



Office of Policy Planning
Bureau of Competition
Bureau of Economics

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

December 30, 2010

Mr. Randall Vaughn
Division Director
Secretary of State
Professional Licensing Boards Division
Georgia Board of Dentistry
237 Coliseum Drive
Macon, GA 31217

Dear Mr. Vaughn,

The staffs of the Federal Trade Commission's Office of Policy Planning, Bureau of Competition, and Bureau of Economics appreciate this opportunity to provide our comments on the Georgia Board of Dentistry's proposed amendments to board rule 150-5-.03 Supervision of Dental Hygienists.¹ Current board rules permit dental hygienists to provide certain dental services, such as sealant and fluoride treatments, without the direct supervision of a dentist at approved dental facilities of the Georgia Department of Community Health, county boards of health, and the Department of Corrections.

The proposed amendments will require the indirect supervision of a dentist for dental hygienists performing permitted treatments at approved facilities. This proposed change could be interpreted to require a dentist's initial diagnosis of all patients at such facilities before they can receive any specific treatment from a dental hygienist.

The Notice cites no evidence of past or future harm from current practices, and FTC staff is unaware of any such evidence. Thus, we urge the Board to reject the proposed amendments. Requiring dental hygienists to provide covered services only with the indirect supervision of a dentist will likely raise the cost of these services and result in fewer persons receiving them at approved facilities.

We are particularly concerned about the possible negative effects of the proposed amendments on vulnerable populations. The Surgeon General has found that "a 'silent

¹ Georgia Board of Dentistry, Notice of Intent to Adopt Amendments to the Georgia Board Dentistry Board Rules 150-3-.01 *Examination of Dental Licensure* 150-5-.03 *Supervision of Dental Hygienists*, and Notice of Public Hearing (Dec. 2010) ("Notice"), available at http://sos.georgia.gov/plb/dentistry/proposed_amendments.htm.

epidemic’ of oral diseases” affects our most vulnerable citizens, including poor children, the elderly, and many members of racial and ethnic minority groups.² The lack of dental care is a particular problem for children in rural and low-income urban communities.³ Dental hygienists play an important role in delivering dental care to these communities.

Section I of these comments summarizes the interest and experience of the Federal Trade Commission. Section II discusses the proposed amendments.

I. Interest and Experience of the Federal Trade Commission

The FTC is charged under the FTC Act with preventing unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.⁴ Anticompetitive conduct in health care markets has long been an area of focus for the FTC’s law enforcement, research, and advocacy activities.⁵

For example, in 2003 the Commission brought suit against the South Carolina Board of Dentistry (“SCBD”), a regulatory body composed largely of practicing dentists, alleging that an SCBD rulemaking had illegally restricted dental hygienists from providing preventive dental care services in schools.⁶ The South Carolina legislature had specifically authorized dental hygienists to perform such services in schools under the general supervision of a dentist, but without need the for a dentist’s presence.⁷ SCBD, however, subsequently issued a regulation requiring that dentists pre-examine patients before dental hygienists could perform these types of treatments in school settings.⁸

The FTC’s complaint alleged that this regulation violated the antitrust laws by unreasonably restricting the delivery of dental cleanings, sealants, and topical fluoride treatments by licensed dental hygienists in school settings.⁹ According to the Commission, the regulation adversely affected competition and deprived thousands of economically disadvantaged school children of needed dental care.¹⁰

² DEPARTMENT OF HEALTH AND HUMAN SERVICES, ORAL HEALTH IN AMERICA: A REPORT OF THE SURGEON GENERAL vii (2000), available at <http://silk.nih.gov/public/hck1ocv.@www.surgeon.fullrpt.pdf>.

³ CENTERS FOR DISEASE CONTROL AND PREVENTION ET AL., HEALTHY PEOPLE 2010: ORAL HEALTH Ch. 21 (2010), available at <http://www.healthypeople.gov/Document/HTML/Volume2/21Oral.htm>.

⁴ 15 U.S.C. § 45.

⁵ See FTC, OVERVIEW OF FTC ANTITRUST ACTIONS IN HEALTH CARE SERVICES AND PRODUCTS (2010), available at <http://www.ftc.gov/bc/0610hcupdate.pdf>. See also FTC, Competition in the Health Care Marketplace, Formal Commission Actions, available at <http://www.ftc.gov/bc/healthcare/antitrust/commissionactions.htm>.

⁶ *In re South Carolina Board of Dentistry*, Opinion of the Commission (2004) (Docket No. 9311), available at <http://www.ftc.gov/os/adjpro/d9311/040728commissionopinion.pdf>.

⁷ *Id.* at IV. Factual Allegations and Statutory Framework.

⁸ *Id.*

⁹ *Id.* at II. Procedural Background.

¹⁰ *Id.*

In 2007, SCBD entered into a consent agreement with the FTC for a period lasting ten years.¹¹ The consent order required SCBD to publicly announce its support for the state's policy – that hygienists can provide such care in public health settings without a dentist's examination – and requires SCBD to notify the Commission before adopting rules or taking other actions relating to preventive dental services provided by dental hygienists in public health settings.¹²

FTC staff has also provided comments on competition and consumer protection matters to other state dentistry boards and state officials.¹³ Recently, staff provided comments to Louisiana state legislators and the Louisiana Board of Dentistry ("LBD") on proposed changes relating to the practice of in-school dentistry. In May 2009, staff filed two comments with the Louisiana legislature explaining that a proposed bill to restrict the practice of in-school dentistry raised competition concerns and would likely harm children seeking dental care.¹⁴ Subsequently, legislation passed allowing dentistry to continue in schools but mandating that LBD adopt rules to ensure the safe delivery of care. In December the Commission filed additional comments with LBD advocating that it strike proposed rule changes that would have made it more difficult to conduct mobile dentistry in public settings.¹⁵ The comment explained that, if enacted, the changes would likely make the most vulnerable of Louisiana's children – particularly Medicaid-eligible children – worse off by denying many of them the opportunity to receive dental care.¹⁶ Consistent with the FTC's comments, LBD ultimately adopted rules for portable and mobile dentistry that more closely align dental practice requirements in schools and other non-traditional settings with those required of the same dentists in traditional settings.¹⁷

II. Discussion

Georgia law currently permits dental hygienists to provide certain dental services without the direct supervision of a dentist at approved dental facilities of the Georgia Department of Community Health, county boards of health, and the Department of

¹¹ *In re South Carolina Board of Dentistry*, Decision and Order (2007) (Docket No. 9311), available at <http://www.ftc.gov/os/adjpro/d9311/070911decision.pdf>.

¹² *Id.* See also FTC, Press Release, South Carolina Board of Dentistry Settles Charges That it Restrained Competition in the Provision of Preventive Care by Dental Hygienists (June 20, 2007), available at <http://www.ftc.gov/opa/2007/06/dentists.shtm>.

¹³ FTC, Advocacy Filings by Subject, Dentistry, available at http://ftc.gov/opp/advocacy_subject.shtm#detg.

¹⁴ FTC Staff Comment to the Hon. Timothy G. Burns Concerning Louisiana H.B. 687 (May 1, 2009), available at <http://ftc.gov/os/2009/05/V090009louisianadentistry.pdf>; FTC Staff Comment to the Hon. Sam Jones Concerning Amendments to Louisiana H.B. 687 (May 22, 2009), available at <http://ftc.gov/os/2009/05/V090009louisianahb687amendment.pdf>.

¹⁵ FTC Staff Comment Before the Louisiana State Board of Dentistry Concerning Proposed Modifications to Louisiana's Administrative Rules Regarding the Practice of Portable and Mobile Dentistry (Dec. 18, 2009), available at <http://ftc.gov/os/2009/12/091224commentladentistry.pdf>.

¹⁶ *Id.*

¹⁷ Louisiana Administrative Code, Title 46 § 313 (Portable and Mobile Dentistry), available at <http://www.lsbdb.org/applications/dentalact2010.pdf>.

Corrections.¹⁸ These statutory provisions are reflected in the Rules of the Georgia Board of Dentistry.¹⁹ Currently, certain dental services, such as sealant and fluoride treatments, can be performed by dental hygienists in these settings without a requirement of either direct or indirect supervision by a dentist.²⁰ For example, the Georgia Oral Health Prevention Program Fluoride Varnish Manual²¹ includes a recommended sample parental consent form that requests parents to “give permission for an examination by a licensed dental professional to determine the need for fluoride varnish and the application of the fluoride varnish if recommended.”²² Both dentists and dental hygienists are licensed in the state of Georgia;²³ this form gives no indication that supervision by a dentist, such as an initial examination, is required before a dental hygienist can apply a fluoride varnish treatment.

The Georgia Board of Dentistry’s Notice, by contrast, includes proposed amendments that will require the indirect supervision of a dentist for dental hygienists performing permitted treatments at approved facilities. The proposed rule defines “indirect supervision as it pertains to procedures delegated to a dental hygienist” to “mean that the licensed dentist is not on the premises but has given either written or oral instructions for the treatment of the patient.”²⁴ This

¹⁸ O.C.G.A. § 43-11-74. Generally, “[d]ental hygienists shall perform their duties only under the direct supervision of a licensed dentist.” *Id.* at § 43-11-74(a). But “[t]he requirement of direct supervision shall not apply to the performance of dental hygiene duties at approved dental facilities of the Department of Community Health, county boards of health, or the Department of Corrections.” *Id.* at § 43-11-74(d). Instead, the Georgia Board of Dentistry “shall provide by rule or regulation . . . for the appropriate degree of supervision by a licensed dentist over dental hygienists performing duties in such facilities.” *Id.*

¹⁹ Generally, “[a] dental hygienist shall perform his or her duties only under the direct supervision of a duly licensed dentist who is licensed to practice in the state of Georgia.” Rules of the Georgia Board of Dentistry Ch. 150-5-.0.3 (3), available at <http://www.sos.ga.gov/acrobat/PLB/Rules/chapt150.pdf>.

“Direct Supervision” means that “a dentist licensed in Georgia is in the dental office or treatment facility, personally diagnoses the condition to be treated, personally authorizes the procedures and remains in the dental office or treatment facility while the procedures are being performed by the dental hygienist and, before dismissal of the patient, examines the patient.” *Id.* at Ch. 150-5-.0.3 (2).

But, “[t]he requirement of direct supervision shall not apply to the performance of dental hygiene duties at approved dental facilities of the Department of Human Resources, county boards of health, or the Department of Corrections.” *Id.* at Ch. 150-5-.0.3 (3)(b).

²⁰ See *id.* See also Georgia Department of Community Health, Division of Public Health, Oral Health, <http://health.state.ga.us/programs/oral/index.asp> (Describing school-linked fluoride supplement programs for high-risk children and dental sealant programs administered by the Department’s Oral Health Unit).

²¹ Georgia Department of Human Resources, Division of Public Health, *Georgia Oral Health Prevention Program Fluoride Varnish Manual: Resources & Information* (Feb. 2008), available at <http://health.state.ga.us/pdfs/familyhealth/oral/fluoridemanual.pdf> (hereinafter, “Georgia Public Health Division Fluoride Varnish Manual”).

²² *Id.* at 17.

²³ O.C.G.A. sections 43-11-40; 43-11-70.

²⁴ The proposed amendments will require that:

Dental hygiene duties performed at approved dental facilities of the Department of Community Health, county boards of health or the Department of Corrections shall be

proposed change could be interpreted to require a dentist's initial diagnosis of all patients at such facilities before they can receive any specific treatment from a dental hygienist.²⁵ In addition, it is unclear whether the proposed rule will require a dentist's initial examination of each patient before they can receive fluoride varnish.²⁶ Current practice requires a prescription from a dentist to obtain fluoride varnish, but it does not require a dental hygienist to restrict the application of fluoride varnish to patients a dentist has examined and ordered treated with fluoride varnish.

In general, sound competition policy calls for competition to be restricted only when necessary to protect the public from significant harm and, if there is a restriction, for the restriction to be narrowly crafted to minimize its anticompetitive impact.²⁷ This is because consumers benefit from competition, including competition among professionals.²⁸

The Notice, however, cites no evidence that the current practice of allowing hygienists to perform covered services in approved facilities without either the direct or indirect supervision of a dentist has harmed or will harm patients, and FTC staff is unaware of any such evidence. Thus, the proposed amendments appear both unnecessary and overly broad.

If adopted, the proposed amendments will likely harm consumers and competition in at least two ways, particularly if they are interpreted to require a dentist's initial

allowed under indirect supervision. Indirect supervision as it pertains to procedures delegated to a dental hygienist shall mean that the licensed dentist is not on the premises but has given either written or oral instructions for the treatment of the patient.

Notice, supra note 1, at proposed Ch. 150-5-.0.3 (3)(b)2. (Emphasis added).

²⁵ The proposed amendments will require that:

In all instances of supervision of dental hygienists employed or under contract with approved dental facilities of the Department of Community Health, county boards of health, or the Department of Corrections, *the dentist assumes responsibility for determining the basis of diagnosis specific treatment* patients will receive and may *only* designate performance by dental hygienists of those treatments specifically identified in subsection (5)(a) through (e) and (g) of this rule.

Id. at proposed Ch. 150-5-.0.3 (3)(b)1. (Emphasis added).

²⁶ *Id.* Subsection 5(c) covers the application of "medications and/or solutions approved by the Board and prescribed by the dentist that can be applied by methods approved by the Board, be that by irrigation, tray, or insertion of bioresorbable materials (emphasis added)." According to the Georgia Public Health Division Fluoride Varnish Manual, even "Physicians and Registered Nurses who are licensed in Georgia may also perform oral health screening/assessment and apply fluoride varnish." See Fluoride Varnish Manual, supra n. 21, at 10. This appears to contradict the notion that an assessment by a dentist should be required before fluoride varnish can be applied.

²⁷ Cf. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986) ("Absent some countervailing procompetitive virtue," an impediment to "the ordinary give and take of the market place . . . cannot be sustained under the Rule of Reason.") (Internal quotations and citations omitted).

²⁸ *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975).

diagnosis of all patients at approved facilities before they can receive any specific treatment from a dental hygienist.

First, if a dentist's initial diagnosis is required, the cost of transporting the dentist to an approved facility and the dentist's time in examining each patient must be added to the current cost of a dental hygienist performing covered services. To the extent that approved facilities charge patients for covered services, resulting price increases will likely cause some consumers to forgo necessary treatments because they will no longer be able to afford them. To the extent that government entities themselves absorb these additional costs, doing so will also likely reduce the total number of patients that can be served in these settings.²⁹

Second, requiring a dentist's initial diagnosis will prevent dental hygienists from treating patients at approved facilities in areas where a dentist is unavailable to perform this task. Likewise, requiring additional indirect supervision also will prevent hygienists from treating patients in these settings when a dentist is not available. Patients will suffer from this loss of service, especially in locations where the number of available dentists is low, as may be likely in many rural Georgia counties and in low-income urban areas.

In sum, the proposed rule appears likely to increase costs to the Georgia state government and low-income citizens for preventive dental care, and thereby reduce access to such care for Georgia's most vulnerable citizens. Oral preventive health care can prevent or reduce dental disease and costly dental problems. For example, the Georgia Department of Public Health has concluded that "[w]ide spread use of fluoride varnish in public health programs, and applications by other medical and dental professionals will provide long term prevention benefits for children at risk for poor oral health."³⁰ Similarly, when a 2009 article in the Journal of the American Dental Association reviewed the evidence and provided updated recommendations for school-based sealant programs,³¹ the authors concluded that "[c]aries risk among children from low-income families is sufficiently high to justify sealing all eligible permanent molars and is the most cost-effective strategy," so "children participating in [school-based sealant programs] usually receive sealants as a primary preventive measure without undergoing a routine assessment of their caries risk."³² Reduced access to preventive dental care is of particular concern given "the need for preventive oral health services for

²⁹ See Description of Georgia's Dental Public Health Programs, *available at* <http://health.state.ga.us/programs/oral/index.asp> ("[p]ublic health dental services are provided to children who are enrolled in Medicaid and PeachCare programs, as well as to low-income patients on a sliding-fee scale (based on the patient's ability to pay)").

³⁰ Georgia Public Health Division Fluoride Varnish Manual, *supra* n. 21, at 5.

³¹ Gooch, Barbara F., et al., *Preventing Dental Caries Through School-Based Sealant Programs: Updated Recommendations and Reviews of Evidence*, J. AM. DENTAL ASSOC. 2009; 140; 1356-1365, *available at* <http://jada.ada.org>.

³² *Id.* at 1362 (emphasis added).

children throughout Georgia, especially young children.”³³ The proposed rule, however, appears likely to reduce, rather than improve, access to such care.

Conclusion

Restricting dental hygienists from performing services that they currently perform without either direct or indirect supervision in covered public health settings will likely raise the cost of these services and ultimately result in fewer persons receiving them. The possible negative effect of these amendments on vulnerable populations is of particular concern. In general, sound competition policy calls for competition to be restricted only when necessary to protect the public from significant harm. Here, we are aware of no evidence of past or future harm from current practices. Therefore, FTC staff urges the Board to reject these proposed amendments absent clear evidence that allowing dental hygienists to perform covered services without direct or indirect supervision in these settings has harmed or will harm patients.

We appreciate your consideration of these issues.

Respectfully submitted,

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³³ Georgia Public Health Division Fluoride Varnish Manual, *supra* n. 21, at 4-5 (results of 2006-7 Georgia Head Start Oral Health survey provided documentation that demonstrated the need for preventive oral health care for Georgia children, especially young children).