

57 N.J.R. 2422(a)

Copy Citation

VOLUME 57, ISSUE 20, OCTOBER 20, 2025

RULE ADOPTIONS

Reporter

57 N.J.R. 2422(a)

**NJ - New Jersey Register PAW 2025 OCTOBER OCTOBER 20, 2025 RULE
ADOPTIONS LAW AND PUBLIC SAFETY -- DIVISION OF CONSUMER AFFAIRS**

Agency

LAW AND PUBLIC SAFETY > DIVISION OF CONSUMER AFFAIRS > STATE BOARD OF MEDICAL
EXAMINERS

Administrative Code Citation

Adopted Amendment: N.J.A.C. 13:35-6.23

Text

Sexual Misconduct Prevention

Proposed: April 15, 2024, at 56 N.J.R. 544(a).

Notice of Substantial Changes Upon Adoption: May 5, 2025, at 57 N.J.R. 900(a).

Adopted: August 13, 2025, by State Board of Medical Examiners, S. Chetan Shah, M.D., President.

Filed: September 22, 2025, as R.2025 d.120, with **substantial changes** to proposal after additional notice and comment period pursuant to N.J.S.A. 52:14B-4.1.

Authority: N.J.S.A. 45:9-2.

Effective Date: October 20, 2025.

Expiration Date: January 8, 2032.

Take notice that the State Board of Medical Examiners (Board) proposed amendments to rules related to observers at N.J.A.C. 13:35-6.23 on April 15, 2024, at 56 N.J.R. 544(a), to prevent sexual misconduct. The notice of proposal was issued in response to Administrative Executive Directive No. 2021-3 (2021), which set forth a comprehensive agenda for tackling sexual misconduct in the licensed professions.

Comments on the original notice of proposed amendments were received from Lawrence Downs, CEO, Medical Society of New Jersey; Laurie A. Clark, Legislative Counsel, the New Jersey Association of Osteopathic Physicians and Surgeons, the New Jersey Society of Interventional Pain Physicians, New Jersey Section of ACOG, and New Jersey Podiatric Medical Society; Patricia Kelmar, Senior Director, Health Care Campaigns, and Doug O'Malley, Senior Advisor, New Jersey Public Interest Research Group (NJPIRG); John D. Fanburg, Brach Eichler, LLC, for New Jersey State Society of Anesthesiologists; Lisa McGiffert, President/Co-founder and Carol Cronin, Chair, Medical Board Roundtable, Patient Safety Action Network; and Azza AbuDagga, M.H.A., Ph.D., Health Services Researcher, Public Citizen.

The Board published a Notice of Substantial Changes Upon Adoption on May 5, 2025, at 57 N.J.R. 900(a). The public comment period closed on July 4, 2025. The Board received three comments on the notice of proposed substantial changes upon adoption to proposed amendments from: Khayriyyah Chandler, DO; Lawrence Downs, CEO, Medical Society of New Jersey; and Donald P. Talenti, MD, MAHP.

1. Comments Received During Initial Comment Period Giving Rise to Substantial Changes in Proposal Upon Adoption

1. COMMENT: Every commenter addressed the credentials and training of observers. Three commenters stated that observers should be trained individuals, but that no license or certification should be required due to the financial burden and staffing challenges associated with the observer being a licensee or a certified medical assistant (CMA). One commenter expressed difficulty finding and retaining staff even without the additional requirement of the observer being a licensee or CMA and suggested a new category of registered assistants. Two commenters stated that the requirement that observers be licensees or CMAs would be especially burdensome on small practices. One commenter stated that it would disproportionately affect practices running on margins, which tend to serve vulnerable populations, leading to decreased access to essential care. These commenters all supported required training for observers, in lieu of a requirement for the observer to be a licensee or CMA. One commenter suggested a two-hour training course on proper technique and conduct in the performance of sensitive examinations. Another commenter suggested the Board make an online observer training course available at no cost.

Three other commenters supported the requirement of medical training or licensure for observers. These commenters also stated that observers should be trained, even if they are licensees or CMAs. Two commenters stated that observers should be required to take the same training course that physicians are required to take pursuant to N.J.A.C. 13:35-6.15(e). Another commenter stated that the observers should have training that addresses what constitutes an appropriate exam for the type of exam being observed, when an intimate exam is medically indicated, how to intervene when they witness misconduct, reporting obligations, and protection from retribution and retaliation. Another commenter stated that without mandatory training for observers, "their presence will just offer an 'illusion of safety.'" This commenter also stated that the rules should stipulate that the observer not have past criminal, disciplinary, or malpractice history.

RESPONSE: The Board believes that observers must be medically trained and empowered to report misconduct to be effective. The Board proposed to use a license or certification as a mechanism to ensure observers have training and that a board or certifying agency has authority over the observer. Having reviewed the public comments summarized above, the Board recognizes that this approach would be burdensome on small practices due to staffing challenges and the financial impact of dedicating a licensee or CMA to observation. The Board remains committed to ensuring that observers are trained. Accordingly, the Board is removing the proposed requirement that the observer be a licensee or a CMA and is replacing it with the requirements at new N.J.A.C. 13:35-6.23(a)1. This paragraph requires the licensee to utilize an observer who has provided the licensee with documentation of completion of two hours of observer training and an affirmation that the licensee has not been subject to discipline or civil or criminal liability for failure to report misconduct or been convicted of a crime that would disqualify the observer from obtaining a license pursuant to N.J.S.A. 45:1-15.9. The Board believes that this training requirement will reduce the burden on licensees, especially small practices, while ensuring observers are

adequately trained. This requirement will go into effect 180 days after the effective of the proposed new rule to ensure observers have time to complete the required training.

[page=2423] 2. COMMENT: Three commenters addressed the need for observers to be independent and free of conflicts of interest. One commenter assumed that nurses or CMAs "would be in the employ of the physician[,] creating a possible conflict-of-interest in terms of retaining employment." This commenter stated that the rules should permit certified patient advocates to be observers. Another commenter stated that observers should be employed by a third party and not rely on the licensed professional they are observing for employment. This commenter stated that the rules should be amended to specify that the relationship between the observer and physician must be free of conflicts of interest, require the observer to be in the room for the entire exam, and protect the observer from retaliation. Another commenter stated that the rules should stipulate best practices--such as requiring an active license to strengthen the duty to report and using a panel of rotating observers so the observer cannot develop a collegial relationship with any specific physician--and address retaliation.

RESPONSE: The Board recognizes the potential conflicts of interest associated with observers who are employed by the licensee they observe. In order to address the inherent conflict, the Board will require the licensee to provide the observer with the information specified at new N.J.A.C. 13:35-6.23(a)2. This paragraph requires the licensee to inform the observer that the observer must remain in the room and be free of distractions, maintain a clear line of sight of the examination, report misconduct to the Board, and that the licensee shall not retaliate against the observer for doing so. In addition, the Board is adding new N.J.A.C. 13:35-6.23(a)3, which prohibits an observer from being a friend or relative of the licensee or patient, while not preventing a friend or relative of the patient from being present during an examination.

3. COMMENT: One commenter stated that the rules should specify the duty of observers to report and provide a phone number for observers to call for anonymous advice.

RESPONSE: The Board is adding new N.J.A.C. 13:35-6.23(a)2iii, which will require the licensee to inform the observer that the observer shall report misconduct and how to do so. In addition, observers who are licensed health care professionals have a statutory duty to report information that reasonably indicates that another health care professional has demonstrated an impairment, gross incompetence, or unprofessional conduct which would present an imminent danger to an individual patient or to the public health, safety, or welfare. See N.J.S.A. 45:1-37.

4. COMMENT: Four commenters addressed the notice requirement. The rulemaking requires the licensee to post, conspicuously, the notice of the right to an observer, provide written notice to the patient, and confirm the patient's understanding of the notice prior to proceeding with the examination.

One commenter strongly supported posting of the notice, providing written notice, and affirming the patient's understanding of it. This commenter stated that the notice must be in plain English and Spanish and be understandable at all levels of health literacy to ensure it is accessible and understandable. This commenter also stated that physicians should be required to use the exact Board-provided language and that the Board specify font size and placement. This commenter urged the Board to test the notice with patients and health literacy experts. Another commenter, who preferred an opt-out rather than an opt-in approach (see Comment 8), recommended that if patients must opt in to having an observer, the Board clarify the notice process so patients know who and how to ask for an observer. This commenter stated that asking at reception in the presence of other patients may be difficult and may make the patient feel uncomfortable.

Another commenter stated that requiring the notice be posted, in writing, and reviewed by the physician with the patient before the exam is duplicative and will be burdensome to implement. This commenter stated that the rules should be amended to allow any one of the three methods of the notice to be provided to the patient. This commenter also stated that the Board should provide the language of the notice.

Finally, another commenter stated that the notice requirement will increase administrative burdens and reduce time for patient care. This commenter stated that the rule should allow a single, conspicuously posted notice in a waiting room or an examination room. This commenter stated that if the affirmation must be signed, the Board should allow it to be signed once when the patient begins treatment with the practice.

RESPONSE: The Board is committed to a thorough notice requirement to ensure that patients are aware of their right to an observer. Pursuant to new N.J.A.C. 13:35-6.23(j)2, the Board will post the notice required at N.J.A.C. 13:35-6.23(e), and it will be written in plain language.

The Board is creating three exceptions to the need to obtain a patient signature and confirm patient understanding at new N.J.A.C. 13:35-6.23(h). These exceptions include emergencies, when the licensee conducting the examination provided the patient with written notice and confirmed understanding within

the last 12 months, or when an observer that meets the requirements at new N.J.A.C. 13:35-6.23(a) is already present in the normal course of the examination and documented in the medical record.

The Board declines to permit licensees to obtain the patient's signature, once for the entire physician-patient relationship or once for an entire medical practice. The Board disagrees with the suggestion that it would be sufficient for a patient to be asked once, for an entire practice, whether the patient would like an observer. The patient's decision regarding an observer may be different for each health care provider and may also change over time, based on the circumstances of the exam or the patient's relationship with the health care provider. At the same time, if a patient has frequent appointments with the same physician, the Board believes annual notice is sufficient and proposes that a licensee not be required to obtain a signature and confirm understanding of the right to an observer more than once per year pursuant to the exception at new N.J.A.C. 13:35-6.23(h).

5. COMMENT: Two commenters addressed recordkeeping requirements. One commenter stated that the identity of the observer should be documented in the patient's medical record. Another commenter stated that patients should be given a copy of the written notice they sign with information on where to report any violations.

RESPONSE: The Board agrees that the identity of the observer should be recorded in the patient's medical record to ensure a complete record should any allegation of misconduct be made. The Board believes that the patient should receive a copy of the written notice upon request. The Board is changing proposed N.J.A.C. 13:35-6.23(g) to require the licensee to document the identity of the observer in the medical record and to provide a copy of the written notice to the patient upon request.

6. COMMENT: One commenter addressed the counseling that a patient receives if the patient declines care due to the lack of an observer. The commenter stated that the rule should include language that this explanation is to be done in a scientific way and should not be coercive.

RESPONSE: To address this commenter's concern, the Board is adding, at proposed N.J.A.C. 13:35-6.23(d), language requiring that the counseling be unbiased.

7. COMMENT: Three commenters addressed the setting to which the rule applies. One stated that the final rule should make clear that the use of trained observers applies in both inpatient and outpatient settings, including diagnostic procedures and labor. Another commenter stated that it should be expanded to all encounters in all settings. A third commenter stated that the rule should be clarified to confirm that it does not apply in the hospital setting.

RESPONSE: The Board has statutory authority over its licensees, but not over the facilities that employ them. While recognizing that sexual misconduct can occur in any setting, the Board is not extending the observer rule to facilities because licensees typically cannot control signage and staffing at health care facilities. The Board will change proposed N.J.A.C. 13:35-6.23(e) to replace "In all office settings" with "In every location where the licensee provides professional services other than a health care facility licensed by the New Jersey Department of Health" in order to clarify the applicability of the observer rule. This language mirrors the Uniform Requirements Pertaining to Board-Mandated Observer Approval and Utilization applicable to Board-mandated observers. In addition, the Board has shared this comment with the New Jersey Department of Health for consideration.

2. Comments Received During Initial Comment Period, Not Giving Rise to Substantial Changes in Proposal Upon Adoption

8. COMMENT: Two commenters addressed the rule's approach of offering an observer and requiring patients to opt in to having an observer. One commenter stated that the rule should mandate the routine use of a [page=2424] trained observer for all sensitive examinations, consistent with the guidelines of the American College of Obstetricians and Gynecologists. Another commenter said the rule should allow patients to opt out of having an observer, rather than opting in to have an observer.

RESPONSE: The Board considered whether to shift from an "opt-in" approach to an "opt-out" approach to observation of sensitive examinations. An opt-out approach may reduce the administrative burden of obtaining each patient's signature and confirming the patient's understanding of the right to an observer as required at proposed N.J.A.C. 13:35-6.23(g). However, the Board believes an opt-out approach would be too burdensome for licensees who may not be able to afford to have an observer present at every sensitive examination (unless the patient opts out). Thus, rather than adopt an opt-out approach, the Board is proposing a robust opt-in approach.

9. COMMENT: Two commenters addressed the exams to which the observer rule applies. One commenter stated that the right to an observer should be available for any medical appointment and should not be limited to sensitive examinations. This commenter stated that, in many cases of sexual misconduct, patients did not expect to receive an intimate exam and would not have known of the right to an observer. This commenter reported that the most egregious cases involve patients who trusted the

doctor, "thereby necessitating an approach that doesn't focus solely on certain types of exams." Another commenter stated that the rule should be expanded to all clinical encounters.

RESPONSE: The Board understands that sexual misconduct can occur in any examination. The observer rule applies to any intimate examination, even if not planned. Due to the staffing burdens associated with providing an observer, the Board declines to extend the observer rule to all clinical encounters. However, a patient may request an observer for any clinical encounter, even if they do not have a right to have an observer present pursuant to N.J.A.C. 13:35-6.23.

10. COMMENT: Two commenters supported the right to an observer being gender neutral and based on the type of examination. Another commenter stated that the right to an observer should apply, irrespective of the gender identity or expression of the physician, as well as the patient. This commenter also stated that the rule should indicate that the observer should be a person acceptable to the patient, including that the gender identity or expression of the observer be acceptable to the patient.

RESPONSE: As proposed, the right to an observer applies, regardless of the gender identity or expression of the physician. The Board sees no need to amend the rulemaking to ensure the right to an observer applies, regardless of the gender identity or expression of the physician. N.J.A.C. 13:35-6.23(b) states that a patient or person to be examined has the right to decline care if the licensee fails to provide an observer acceptable to the patient.

11. COMMENT: One commenter expressed concern regarding language at proposed N.J.A.C. 13:35-6.23(h) (recodified upon adoption as N.J.A.C. 13:35-6.23(i)), which requires the licensee to use another means to ensure the patient or person to be examined understands the notice if the posting or written notice would not convey the right to have an observer present and to decline care. This commenter stated that it is vague and puts the physician at risk of non-compliance.

RESPONSE: N.J.A.C. 13:35-6.23(i) is recodified from existing N.J.A.C. 13:35-6.23(b). This provision is meant to address a situation where the licensee is aware, or should be aware, that posted and written notice is not meaningful to a patient, such as a patient who is visually impaired or who cannot read for any reason. As this language was adopted in 2004, the Board has not encountered any confusion among licensees regarding compliance with this requirement.

12. COMMENT: One commenter expressed concern and confusion regarding the use of "or other person to be examined" and stated that "[i]f this phrase is intended to cover persons who are not patients, it should be deleted. The physician's duty should be limited to the physician's patients."

RESPONSE: The phrase "other person to be examined" is used at existing N.J.A.C. 13:35-6.23(b) and was carried throughout N.J.A.C. 13:35-6.23 in the proposed amendments that are the subject of these comments. This language ensures that the right to an observer applies to examinations of persons other than patients, such as may occur if a licensee participates in health screening programs. The Board believes that any person whom a licensee examines should have the protection of this rule, even if the individual is not a patient.

13. COMMENT: Two commenters asked that the rule ensures that the patient can bring an observer of the patient's choosing.

RESPONSE: The rule does not prevent a patient from bringing a trusted individual to an examination. However, such an individual cannot serve as the observer for purposes of the licensee meeting obligations pursuant to this rule because, pursuant to proposed N.J.A.C. 13:35-6.23(a)3, to address conflicts, the observer cannot be a friend of the patient or the licensee.

14. COMMENT: One commenter objected to the change in terminology from "chaperone" to "observer." This commenter stated that the rules should retain "chaperone" because "chaperone" conveys protection, which reassures patients, whereas "observer" evokes scrutiny or surveillance, leading to discomfort and anxiety. This commenter further stated that the presence of medical residents as observers for educational purposes "has been found to make patients feel exposed and uneasy." Another commenter stated that it did not object to the change, but failed to see how it will improve awareness for patients, as "observer" is more passive and ambiguous than "chaperone." Another commenter did not have any concerns with the change in terminology, and three other commenters did not address it.

RESPONSE: The Board recognizes that "chaperone" and "observer" each have benefits and drawbacks, as do other possible terms. Upon deliberation, the Board concluded that "chaperone" has a paternalistic connotation. "Chaperone" also suggests a person in a role of authority over others, which is not accurate in this case and could be misleading. Accordingly, the Board will retain use of the term "observer."

15. COMMENT: One commenter noted that the healthcare providers licensed by the Board of Nursing conduct sensitive examinations as well. This commenter suggested that the Board and the Board of Nursing might collaborate in adopting rules to ensure that all patients are similarly protected.

RESPONSE: The Board thanks the commenter for this suggestion. The Board has shared this suggestion with the Board of Nursing. The Board does not have authority over licensees of the Board of Nursing.

3. Comments Received Upon Publication of Notice of Proposed Substantial Changes Upon Adoption to Proposed Amendments

16. COMMENT: One commenter addressed physicians with "micropractices," which the commenter described as physicians having only a front desk secretary or no staff. This commenter stated that "the proposal essentially says that family docs who want to start small cannot open a practice because of staffing."

RESPONSE: The Board's initial notice of proposal, published on April 15, 2024, at 56 N.J.R. 544(a), would have required observers to be licensees of the Board or the Board of Nursing or be certified medical assistants. In response to comments that this requirement would be burdensome, the Board proposed to reduce the burden by removing the requirement of licensure or certification and instead require observers be trained, among other requirements. The Board believes that any burden on licensees as a result of offering a trained observer is outweighed by the benefits to patient safety. The Board believes that the adopted amendments are necessary to protect public health, safety, and welfare.

17. COMMENT: One commenter stated that the rule should offer the patient an alternative of having a family member available virtually through secure methods or having a family member accompany the patient during the visit.

RESPONSE: The adopted rule does not prevent a family member from accompanying the patient to an exam. See N.J.A.C. 13:35-6.23(a)3. A family member cannot serve as the observer because the observer cannot be a friend or relative of the patient or licensee. See N.J.A.C. 13:35-6.23(a)3. The Board believes that requiring licensees to offer trained observers who are not friends or family members will reduce potential conflicts of interest and protect both licensees and patients in the event of a dispute regarding licensee conduct during a breast, pelvic, genitalia, or rectal examination. This approach is consistent with the Code of Medical Ethics of the American Medical Association (AMA), which states that physicians should have an authorized member of the health care team serve as a chaperone and generally "use a chaperone even when a patient's [page=2425] trusted companion is present." See AMA, *Code of Medical Ethics Opinion 1.2.4*, available at <https://code-medical-ethics.ama-assn.org/ethics-opinions/use-chaperones>; see also American College of Obstetricians and Gynecologists (ACOG), *Sexual Misconduct ACOG Committee Opinion*, available at <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2020/01/sexual-misconduct> (endorsing the routine use of chaperones and stating that family members should not be used as chaperones and only be present if requested by the patient).

Regarding the suggestion that an observer attend the exam virtually, the Board believes that an observer must be present in-person at an exam in order to be effective. A licensee or patient would not be able to determine if a virtual observer has sufficient audio or visual access to observe the exam effectively. Disruption to connectivity could also prevent the observer from being present virtually, without the patient or licensee being aware. As a result, a virtual observer could not effectively observe the exam to protect both the patient and the licensee. Moreover, allowing a virtual observer would create patient privacy concerns, if the licensee does not have knowledge of who may be in the room with the virtual observer or the security of the virtual observer's connection.

18. COMMENT: One commenter suggested initial paperwork state that the provider will not be able to provide care of any "sensitive" areas (which the commenter states is not defined and could be an abdomen) and that the patient has the right to waive a chaperone or seek care at another facility.

RESPONSE: The right of the patient or person to be examined to have an observer present applies to breast, pelvic, genitalia, and rectal examinations; it does not apply to abdominal examinations that do not include breast, pelvic, genitalia, or rectal areas. See N.J.A.C. 13:35-6.23(b). Any licensee who performs these exams must inform the patient or person to be examined of this right and offer an observer. The patient or person to be examined decides whether to exercise this right.

The adopted rule already effectively addresses the obligations of a licensee if an observer is not available and the ability of the patient to decline care. The Board refers the commenter to N.J.A.C. 13:36-6.23(b), which states that the patient or person to be examined has a right to decline care if the licensee fails to provide an acceptable observer. Moreover, pursuant to N.J.A.C. 13:36-6.23(c), a licensee is not obligated to proceed with an examination for which either party wishes to have an observer, or with any care or treatment for which the examination is necessary, if the licensee is unable to provide an acceptable observer or if the patient or person to be examined declines the licensee's request to have an observer present. N.J.A.C. 13:36-6.23(d) states that if care is not provided, the licensee shall, consistent with the principles of informed consent and in an unbiased manner, discuss the risks of not receiving further care at that time and provide an appropriate referral to another practitioner, if available.

19. COMMENT: One commenter stated that the requirement of written notice signed by the patient adds an administrative burden without meaningfully enhancing patient protection. This commenter stated that the requirement to post clear, accessible notice in the facility is sufficient to ensure patient awareness and choice.

RESPONSE: The Board disagrees that posting a notice is sufficient to ensure patients have meaningful notice of the right to an observer. In response to comments on the initial notice of proposal, the Board reiterated its commitment to a thorough notice requirement. In order to address concerns regarding the administrative burden, the Board's substantial changes being adopted include three exceptions to the need to obtain a patient signature and confirm patient understanding. See N.J.A.C. 13:35-6.23(h). These exceptions include emergencies, when the licensee conducting the examination provided the patient with written notice and confirmed understanding within the last 12 months, and when an observer who meets the requirements at N.J.A.C. 13:35-6.23(a) is already present in the normal course of the examination and is documented in the medical record. The Board continues to believe that any administrative burden of the notice requirement is outweighed by the benefits of the notice requirement to patient health, safety, and welfare.

20. COMMENT: One commenter stated that the requirement that the observer have a "direct line of sight" is a burden for male patients, as most medical facilities are staffed almost exclusively by females. This commenter stated that most male patients do not want a female observer viewing their genitals, and that most female patients would not want a male observer viewing their speculum and bimanual exam. This commenter stated that having "someone in the room, but not necessarily staring at the patient's sensitive areas, should be sufficient, as improper touch or extended contact time would still be obvious."

RESPONSE: The adopted amendments do not require a patient to have an observer. The adopted amendments require licensees to inform patients of their right to have an observer and offer an observer; the patient decides whether to exercise that right and whether the available observer is acceptable to the patient. If a patient does not want an observer, the patient can decline to have one. If the patient does not want the observer that is available (for example, due to the gender of the available observer), the patient can decline care. The obligations of the licensee in these circumstances are addressed in the Response to Comment 18.

The adopted rule does not require an observer to stare at a patient's genitals. The observer may not leave the exam room or multi-task during the exam under observation. The observer must have a direct line of sight to the exam in order to be effective. An observer who is multi-tasking or who does not have a line of sight to the exam cannot be an effective witness to the examination in the event of an allegation of misconduct.

Moreover, simply having another person in the examination room is insufficient to prevent sexual misconduct. "It is not enough for a chaperone to be present." See DuBois JM, Walsh HA, Chibnall JT, Anderson EE, Eggers MR, Fowose M, Ziobrowski H. *Sexual Violation of Patients by Physicians: A Mixed-Methods, Exploratory Analysis of 101 Cases*, in *Sexual Abuse* (Vol. 31(5) p. 503-523 (Aug. 2019)). Research has found that sexual misconduct and abuse can occur with another person in the room, but is much less likely to occur in academic settings where active observers participating in care are common. A licensee can commit sexual misconduct silently, in the presence of an inattentive observer. "If a nurse is in the room, doing paperwork or intentionally not observing to respect privacy or to avoid implying mistrust (factors sometimes explicitly mentioned in case literature), then it leaves open the possibility of inappropriate touching and sodomy ..." *Id.*

21. COMMENT: One commenter stated, "In our zeal to provide safety, we must be cognizant of patient dignity and privacy, and strive to avoid unnecessary embarrassment. I am personally aware of instances where female physicians with female staff have required 14 year old boys to stand up and drop their pants and underwear for a sports exam, with no accommodation for privacy or gender-appropriate chaperoning. You could imagine if two men did that to a 14 year old girl." This commenter stated that such experiences can have lasting emotional effects and that the rule promotes this practice. The commenter respectfully urged the Board to revise the language to better balance safety, practicality, and patient dignity, privacy, and modesty.

RESPONSE: The adopted rule requires licensees to inform each patient of the right to an observer; each patient (or the parent or legal guardian of a minor patient) decides whether to exercise that right and whether the observer offered by the licensee is acceptable. The adopted rule does not promote requiring patients to undress in front of staff unless the patient (or the parent or legal guardian of a minor patient) exercises the right to an observer and finds the available observer to be acceptable. Regarding the commenter's suggestion of "gender-appropriate chaperoning," the adopted rule allows each patient to determine if an observer is acceptable, which could be an observer of the same gender or, based on the patient's choice, an observer of another gender. The Board received, and thoughtfully considered, robust comments from stakeholders regarding the initial observer proposal. In developing the adopted

amendments at N.J.A.C. 13:35-6.23, the Board carefully balanced the burden on the regulated community with the health, safety, and welfare of patients.

22. COMMENT: One commenter thanked the Board for its thoughtful and responsive consideration of public comments to the rulemaking. This commenter stated that the Board's substantial changes "strike an appropriate balance between ensuring patient safety and reducing operational burdens on physician practices, particularly small and solo practices serving vulnerable populations." This commenter appreciates the flexibility and clarity around notice and documentation in the adopted substantial changes. This commenter stated that "[i]n all, we believe the revised rule represents a significant and positive step forward in [page=2426] promoting patient comfort, preventing misconduct, and supporting the trusted relationship between physicians and their patients."

This commenter recommended the Board revisit replacing the term "chaperone" with "observer." The commenter stated that, "[b]ased on physician feedback, 'chaperone' conveys a clearer sense of protection and reassurance to patients, whereas 'observer' may inadvertently evoke feelings of scrutiny or surveillance. We understand the Board's rationale but hope this issue might be revisited in future rulemakings or patient-facing communications."

RESPONSE: The Board thanks the commenter for positive feedback on the adopted changes and for feedback on the term "observer." The Board determined to utilize "observer" rather than "chaperone" due to the paternalistic connotations of "chaperone." Moreover, "chaperone" suggests a person with authority over others, which is not accurate in this case and could be misleading. The Board will retain use of the term "observer" in the adopted amendments and monitor the impact of this change on practice.

Summary of Agency-Initiated Changes Upon Adoption:

The Board is making substantial changes upon adoption not requested in the public comments submitted on the original notice of proposal. These changes were noticed in the Notice of Substantial Changes Upon Adoption and are necessary to protect the public health, safety, and welfare and for consistency with the rule's subchapter.

Upon adoption, the Board is adding "or person to be examined" at N.J.A.C. 13:35-6.23(b) regarding the right to decline care for consistency with the rest of the subchapter.

The Board is adopting new N.J.A.C. 13:35-6.23(h)1 to create an explicit exception for imminent patient harm. Pursuant to this exception, a licensee is not required to provide written notice and confirm understanding of the right to an observer in circumstances in which there is substantial risk that the delay caused by offering or obtaining an observer would result in significant and imminent harm to the patient or person to be examined, such as during a medical emergency.

The Board is adopting new N.J.A.C. 13:35-6.23(k) to require a licensee to make documentation of the training and affirmation of the licensee's observers and the information provided by the licensee to the licensee's observers pursuant to N.J.A.C. 13:35-6.23(a)1 and 2 available to the Board upon request. This new provision will facilitate the Board's enforcement of the observer rule.

The Board is changing recodified N.J.A.C. 13:35-6.23(j), so that the non-English languages spoken by individuals with limited-English proficiency in this State be determined pursuant to the method in the Language Access Law, N.J.S.A. 52:14-40 et seq.

Federal Standards Statement

A Federal standards analysis is not required because there are no Federal laws or standards applicable to the adopted amendment.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks ***[thus]***):

SUBCHAPTER 6. GENERAL RULES OF PRACTICE

13:35-6.23 Presence of observers

(a) When used in this ***[subchapter]*** ***section***, "observer" means ***[a health care professional licensed by the Board of Medical Examiners or the Board of Nursing, or a certified medical assistant, as that term is defined at N.J.A.C. 13:35-6.4.]*** ***an individual who meets the following requirements:**

1. As of April 18, 2026, has provided the licensee with the following:

i. A certificate that the individual has successfully completed the "CP-2" training course for "as-needed chaperones" available at <https://pbieducation.com/courscs/ctp-2/>, or a course of comparable scope and rigor approved by the Board; and

ii. A written affirmation that the individual has not been subject to discipline or to civil or criminal liability for failure to report misconduct and has not been convicted of sexual assault, criminal sexual contact, or lewdness pursuant to N.J.S.A. 2C:14-2, 2C:14-3, and 2C:14-4 that is of the first, second, third, or fourth degree, endangering the welfare of a child pursuant to N.J.S.A. 2C:24-4.a(1), attempting to lure or entice a child pursuant to section 1 at P.L. 1993, c. 291 (N.J.S.A. 2C:13-6), or equivalent offenses in another jurisdiction;

2. Has received the following information from the licensee in writing:

i. The observer shall not leave the examination room or perform other tasks during an examination under observation, and the licensee shall not ask the observer to do so;

ii. The observer shall maintain a clear line of sight to the examination under observation, and the licensee shall not obstruct the observer;

iii. The observer shall report suspected misconduct to the Board at 609-826-7100 or bme@dca.lps.state.nj.us; and

iv. The licensee shall not retaliate against the observer for reporting suspected misconduct; and

3. Is not a friend or relative of the licensee or the patient; provided, however, that nothing in this section shall preclude the licensee from permitting a patient's friend or relative to be present during an examination at the patient's request.*

(b) A licensee, a patient, or any other person who is to be examined shall have the right to have an observer present during breast, pelvic, genitalia, and rectal examinations. The patient or person to be examined has a right to decline care if the licensee fails to provide an observer acceptable to the patient ***or person to be examined***, or if an observer acceptable to the patient or the person to be examined is not available.

(c) A licensee shall not be obligated to proceed with an examination for which the licensee or the patient or person to be examined wishes to have an observer present pursuant to (b) above, or with any care or treatment for which the examination is necessary, if the licensee is unable to provide an observer acceptable to the patient or the person to be examined, or if the patient or person to be examined declines the licensee's request to have an observer present.

(d) If care is not to be provided to a patient or a person to be examined pursuant to the circumstances described at (b) or (c) above, the licensee shall, consistent with the principles of informed consent ***and in an unbiased manner***, discuss with the patient or the person to be examined, the risks of not receiving further care at that time and provide an appropriate referral to another practitioner, if available.

(e) In ***[all office settings]*** ***every location where the licensee provides professional services other than a health care facility licensed by the New Jersey Department of Health***, a licensee shall provide notice to a patient, or any other person who is to be examined, of the right to have an observer present during any of the examinations identified at (b) above.

(f) The notice required pursuant to (e) above shall be provided in written form to the patient or the person to be examined, and shall be conspicuously posted in a manner in which patients or any other person who is to be examined, are made aware of the right to request an observer and to decline care if the licensee fails to provide an observer, or if an observer acceptable to the patient or the person to be examined is not available.

(g) Before proceeding with an examination identified at (b) above, the licensee shall confirm that the patient or the person to be examined has read and understood the notice required pursuant to (f) above. The licensee shall not proceed with the examination unless the patient or the person to be examined has signed the written notice provided to the patient or the person to be examined pursuant to (e) above. The licensee shall keep the signed written notice in the file of the patient or the person to be examined ***and provide a copy to the patient or the person to be examined, upon request***. ***The licensee shall document the identity of the observer in the medical record of the patient or the person to be examined.**

(h) A licensee is not required to provide written notice to the patient or person to be examined pursuant to (f) above or to comply with (g) above in the following circumstances:

1. There is substantial risk that the delay caused by providing written notice would result in significant and imminent harm to the patient or person to be examined, such as during a medical emergency;

[page=2427] **2. The licensee who will be conducting the examination has provided the patient or person to be examined with written notice pursuant to (f) above and complied with (g) above in the last 12 months; or**

3. An observer who meets the requirements at (a) above is already present in the normal course of the examination; provided the licensee documents the presence of such observer in the medical record of the patient or person to be examined.*

[(h)] **(i)** In circumstances where the posting or the provision of the written notice to the patient or the person to be examined would not convey the right to have an observer present, and to decline care if the licensee fails to provide an observer or if an observer acceptable to the patient or the person to be examined is not available, the licensee shall use another means to ensure that the patient or the person to be examined understands the right to have an observer present.

[(i)] **(j)** Upon request, the notice required pursuant to (e) above shall be made available to the patient or the person to be examined in English, Spanish, and any of 10 or more [additional languages determined by the Director of the Division of Consumer Affairs to be the first language of a significant number of persons in the State] ***of the most common non-English languages spoken by individuals with limited English proficiency in this State, based upon United States Census Bureau American Community Survey data, as determined by the Director*.**

1. [The Director's determination of the 10 or more additional languages, other than English and Spanish, that are the first languages of a significant number of persons in the State shall be based on the U.S. Census Bureau's American Community Survey or a comparable data set.] This determination shall be based on data from American Community Survey respondents who indicated that they speak English at a level of proficiency below "very well*[,]**.*" [or on similar data from a data set that is comparable to the U.S. Census Bureau's American Community Survey.]

2. The Board shall post the notice required pursuant to (e) above in English, Spanish, and each of the 10 or more additional languages determined by the Director [to be the first language of a significant number of persons in the State,] on its website at: [(website to be added upon adoption)] ***<https://www.njconsumeraffairs.gov/bme/Pages/default.aspx>*.**

3. The Board shall notify licensees by email and by a notice posted on its website in the event of any revision to the Director's determination of the 10 or more languages, other than English and Spanish[, that are the first languages of a significant number of persons in the State].

(k) A licensee shall make documentation of the training and affirmation of the licensee's observers and the information provided by the licensee to the licensee's observers pursuant to (a)1, 2, and 3 above available to the Board, upon request.*

NEW JERSEY REGISTER

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Content Type:

Terms:

Narrow By: -None-

Date and Time: Apr 30, 2026 02:00:44 p.m. EDT

