

**State of California  
Office of Administrative Law**

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

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

**Adopt sections:** 1103, 1105, 1105.1, 1105.2,  
1105.3, 1105.4, 1106

**Amend sections:**  
**Repeal sections:**

**DECISION OF DISAPPROVAL OF  
REGULATORY ACTION**

**Government Code Section 11349.3**

**OAL File No. 2015-0224-02S**

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**SUMMARY OF REGULATORY ACTION**

On February 24, 2015, the Dental Hygiene Committee of California (Committee) submitted to the Office of Administrative Law (OAL) its proposed regulatory action to adopt various sections in title 16, division 11 of the California Code of Regulations (CCR). The proposed adoptions would establish educational program requirements for dental hygienists. The regulation also describes the appeals process to contest the Committee's denial or withdrawal of its approval of a program and the process for changes to an existing approved program.

On April 8, 2015, OAL notified the Committee that OAL disapproved the proposed regulations. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

**DECISION**

OAL disapproved the above-referenced regulatory action for the following reasons:

1. The proposed regulations failed to comply with the consistency standard of Government Code section 11349.1, subdivision (a)(4); and
2. The proposed regulations failed to comply with the clarity standard of Government Code section 11349.1, subdivision (a)(3).

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

**DISCUSSION**

The above proposed regulatory adoptions by the Committee must satisfy requirements established by the part of the California Administrative Procedure Act that governs 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 Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make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, 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 in Government Code section 11349.1. 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 that the public is provided with a meaningful opportunity to comment on regulations before they become effective.

### 1. Consistency

Government Code section 11349, subdivision (d), defines “consistency” to mean “being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.” As discussed below, aspects of the proposed regulations are inconsistent with the Business and Professions Code statute being implemented.

In its originally proposed text, the Committee proposed to adopt regulation section 1103, subdivision (j), to define the term “dental hygiene process of care” with the following definition:

The application of scientific, evidence-based knowledge in the identification and treatment of actual or potential patient health problems. The dental hygiene process of care *includes* assessment, dental hygiene *diagnosis*, planning and outcome identification, implementation, evaluation and documentation, and will serve as the accepted professional standard for decision making.  
[Bold and italics added.]

During the 45-day comment period, the Dental Board of California (Board) submitted a comment to the Committee, expressing its concern that the above definition expands the dental hygiene practice. The Board states in its comment:

Pursuant to [Business and Professions] Code Section 1908, the practice of dental hygiene includes dental hygiene assessment and development, planning, and implementation of a dental hygiene care plan. It also includes oral health education, counseling, and health screenings. The practice of dental hygiene does not include diagnosis and comprehensive treatment planning.

Since Code Section 1908 specifically states that diagnosis and comprehensive treatment planning are not included procedures in the practice of dental hygiene, the Board recommends that the Committee amend the language to delete

references to “diagnosis” and replace with a term such as “assessment” or “evaluation” so as not to exceed the authority vested in Code Section 1908.

Additionally, the phrase: “identification and treatment of actual or potential patient health problems” seem vague and could potentially be perceived to expand the dental hygiene scope of practice. The Board recommends that the Committee amend the language to maintain consistency with Code Sections 1907, 1908, and 1914.

As pointed out by the Board, Business and Professions Code section 1908, subdivision (b)(1), states that “[t]he practice of dental hygiene does not include... [d]iagnosis and comprehensive treatment planning.”

In its Final Statement of Reasons, the Committee responded to the Board’s comment by stating that “since 1986, dental hygiene diagnosis has been part of instruction in the dental hygiene process of care and included in textbooks, education, and is required for the dental hygiene national written exam.” However, Business and Professions Code section 1908, which specifically limits the dental hygiene scope of practice, was adopted in 2008. This statute provides that diagnosis is specifically excluded from the dental hygiene scope of practice despite the fact that dental hygiene diagnosis has been part of instruction in the dental hygiene process of care.

Also during the 45-day comment period, the California Dental Association (CDA) submitted a comment stating that “[i]n recognition that [the definition of dental hygiene process of care] is intended to be used for educational purposes and is not intended to define practice, CDA believes further clarification may be found in the definition provided by the American Dental Educators Association guidelines for dental hygiene education.”

The Committee accepted CDA’s comment, which suggested to adopt the American Dental Educators Association’s definition of dental hygiene process of care, as underlined below. The following modified text was made available for a 15-day comment period, which was subsequently submitted to OAL as the Committee’s final proposed text:

The application of scientific, evidence-based knowledge in the identification and treatment of actual or potential patient health problems as it relates to oral health. The dental hygiene process of care includes assessment, dental hygiene *diagnosis*, planning and outcome identification, implementation, evaluation and documentation, and will serve as the accepted professional standard for decision making. The dental hygiene *diagnosis* is a component of the overall dental *diagnosis*. It is the identification of an existing or potential oral health problem that a dental hygienist is educationally qualified and licensed to treat. The dental hygiene *diagnosis* utilizes critical decision making skills to reach conclusions about the patient’s dental needs based on all available assessment data.  
[Bold and italics added.]

This proposed language is still inconsistent with Business and Professions Code section 1908 because it does not limit the definition of dental hygiene process of care in the context of education, but rather

continues to imply that dental hygiene diagnosis can be included in the dental hygiene scope of practice.

Thus, proposed regulation section 1103, subdivision (j), as written, is not consistent with Business and Professions Code section 1908, subdivision (b)(1). The Committee may modify its definition of “dental hygiene process of care” to be consistent with Business and Professions Code section 1908. These regulatory changes must be made 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 California Code of Regulations before adopting the regulations and resubmitting this regulatory action to OAL for review. Additionally, any comments made in relation to these additional explanations must be summarized and responded to in the final statement of reasons. (Gov. Code, sec. 11347.1, subd. (d).)

## **2. Clarity Standard**

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 “written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them.”

Title 1, section 16, subdivision (b)(1), of the CCR provides a definition for the term “directly affected.” It states:

- (b) Persons shall be presumed to be “directly affected” if they:
  - (1) are legally required to comply with the regulation; or
  - (2) are legally required to enforce the regulation; or
  - (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
  - (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

In this regulatory action, the Committee failed to comply with the clarity standard of the APA.

### **2.1. “Approved accreditation standards”**

Numerous provisions throughout the regulations refer to “approved accreditation standards.” For instance, proposed section 1103, subdivision (c), states that the “instructor to student ratio shall meet approved accreditation standards.” The ratio can be one instructor to ten students or one instructor to one hundred students. Thus, because, these standards are undefined, the regulation is unclear.

Proposed section 1105, subdivision (b)(4) adds a bit more detail but still remains unclear. It states that the “instructor to student ratio shall meet approved Commission on Dental Accreditation standards.”

The specific standards are still undefined. If the said “Commission on Dental Accreditation standards” is a separate document that contains all the requirements, the Committee would have to incorporate them by reference in the regulation or it would have to insert the language containing the requirements directly in the regulation itself.

In the event the Committee opts to incorporate a document by reference, it would have to comply with section 20, title 1, of the California Code of Regulations by having the regulation state that “the document is incorporated by reference and it identifies the document by title and date of publication or issuance.” Also, the document would have to be made available to the public for a 15-day comment period.

Another example is found in proposed section 1105.1, subdivision (a), which defines the program director as “a registered dental hygienist or dentist who has the authority and responsibility to administer the educational program in accordance with accreditation standards.” Here too, it is unclear what the accreditation standards are. Those directly affected would not know what requirements they must comply with to fulfil their responsibilities.

The various proposed regulations that contain the vague term “accreditation standards” must be modified to correct this clarity issue.

## **2.2. “Reasonable period of time”**

Proposed regulation section 1103, subdivision (z), defines “quarter unit” to mean “at least ten (10) hours of college or university level instruction during a quarter plus a reasonable period of time outside of instruction which an institution requires a student to devote to preparation for planned learning experiences, such as preparation for instruction, study of course material, or completion of educational projects.”

Similarly, proposed regulation section 1103, subdivision (ac), defines “semester unit” to mean “at least fifteen (15) hours of college or university level instruction during a quarter plus a reasonable period of time outside of instruction which an institution requires a student to devote to preparation for planned learning experiences, such as preparation for instruction, study of course material, or completion of educational projects.”

The word “reasonable” is unquantified, which makes the required additional period of time outside of instruction unclear. Those directly affected would not know whether reasonable means five hours, thirty hours, or any other amount of hours, in order to comply with the regulation.

## **2.3. “Written plan as required by the Commission on Dental Accreditation”**

Proposed regulation section 1105, subdivision (e) states that the “educational program shall have a written plan *as required by the Commission on Dental Accreditation* for evaluation of all aspects of the program....” (Bold and italics added.)

With this proposed language, it is unclear what written plan is required by the Commission on Dental Accreditation. Those directly affected may not know what the written plan must include. In the event the Committee simply intended to require those directly affected to use a written plan that is already required by the Commission on Dental Accreditation, the language should clearly state that in the regulation and the requirements of the Commission on Dental Accreditation must be incorporated by reference.

**2.4. “Substantive or major change”**

Proposed regulation section 1105.3, subdivision (a)(2)(B), requires an approved dental hygiene program to notify the Committee within ten days of any “[s]ubstantive or major change in the organizational structure, administrative responsibility, or accountability in the dental hygiene program, the institution of higher education in which the dental hygiene program is located or with which it is affiliated that will affect the dental hygiene program.”

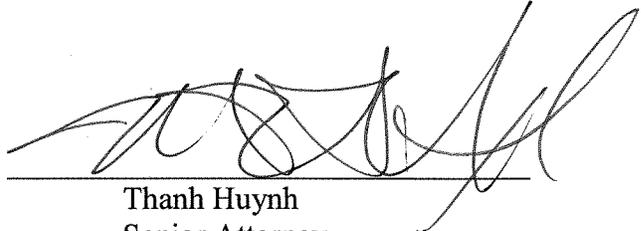
The regulation does not explain what constitutes a substantive or major change. Those directly affected would not know whether a change is substantive or major, and consequently, they would not know when they are required to notify the Committee. Thus the regulation is unclear.

For the reasons discussed above, the Committee failed to comply with the clarity standard of the APA. The Committee must make proposed modifications 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 California Code of Regulations before adopting the regulations and resubmitting this regulatory action to OAL for review. Additionally, any comments made in relation to these proposed modifications must be summarized and responded to in the final statement of reasons. (Gov. Code, sec. 11347.1, subd. (d).)

**CONCLUSION**

For the reasons stated above, OAL disapproved this regulatory action proposed by the Committee. If you have any questions, please contact me at (916) 323-6824.

Date: April 15, 2015



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