



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

Office of Policy Planning
Bureau of Economics
Bureau of Competition

May 1, 2009

Hon. Timothy G. Burns
State Representative
Louisiana House of Representatives
900 Third Street
Baton Rouge, LA 70804

Re: Louisiana House Bill 687

Dear Representative Burns:

The staffs of the Federal Trade Commission's Office of Policy Planning, Bureau of Economics, and Bureau of Competition¹ are pleased to provide our comments on House Bill 687 ("HB 687," "the Bill" or "the proposed legislation").² The Bill, as drafted, will prohibit the practice of most forms of in-school dentistry throughout Louisiana.³

We are concerned that if the proposed legislation becomes law, fewer students – especially the indigent and economically disadvantaged – will receive dental care. According to the Surgeon General, "a 'silent epidemic' of oral diseases" is affecting our most vulnerable citizens—poor children, the elderly, and many members of racial and

¹ This letter expresses the views of the Federal Trade Commission's Office of Policy Planning, Bureau of Economics, and Bureau of Competition. The letter does not necessarily represent the views of the Federal Trade Commission or of any individual Commissioner. The Commission has, however, voted to authorize us to submit these comments.

² The proposed legislation is available at <http://www.legis.state.la.us/billdata/streamdocument.asp?did=645549>

³ See Bill at §796(A) ("Subject to the exceptions set forth in this Section, the practice of dentistry on any patient within any building, improvement, other construction, or upon the grounds of any elementary or secondary school within the state of Louisiana is prohibited."). The Bill allows: (1) services provided specifically through the Louisiana State University and University of Louisiana System, (2) dental screenings, cleanings, radiographs, and fluoride treatments only if performed at no charge to the patient, the patient's parents, or any Third Party Payor; and (3) treatment provided within any federally qualified health center.

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ethnic minority groups.⁴ The lack of dental care is a particular problem for children in rural and low-income urban communities;⁵ only 37 percent of Louisiana's children who qualify for Medicaid have seen a dentist.⁶ We urge the Louisiana legislature to scrutinize carefully any assertion that the Bill will improve the quality of dental care for this population in light of the fact that the United States Surgeon General, the United States Centers for Disease Control and Prevention, and the Louisiana Department of Health and Hospitals have all advocated for more school-based dental services.⁷

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.⁸ Anticompetitive conduct in health care markets has long been a target of the FTC's research, advocacy and law enforcement mission.⁹ For example, in 2002, the

⁴ U.S. Department of Health and Human Services, *Oral Health in America: A Report of the Surgeon General*; Rockville, MD: U.S. Department of Health and Human Services, National Institute of Dental and Craniofacial Research, National Institutes of Health, 2000; available at <http://silk.nih.gov/public/hck1ocv.@www.surgeon.fullrpt.pdf>, (internal quotations omitted).

⁵ See Centers for Disease Control and Prevention ; Health Resources and Services Administration; Indian Health Service; National Institutes of Health, *Healthy People 2010: Oral Health*, Ch. 21 (November, 2000) ("In some rural areas and urban neighborhoods, where health and social problems are concentrated and few residents have health insurance or the personal means to pay for private health care, most children do not receive timely preventive procedures."); available at <http://www.healthypeople.gov/Document/HTML/Volume2/21Oral.htm>.

⁶ See Oral Health Program, Office of Public Health, Louisiana Department of Health and Hospitals, *Brushing Up on Children's Oral Health in Louisiana: A Policy Brief*, 5 (2006) ("In Louisiana, children's oral health is in a state of crisis. Only 37% of Medicaid -eligible children received dental services during the last year."); available at <http://www.dhh.louisiana.gov/offices/publications/pubs-267/oralhlthnewpdf.pdf>

⁷ See *Oral Health in America: A Report of the Surgeon General*, *supra* n 4, at 167, 254 (explaining that the, "Lack of access to dental services for Medicaid recipients is perceived as the greatest pediatric health care problem in many states" and describing the success of school-based fluoride, sealant, and other dental programs); see also CDC Task Force on Community Preventive Services; *Recommendations on Selected Interventions to Prevent Dental Caries, Oral and Pharyngeal Cancers, and Sports Related Craniofacial Injuries*; 17 AM. J. PREV MED (2002); (recommending school-based dental sealant programs, particularly for high risk children), available at <http://www.thecommunityguide.org/oral/oral-ajpm-recs.pdf>; see also *Brushing Up on Children's Oral Health in Louisiana: A Policy Brief*, *supra* n. 5, at 6-7 (Describing that most school health clinics, which are "ideal settings to address health needs," do not have access to dentists, and recommending an increase in the number of school-based dental programs in Louisiana).

⁸ Federal Trade Commission Act, 15 U.S.C. § 45.

⁹ See FEDERAL TRADE COMMISSION, FTC ANTITRUST ACTIONS IN HEALTH CARE SERVICES AND PRODUCTS (Mar. 2008), available at <http://www.ftc.gov/bc/0608hcupdate.pdf> ; see also Competition in the Health Care Marketplace: Formal Commission Actions, available at <http://www.ftc.gov/bc/healthcare/antitrust/commissionactions.htm>.

Commission brought suit against the South Carolina Board of Dentistry (“SCBD”), a regulatory body composed largely of practicing dentists, alleging that the Board had illegally restricted dental hygienists from providing preventive dental care services in schools.¹⁰ The South Carolina legislature had previously eliminated a statutory requirement that a dentist must examine a child prior to receiving dental hygiene services such as cleanings and applications of sealants.¹¹ The complaint charged that the Board’s action unreasonably restrained competition in the provision of preventive dental care services, deprived thousands of economically disadvantaged schoolchildren of needed dental care, and that its harmful effects on competition and consumers could not be justified.¹² In 2007, the SCBD entered into a consent agreement with the FTC.

Discussion

Competition is the hallmark of America’s free market economy. The United States Supreme Court has observed, “ultimately competition will produce not only lower prices, but also better goods and services. ‘The heart of our national economy long has been faith in the value of competition.’”¹³ Consumers benefit from competition, including competition among professionals.¹⁴ These benefits accrue in both price and non-price dimensions: “[A]ll elements of a bargain – quality, service, safety, and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.”¹⁵

We understand that presently there are dentists who provide in-school dental services, primarily to Louisiana’s poorest children.¹⁶ The Bill will restrict competition to provide underserved juvenile populations routine dental services by making it illegal for anyone to provide in-school dental services for a fee. Accordingly, HB 687 will force many families to seek dental care for their children outside of the school setting. But as proponents of school-based dental programs have explained, low-income families face various obstacles to obtaining dental services outside school settings, including locating a

¹⁰ See Opinion of the Commission, *In re South Carolina Board of Dentistry* (July 30, 2004), at <http://www.ftc.gov/os/adjpro/d9311/040728commissionopinion.pdf>. In 2007, the SCBD entered into a consent agreement with the FTC. See *In re South Carolina Board of Dentistry*, Decision and Order (Sept. 7, 2007), at <http://www.ftc.gov/os/adjpro/d9311/070911decision.pdf>.

¹¹ *Id.* at ¶1.

¹² *Id.* at ¶¶ 11-17 (Prior to lifting the restraint, the law required that students receiving hygienists services must have seen a dentist in the 45 days prior to seeing the hygienist.).

¹³ *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978).

¹⁴ See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975).

¹⁵ *Prof’l Eng’rs*, 435 U.S. at 695.

¹⁶ See, e.g. Mark Ballard, *Off-site Dentistry Challenged*, Advocate Capital News Bureau (April 22, 2009) (describing a mobile dentistry program providing in-school dental services); available at <http://www.2theadvocate.com/news/43406382.html>.

provider who accepts Medicaid or other assistance programs and arranging transportation and time off from work to take a child to an appointment. Further, although we understand that Medicaid covers many of these children's payments, requiring children not covered by Medicaid, but who nonetheless receive dental care from in-school providers, to seek dental care outside of school is likely to raise the prices that the families of these children pay for dental care. Faced with such obstacles, it is likely that many children will not receive dental care at all.¹⁷

In general, sound competition policy calls for competition to be restricted only when necessary to protect the public from significant harm, and for the restriction to be narrowly drawn to minimize its anticompetitive impact.¹⁸ We are not aware of any evidence to suggest that the sweeping restrictions on competition found in HB 687 will provide any benefits.

Evidence suggests that children benefit from access to school-based dental programs. The Centers of Disease Control (CDC), for example, has studied the issue, and concluded:

School-based and school-linked dental sealant delivery programs are strongly recommended on the basis of strong evidence of effectiveness in reducing [cavities] on occlusal surfaces of posterior teeth among children.¹⁹

The CDC report has detailed how school-based dental intervention brings dramatic health benefits, particularly to children who otherwise do not receive adequate dental care.²⁰ In

¹⁷ See William Sage, David A. Hyman & Warren Greenburg, *Why Competition Law Matters to Health Care Quality*, 22 HEALTH AFFAIRS 31, 35 (March/April 2003) ("when costs are high, people who cannot afford something find substitutes or do without."). We understand that only a small proportion of Medicaid eligible children in Louisiana have ever been treated by a dentist. See Louisiana Department of Health and Hospitals, *supra* note 6; see also Ballard, *supra* note 13 (reporting that only 32 percent of Louisiana's 753,000 Medicaid children have seen a dentist at least once in their lifetimes, according to Louisiana Department of Health and Hospital statistics). Further, a provider of in-school dental services reports that of the 435 referrals he has made for children who are suffering serious dental maladies to see dentists who work in permanent offices, only 90 children have gone. See *id.*

¹⁸ 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).

¹⁹ See *Preventing Dental Caries: School-Based or -Linked Sealant Delivery*, United States Centers of Disease Control, 2002, available at <http://www.thecommunityguide.org/oral/supportingmaterials/RRschoolsealant.html> citing *Recommendations on Selected Interventions to Prevent Dental Caries, Oral and Pharyngeal Cancers, and Sports Related Craniofacial Injuries*; *supra* n. 7, at 23 (1S).

²⁰ *Id.*

many cases, these are children who qualify for Medicaid benefits, or are from indigent care settings.²¹

The FTC is unaware of any evidence that children are harmed from in-school-based dental services.²² Further, like all other states, Louisiana has passed laws that protect dental consumers through regulation of the practice of dentistry such that consumers have several means by which to protect their interests from harmful dental practices.²³ Dentists treating children, like all health care providers, are also subject to additional standards of care and observation, and face additional liabilities for failing to perform these duties.²⁴ Those who provide health care services through Medicaid, moreover, are subject to specific Medicaid standards.²⁵

We also note that by allowing dentists to perform certain services as long as they are affiliated with one of two state universities or otherwise do not charge for their services, the Bill does not appear concerned with the location of the services, or the competence of the provider, but rather the profit motive of the provider. The FTC Staff is unaware of any evidence that for-profit health care providers provide inferior care to that provided by non-profit providers.²⁶ Indeed, profit-seeking dentists may have a greater incentive to provide higher quality of services given the financial risk at stake for providing shoddy service.

Conclusion

HB 687 restricts competition among dentists and does not appear to provide any countervailing benefits. If enacted, this Bill is likely to make the most vulnerable of

²¹ *Id.* The CDC's web-site details many advantages of in-school dental care for children, as well as policy implications arising from disparities in dental health due to ethnic and racial make-up. See CDC, Division of Oral Health, available at <http://www.cdc.gov/OralHealth/>.

²² We also understand that some in-school dental care providers refer children that require more substantial care to dentists who work in permanent offices. See, e.g., Ballard, *supra* note 16.

²³ See Louisiana R.S. 37:751. et. seq. (defining the role of dentists, the qualifications necessary to perform such services (including failing to follow adequate safety, infection control, and other service protocols), and the penalties for failing to do so, including loss of license).

²⁴ See, e.g. Louisiana Children's Code; CHC 603 and 609 (defining, among others, dentists and dental hygienists as mandatory reporters and subject to civil and criminal penalties for failing to report to appropriate authorities if they have cause to believe a child under their care is the victim of child abuse).

²⁵ See generally United States Department of Health and Human Services, *Guide to Children's Dental Care in Medicaid*, Appendix A and Appendix B; October 2004, (detailing the proper dental diagnostic procedures for children receiving benefits under Medicaid, and detailing the unique set of benefits to be provided to children receiving Medicaid benefits); available at <http://www.cms.hhs.gov/medicaidentalcoverage/downloads/dentalguide.pdf>.

²⁶ See Karen Eggleston et al., *Hospital Ownership and Quality of Care: What Explains the Different Results in the Literature?*, 17 HEALTH ECON. 1345 (2008).

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Louisiana's children worse off by denying many the opportunity to receive dental care. According, the Staff of the Federal Trade Commission urges the Louisiana legislature to reject HB 687.

Respectfully submitted,

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