate, outside of those offered by AHA or ARC providers or courses.⁹⁴

93. This change is made for the same reasons noted elsewhere in these findings of fact.⁹⁵

94. This change has been challenged and is addressed below in Section N.

I. Minn. R. 3100.5300, AUDIT PROCESS OF PORTFOLIO

95. The Board has proposed a language change to subpart 3 of this rule, removing “may either” and replacing it with “must impose one or both of the following options.”⁹⁶

96. This change was made to grant the Board authority to determine whether one or both of the stated options would be applied when a licensee has failed an audit, rather the limiting the Board to one option or the other.⁹⁷

97. The Board has proposed to change subpart 6 of this rule, the requirement for licensee to pay an audit fee. Currently, the rule requires a licensee to pay an audit fee after failing two consecutive professional development portfolio audits. The

⁹¹ Ex. C at 11-12, Ex. D at 12.

⁹² Ex. D at 12.

⁹³ Ex. D at 11.

⁹⁴ Ex. C at 13; *Id.* at 12.

⁹⁵ Ex. D at 12.

⁹⁶ Ex. C at 14.

⁹⁷ Ex. D at 13.

proposed rule requires a licensee to pay the audit fee after failing any two professional development portfolio audits.⁹⁸

98. This change was made to improve the professional responsibility of licensees. The Board has observed that some licensees fail to recognize the importance of maintaining professional development throughout their careers and disregard rules requiring additional training in areas that have demonstrated to be the most problematic.⁹⁹

99. These changes have not been challenged.

J. Minn. R. 3100.7000, ADVERTISING DENTAL SPECIALTY PRACTICE

100. The Board has proposed changes to subparts 1 and 2 of this rule to update language to reflect current dental practice terms, and to permit dentists to promote their practice in one or more specialty areas rather than only one.¹⁰⁰

101. This change was made to enable dentists with specialty in more than one area promote all of their specialties.¹⁰¹

102. These changes have not been challenged.

K. Minn. R. 3100.8500, LICENSED DENTAL ASSISTANTS

103. The Board has proposed changes to subparts 1 and 1b of this rule, which add new duties to licensed dental assistants. Under subpart 1, licensed dental assistants will now be able to obtain informed consent from patients for treatments.¹⁰² Under subpart 1b, licensed dental assistants will be able, following appropriate training, to place nonsurgical retraction materials on patients.¹⁰³

104. These changes are made to ensure that patients are able to provide informed consent for treatment that may occur within the scope of the expertise of the licensed dental assistant. They also improve efficiency within the dental practice.¹⁰⁴

105. These changes have not been challenged.

L. Minn. R. 3100.8700, DENTAL HYGIENISTS

106. The Board has proposed changes to subparts 1 and 2a of this rule. The changes add the same new duties to dental hygienists that have been added for licensed dental assistants. Under subpart 1, dental hygienists will now be able to obtain

⁹⁸ Ex. C at 15, Ex. D at 13.

⁹⁹ Ex. D at 13.

¹⁰⁰ Ex. C at 15-17; Ex. D at 14.

¹⁰¹ Ex. D at 14.

¹⁰² Ex. C at 17; Ex. D at 14.

¹⁰³ Ex. C at 18; Ex. D at 14-15.

¹⁰⁴ Ex. D at 14-15.

informed consent from patients for treatments.¹⁰⁵ Under subpart 2a, dental hygienists will be able, following appropriate training, to place nonsurgical retraction materials on patients.¹⁰⁶

107. These changes are made to ensure that patients are able to provide informed consent for treatment that may occur within the scope of the expertise of the dental hygienists. They also improve efficiency within the dental practice.

108. These changes have not been challenged.

M. Minn. R. 3100.9600, RECORD KEEPING

109. The Board has proposed changes to subpart 9 of this rule. This change updates requirements for dental records to note whether the dental hygienist or licensed dental assistant discussed treatment options, prognosis, benefits, and risks for each treatment within the scope of practice of the respective licensee.¹⁰⁷

110. This change is to maintain consistency with the changes proposed for Minn. R. 3100.8500 and .8700.¹⁰⁸

111. These changes have not been challenged.

N. Discussion of challenges to changes to Minn. R. sections 3100.0100, .3600, and .5100

112. The proposed changes to Minn. R. 3100.0100, .3600, and .5100 have not been challenged by the regulated parties. However, the Health and Safety Institute, which is comprised of two emergency care training companies, American Safety and Health Institute and MEDIC First Aid (collectively HSI/ASHI), opposes the changes removing language from various rules concerning “equivalent course[s].”¹⁰⁹ The changes appear at Minn. R. 3100.0100, subps. 2a, 9a, and 15c; 3100.3600, subps. 2, 3, 5, and 9a; 3100.5100, subps. 3 and 4.

113. The objection of HSI/ASHI is based on its assertion that it would be excluded from providing CPR, ACLS, and PALS training courses for dental professionals if the “equivalent course” language is removed.¹¹⁰ According to HSI/ASHI, the proposed rules “would create a monopoly and duopoly markets giving AHA and

¹⁰⁵ Ex. C at 19; Ex. D at 15.

¹⁰⁶ Ex. C at 20; Ex. D at 16.

¹⁰⁷ *Id.*

¹⁰⁸ Ex. D at 16.

¹⁰⁹ Ex. 1; November 6, 2014 Letter from Michael Ahern to Judge Mortenson; December 5, 2014, Letter from Michael Ahern to Judge Mortenson. (It is not clear how the signatories to the letter at Ex. I are related to HSI/ASHI or whether they have any real interest in this matter at all, given that none of the signatories appeared at the November 6, 2014 hearing or submitted any independent information about their alleged objections to the proposed rules.)

¹¹⁰ *Id.*

ARC unfair market control and significant influence over the price of CPR, ACLS, and PALS training courses for dental professionals.”¹¹¹

114. HSI/ASHI asserts that removing a burden on Board staff is not an appropriate basis for the proposed rule changes.¹¹² A less intrusive approach would have been, according to HSI/ASHI, to only include the added “hands on” requirement for CPR training, without eliminating “equivalent” courses.¹¹³ HSI/ASHI also proposes other ways to address enforcement problems noted by the Board.¹¹⁴

115. HSI/ASHI asserts that the Board should have, but failed, to consider the costs its proposed rules would have on “HSI/ASHI and the well-qualified vendors whose business is CPR training.”¹¹⁵

116. HSI/ASHI asserts that the proposed rules violate the legislative policy of supporting performance-based regulatory systems whenever feasible because of the limitation of certain training courses to those provided by only two organizations.¹¹⁶

O. Summary

117. The Administrative Law Judge finds that the Board has provided a rational explanation for the proposed rules and the grounds on which it is relying including, specifically, the rules removing “equivalent courses” from alternatives for training provided by AHA and ARC certified providers. While one group disagrees with that elimination, the Board is allowed to make rational choices between possible approaches and the Administrative Law Judge cannot properly interfere with its policy-making discretion.

118. Further, the Board is not in the business of regulating CPR, ACLS, or PALS course providers and to do so would be beyond its authority. The Board’s determination to limit courses for which licensees will be permitted to establish their required training is needed and reasonable in order to ensure the Board functions efficiently, licensees are provided clear and understandable guidance, and the general public is protected. Therefore, the changes made in the proposed rules do not cause the rules to be defective.

119. The Administrative Law Judge finds that the Board has demonstrated, by an affirmative presentation of facts, the need for and reasonableness of the rule provisions that are not specifically addressed in this Report.¹¹⁷

¹¹¹ November 6, 2014 Letter from Michael Ahern to Judge Mortenson at 3.

¹¹² *Id.* at 6-7.

¹¹³ *Id.* at 7.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 9.

¹¹⁶ *Id.* at 11.

¹¹⁷ See Minn. Stat. § 14.50.

120. The Administrative Law Judge finds that all the Board's proposed rule changes addressed in this Report are authorized by statute and that there are no other defects that would bar the adoption of those rules.¹¹⁸

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Minnesota Board of Dentistry gave notice to interested persons in this matter.
2. The Board has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.
3. The Administrative Law Judge concludes that the Board has fulfilled its additional notice requirements.
4. The Board has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii).
5. The Dual Notice, the proposed rules, and the SONAR complied with Minn. R. 1400.2080, subp. 5 (2013).
6. The Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14 and 14.50.
7. A Finding or Conclusion with regard to any particular rule subsection does not preclude, and should not discourage, the Board from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

¹¹⁸ *Id.*

