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STATE OF MAINE
DEPARTMENT OF PROFESSIONAL
& FINANCIAL REGULATION



Joan F. Cohen
Commissioner

TESTIMONY OF
JOAN COHEN
COMMISSIONER
DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION
NEITHER FOR NOR L.D. 1803

"An Act to Amend the Laws Governing Optometric Practice"

Sponsored by Senator Stacy Brenner

**BEFORE THE JOINT STANDING COMMITTEE ON
HEALTH COVERAGE, INSURANCE AND FINANCIAL SERVICES**

Public Hearing: May 13, 2025, 1:00 PM

Senator Bailey, Representative Mathieson, and honorable members of the Committee, my name is Joan Cohen, and I am the Commissioner of the Department of Professional and Financial Regulation. I am here today to speak neither for nor against LD 1803, but to share some observations as a regulator leading a Department that includes 38 licensing entities within the Office of Professional and Occupational Regulation and 4 affiliated licensing boards, including the Board of Optometry.

The sole purpose of a licensing board is to protect the public. It is the legislature's role to define scope of practice, and we do not take a position on whether or not the bill appropriately expands scope of practice for this profession.

However, given the significant nature of the proposed expansion, we share the following observations for your consideration:

- The Board currently has a single part-time (30 hours per week) secretary as its sole staff member. The Board receives legal services from .05% of one FTE of one Assistant Attorney General. This AAG provides legal services to 10 other licensing boards and another non DPFR entity.
- The bill grants the Board an extremely broad and exclusive authority over their scope of practice that is not contemplated in any other licensing statute. Section 19201-A appears to preempt the legislature's authority to determine scope of practice, an attorney general's ability to interpret the law and rules, and the Department's ability to provide the kind of limited oversight it has over all other affiliated boards.

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The exclusive authority which reads as follows:

19201-A. Exclusive authority. The board has exclusive authority to determine what constitutes the practice of optometry as set out in section 19102 and as further defined by the board by rule. This chapter may not be construed to permit any agency, board or other entity of this State other than the board to determine what constitutes the practice of optometry. The board has sole jurisdiction to exercise any other powers and duties of the board established under this chapter.

- This bill permits the Board to determine the profession's scope of practice, and *"further expand the scope of practice"* through rulemaking. The sponsor's amendment, circulated the day before today's hearing, additionally specifies that "[t]he Board may adopt rules to further expand the scope of optometry as appropriate. Any such rules **are major substantive rules.**" (emphasis added). I assume that the addition of the language to designate any rulemaking related to scope of practice as "major substantive rulemaking" is intended to address concerns that may be expressed regarding the delegation of determining scope of practice to the licensing board.

By definition, "major substantive" rules "are rules that, in the judgment of the Legislature [r]equire the exercise of significant agency discretion or interpretation in drafting."¹ As already noted above, there is a sole part-time staff member for this Board and .05 of an AAG assigned to it. The Board is not staffed or supported sufficiently to engage in rulemaking requiring significant discretion and interpretation, which will require extensive research and an individual with rulemaking expertise to execute.

- The sponsor's amendment sets the effective date of the law as July 1, 2026. Major substantive rules must be sent to the Executive Director of the Legislative Council during a "legislative rule acceptance period," which is defined as "the period beginning the July 1st preceding the convening of a regular session of the Legislature and ending at 5:00 p.m. on the 2nd Friday in January after the convening of that regular session of the Legislature." 5 M.R.S. §§ 8071-A(2), 8072(3).

Even *if* the rules could be prepared, provisionally adopted, and ready to submit during the legislative rule acceptance period commencing July 1, 2026 (after the rules had been drafted, reviewed and discussed by the Board, public rulemaking hearing(s) had been held, and an AAG had conducted post-legal review), the rules would not be effective until *after* the committee reviews them and has its own opportunity to hold public hearings, makes a recommendation to the full legislature, and the rules go back to the Board for final adoption. 5 M.R.S. § 8072(1) ("The [major substantive] rule has

¹ They are also defined as major substantive "[b]ecause of their subject matter or anticipated impact, are reasonably expected to result in a significant increase in the cost of doing business, a significant reduction in property values, the loss or significant reduction of government benefits or services, the imposition of state mandates on units of local government as defined in the Constitution of Maine, Article IX, Section 21, or other serious burdens on the public or units of local government." 5 M.R.S. § 8071(2)(B)(2).

legal effect only after review by the Legislature followed by final adoption by the agency.”). Which is all to say that the bill’s provisions, to the extent they will expand the scope of practice in the statute, will go into effect without the benefit of rulemaking to clarify provisions or add necessary guardrails.

- The sponsor’s amendment adds to the definition of the “practice of optometry” a list of procedures and treatments that further illustrate how the bill is written to require rulemaking to fill in the gaps – as terms are specific but undefined, and include words like “including” and “such as”:

- I. Removal of benign skin lesions of the eyelid;*
- J. Kenalog injection for chalazions;*
- K. Removal of chalazion benign skintags of the eyelid, independently order biopsy, bloodwork, and other testing;*
- L. Independently prescribe oral and topical antihistamines/anti-allergy medications and prescribe medicated contact lenses;*
- M. Independently prescribe oral and topical anti-inflammatory, **including** steroids **such as** prednisone;*
- N. Independently prescribe oral & topical anti-glaucoma medications **including** oral acetazolamide;*
- O. Independently perform therapeutic ultrasound, radiofrequency, and intense pulsed light treatments;*
- P. Independently perform corneal collagen crosslinking;*
- Q. Independently perform subconjunctival injections;*
- R. Perform **YAG** capsulotomy;*
- S. Perform **YAG** peripheral iridotomy; and*
- T. Selective laser trabeculoplasty.*

- The bill proposes adding “hydrocodone combination products” and broadens the delivery system to include injections.

Optometrists are permitted to administer or prescribe Schedule III drugs². Prior to 2014, Schedule III included hydrocodone combination products. Hydrocodone combination products are drugs that contain hydrocodone and another substance, such as acetaminophen or aspirin. Effective October 2014, the DEA reclassified hydrocodone combination products from Schedule III to Schedule II.

The Controlled Substances Act places drugs with accepted medical uses and the greatest potential for harm and abuse in Schedule II. As I understand it, the reclassification to Schedule II occurred because the hydrocodone combination products are the most commonly prescribed opioid pain relief drugs and at risk for abuse.

The committee should carefully consider the implications of expanding the prescriptive authority of any health care provider, especially related to opioid prescribing. Any

² Schedule I drugs are highly addictive and have no currently accepted medical use. Those with the highest addiction potential with an accepted medical use fall under Schedule II and those with progressively less potential for harm and abuse fall into Schedules III through V.

prescribing of Schedule II drugs must be accompanied by the statutory requirements placed on other practitioners including those related to electronic prescribing, continuing education requirements, penalties for violation of opioid prescribing rules, a requirement that any optometrist whose scope of practice includes prescribing any opioid medication put in place an opioid prescribing policy.

Opioid prescribing authority would necessitate substantial rulemaking.

- The proposed bill establishes a definition of "ophthalmic surgery" which permits a number of procedures not currently authorized for optometrists and for which many currently licensed optometrists may not have been trained. These surgical procedures may be part of the curriculum of more recent O.D. graduates.

This expansion will require extensive rulemaking to develop the "credentialling" requirements for less recent graduates to gain the requisite education and monitored experience to undertake these types of surgeries

- The bill permits declaratory rulings (§19202(10)). The Board already has the authority to issue advisory rulings, 5 M.R.S. § 9001, and therefore, it is unclear why there would be a need for "declaratory rulings" as well.

We recommend that this Committee consider whether these expansions are appropriate and whether current board staffing is sufficient to protect the public including undertaking these complex rulemakings, responding to and investigating complaints that may emanate from these expanded procedures, provide needed oversight, and even just responding to phone calls and questions from their licensees and the public.

Finally, the committee should consider whether a Sunrise Study pursuant to Title 5 §12015. (3) is required given the proposed substantial expansion of scope of practice.

Thank you very much for your time and I would be happy to answer any questions now or at the work session.