

## TITLE 16.

### DENTAL HYGIENE COMMITTEE OF CALIFORNIA

#### DEPARTMENT OF CONSUMER AFFAIRS ADDENDUM TO THE INITIAL STATEMENT OF REASONS

**HEARING DATE:** March 25, 2014

**SUBJECT MATTER OF PROPOSED REGULATIONS:** Remedial Education

**SECTION(S) AFFECTED:** Title 16, Division 11, California Code of Regulations, Section 1108

**UPDATED INTRODUCTION:**

The Introduction is updated as follows:

On March 30, 2015, the Office of Administrative Law (OAL) issued a Decision of Disapproval of Regulatory Action of the Dental Hygiene Committee of California's (Committee) proposed regulations due to the following: (1) failure to follow required Administrative Procedure Act (APA) procedures; (2) failure to comply with the clarity standard of Government Code section 11349.1; and, (3) failure to comply with the necessity standard of Government Code section 11349.1

*Issue #1 - Failure to Follow Required APA Procedures*

OAL's primary APA concerns are related to variance found between the text and forms adopted by the DHCC at their December 7, 2013 meeting and the text and forms that were made available to the public for comment. OAL found the regulatory text materially varied in three ways from the text initially adopted by the DHCC.

First, the Committee adopted regulatory text requiring all remedial courses be at the postsecondary educational level "in an approved dental hygiene program"; however, the Committee prepared, submitted to OAL, and made available to the public for comment regulatory text omitting the requirement that courses be in approved dental hygiene educational program. 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. However, OAL found that the Committee prepared, submitted to OAL and made available to the public regulatory text omitting both of these approved requirements from the Application Form. 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"; however, OAL stated that it is unclear whether the regulatory text the Committee prepared, submitted to OAL and made

available to the public for comment, omitted the qualification that licensees have no disciplinary actions.

At its May 3, 2015 meeting, the Committee voted to adopt modifications to the text and to the application form in order to be in compliance with APA procedures, provide additional clarification and make the changes as noted by OAL. The Committee voted to amend California Code of Regulations (CCR) section 1108 (a)(3) to require that all courses are required to be at the postsecondary educational level in an approved dental hygiene program. Second, with respect to the Application Form, the Committee voted to amend it by adding a column for out-of-state license status and by adding a clarifying sentence on page 2 of the form. Third, the Committee voted to amend CCR section 1108(b)(2)(A) to clarify that faculty are required to have a California license to practice dentistry or dental hygiene, but only with no disciplinary actions “at any time in any jurisdiction”.

OAL’s APA procedural concerns are addressed in this Addendum to the Initial Statement of Reasons, the modified text and the modified Application for Approval of Course in Remedial Education form (incorporated by reference), which was noticed to the public for a 15-day comment period.

#### *Issue #2 – Clarity*

In their disapproval decision, OAL stated concerns regarding the clarity of the regulatory text related to the timing of faculty discipline, scope of faculty discipline and recordkeeping requirements. First, OAL found that the timing of faculty discipline expressed in the proposed regulation could have two possible interpretations. Second, OAL found that the scope faculty discipline expressed in the proposed regulation could have two possible interpretations. Third, OAL stated a clarity concern with recordkeeping requirements as listed on the Application Form as compared to the proposed regulatory text for CCR section 1108 in addition to a reference that records to be kept may be interpreted differently due to the citation of Title 16, Division 11 of the California Code of Regulations. The records faculty is required to keep for at least five years are listed on question 9 of page 3 of the Application Form and also CCR section 1108(b)(6). CCR section 1108(b)(6) was missing five of the ten records required to be retained by applicants.

At its May 3, 2015 meeting, the Committee voted to adopt modifications to the text and to the Application Form in order to address OAL concerns and provide additional clarity about the types of records the applicant is required to keep. The Committee voted to amend CCR section 1108(b)(2)(A) to clarify the timing and scope of faculty discipline, by adding the phrase “at any time in any jurisdiction” to the proposed language. Lastly, the Committee amended the proposed text of CCR section 1108(b)(6)(F) to add the additional five types of records (i.e. copies of curriculum, including course syllabi, exams, sample test questions and clinic rubrics) as requested by question 9 of the form that were missing from the proposed regulatory text. In addition, page 1 of the Application Form was amended to only cite “16 CCR §1108” so that it clarifies that this application form applies to the requirements stated in CCR section 1108.

*Issue #3 – Necessity*

OAL's necessity concern related to insufficient explanation of the necessity for several provisions of the proposed regulations, indicating that this was not adequately addressed in the initial statement of reasons. Those concerns are addressed in this Addendum, which was noticed to the public for a 15-day comment period.

**UPDATED SPECIFIC PURPOSE OF EACH ADOPTION OR AMENDMENT:**

The Committee's proposed changes are updated as follows:

**Section 1108 (a)(2) – Approval of Remedial Education Course**

This section was amended to reflect the new date for form DHCC RE-01 which was amended by the Committee at its May 2015 meeting.

**Section 1108 (a)(3) – Approval of Remedial Education Course**

This section was corrected to reflect the Committee's December 2013 approved text and amended to specify that courses must be at the postsecondary educational level "in an approved dental hygiene educational program." The Committee reaffirmed its approval of this corrected text at its May 2015 meeting.

**Section 1108 (b)(2)(A) – Requirements for Approval of Course in Remedial Education**

OAL stated that regarding the scope of faculty discipline, the Committee did not include a statement explaining the purpose or necessity for proposed Section 1108(b)(2)(A). Following is a statement of purpose.

Proposed Amendments: The proposed amendments specify that pre-clinical and clinical faculty, including the course director and supervising dentist(s) are required to possess a valid, active California license for at least two years prior to instruction. In addition, the faculty can have no disciplinary actions at any time in any jurisdiction.

Purpose: The proposed amendments are needed because applicants for approval of a remedial education course need to know the specific criteria for their faculty to teach a remedial education course approved by the Committee. In order to gain and keep Committee approval of this course, this requirement needs to be fulfilled. The requirement for clinical faculty to have a valid, active license for two years (with no disciplinary actions in any jurisdiction) is modeled to be consistent with the amount of time dental assistant educational program faculty needs to hold a license before they can teach (Title 16, Division 10 CCR §1070(d)).

Problem: Faculty, the director and supervising dentists need to have a current license in order to practice on patients. Unlicensed individuals or licensees who possess a revoked, cancelled or expired license could instruct students in the course, and may give erroneous, inadequate, or detrimental instruction to unknowing students, which can cause harm to patients during clinical instruction.

Rationale: The proposed amendment would further clarify the license requirements necessary for pre-clinical and clinical faculty, including the course director and supervising dentist(s) that are teaching in the remedial education course. According to OAL, the initial language was unclear and could be interpreted in multiple ways. The Committee amended the proposed text to include the suggestions made by OAL in their decision of disapproval. It is important that faculty do not have any disciplinary actions in any jurisdiction to ensure that students are trained adequately and to prevent country- or state-hopping by individuals whose licenses have been revoked in another country or state from teaching California dental hygiene students. 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 in any jurisdiction so neither students nor the public are harmed through instructors negligence or lack of knowledge and skill in dental hygiene procedures.

**Section 1108 (b)(6)(F) – Requirements for Approval of Course in Remedial Education Recordkeeping**

OAL stated that regarding recordkeeping, the Committee did not provide a rationale in the 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. The Committee amended the proposed text of CCR section 1108(b)(6)(F) to add the additional five types of records (i.e. copies of curriculum, including course syllabi, exams, sample test questions and clinic rubrics) as requested by question 9 of the form that were missing from the proposed regulatory text. Following is the statement of purpose:

Proposed Amendments: These amendments specify that course providers must keep copies of curriculum, including course syllabi, exams, sample test questions and clinic rubrics for at least 5 years.

Purpose: The proposed amendments are needed to inform course providers that specific information must be retained on file for a minimum of 5 years for the purpose of audits by Committee staff.

Problem: There are no written requirements that course providers must keep copies of curriculum, including course syllabi, exams, sample test questions and clinic rubrics, necessary for Committee staff to review and audit the course. Five years is the standard length of time for retention of institutional records and provides staff sufficient material for audit purposes.

Rationale: Course providers, Committee staff and students need to know and be assured that copies of copies of curriculum, including course syllabi, exams, sample test questions and clinic rubrics will be kept for five years so that Committee staff may review and audit course providers to determine that students are receiving adequate and accurate professional instruction, and course providers will know exactly which

records to keep, and for how long. The audit process ensures that students receive quality education in dental hygiene, as it is monitored by the Committee.

### **Application for Approval of Course in Remedial Education - DHCC RE-01 (05/2015)**

**The Fee and Its Amount** - OAL stated that the Committee must 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. Following are statements of the specific purpose of the fee and its necessity, and the purpose and necessity of the fee amount of \$300:

**Purpose:** An application fee of \$300 is required of all applicants. This fee offsets the cost of staff time and resources to review the application and perform a site visit for audit purposes.

**Problem:** Business and Professions Code Section 1944(a)(11) provides for a fee not to exceed \$300 for each review of courses required for licensure that are not accredited by a committee-approved agency, the Council for Private Postsecondary and Vocational Education, or the Chancellor's Office of the California Community Colleges. Remedial courses are tailored to the individual student and are not accredited by any entity. Staff time and resources are necessary to review and audit remedial education courses. For example, it is estimated that application review and consultation with the course provider would take approximately 1 hour and a site visit for audit purposes would take approximately 9 hours (1-2 working days, plus travel time). This work is assigned to a Staff Analyst whose compensation is calculated at \$30 per hour x 10 hours = \$300. The Committee is not able to absorb these costs, and the \$300 fee would offset them.

**Rationale:** This text is needed so that course providers know the fee to submit with the application. The Committee needs revenue to ensure that staff and resources will be available to review the application and perform audits, and this text specifies the amount of the fee that must accompany the application which is both reasonable and offsets the staff time involved in application review and the audit process.

### **Form Contents**

OAL stated that 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. Following is a statement of purpose for each element of the form.

**Name of Course Provider - Purpose:** The Committee requires this information in order to identify the applicant and to initiate the applicant's record file, which is filed alphabetically. If the applicant is not identified, the applicant's record file cannot be

labeled and the applicant cannot be distinguished from other applicants.

Rationale: The Committee would not be able to distinguish one applicant from another, create records, or know who is applying for approval if the course provider's name is not included on the application form.

Phone Number - Purpose: The Committee needs the ability to contact applicants by phone to clarify any questions that arise during review of the application. If no phone number is provided, a letter must be sent to the applicant, delaying the application review process.

Rationale: All other applicants and licensees provide this necessary contact information.

Email Address - Purpose: All applicants for registered dental hygienist (RDH) or registered dental hygienist in alternative practice (RDHAP) must provide an email address for contact purposes. Section 1934 specifies that a licensee must notify the Committee within 30 days of changes to his or her email address. In the interest of speed and cost containment, much of the Committee's contact with applicants and licensees occurs through email.

Rationale: All other applicants and licensees provide this necessary contact information.

Name and Title of Course Director - Purpose: The Committee needs to know whom to contact for clarification or additional information regarding the application in the review process.

Rationale: If not provided, staff may waste time searching for the appropriate person to contact regarding the course application.

Affiliated Dental Hygiene or Dental Program - Purpose: The Committee needs to ensure that the applicant's remedial course provides the required facilities for instruction. Sections 1108 (a)(3) and (b)(5) require instruction be given in an approved dental hygiene program. Some dental hygiene programs are given within a dental program.

Rationale: The applicant needs to inform the Committee where the remedial instruction will take place.

Mailing Address of Course Provider – Purpose: This allows the Committee to obtain the correct address to direct any postal correspondence to the applicant.

Rationale: The course provider's mailing address may differ from the physical address.

Requirements for Course – Purpose: Course provider applicants need to know that a remedial education course may not operate before receiving the Committee's approval, that a biennial report must be submitted, that records may be inspected at any time, that approval may be withdrawn at any time the Committee determines that a course does not meet the requirements of the law, and that any changes in course content, faculty,

and physical facilities must be submitted to the Committee within 10 days.

Rationale: It is important that unapproved courses not take students' money and begin instruction before obtaining Committee approval. An unapproved course provider could accept students' funds and vanish before submitting application. Course providers need to be aware that records must be available for inspection and that a biennial report is required, so that the Committee may act upon complaints and monitor courses. It is fair to inform course providers that the Committee may withdraw approval at any time it determines that the course does not meet the requirements of the law, therefore it is incumbent upon the course provider to be cognizant of the applicable laws. Notification to the regulatory board within 10 days of changes to course content, faculty or physical facilities is required of all registered dental assistant programs (CCR Title 16, Division 10, Chapter 3, Article 2, Section 1070(b)(2)), pit and fissure sealant courses (CCR Title 16, Division 10, Chapter 3, Article 2, Section 1070.3(c)(2)(C)), coronal polishing courses (CCR Title 16, Division 10, Chapter 3, Article 2, Section 1070.4(c)(2)(C)), and ultrasonic scaling courses (CCR Title 16, Division 10, Chapter 3, Article 2, Section 1070.4(c)(2)(C)), and is consistent for course requirements in the dental profession.

Requirements for Course Question 1. – Purpose: The course provider applicant needs to know that all aspects of dental hygiene instruction must be offered by a remedial course provider, not only certain functions. The items listed in the question are either contained in statute (Business and Professions Code Sections 1908, 1909 and 1910) or are procedures utilized in broader terms (i.e., a dental hygiene care plan referenced in Section 1908(a) consists of assessment and probing, exploration and detection of calculus; oral prophylaxis referenced in Section 1910(a) involves hand and sonic or ultrasonic instrumentation to remove plaque biofilm and calculus).

Rationale: The Committee seeks to ensure that course providers do not offer remedial instruction in only one or two areas of dental hygiene, but cover the breadth of knowledge necessary for students who have failed the clinical examination three times, or failed once due to gross trauma to the patient, to achieve competence in the area or areas that they are lacking.

Requirements for Course - Course Faculty Question 2. – Purpose: The proposed regulations specify that pre-clinical and clinical course faculty, including the course director, must meet certain requirements listed in Section 1108(b)(2)(A) – (D).

Rationale: Through the collection of the information requested in the chart for all faculty, including certification for all out-of-state licenses ever held by faculty, Committee staff has the ability to verify that all faculty and the course director meet the requirements of this Section and that the course provider has qualified faculty and course director before the course is approved. These criteria for directors and faculty are consistent within dental education, as contained in CCR Title 16, Division 10, Chapter 3, Article 2, Section 1070(b) and (d) for registered dental assisting programs.

Requirements for Course Question 3. – Purpose: The Committee must ensure that

adequate physical facilities are available as stated in Section 1108 (b)(3)(A) before a course is approved and student instruction begins.

Rationale: Adequate facilities must be available for student instruction to take place. Without adequate facilities available, the students would not receive the remedial training necessary in order to be prepared to retake their clinical licensure exam, which determines their competence to practice dental hygiene. In addition, in order for hands-on instruction to take place and for students to receive the adequate amount of hands-on practice before taking the clinical exam, there is a need for adequate facilities to accommodate both students and patients.

Requirements for Course Question 4. – Purpose: The Committee must ensure that adequate equipment as specified in Section 1108 (b)(3) is available before approving a remedial education course and student instruction begins.

Rationale: Adequate equipment must be available for student instruction to take place. Without adequate facilities available, the students would not receive the remedial training necessary in order to be prepared to retake their clinical licensure exam, which determines their competence to practice dental hygiene. The Committee is required to evaluate a licensee's competence in order to ensure consumer protection.

Requirements for Course Question 5. – Purpose: The Committee must ensure that health and safety requirements as specified in Section 1108(b)(4) are part of the curriculum before approving a remedial education course and student instruction begins.

Rationale: It is important that hazardous waste management and hazardous communication plans be in place and that students be instructed in the correct actions to take when disposing of needles and medical waste, or if there is a radiation hazardous emergency.

Requirements for Course Question 6. – Purpose: The Committee must ensure students' safety and that the course provider applicant has a bloodborne and infectious diseases exposure control plan and that all students receive a copy of the plan before approving a remedial education course and student instruction begins.

Rationale: Provisions must be made for accidental needlestick and exposure to bloodborne or infectious diseases for students' and public safety.

Requirements for Course Question 7. – Purpose: The Committee must ensure that a course provider applicant intends to provide information to remedial students as specified in Section 1108(b)(7) and has a mechanism for doing so before approving a remedial education course and student instruction begins.

Rationale: Students need to know what the remedial education course will contain, and how the course will apply in practice to achieve competence in the areas of deficiency before committing time and money to the course. The Committee needs to ascertain that

the course provider applicant can develop a sample curriculum to address a student's areas of deficiency that contains written course and instructional learning outcomes, and methods of student assessment and evaluation before approving the course provider.

Requirements for Course Question 8. – Purpose: The Committee must ensure that a course provider applicant will provide remedial courses of sufficient duration to allow a student to develop competence by requesting a sample course schedule before approving a remedial education course and student instruction begins.

Rationale: If students receive insufficient instruction, they will continue to fail the clinical examination. The Committee needs to prevent course providers from offering truncated courses that require students to take remedial courses over and over so the course makes additional money by ensuring that sample course schedules contain sufficient hours of instruction for a student to achieve competence.

Recordkeeping Question 9. – Purpose: Course providers need to know that they are required to keep curriculum, syllabi, exams, sample test questions and clinic rubrics, copies of faculty credentials, faculty calibration plan and individual student records including evaluations and summations thereof for the Committee to audit the course, and how long they must be kept. The Committee needs to review all of these materials to ensure that course providers have qualified faculty who give adequate instruction to students in remediation. Five years for these records to be kept is standard for all registered dental assistant programs (CCR Title 16, Division 10, Chapter 3, Article 2, Section 1070(b)(1)), pit and fissure sealant courses (CCR Title 16, Division 10, Chapter 3, Article 2, Section 1070.3(c)(2)(C)), coronal polishing courses (CCR Title 16, Division 10, Chapter 3, Article 2, Section 1070.4(c)(2)(B)), and ultrasonic scaling courses (CCR Title 16, Division 10, Chapter 3, Article 2, Section 1070.4(c)(2)(B) and is consistent with course requirements in dental education.

Rationale: The Committee needs a mechanism to ensure that course providers continue to provide quality instruction to students after initial approval.

Recordkeeping Question 10. – Purpose: Course providers need to know that they are required to issue each student a certificate of completion after the student achieves at least 75% in each competency for all competencies needed for the student's individual remedial education course. Seventy-five percent is the minimum passing score for competencies within dental hygiene educational programs, and also for the Committee's written and clinical examinations.

Rationale: The Committee needs documentation to verify that a student has successfully completed remediation at the minimum passing score for the Committee's examinations before the student is eligible for reexamination according to the provisions of Business and Professions Code 1917.3, otherwise remedial students may pay a provider money for insufficient or inadequate remedial education and again fail to pass the Committee's examination, and placing clinical patients at risk of harm.

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

OAL stated that each applicant is required to affirm or deny that 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, noting that 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. Following are the purpose and rationale of the questions:

Acknowledgement Question 11. – Purpose: Course providers need to know that they are required to review Business and Professions Code 1909 particularly as these procedures must be directly supervised by a dentist.

Rationale: The Committee needs to ensure that course providers are aware that instruction in these procedures requires that a dentist supervise any provision of local anesthetic, nitrous oxide-oxygen analgesia or soft tissue curettage within the course, even when students practice on each other, otherwise providers may believe that a dentist's supervision is only required when procedures are performed by licensees in a dental office.

Acknowledgement Question 12. – Purpose: Course providers need to know that they must abide by the requirements of Business and Professions Code 1909 and the California Code of Regulations pertaining to dental hygienists or they may lose course approval.

Rationale: The Committee needs to ensure that course providers are aware that they must adhere to the requirements of Section 1909 for the reasons explained above, and that failure to do so can result in loss of course approval. Similarly, Division 11 contains all regulations pertaining to the profession of dental hygiene, including Disciplinary Guidelines and provisions for citations and fines, as well as specific requirements for a course in the administration of local anesthetic, nitrous oxide-oxygen analgesia, and soft tissue curettage. Course providers need to be aware of all of these laws so they are not subject to fines or discipline, and so that any course which contains remedial instruction in soft tissue curettage, administration of local anesthetic or administration of nitrous oxide-oxygen analgesia meets the requirements in law for such a course of instruction.

Statement that Committee may approve or deny approval of any course: This section also contains a statement that the Committee may approve or deny approval of a course, and if the Committee denies approval, the reasons for denial will be provided to the course in writing within 90 days. This statement informs course provider applicants that there is only approval or denial of a course provider application, no provisional approval, interim approval or other temporary type of approval. Further, the course provider will be provided with the reasons for denial in writing so that the course provider knows exactly the reasons for the denial.

Rationale: Course provider applicants may think that they can be given an interim or provisional approval before being granted full approval. Course providers whose applications are denied receive timely notification of the reasons for denial so they know

exactly why the application was denied. If they choose to reapply for approval, they can correct the reasons for denial and achieve course approval, rather than guess at what deficiencies were found by the Committee.

Certification of Application under Penalty of Perjury: Course provider applicants are required to sign the application and certify under penalty of perjury that all statements made in the application are true and correct.

Rationale: All of the Committee's forms contain the requirement for a signature certifying that the applicant certifies the truth of the form's content under penalty of perjury. Even sponsors of free health events are required to sign and certify their application form under penalty of perjury. This informs applicants that the information that they provide must be true and correct, prevents applicants from providing false information, and provides notification that if the Committee finds that false information has been provided on the form, it will seek all appropriate legal remedies.

Information Collection and Access: This is a boilerplate section that Department of Consumer Affairs requires on all forms, and informs applicants who is collecting and maintaining the information, where it will be kept, and why it is being collected.

Rationale: This standard language informs applicants where their information may be accessed, why it is being collected, and notes that the names and addresses submitted may, under limited circumstances, be made public. Course provider applicants are thus informed that they may contact the Committee to review their own personal information that the Committee has collected, and that once approved, the provider's name and address may become public information.

### **Miscellaneous**

Lastly, the following non-substantive changes recommended by OAL were made to the materials for purposes of clarity:

- Page 1, proposed text: The name of the form was updated to the new version of 05/2015, since the most updated form was amended by the Committee in May of 2015.
- Page 1-3 of the Application Form was modified to reflect the new version of the form as updated May 2015.
- Page 1 of the Application Form was modified to correct the citation from Section 1104 to Section 1108.