

December 22, 2023

Dr. Maxine Feinberg, Chair
Commission on Dental Accreditation
211 East Chicago Avenue
Chicago, IL 60611

Sent via email only

Dear Dr. Feinberg,

The following correspondence is related to the Report of the Ad Hoc Committee on Faculty to Student Ratios in Accreditation Standards (the “Report”), which was written in response to a request from 19 state dental associations that the Commission on Dental Accreditation (“CODA”) develop and implement an overarching methodology for setting faculty to student ratios used in its various Accreditation Standards. This document reflects the opinion and position of the Washington State Dental Association (“WSDA”) and does not necessarily reflect the position of any other organization.

While WSDA appreciates CODA’s consideration of the aforementioned request, our antitrust concerns are exacerbated by both CODA’s process for developing as well as the conclusions drawn in the Report. Unless CODA takes immediate corrective action at its Winter 2024 meeting, WSDA will initiate further action to address our concerns.

WSDA is concerned that CODA is engaged in anticompetitive behavior in violation of the federal antitrust laws and that CODA’s concerted activities have resulted in harm to patients in the form of reduced competition, decreased access and consumer choice, and increased prices for dental services.

Section 1 of the Sherman Act prohibits combinations and conspiracies in restraint of trade. In the context of standard setting by accreditation agencies, the relevant case law is clear that, while establishing industry-wide standards can be a legitimate and pro-competitive activity, competitors cannot abuse standard setting, credentialing, or accreditation processes undertaken by agencies to shield themselves from competition with qualified providers without reasonable justification. Utilizing a Rule of Reason analysis, courts assess whether the restriction at issue serves a legitimate purpose without unduly limiting competition among providers or otherwise improperly using legitimate activities (*i.e.*, standard setting) to harm potential competitors or to confer market power for products or services. To that end, the accrediting agency and its individual members may be liable for antitrust violations even where the agency’s motives were entirely proper. Those found in violation of the Sherman Act may be subject to civil and criminal penalties including injunctive relief, monetary penalties, and jail time.

WSDA believes that CODA’s members are improperly manipulating CODA’s Accreditation Standards to artificially and unnecessarily suppress competition for dental hygienist services in order to directly benefit those currently licensed as dental hygienists, including CODA’s dental hygienist members, amounting to a concerted restraint of trade in direct violation of the Sherman Act. Specifically, by unnecessarily and uniquely restricting staff ratios for dental hygienists, CODA is effectively suppressing competition in the dental hygienist labor market. The fact that CODA is the

only health care profession accrediting body that utilizes explicit faculty to staff ratios, combined with CODA's inability to articulate any specific methodology or rationale for determining the faculty to staff ratios other than their "long-standing history" in CODA's Accreditation Standards, clearly demonstrates that CODA is improperly using an otherwise legitimate activity – the promulgation of specific, potentially competition-enhancing accreditation standards – to bar potential competitors for dental hygienist services from the market and to confer market power on CODA's existing dental hygienist members, and currently licensed dental hygienists more broadly, in clear violation of the federal antitrust laws.

Further, WSDA believes that CODA's activities are in direct opposition to relevant guidance issued by the Federal Trade Commission's Office of Policy Planning, including guidance provided directly to CODA. The FTC has urged boards and agencies to reject or narrow restrictions that limit health care access and raise prices to consumers by limiting competition among health care providers and professionals. As CODA is undoubtedly aware, in a 2014 letter to CODA advocating for the adoption of proposed Accreditation Standards for dental therapy programs, the FTC made specific reference to the fact that standards enhance competition by increasing the number of providers entering the field. In the face of historic understaffing for dental hygienists, the decision by CODA to continue to limit the pool of potential hygienists can only be seen as an artificial suppression of competition intended to confer market power on existing hygienists – some of whom are actively involved in CODA's standard setting – in direct violation of the Sherman Act and guidance from the FTC.

In order to address our concerns, CODA must take or initiate action on one of the following options at its Winter 2024 meeting:

- Entirely eliminate faculty to student ratios in the Accreditation Standards for all allied dental professions to move into alignment with the Accreditation Standards for Predoctoral Dental Education Programs as well as all other accreditation standards for health professions outside of dentistry; or
- Immediately make the faculty to student ratio in the Dental Hygiene Accreditation Standards (Section 3-6) the same as the faculty to student ratios in the Dental Therapy Accreditation Standards (Section 3-5) and the Dental Assisting Accreditation Standards (Section 3-8). The result of this change would be that the Accreditation Standards for all three auxiliary professions would be identical with a faculty to student ratio of 1 to 6.

In the absence of appropriate attention by CODA, WSDA is prepared to initiate further action to address its antitrust concerns. CODA should not discard nor destroy any documentation germane to this matter.

Respectfully,



Bracken R. Killpack, MBA, CAE
Executive Director
WSDA



Emily R. Studebaker
Studebaker Nault, PLLC
WSDA Outside Counsel



Michael R. Greer
Hall, Render, Killian, Heath & Lyman, P.C.

Cc: Dr. Sherin Took, Director, Commission on Dental Accreditation
Ms. Cathryn Albrecht, Senior Associate General Counsel, American Dental Association
ADA Board of Trustees
ADA Council on Dental Practice
ADA Council on Dental Education and Licensure
Dr. Linda J. Edgar, President, American Dental Association
Dr. Brett Kessler, President-elect, American Dental Association
Dr. Raymond A. Cohlma, Executive Director, American Dental Association
Dr. John Hisel, ADA 11th District Trustee
Mr. Scott Fowkes, General Counsel, American Dental Association
American Society of Constituent Dental Executives