

BEFORE THE BOARD OF BEHAVIORAL HEALTH
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the adoption of NEW) NOTICE OF ADOPTION
RULE I licensees authorized to)
perform psychological assessments,)
NEW RULE II educational)
requirements for performing)
psychological assessments without)
supervision, and NEW RULE III)
licensees qualified to supervise)
psychological assessments)

TO: All Concerned Persons

1. On October 15, 2015, the Board of Behavioral Health (board) published MAR Notice No. 24-219-28 regarding the public hearing on the proposed adoption of the above-stated rules, at page 1614 of the 2015 Montana Administrative Register, Issue No. 19.

2. On November 6, 2015, a public hearing was held on the proposed adoption of the above-stated rules in Helena. Several comments were received by the November 13, 2015, deadline.

3. The board has thoroughly considered the comments received. A summary of the comments and the board responses are as follows:

COMMENT 1: Several commenters supported the new rules as a good balance between ensuring consumer protection and allowing qualified clinicians to utilize psychological testing and assessments in practice.

RESPONSE 1: The board acknowledges the comments and agrees that board regulation must balance protection of consumers with allowing qualified people to practice.

COMMENT 2: Two commenters noted an error in the fifth paragraph of the reasonable necessity statement. The commenters stated that the current DSM (Diagnostic and Statistical Manual of Mental Disorders) does not use the multiaxial system, but only a single axis.

RESPONSE 2: The board acknowledges the inadvertent error regarding the DSM-5. The board's intent is that licensees use the current version of the DSM. Because the language is in the reasonable necessity statement and not in rule text, no further response is necessary.

COMMENT 3: One commenter noted that in forensic application, psychological test results are frequently reviewed by an expert and subject to vigorous cross-examination in open court. The commenter believed the new rules will enable psychological testing in rural areas of the state where psychologists may not be available. Noting that unqualified licensees who utilize psychological testing would be practicing outside their scope and violating ethics requirements, the commenter urged the board to adopt the new rules exactly as proposed.

RESPONSE 3: The board acknowledges the comments and is adopting the rules as amended in response to other comments as set out below.

COMMENT 4: A number of commenters opposed the new rules asserting the rules adopt a stricter standard for licensees than is necessary, and noted that licensees know their competence and are always subject to board disciplinary action if they practice outside the scope of their licensure.

RESPONSE 4: The board disagrees that the rules adopt an unreasonably strict standard. The board further responds that the Governor's amendatory veto to Senate Bill 235 required the board to "articulate the minimum standards of education and training required for their licensees to be authorized to conduct psychological testing." The rules meet the requirements of state statute and set reasonable standards.

COMMENT 5: One commenter opposed the new rules and asserted the rules will hold licensees to an unjustified higher standard by requiring specific academic courses for master's level clinicians, but not for psychologists.

RESPONSE 5: The board disagrees that licensees are held to an unjustified higher standard because psychological assessment training is part of the education required of a psychologist to obtain a postgraduate degree. The rules clarify the education necessary to perform psychological assessments by board licensees.

COMMENT 6: Two commenters noted that sex offender evaluations by Montana Sex Offender Treatment Association (MSOTA) members have been used in court proceedings for 35 years, with at least some non-PhD members qualified as experts.

RESPONSE 6: The board agrees that pursuant to 46-18-111, MCA, MSOTA-credentialed licensees are statutorily authorized to perform psychosexual evaluations. The board also agrees that this credentialing constitutes sufficient education and training to perform those evaluations. The board is amending NEW RULE II to clarify that MSOTA credentials are sufficient to perform the various evaluations MSOTA members currently perform for the court system.

COMMENT 7: Opposing the specific academic requirements in NEW RULE II, three commenters urged the board to adopt language to allow master's level clinicians to conduct psychological testing if they obtain education and training, and comply with supervision requirements. The commenters asserted that the requirements fail to

acknowledge skills gained through experience and training over the course of a career.

RESPONSE 7: The board agrees that in certain cases, licensees who do not have the specific education required by the rule may nonetheless have the background necessary to perform psychological assessments. The board is amending NEW RULE II by adding (4) to allow licensees to request board approval to perform assessments if they do not meet the criteria set out in (1), (3), or (5).

COMMENT 8: A number of commenters opposed the requirement in NEW RULE II(1) that licensees must submit documentation to the board to show competency in psychological testing, and asserted that it is not the board's responsibility to verify licensee aptitude in specific treatment modalities or therapeutic services. The commenters stated it is reasonable for licensees to maintain the required documentation in their personal records regarding competency in any area of treatment provided.

RESPONSE 8: The board agrees that it is not necessary for licensees to submit documentation except as provided in (4). The board is amending NEW RULE II(1) to require licensees to maintain required documentation in their own records and provide such documentation to the board upon request.

COMMENT 9: One commenter objected to grandfathering licensees who performed psychological assessments prior to October 14, 2011, because these licensees have the same or very similar education as the commenter. The commenter noted that anyone not grandfathered will be required to complete additional education and supervision at the clinician's expense. On this basis, the commenter disagreed with the board's determination that the proposed new rules will have no significant and direct impact on Montana small businesses. The commenter suggested that the new requirements apply equally, to ensure a fair playing field.

RESPONSE 9: The board agrees with the comment and is amending NEW RULE II(5) to change the grandfathering date to the effective date of this rule. The board notes that the original grandfathering date was the date the previous rules regarding this issue were adopted in MAR Notice No. 24-219-22. However, because the previous rules did not set minimum standards, the board agrees it is not proper to treat current providers differently. By adopting a current grandfathering date, all providers will be treated similarly and new licensees are on notice of the requirements. The grandfathering date provides a reasonable means to transition to the new rule.

COMMENT 10: A commenter asked for a definition of "regionally accredited program" as used in NEW RULE II(1)(a). The commenter also asked where the board obtained the items required in the academic training in (1)(a), and asserted that the board only gathered information from those not interested in "other mental health professionals" conducting psychological testing.

RESPONSE 10: The board's intent is that "regional accreditation" means accreditation by any one of the seven regional accreditation agencies recognized by the United States Department of Education (USDE). The term means that a licensee can obtain education anywhere in the United States or can take online courses from any institution that has been accredited by one of the seven USDE accrediting bodies. The board disagrees with the characterization of how it gathered the items listed in the required academic training. The rule follows the language of the Wisconsin rules which sets out the necessary educational components for conducting psychological assessments. The board is adding (2) to NEW RULE II to define "regionally accredited program."

COMMENT 11: Numerous commenters opposed the new rules because Montana suffers from a shortage of mental health services, specifically in the particular field of sexual offender evaluation and treatment. The commenters stressed the state should avoid any policy that further restricts access to care and forces rural Montanans to travel hundreds of miles to obtain testing from one of the 214 licensed psychologists in Montana. The commenters further asserted that the rules could impede cases in the social service, correctional, and court systems.

RESPONSE 11: The board agrees that it is vital to maintain enough providers of mental health services, especially for rural areas and for sexual offender treatment. The board does not believe NEW RULE II as amended will limit the number of providers.

COMMENT 12: Two commenters asserted that by imposing specific academic requirements to perform psychological assessments, the board would be attempting to restrict trade for master's level clinicians.

RESPONSE 12: The board disagrees that the requirements of the rule unreasonably restrict trade. The requirements set minimum standards that are generally accepted standards of practice and that are specifically required by statute.

COMMENT 13: One commenter questioned whether the board researched the rules enough and whether adequate notice was given to principal providers of psychological testing to get input and reaction.

RESPONSE 13: The board has worked on this issue for years and followed all rulemaking requirements of the Montana Administrative Procedure Act.

COMMENT 14: Two commenters requested the board amend NEW RULE II to clarify that only the educational requirements for specific instruments used by a specific practitioner would apply. In the commenters' opinion, full training in the delivery of a specific IQ test, for example, would not be required if the practitioner did not give IQ tests as part of the practitioner's assessment battery of tests.

RESPONSE 14: The board's rule sets proper minimum standards and avoids piecemeal qualifications that erode the statutory requirement to set minimum standards.

COMMENT 15: Two commenters expressed concern that the reasonable necessity statement is too detailed and will mislead licensees to believe the proposed rules are insufficient and must be explained. One stated it contains excessive detail that appears regulatory and opined that it is inappropriate to include language in an "introductory statement" that expands the rules without being adopted in rule.

RESPONSE 15: The board responds that the referenced "introductory statement" is not simply an "introduction," but is a "reasonable necessity" statement required by the Montana Administrative Procedure Act. Because the rule does not specify a required amount of education or training by its explicit terms, the description in the statement is only general guidance. The plain language of the rule controls and that language does not have specific credit hours or numbers of assessments. It is up to licensees to determine if they have the amount of education and supervised training necessary to competently perform psychological assessments.

COMMENT 16: Two commenters stated that the reasonable necessity contains an inaccurate statement in that commenters disagreed with the description of Senate Bill 235 (2009) and asserted the bill did not "expand the category of professionals" able to perform psychological assessments. The commenters stated that counselors have been authorized to do psychological testing since the licensing law was passed in 1983.

RESPONSE 16: The board appreciates the comments and notes the language of the two bills as set out in the reasonable necessity statement are the Legislature's most current statement of the law. The title of Senate Bill 235 states its provisions were "expanding the exemption from licensing as a psychologist to include psychological testing, evaluation, and assessment by qualified members of other professions." The title of House Bill 530 states it was "revising the definition of 'social work' to clarify that the term includes the use of diagnoses and administering, evaluating, and assessing tests."

COMMENT 17: A commenter objected to the "mentioning" of two psychological instruments licensees may administer, stating there are innumerable instruments available. The commenter cautioned that this could "lay the groundwork" for the Montana Board of Psychologists' attempt to define which psychological evaluative instruments LCPCs and LCSWs can utilize. The commenter noted that a similar situation in Indiana was determined in court to be an attempt at restriction of trade.

RESPONSE 17: The board disagrees that the mention of two tests has any intent other than to give examples.

COMMENT 18: One commenter requested the board define "psychological assessments." The commenter also asked whether the definition includes psychosexual evaluations and risk evaluations.

RESPONSE 18: Psychosexual evaluations are included as an assessment and, as indicated by the amendments to NEW RULE II, MSOTA-credentialed members are considered qualified to perform them under the rule.

COMMENT 19: Two commenters opposed the new rules as unnecessary restrictions and asserted that the competency-based rules adopted by the board over four years ago are working. The commenters stated there have been no reports of testing violations, nor any data suggesting harm to the public.

RESPONSE 19: The board acknowledges the comments and disagrees the rules are unnecessary due to the statutory requirement to adopt minimum standards.

4. The board has adopted NEW RULE III (24.219.1004) exactly as proposed.

5. The board has adopted NEW RULE I (24.219.1002) and II (24.219.1003) with the following changes, stricken matter interlined, new matter underlined:

NEW RULE I LICENSEES AUTHORIZED TO PERFORM PSYCHOLOGICAL ASSESSMENTS (1) remains as proposed.

(a) a licensed clinical professional counselor or licensed clinical social worker who satisfies the requirements in [NEW RULE II](1), (3), (4), or ~~(2)~~ (5);

(b) through (d) remain as proposed.

AUTH: 37-17-104, MCA

IMP: 37-17-104, MCA

NEW RULE II EDUCATIONAL REQUIREMENTS FOR PERFORMING PSYCHOLOGICAL ASSESSMENTS WITHOUT SUPERVISION (1) Except as provided in ~~(2)~~ (3), (4), and (5), a licensed clinical professional counselor or licensed clinical social worker may engage in psychological assessments without supervision only if ~~the board has received and approved~~ the licensee has completed and can document to the board, if requested, the following information demonstrating generic and specific qualifications to perform psychological assessments:

(a) and (b) remain as proposed.

(2) For purposes of this rule, "regionally accredited program" means a program accredited by one of the seven regional accreditation agencies recognized by the United States Department of Education.

(3) A credentialing level designated and approved by statute for psychological assessments meets the requirements as set out in (1). For example, 46-18-111, MCA, authorizes members of the Montana sex offender treatment association to perform psychosexual evaluations.

(4) A licensed clinical professional counselor or licensed clinical social worker whose education was not from a regionally accredited program must obtain board

approval before conducting psychological assessments. The licensee must demonstrate their education is substantially equivalent to the content set out in (1).

(2) (5) A licensed clinical professional counselor or licensed clinical social worker is qualified to perform psychological assessments and is not required to demonstrate that the licensee has met the qualifications set forth in (1) if the licensee performed psychological assessments prior to ~~October 14, 2014~~ December 25, 2015.

AUTH: 37-17-104, MCA

IMP: 37-17-104, MCA

BOARD OF BEHAVIORAL HEALTH

DR. PETER DEGEL, LCPC

/s/ DARCEE L. MOE

Darcee L. Moe

Rule Reviewer

/s/ PAM BUCY

Pam Bucy, Commissioner

DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State December 14, 2015