

**State of California
Office of Administrative Law**

In re:
Dental Hygiene Committee of California

Regulatory Action:

Title 16, California Code of Regulations

Adopt sections: 1104, 1104.1, 1104.2

Amend sections:

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2015-0722-03S

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

This regular rulemaking by the Dental Hygiene Committee of California (the “Committee”) proposes to adopt sections 1104, 1104.1, and 1104.2 in title 16 of the California Code of Regulations (the “CCR”). Senate Bill 1202 (2011-2012 Reg. Sess.) gave the Committee permissive authority to approve any registered dental hygiene (“RDH”) educational program accredited by the Commission on Dental Accreditation (“CODA”). The Committee proposes to adopt these regulations to clarify the approval process for both existing and new programs, including specifying the instructions for the feasibility study required for new RDH educational programs seeking approval.

On July 22, 2015, the Committee submitted the above-referenced rulemaking action to the Office of Administrative Law (“OAL”) for review. On September 2, 2015, OAL notified the Committee of OAL’s decision to disapprove the proposed rulemaking. This Decision of Disapproval of Regulatory Action explains the reasons for OAL’s action.

DECISION

OAL disapproved the above-referenced rulemaking action for the following reasons: the proposed regulations fail to comply with the clarity and necessity standards of Government Code section 11349.1, and the Committee failed to follow required Administrative Procedure Act (“APA”) procedures. Additionally, there are several miscellaneous issues with the rulemaking record.

All APA issues must be resolved prior to OAL’s approval of any resubmission.

DISCUSSION

The Committee’s regulatory action must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. (See Gov. Code, sec. 11340 et seq.) 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regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a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, sec. 11346.)

Before any regulation subject to the APA may become effective, the regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations set forth in Government Code section 11349.1. (See Gov. Code, sec. 11340.1, subd. (a).) Generally, to satisfy the APA 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. (*Ibid.*) 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 that the public is provided with a meaningful opportunity to comment on regulations before they become effective.

1. **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. (Gov. Code, sec. 11340, subd. (b).) Government Code section 11349.1, subdivision (a)(3) requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349, subdivision (c) defines “clarity” to mean that regulations are “written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them.” The “clarity” standard is further defined in section 16 of title 1 of the CCR, OAL’s regulation on “clarity”, which provides the following:

In examining a regulation for compliance with the “clarity” requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

(a) A regulation shall be presumed not to comply with the “clarity” standard if any of the following conditions exist:

.....

(2) the language of the regulation conflicts with the agency’s description of the effect of the regulation; or

.....

(4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or

.....

(6) the regulation does not use citation styles which clearly identify published material cited in the regulation.

Each instance of non-compliance with the clarity standard of the APA is set forth below:

1.1. “Instructions for Institutions Seeking Approval of a New Education Program for Registered Dental Hygienists”: One-Year Period to Complete the Process

“Incorporation by Reference” means “the method whereby a regulation printed in the [CCR] makes provisions of another document part of that regulation by reference to the other document.” (Cal. Code Regs., tit. 1, sec. 20, subd. (a).) “Material proposed for ‘incorporation by reference’ shall be reviewed in accordance with procedures and standards for a regulation published in the [CCR].” (*Id.* at subd. (b).) The Committee proposes to incorporate one document by reference through this rulemaking action: the “Instructions for Institutions Seeking Approval of a New RDH Educational Program” (EDP I-01 Rev. 12/14) (the “Instructions”). This form “shall be reviewed in accordance with the procedures and standards for a regulation published in the [CCR].” (See *ibid.*)

The Instructions state, “The process shall be completed within one year of submission unless an extension is granted by the [Committee].” There are two clarity issues with this regulatory provision. First, it is not clear how the one-year period is calculated. Does the one-year period begin when the applicant submits the \$2,100 fee and the feasibility study to the Committee, and end when the applicant submits the self-study described under Step 6 of the Instructions? Or, does the process end when the full Committee renders a decision on the self-study and site visit? If it is the latter milestone, must an appeal under the proposed Section 1104.2 also be completed within the one-year timeframe? As demonstrated by the multiple ways the one-year period can be interpreted, the Committee must clarify when the one-year period begins and ends, as the regulations must be “written . . . so that the meaning of the regulations will be easily understood by those persons directly affected by them.” (Gov. Code, sec. 11349, subd. (c).)

The second issue with the above-quoted regulatory provision from the Instructions is that the Committee does not list the criteria they will use to determine whether an extension to the one-year requirement shall be granted. Therefore, the Instructions are not easily understood by those persons directly affected because the applicant does not know the circumstances under which they may be granted an extension. The regulations must be “written . . . so that the meaning of the regulations will be easily understood by those persons directly affected by them.” (Gov. Code, sec. 11349, subd. (c).) To remedy this issue, the Committee must list the criteria they will use to determine whether or not an extension to this one-year requirement shall be granted.

1.2. The Instructions: CODA Accreditation

There is a lack of clarity regarding whether the new RDH educational programs must obtain CODA accreditation, or whether accreditation by an equivalent accrediting body is sufficient. Section 1104.1, subdivision (b) states, “After approval of the feasibility study by the Committee, and at least twelve (12) months prior to the proposed date for enrollment of students, the educational program shall submit the CODA or equivalent accrediting body’s required documents to the Committee in accordance with the requirements specified in the ‘Instructions’.” Additionally, the Instructions state, “If the feasibility study is approved, the educational program

may apply for initial accreditation from [CODA] or an approved, equivalent accrediting body.” These statements allow for accreditation from either CODA or an equivalent accrediting body. However, the ISR does not describe accreditation by an equivalent accrediting body as an option: “Step 5 clarifies that if the Committee takes action to approve the feasibility study, the new RDH educational program may then apply for the initial accreditation from [CODA], so the program is notified that this is the point at which CODA approval may be sought.” (ISR, p. 10.) Also, Section 1104, subdivision (c) states, “All Committee-approved programs shall maintain current accreditation by CODA.” Additionally, in regards to the self-study report, the Instructions state the following:

Upon [Committee] approval of the feasibility study, the educational program shall prepare the [CODA] self-study for the proposed program. At least twelve (12) months prior to the projected date of student enrollment the program must submit to the DHCC the self-study that delineates how the proposed program plans to comply with accreditation standards.

(Instructions, p. 6.) This internal inconsistency between the regulation text, the Instructions, and the ISR leads to ambiguity regarding whether accreditation by an accrediting body besides CODA is permitted. Additionally, the requirements that the applicant “prepare the [CODA] self-study” (Instructions, p. 6 [emphasis added]) and that educational programs “maintain current accreditation by *CODA*” (Section 1104, subd. (c) [emphasis added]) give the impression that the CODA accreditation is the only option, particularly since maintaining current accreditation by an equivalent accrediting body is not an option. As such, the regulations are not “written . . . so that the meaning of the regulations will be easily understood by those persons directly affected by them.” (Gov. Code, sec. 11349, subd. (c).) Also, given the conflicting statement in the ISR, “the language of the regulation conflicts with the agency’s description of the effect of the regulation[.]” (See Cal. Code Regs., tit. 1, sec. 16, subd. (a)(2).)

Due to the lack of clarity between the regulation text, the Instructions, and the ISR, the Committee must revise these documents as necessary to resolve this issue. The Committee must also make any revised documents available for at least 15 days pursuant to Government Code sections 11346.8, 11347.1, and 11347.3, as well as section 44 of title 1 of the CCR.

1.3. The Instructions: On-Site Visit Review Criteria

Step 6 of the Instructions states, “Once the [Committee] staff has verified the self-study addresses the applicable standards and regulations, an on-site visit shall be scheduled. The [Committee] staff shall visit selected clinical sites the program plans to use as part of the on-site visit. The [Committee] staff shall complete a written report of the findings. This report shall be submitted to the [Educational Subcommittee] for action and recommendation to the full Committee.” The Instructions do not state the criteria Committee staff will use to evaluate the selected clinical sites during the on-site visit. Therefore, applicants do not know how to prepare for an on-site visit, nor do they know how they will be evaluated. The Committee must list the criteria regarding how RDH educational programs will be evaluated during the on-site visit so that the “meaning of the regulations will be easily understood by those persons directly affected by them.” (Gov. Code, sec. 11349, subd. (c).)

1.4. The Instructions: Payment of the \$2,100 Fee

The \$2,100 fee required to be submitted with the feasibility study is for the curriculum review and site evaluation. The Committee will not begin the curriculum review or conduct the site visit until the feasibility study is approved. (See Instructions, p. 6.) Under the proposed regulations, if an applicant's feasibility study is not approved, the Committee gets to keep the \$2,100 fee even though the Committee never began the curriculum review or conducted the site visit. This possible scenario appears to be in direct conflict with Business and Professions Code section 1944, subdivision (a)(10), which states that a fee not to exceed \$2,100 is required only for the curriculum review and site evaluation. The Committee must revise the regulatory provisions governing the submission of the fee so that it is clear that the \$2,100 fee is only earned by the Committee for the curriculum review and site evaluation.

1.5. Section 1104.1, Subdivision (a)(2): Citation to Section 1941(b)

Section 1104.1, subdivision (a)(2) contains a citation to "section 1941(b)". This appears to be a citation to Business and Professions Code section 1941, subdivision (b), which is included as a Reference citation in Section 1104.1. However, there is also a section 1941 in title 16 of the CCR. Since there is a "section 1941" in both the Business and Professions Code and title 16 of the CCR, "the regulation does not use citation styles which clearly identify published material cited in the regulation." (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(6).) The Committee must revise Section 1104.1, subdivision (a)(2) to clarify whether the citation to "section 1941(b)" is to section 1941 in the Business and Professions Code or title 16 of the CCR.

1.6. The Instructions: Restatement of Business and Professions Code section 1941

Page 1 of the Instructions includes a quote of the entire Business and Professions Code section 1941. However, this statute is not accurately restated, as the title of section 1941 and subdivisions (a) and (c) are inaccurate. The Committee must resolve this issue prior to resubmitting this regulatory action to OAL.

1.7. The Instructions: Miscellaneous Grammatical and Punctuation Issues

On page 4 of the Instructions, there is a list of examples of types of equipment to be included in the five-year capital and operational line item budget required under Step 2 of the Instructions. The second item listed is "Radiography (unit,". Since the word "unit" is followed by a comma, it appears as though more items are supposed to follow. If so, the Committee must list these items. If not, then the Committee must include the proper punctuation after the word "unit", such as second parenthesis.

A sentence on page 6 of the Instructions is grammatically incorrect. The third sentence under Step 4 states, "The [Committee] staff shall notify the educational program of the [Educational Subcommittee] meeting date at which the [Educational Subcommittee] shall discuss and may make a recommendation *on the* take action on the feasibility study." (Emphasis added.) This error is identified in the final statement of reasons (the "FSR"), which states, "The first edit to the order of adoption can be found on page 6 of 7 of the form under the heading of Step 4: staff changed 'on the take action' phrase to 'to take action' in order to correct a grammatical error." Although this proposed change would resolve this issue, this change was not made to the

version of the Instructions attached to the original Form 400. The Committee must correct this grammatical error prior to resubmitting this regulatory action to OAL.

For the reasons discussed above, the Committee failed to comply with the clarity standard of the APA. The Committee must make all substantial regulatory text changes, which are sufficiently related to the original text, available to the public for comment for at least 15 days pursuant to Government Code section 11346.8, subdivision (c), and section 44 of title 1 of the CCR before the Committee adopts the regulations and resubmits this regulatory action to OAL for review. Additionally, any comments made in relation to these proposed modifications must be presented to the Committee for consideration and be summarized and responded to in the FSR. (Gov. Code, sec. 11346.8, subd. (c); see also Gov. Code, sec. 11346.9, subd. (a)(3).)

2. Necessity

In addition to clarity, OAL also reviews proposed regulations for necessity. (Gov. Code, sec. 11349.1, subd. (a)(1).) “Necessity” is defined in Government Code section 11349, subdivision (a), as follows:

“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. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

This necessity must be provided in the initial statement of reasons (the “ISR”) for substantive changes proposed through the original regulation text. Specifically, the ISR must include “[a] statement of the specific purpose of each adoption, amendment, or repeal, . . . 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 is proposed.” (Gov. Code, sec. 11346.2, subd. (b)(1); see also Cal. Code Regs., tit. 1, sec. 10.)

All instances of non-compliance with the necessity standard of the APA relate to the \$2,100 fee set forth in the Instructions, and each instance of non-compliance is explained below:

2.1. The Fee Amount

The first instance of non-compliance with the necessity standard relates to the fee amount established by the Committee. Business and Professions Code section 1944, subdivision (a) states that the Committee shall establish by resolution specified fees subject to certain limitations. The limitation for “[t]he fee for each curriculum review and site evaluation for educational programs for dental hygienists who are not accredited by a committee-approved agency” is that this fee shall not exceed \$2,100. As a change made to the modified regulation text, which was made available from December 31, 2014, to January 15, 2015, the Committee specified in the Instructions that the fee for each curriculum review and site evaluation is \$2,100. Since the underlying statute allows the Committee to set a fee amount up to \$2,100 (Bus. & Prof. Code, sec. 1944, subd. (a)(10)), the Committee has discretion to set a fee amount lower than \$2,100. Therefore, the rulemaking record must include a statement explaining why the

Committee chose the highest possible fee amount authorized by Business and Professions Code section 1944, subdivision (a)(10), and include supporting documentation. (See Gov. Code, sec. 11349, subdivision (a); see also Cal. Code. Regs., tit. 1, sec. 10.)

2.2. Non-Refundable Fee

Secondly, the first page of the Instructions states that the \$2,100 fee must be submitted with the feasibility study, and that this fee is non-refundable. However, the Committee did not provide any necessity in the ISR explaining why the fee is non-refundable. It is especially important that the Committee provide necessity for this regulatory provision since the fee is not for review of the feasibility study, but, rather, for the curriculum review and site evaluation. (See Bus. & Prof. Code, sec. 1944, subd. (a)(10).) Additionally, the Committee will not begin the curriculum review or conduct the site visit until the feasibility study is approved. (See Instructions, p. 6.) Therefore, under the proposed regulations, if an applicant's feasibility study is not approved, the Committee may keep the \$2,100 fee even though the Committee never earned the fee by performing the curriculum review and conducting the site visit. This possible scenario also appears to be in direct conflict with Business and Professions Code section 1944, subdivision (a)(10). As such, the Committee must explain why the \$2,100 fee is non-refundable, especially considering the possible scenario described above.

2.3. New Fee Required for Re-Submission

The third and final instance of non-compliance with the necessity standard is the lack of necessity for the requirement that, if the process is not completed within one year of the applicant submitting the \$2,100 fee and the feasibility study to the Committee, the applicant must submit another \$2,100 fee with their re-submission. Again, it is especially important that the Committee provide necessity for this regulatory provision considering the possible scenario described in Item #2.2, *supra*. Therefore, the Committee must explain why a new \$2,100 fee must be included with a re-submission when the one-year period has expired.

For the reasons discussed above, the Committee failed to comply with the necessity standard of the APA. The Committee must resolve these issues through an addendum to the ISR and make this document available to the public for comment for at least 15 calendar days pursuant to Government Code section 11347.1 before the Committee adopts the regulations and resubmits this regulatory action to OAL for review. Any comments made in relation to this addendum must be presented to the Committee for consideration and be summarized and responded to in the FSR. (Gov. Code, sec. 11346.8, subd. (c); see also Gov. Code, sec. 11346.9, subd. (a)(3).)

3. Failure to Follow Procedure

OAL also notes the following procedural issues—which all concern deficiencies in the FSR—that must be addressed prior to any resubmission of this rulemaking action. First, two citations to Business and Professions Code “Section 1944(10)” appear incompatible, as subdivision (a) is missing from these citations. The Committee must revise these citations accordingly, and OAL also recommends clarifying that these citations are to section 1944 in the Business and Professions Code.

The second issue with the FSR is that two changes to the Instructions are described therein, but these changes were not made in the final version of the Instructions. The second change described in the FSR—which is described in Item #1.7, *supra*—is necessary to correct a grammatical error in the Instructions and must be made prior to the Committee resubmitting this regulatory action to OAL for review. Regarding the first change described in the FSR, the Committee must either remove the description of this change in the FSR or make the change to the Instructions prior to resubmitting this regulatory action to OAL for review. If the latter, the change to the Instructions should be made available to the public for at least 15 calendar days pursuant to Government Code section 11347.1 before the Committee adopts the regulations and resubmits this regulatory action to OAL for review.

The last issue with the FSR is that it does not include the demonstrations required by section 20, subdivision (c)(1) and (2) of title 1 of the CCR, which states the following:

- (c) An agency may “incorporate by reference” only if the following conditions are met:
 - (1) The agency demonstrates in the [FSR] that it would be cumbersome, unduly expensive, or otherwise impractical to publish the document in the [CCR].
 - (2) The agency demonstrates in the [FSR] that the document was made available upon request directly from the agency, or was reasonably available to the affected public from a commonly known or specified source. In cases where the document was not available from a commonly known source and could not be obtained from the agency, the regulation shall specify how a copy of the document may be obtained.

Since the Committee is incorporating a document by reference through this rulemaking—the Instructions—the demonstrations required by section 20, subdivision (c)(1) and (2) of title 1 of the CCR must be included in the FSR prior to resubmitting this rulemaking action to OAL for review.

4. Miscellaneous

OAL also notes the following miscellaneous issues that must be addressed prior to any resubmission of this rulemaking action:

4.1. Reference

In addition to clarity and necessity, OAL also reviews proposed regulations’ sources of “reference”. (Gov. Code, sec. 11349.1, subd. (a)(5).) “Reference” is defined in Government Code section 11349, subdivision (e), to mean “the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation.” The “reference” standard is further defined in section 14, subdivision (b), of title 1 of the CCR—OAL’s regulation on “reference”—which provides, “‘Reference’ shall be presumed to exist if an agency is empowered to implement, interpret or make specific a .

.. California statute[.]” Both instances of non-compliance with the reference standard of the APA are set forth below:

4.1.1. Section 1104

Section 1104 describes the approval process for new RDH educational programs, as well as the process for accredited RDH educational programs to maintain Committee approval. Subdivision (e) of this section states, “A material misrepresentation of fact by a new educational program or an approved educational program in any information required to be submitted to the Committee is grounds for denial of approval or revocation of the program’s approval.” Although there may be consequences when an educational program makes a material misrepresentation “in any information required to be submitted to the Committee[.]” the consequences listed in subdivision (e) do not including a fine being assessed against the educational program. Therefore, Business and Professions Code section 125.9, which establishes a citation issuance system, is inappropriate as a source of reference for Section 1104. As such, the Committee must remove Business and Professions Code section 125.9 as a source of reference for Section 1104 prior to resubmitting this rulemaking action to OAL.

4.1.2. The Instructions

Page 1 of the Instructions states that a check in the amount of \$2,100 made payable to the Committee must be submitted by the applicant with the feasibility study. The Committee requires this fee pursuant to Business and Professions Code section 1944, subdivision (a)(10), which states, “The fee for each curriculum review and site evaluation for educational programs for dental hygienists who are not accredited by a committee-approved agency shall not exceed two thousand one hundred dollars (\$2,100).” Therefore, the Committee “implements, interprets, or makes specific” Business and Professions Code section 1944, subdivision (a)(10) by adopting the \$2,100 fee in the Instructions. (See Gov. Code, sec. 11349.1, subd. (a)(5); see also Cal. Code. Regs., tit. 1, sec. 14, subd. (b).) As such, the Committee must add Business and Professions Code section 1944, subdivision (a)(10) as a source of reference prior to resubmitting revised regulations to OAL.

4.2. Incorporation by Reference

The title of the document incorporated by reference in Section 1104.1, subdivision (a) is not clearly set out in the text, as the two are not exactly the same. The title of the document in Section 1104.1, subdivision (a) is “Instructions for Institutions Seeking Approval of a New RDH Educational Program”. However, the actual title of the document is “Instructions for Institutions Seeking Approval of a New Education Program for Registered Dental Hygienists”. Prior to resubmitting this regulatory action to OAL, the Committee must revise either the regulation text or the document incorporated by reference so that the title of the document matches in both places. (See Cal. Code Regs., tit. 1, sec. 20, subd. (c)(4).)

4.3. Table of Contents

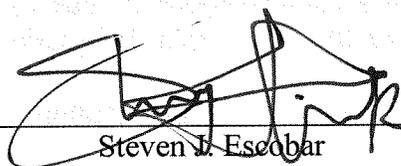
Each rulemaking file must include “[a]n index or table of contents that identifies each item contained in the rulemaking file.” (Gov. Code, sec. 11347.3, subd. (b)(12).) Two documents in the rulemaking file listed as “Materials Relied Upon” are not accurately identified

in the Table of Contents. First, the Table of Contents state that the meeting minutes are from the Committee's meetings on May 2-3, 2014. However, the minutes in the rulemaking file are only dated May 3, 2014. The other document not accurately identified in the Table of Contents is the Commission on Dental Accreditation's "Accreditation Standards for Dental Hygiene Education Programs". The word "Education" is omitted in the Table of Contents. Upon resubmitting this rulemaking action to OAL, the Committee must ensure that the Table of Contents accurately identifies each item in the rulemaking file.

CONCLUSION

OAL disapproved the above-referenced rulemaking action for the foregoing reasons. Pursuant to Government Code section 11349.4, subdivision (a), the Committee may resubmit revised regulations within 120 days of its receipt of this Decision of Disapproval. If you have any questions, please contact me at (916) 324-6948.

Date: September 8, 2015



Steven J. Escobar
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