

DENTAL HYGIENISTS: Application of sodium fluoride by employees of United States Public Health Service not a violation of Missouri Licensing Law.

January 29, 1949



2-1-49

Dr. Reuben R. Rhoades
Secretary, Missouri Dental Board
Central Trust Building
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"The Missouri Dental Board would like an opinion as to the interpretation of the dental hygienists law, being House Bill 105 of the 64th General Assembly, found on pages 269 to 277 of Laws of Missouri, 1947.

"The United States Public Health Service is using a mobile dental unit in some of the counties of Missouri, employing a dentist and two dental hygienists, employees of the United States Public Health Service. The idea of this unit is to clean the teeth of children and apply a solution of sodium fluoride, for the prevention of decay. This program is a national program and congress has appropriated thousands of dollars for its operation and is being sponsored here in Missouri by the Missouri State Department of Health.

"The question has been raised, if the dental hygienists are violating section 1 (a) of the Hygienist Act, which defines the operative procedure authorized to be performed by dental hygienists. Our hygienist's law does not permit the application of this solution. We were

of the opinion that all three of these persons are federal employees and have a legal right to operate in Missouri as long as this mobile unit is using this method as a demonstration and immunization to prevent decay and not charging a fee for their services.

"These mobile units are operating in many states, some of the states have amended this law to permit the application of sodium fluoride and some have not. We will be pleased to have your opinion on this matter * * *"

Section 1 of the Missouri Dental Hygienist's Licensing Act, Laws of Missouri, 1947, Volume I, page 269, provides:

"Such persons as shall become, and remain, duly licensed and authorized dental hygienists, under the provisions of this Act, may lawfully practice the operative procedures of dental hygiene under the continuous supervision and inspection of such legally qualified and licensed dentists as shall become, and remain, authorized, under the provisions of this Act, to engage such dental hygienists.

"(a) As used in this Act, the term 'operative procedures of dental hygiene' shall mean the treatment of human teeth by removing therefrom stains and calcareous deposits, by removing accumulated accretions from directly beneath the free margin of the gums, and by polishing the exposed surface of the teeth; and the term 'operative procedures of dental hygiene' shall not include the diagnosis of, or the performance of any other operative procedure on, any other part or condition of the teeth, mouth or jaw."

As we understand the procedure involved, a child's teeth are first examined by the dentist and they are then cleaned by a hygienist who also applies a sodium fluoride solution; the application of the solution is done with a spray and the

solution is allowed to dry for four minutes; the cleaning and application of the solution are under the direction and supervision of the dentist. The actual application of the solution, after the teeth have been properly cleaned, does not involve any particular degree of skill.

Inasmuch as the statute to which you have referred specifically authorizes a dental hygienist to clean teeth, we feel to construe the statute to mean that the hygienist may not, after having cleaned the teeth, perform the relatively simple procedure of applying a solution of sodium fluoride would be an unnecessarily strict construction which would not tend to promote the purpose of the statute by protecting the public. In addition, we feel that the mere application of the solution would not be regarded as an "operative procedure" within the meaning of the section above quoted.

There is also the question of whether or not these hygienists are in any respect subject to the Missouri Hygienists' Law. They are employees of the United States Public Health Service. The program is being carried out pursuant to an appropriation of \$1,000,000 by the second session of the 80th Congress (Chapter 472, Public Law 646). The report of the Appropriation Committee in the House of Representatives (Report No. 1821) contained the following comment concerning the program:

"Assistance to States, general.--The accompanying bill includes \$1,000,000 to enable the Public Health Service to set up facilities to work in cooperation with the States, dental societies, and other organizations to demonstrate to the dental profession and the people of America generally the efficacy of the relatively new procedure of so-called topical application of sodium fluoride to the teeth as a preventative against dental decay. It will be recalled that in connection with consideration of the Labor-Federal Security appropriation bill, 1949, the committee evidenced a good deal of interest in this research accomplishment and expressed its intense desire to see that procedure was made widely known. The program envisioned by the original budget estimate was largely predicated on a new grant-in-aid program to enable the States to inaugurate a wide-

scale program of applying the new treatment to children's teeth. The committee felt that it was neither essential nor desirable to embark on a new grant-in-aid program out of the Federal Treasury in order to reap full benefits from this new research development but, rather, that a widespread and intense demonstration and publicity program would be more appropriate and at the same time fully effective. Accordingly, on the basis of the original presentation, the committee approved in H. R. 5728 only sufficient funds to provide for continuation of the researches and demonstrations currently being carried on in this field.

"In view of widespread public interest the committee subsequently decided to hold further hearings looking to development of a more appropriate, economical, and effective way to accomplishing the purpose. To assist in arriving at the proper determinations, the committee had the benefit of testimony from representatives of the American Dental Association, the National Congress of Parents and Teachers, the State and Territorial Health Officers Association, and the National Grange. As a result of this further consideration, the committee has determined that field demonstration units should be established to operate in the State under a close cooperative arrangement with State health departments, dental societies and organizations and other organizations. It would be the purpose of these units--roughly one mobile unit for each State--to demonstrate to dentists, dental hygienists, State and local health department personnel, etc., the correct techniques of making sodium fluoride applications to the teeth, to serve as a training mechanism for public health personnel, and generally to publicize and promote interest in the procedure.

"It may be stated that this proposal is in full accord with the views of the Council

on Dental Health of the American Dental Association. In recommending the appropriation of \$1,000,000 additional to implement this program of demonstration, it should be clearly understood that the committee does not view this program on the part of the Public Health Service as a permanent fixture. Rather, it is the view of the committee that if the demonstration facilities are properly managed they will thoroughly cover the several States and make the procedure so widely known and available that the Public Health Service can and should withdraw from active participation of the type herein provided for."

This appropriation was made pursuant to the power of Congress to appropriate money for the general welfare (U. S. Constitution, Article I, Section 8). See *United States v. Butler*, 297 U. S. 1, 65, 80 L. Ed. 477, 56 Sup. Ct. 312, and *Helvering v. Davis*, 301 U. S. 619, 640, 81 L. Ed. 1307, 57 Sup. Ct. 904.

The determination of whether or not a particular purpose is a matter of general welfare is a question largely within the discretion of Congress (*Helvering v. Davis*, supra). A determination by Congress that the purpose here involved is a matter of general welfare would not likely be held arbitrary and clearly wrong. See *Oklahoma City v. Sanders*, 94 Fed. (2d) 323; *School Dist. No. 37, Clark County, v. Isackson*, 92 Fed. (2d) 768.

The immunity of federal employees from state regulation in the performance of their duties is well settled. In the case of *Johnson v. Maryland*, 254 U. S. 51, 1.c. 57, 65 L. Ed. 51, 41 Sup. Ct. 16, the court said:

"It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer, upon examination, that they are competent for a necessary part of them, and pay a fee for permission to go on. Such a requirement does not merely touch the government servants remotely

by a general rule of conduct; it lays hold of them in their specific attempt to obey orders, and requires qualifications in addition to those that the government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work, and that duty it must be presumed has been performed. * * *

That principle would appear to be applicable here. The Federal government having determined that the employees in question are competent to perform the duties involved, the state would have no power to interfere.

Conclusion.

Therefore, it is the opinion of this department that dental hygienists employed by the United States Public Health Service may, in carrying out a program of the United States Public Health Service to demonstrate the procedure for the application of sodium fluoride for the prevention of dental caries, apply such solution in this state without violating the Missouri Dental Hygienist's Licensing Law (Laws of Missouri, 1947, Volume I, page 269).

Respectfully submitted,

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APPROVED:

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cc: Dr. E. B. Owen
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