

**State of California  
Office of Administrative Law**

**In re:  
Dental Hygiene Committee of California**

**DECISION OF DISAPPROVAL OF  
REGULATORY ACTION**

**Regulatory Action: Title 16  
California Code of Regulations**

**Government Code Section 11349.3**

**Adopt sections: 1108  
Amend sections:  
Repeal sections:**

**OAL File No. 2015-0205-02S**

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**SUMMARY OF REGULATORY ACTION**

On February 5, 2015, the Dental Hygiene Committee of California (Committee) submitted its proposed regulatory action to the Office of Administrative Law (OAL) to adopt a regulatory scheme for remedial education for a registered dental hygienist examinee who fails to pass clinical examination after three attempts or as a result of a single incidence of imposing gross trauma on a patient. The proposed action would implement, interpret, and/or make specific Business and Professions Code section 1917.3.

On March 20, 2015, OAL notified the Committee that OAL disapproved the proposed regulation. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

**DECISION**

OAL disapproved the above-referenced regulatory action, on the following grounds: (1) the Committee failed to follow required Administrative Procedure Act (APA) procedures; (2) the disapproved regulation fails to comply with the clarity standard of Government Code section 11349.1; and (3) the disapproved regulation fails to comply with the necessity standard of Government Code section 11349.1. The Committee must resolve all APA issues before OAL approves any resubmission.

**DISCUSSION**

The Committee's regulatory actions must satisfy requirements established by the part of the APA governing rulemaking by a state agency. Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or

to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage. (Gov. Code, § 11346.)

Before any regulation subject to the APA may become effective, OAL reviews the regulation for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code section 11349.1. Notably, material proposed for incorporation by reference shall be reviewed in accordance with procedures and standards for a regulation published in the California Code of Regulations. (Cal. Code Regs., tit. 1, § 20, subd. (b).)

Generally, to satisfy the standards a regulation must be legally valid, supported by an adequate record, and easy to understand. In this review OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of regulations that implement, interpret, and make specific statutory law, and to ensure agencies provide the public with a meaningful opportunity to comment on regulations before they become effective. Each ground for the disapproval is set forth below.

**1. Failure to Follow Required APA Procedures: Variance from Committee-Adopted Text**

An agency shall prepare, submit to OAL with its notice of proposed action, and make available to the public upon request a copy of the express terms of the proposed regulation. (Gov. Code, § 11346.2, subd. (a).) Further, an agency shall maintain a rulemaking file including the text of regulations as originally proposed and the modified text of regulations, if any, that were made available to the public prior to adoption. (Gov. Code, § 11347.3, subd. (b)(10).) OAL bases the following analysis upon the regulatory text in the rulemaking file. (*See* Rulemaking File, Tab I.)

The Committee adopted specific regulatory text, as evidenced by the Committee meeting minutes included in the rulemaking file. (*See* Dental Hygiene Full Committee Meeting Minutes, dated 12/7/2013 (Minutes); Rulemaking File Tab III(b), at p. 10, indicating unanimous adoption of regulatory text.) However, as evidenced by the text in the rulemaking file, the Committee prepared, submitted to OAL with its notice of proposed action, and made available to the public for comment, regulatory text materially varying in three ways from the text adopted by the Committee.

First, the Committee adopted regulatory text requiring all remedial courses be at the post-secondary educational level “in an approved dental hygiene educational program.” (*See* Minutes, at p. 10.) However, the Committee prepared, submitted to OAL, and made available to the public for comment regulatory text omitting the requirement that courses be in an approved dental hygiene educational program. (*See* proposed Section 1108, subd. (a)(3).)

Second, with respect to the Application for Approval of Course in Remedial Education form (Application Form), incorporated by reference into the regulations, the Committee agreed to (1) add a column to the section on Course Faculty Information for the status of out-of-state licenses; and (2) require faculty members who hold out-of-state licenses to provide a certification. (*See*

Minutes, at p. 10.) However, the Committee prepared, submitted to OAL, and made available to the public regulatory text omitting both of these approved requirements from the Application Form. (See proposed Section 1108, subd. (a)(2); Application Form DHCC RE-01 (12/2013), incorporated by reference therein.)

Third, the Committee adopted regulatory text requiring remedial education faculty to possess California licenses to practice dentistry or dental hygiene, but only those licensees “with no disciplinary actions.” (See Minutes, at p. 10.) However, as discussed further in the Clarity section below, it is unclear whether the regulatory text the Committee prepared, submitted to OAL, and made available to the public, omitted the qualification that licensees have no disciplinary actions. (See Clarity, Section 2.1; proposed Section 1108, subd. (b)(2)(A).) To the extent the regulatory text fails to require licensees have “no disciplinary actions,” the regulatory text the Committee prepared, submitted to OAL, and made available to the public for comment, varies materially from the regulatory text as adopted by the Committee.

Each of the foregoing three items is a material variance from the Committee’s adopted regulatory text to the regulatory text the Committee prepared and made available to the public for comment. Thus, the Committee failed to prepare, submit to OAL with its notice of proposed action, and make available to the public upon request a copy of the express terms of the proposed regulation.

## 2. Clarity

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to persons who must comply with the regulations. Accordingly, OAL reviews all regulations for clarity. The term *clarity* means regulations are written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them. A regulation shall be presumed not to comply with the clarity standard if (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; (2) the language of the regulation conflicts with the agency’s description of the effect of the regulation; or (3) the regulation uses language incorrectly. (Gov. Code, §§ 11340, subd. (b), 11349, subd. (c), 11349.1, subd. (a)(3), Cal. Code Regs., tit. 1, § 16.) Each instance of non-compliance with the clarity standard of the APA is set forth below.

### 2.1. Timing of Faculty Discipline

The proposed regulations require faculty to possess “a valid, active California license with no disciplinary actions to practice dentistry or dental hygiene for at least two (2) years immediately preceding any provision of course instruction.” (See proposed Section 1108, subd. (b)(2)(A).) This language has two possible interpretations:

(1) faculty must possess a license for at least two years before instruction, with no disciplinary actions *at any time*; or

(2) faculty must possess a license for at least two years before instruction, with no disciplinary actions *within those two years*.

The Minutes suggest the former interpretation is correct because the Committee adopted express language that “faculty ... with no disciplinary actions, shall ... possess a ... license ... issued at least two (2) years immediately preceding any provision of course instruction.” (See Minutes, at p. 10.) This interpretation is buttressed by the Committee’s Initial Statement of Reasons in the rulemaking record, where the Committee states,

“It is important that faculty do not have any disciplinary actions .... Students and the public benefit by ensuring that clinical procedures are performed under the direction and supervision of licensed individuals who have no disciplinary actions.”

(See Initial Statement of Reasons, Rulemaking Record, Tab II, at p. 8.)

While the Committee may have intended one interpretation, (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; (2) the language of the regulation conflicts with the agency’s description of the effect of the regulation; and/or (3) the regulation uses language incorrectly. Thus, the regulation is not easily understood by those persons directly affected by them and is unclear.

## **2.2. Scope of Faculty Discipline**

The proposed regulation requires faculty to possess a California license “with no disciplinary actions to practice dentistry or dental hygiene.” (See proposed Section 1108(b)(2)(A).) This regulation may be interpreted two ways:

(1) faculty shall have a California license with no disciplinary actions to practice dentistry or dental hygiene *against that California license*; or

(2) faculty shall have a California license with no disciplinary actions to practice dentistry or dental hygiene *in any jurisdiction*.

The Minutes appear to support the latter interpretation because the Committee (1) adopted the Application Form explicitly to ask for information about out-of-state licenses; and (2) directed its staff to ensure applicants with an out-of-state license have no disciplinary actions against any license held. (See Minutes, at p. 10.) However, the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning. Thus, the regulation is not easily understood by those persons directly affected by them and is unclear.

## **2.3. Recordkeeping**

The recordkeeping provisions in the primary text of the proposed regulations require course providers keep and maintain five classes of records, summarized as follows: (1) student records; (2) student educational plans; (3) competency records; (4) faculty records; and (5) student course evaluations. (See proposed Section 1108, subd. (b)(6).)

Despite the Committee enumerating this seemingly exclusive list of *five* classes of records in the regulatory text, the Application Form asks the applicant to answer whether the applicant will retain *ten* classes of records, which includes the five classes of records in the regulatory text, *supra*, plus five additional classes of records, summarized as follows: (1) curriculum; (2) syllabi; (3) exams; (4) sample test questions; and (5) clinic rubrics. (See Application Form, Item 9, at p.3.)

Additionally, the Application Form asks the applicant to answer whether the applicant will keep all of these records “pursuant to Title 16, Division 11 of the California Code of Regulations.” (*Ibid.*) Notably, Division 11 of Title 16 of the California Code of Regulations covers a wide array of topics spread over multiple regulatory sections, including, *inter alia*, specific courses for registered dental hygienists, fingerprinting, substance abuse, discipline, citations, fines, and sponsored free health care events.

While the primary regulatory text requires applicants keep only five classes of records, the Application Form requires applicants to affirm or deny they will keep ten classes of records and all records that may fall under the many topics in Division 11 of Title 16 of the California Code of Regulations. The language is unclear as to whether the applicant is required to keep only the five classes of records expressly enumerated in the regulatory text or required keep all the records mentioned on the Application Form.

The question on the Application Form may be reasonably construed as simply seeking information, but it could also be construed as an implicit or veiled mandate to keep all of the classes of records mentioned vaguely on the Application Form. Accordingly, (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; (2) the language of the regulation conflicts with the agency’s description of the effect of the regulation; and/or (3) the regulation uses language incorrectly. Thus, the regulation is not easily understood by those persons directly affected by them and is unclear.

### 3. Necessity

OAL reviews regulations for necessity. The term *necessity* means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. Further, the initial statement of reasons shall include a statement of the specific purpose of each adoption, amendment, or repeal, the problem the agency intends to address, and the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose and address the problem for which it proposed. (Gov. Code, §§ 11349, subd. (a), 11349.1, subd. (a)(1), 11346.2, subd. (b)(1).) Each instance of non-compliance with the necessity standard of the APA is set forth below.

### **3.1. Scope of Faculty Discipline**

As discussed with respect to clarity, the proposed regulation requires faculty to possess a California license “with no disciplinary actions to practice dentistry or dental hygiene.” (See proposed Section 1108(b)(2)(A).) This regulation may be interpreted two ways insofar as the regulation may or may not address California licensees with foreign disciplinary actions in their respective practices. (See Clarity, Section 2.2, *supra*.)

The Committee did not include a statement explaining the purpose or necessity of either regulatory interpretation in its Initial Statement of Reasons. Thus, the regulation does not meet the necessity standard.

### **3.2. Recordkeeping**

As discussed with respect to clarity, the regulatory text requires applicants to keep only five classes of records, but the Application Form requires applicants to affirm or deny they will keep ten classes of records and all documents that may apply under the many topics in Division 11 of Title 16 of the California Code of Regulations. (See Clarity, Section 2.3, *supra*.)

The Committee did not include any rationale in its Initial Statement of Reasons explaining the purpose or necessity of phrasing the question on the Application Form so broadly as to include a multitude of records beyond those expressly required to be kept by the applicant as enumerated in the proposed recordkeeping regulation adopted by this action. Thus, the regulation does not meet the necessity standard.

### **3.3. The Fee and Its Amount**

The Application Form requires an applicant to pay a non-refundable \$300 fee. (See Application Form, at p. 1.) The only statement of necessity for the fee provided by the Committee is that statute caps the fee at \$300. (See Initial Statement of Reasons at p. 20, citing Bus. & Prof. Code, § 1944, subd. (a)(11).)

The Committee is required to include in the Initial Statement of Reasons statements of the specific purpose of the fee and the rationale for its determination that a fee is reasonably necessary as well as statements of the purpose and necessity of *the fee amount of \$300*, as opposed to some lesser amount. Thus, the regulation does not meet the necessity standard.

### **3.4. Requirement to Acknowledge Applicant Review and Abidance by Other Laws**

The Application Form requires each applicant to affirm or deny the applicant has both reviewed and agrees to abide by both Business and Professions Code section 1909, and Division 11 of Title 16 of the California Code of Regulations. (See Application Form, Items 11-12, at p. 3.)

The Committee did not include a statement in its Initial Statement of Reasons explaining the purpose or necessity of the question on the Application Form. The purpose and necessity for this question is not apparent on its face because Business and Professions Code section 1909 deals with

a dentist's supervision of the specific work of registered dental hygienists, whereas this proposed regulation is limited in scope to dental hygienist *examinees*, not registered dental hygienists. Further, Division 11 of Title 16 of the California Code of Regulations covers a multitude of topics, none of which apparently apply readily to remedial education of dental hygienist examinees, as discussed in more detail with respect to the clarity and necessity of recordkeeping provisions. (See Clarity, Section 2.3; Necessity, Section 3.2, *supra*.) Thus, the regulation does not meet the necessity standard.

### **3.5. Certification of Application under Penalty of Perjury**

The Application Form requires the applicant to certify the responses under penalty of perjury. (See Application Form, Certification, at p. 3.)

The Committee is required to include a statement in its Initial Statement of Reasons of the specific purpose of the certification and explain why it is reasonably necessary to carry out the purpose for which it proposed. Thus, the regulation does not meet the necessity standard.

### **3.6. Form DHCC RE-02 Contents**

The proposed regulations require the use of the form entitled Certification of Completion of Remedial Education Course. (See proposed Section 1108, subd. (c), incorporating by reference Form DHCC RE-02.)

Although the Committee addressed the necessity of the form in its Initial Statement of Reasons, the Committee did not include a statement of purpose or necessity in its Initial Statement of Reasons of each of the various elements required to be completed within the form itself. (See Initial Statement of Reasons, at p. 17.) Thus, the regulation does not meet the necessity standard.

## **4. Miscellaneous**

OAL also notes the following issues the Committee must address before any resubmission of this rulemaking action:

### **4.1. Invalid Citation**

The Application Form cites California Code of Regulations, Title 16, Section 1104. (See Application Form, at p. 1.) The cited regulation does not exist. The Committee must strike the citation, as expressly adopted by the Committee. (See Minutes, at p. 10.)

### **4.2. Citation Correction**

With respect to the \$300 statutory cap of the proposed application fee, discussed in Section 3.3, *supra*, the Committee cites in its Initial Statement of Reasons, "Business and Professions Code section 1944(11) [*sic*]." (See Initial Statement of Reasons, at p. 20.) This citation is inaccurate and should read, "1944(a)(11)." The Committee must correct the citation.

**CONCLUSION**

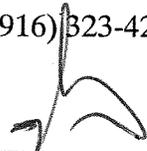
For the reasons discussed above, the Committee failed to comply with APA procedural and substantive requirements. Thus, OAL disapproved this proposed regulatory action.

The Committee must resolve these issues through modified regulatory text and an addendum to the Initial Statement of Reasons, making the modified text and these documents available to the public for comment for at least 15 calendar days before the Committee adopts the regulations and resubmits this regulatory action to OAL for review. (Gov. Code, § 11347.1.)

The resubmitted regulatory action must also contain evidence or documentation that the Committee reviewed and adopted the final modified regulation text after complying with all public availability requirements. Any comments made in relation to these documents must be presented to the Committee for consideration. The Committee must summarize and respond to the comments in its Final Statement of Reasons. (Gov. Code, §§ 11346.8, subd. (c), 11346.9, subd. (a)(3).)

If you have any questions, please contact me at (916) 323-4217.

Date: March 27, 2015



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