Docket No. 9311

OPINION AND ORDER OF THE COMMISSION

By Thompson, Commissioner:

I. INTRODUCTION

This case presents the important question of whether the South Carolina State Board of Dentistry ("Respondent" or "the Board") violated federal antitrust law by enacting a regulation that contravened legislation designed to improve access to dental care for South Carolina's most vulnerable citizens -- children of low-income families. The Board is the regulatory authority for dentists and dental hygienists in South Carolina and this case is before the Federal Trade Commission on the Board's Motion to Dismiss the Complaint. As required by law, we accept the factual allegations in the Complaint as true for purposes of ruling on the Board's motion. Unless otherwise noted, all statements of fact in this opinion are based directly on the Complaint.

More than 40 percent of children in South Carolina are Medicaid-eligible and, in the early 1990s, only 12 percent of those received preventive dental care. According to the South Carolina Administrative Law Judge's Report, this problem is especially acute in rural areas. In 1988, the South Carolina legislature sought to remedy this problem by amending the state dental law to permit dental hygienists to provide preventive dental care to children in schools. However, the amended law did not significantly improve preventive dental care in schools, principally because it required a dentist to examine each student before performing the services. In 2000, the state legislature again amended its law to make it easier for dental hygienists to provide oral health care in schools. The amendments removed the requirement that "a supervising dentist [examine] the patient no more than 45 days before the [hygienist's] treatment," and added the requirement that the hygienist work "under general supervision." The

Governor of South Carolina stated that the 2000 law "remove[d] a regulation that hindered access to dental care."

Following the 2000 amendments, in July 2001, the Board enacted an emergency temporary regulation that reinstated the preexamination requirement. As a result, thousands fewer children in South Carolina received preventive dental care in the latter half of 2001 than in the first half of that year. In 2003, the South Carolina legislature amended the law to state expressly that the dental examination requirements applicable in some settings do not apply to hygienists' work in public health settings. In March 2003, the Board restated its position that a dentist must see a patient and provide a treatment plan before a hygienist provides care. Thereafter, the Commission issued a complaint to enjoin the Board from requiring a dental preexamination in school settings.

The Board asserts two arguments in support of its Motion to Dismiss. The first raises the legal issue of whether the state action doctrine protects the Board's conduct from antitrust liability. We cannot conclude that the state action doctrine protects the Board's reinstatement of the preexamination requirement because the Board's actions appear to directly conflict with a specific legislative mandate. Accordingly, we deny Respondent's Motion to Dismiss the Complaint on this ground.

The Board's second argument, that changes to South Carolina law have rendered the case moot, raises a question of disputed fact that we cannot resolve given the record at this early stage of the proceedings. In light of the narrow scope of this factual question, however, the Commission has decided to retain jurisdiction at this time and to refer this matter to the administrative law judge for a limited inquiry on the issue of whether there is a reasonable likelihood

that the challenged conduct will recur. If, after this inquiry, we decide that the case is moot, the Commission can dismiss the Complaint. Absent such a determination, this matter will proceed to an administrative trial on the merits.

II. <u>PROCEDURAL BACKGROUND</u>

On September 12, 2003, the Commission issued an administrative complaint against the Board, alleging that the Board violated Section 5 of the Federal Trade Commission Act by "restrain[ing] competition in the provision of preventive dental care services by unreasonably restricting the delivery of dental cleanings, sealants, and topical fluoride treatments in school settings by licensed dental hygienists." Compl. ¶ 1. Specifically, the Complaint points to the Board's July 2001 adoption of an "emergency regulation" that allegedly reimposed a requirement that dentists preexamine patients before dental hygienists provide treatment in school settings. *Id.* ¶ 25. The Complaint asserts that the Board's action "deprive[d] thousands of school children -- particularly economically disadvantaged children -- of the benefits of preventive oral health care services." *Id.* ¶ 1. The Complaint also alleges that, despite subsequent actions by the state legislature, the Board presents a current threat to the delivery of preventive dental services in South Carolina. *Id.* ¶ 38.

The Commission has retained adjudicative responsibility for this matter pursuant to Rule 3.42 of the Commission's Rules of Practice, 16 C.F.R. § 3.42 (2004). The Board filed its Motion to Dismiss the Complaint on October 21, 2003, and the Commission heard oral argument on the motion on January 13, 2004.

III. STANDARD OF REVIEW

For purposes of this review, the Commission regards the Board's motion as a motion to dismiss for failure to state a claim and applies the standard used by federal courts under Fed. R. Civ. P. 12(b)(6). *See, e.g., Schering-Plough Corp.*, 2001 FTC LEXIS 198, at *10-13 (Oct. 31, 2001). This is a high standard that requires the Respondent to show that Complaint Counsel can prove no set of facts that would entitle them to relief. *Id.* at *12 (*citing McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980)). In evaluating whether a complaint withstands a motion to dismiss, the Commission must accept as true all of the complaint's well-pled factual allegations and must construe all inferences in the light most favorable to Complaint Counsel. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *TK-7 Corp. and Moshe Tal*, 1989 FTC LEXIS 32, at *3 (May 3, 1989). Moreover, the Commission should not dismiss the complaint if the motion, or Complaint Counsel's opposition to the same, raises disputed issues of material fact. *Schering-Plough Corp.*, 2001 FTC LEXIS 198, at *12.

IV. FACTUAL ALLEGATIONS AND STATUTORY FRAMEWORK

Set forth below are the relevant facts alleged in the Complaint, together with the pertinent South Carolina statutes, regulations and any additional material properly presented for our consideration.

A. Dental Hygienists and the Board

In South Carolina, dental hygienists are "licensed health care professionals who specialize in providing preventive oral health services . . . includ[ing] cleaning teeth, taking x-rays, . . . providing fluoride treatments, and applying dental sealants." Compl. ¶ 11; *see also* S.C. Code Ann. § 40-15-80 (2003). Dental hygienists "practice in collaboration with a

supervising dentist or under the direction of the South Carolina Department of Health and Environmental Control's public health dentist." Compl. ¶ 12; *see also* S.C. Code Ann. §§ 40-15-85; 40-15-102 ; 40-15-110.

The Board is South Carolina's regulatory authority for dentists and dental hygienists, Compl. ¶¶ 7, 9; S.C. Code Ann. § 40-15-10, and "is composed of seven dentists, one dental hygienist, and one public member." Compl. ¶ 5; *see also* S.C. Code Ann. § 40-15-20. Licensed dentists elect six of the Board's dentists, while licensed hygienists elect the Board's sole hygienist. § 40-15-20. The Governor appoints one dentist member and the public "lay" member and may "reject" any elected members based on their "unfitness," in which case additional nominees may be elected in the same manner. *Id.* Dentists that serve as members of the Board "continue to engage in the business of providing dental services for a fee." Compl. ¶ 6.

B. <u>Statutory Framework</u>

1. <u>1988 to 2000</u>

Children in South Carolina, especially those from low-income families, have suffered from oral health problems due to inadequate access to preventive dental care. Compl. ¶ 14. The need for preventive dental care for underprivileged children is partly due to the unavailability of dentists and is especially acute in rural areas. Pub. Hr'g Report of the Admin. Law Judge, *In re: Proposed Regulation,* Doc. No. 2644, Docket No. 01-ALJ-11-0348-RH, at 17-18 (S.C. A.L.J. Feb. 11, 2002) (RX-10) ("ALJ Report"). In 1988, the South Carolina General Assembly amended the state law relating to dentists, dental hygienists and dental technicians (referred to herein as the "Dental Practice Act" or the "DPA") to authorize, subject to certain restrictions, dental hygienists to provide various oral health services in public settings, including schools.

Compl. ¶ 15; 1988 S.C. Act No. 439. Section § 40-15-80 of this legislation authorized hygienists to apply topical fluoride and to perform oral screenings in a school setting "without the presence of a dentist on the premises." S.C. Code Ann. § 40-15-80(B)(1999).

Additionally, this law permitted dental hygienists to apply sealants and oral prophylaxis in a school setting upon satisfaction of the following conditions: (1) the student had written permission from a parent or guardian; (2) the treatments were authorized by a licensed dentist; (3) the student was not an active patient of another dentist; and (4) the authorizing dentist had examined the student and given written authorization within 45 days before application of the sealant or oral prophylaxis. Compl. ¶ 18; § 40-15-80(C)(1)-(3) (1999). The Complaint alleges that, despite this authorization, the 1988 law "did not significantly increase the delivery of dental hygienists' services in school settings." Compl. ¶ 15.

2. The 2000 Dental Practice Act Amendments

In 2000, South Carolina increased Medicaid reimbursement for dental services. Compl. ¶ 16. The legislature also "amended its statutes to make it easier for dental hygienists to deliver preventive dental care services in school settings." Compl. ¶ 18; *see also* 2000 S.C. Act No. 298. For example, Section 40-15-80(B) of the DPA, as amended in 2000, permitted dental hygienists to apply sealants, topical fluoride, and oral prophylaxis[1] in a school setting, provided they had "written permission" from the student's parent or guardian and that such treatment by the dental hygienist was done "under general supervision." *See also* Compl. ¶ 19. The amended

[1] Oral prophylaxis is defined as "the removal of any and all hard and soft deposits, accretions, toxins, and stain from any natural or restored surfaces of teeth or prosthetic devices by scaling and polishing as a preventive measure for the control of local irritational factors." § 40-15-85(3) (2003).

DPA defined “general supervision” to require that either a licensed dentist or a state public health dentist “has authorized the procedures to be performed but does not require that a dentist be present when the procedures are performed.” S.C. Code Ann. § 40-15-85(B) (2000).[2] The amended statute did not include, or indeed make any reference to, the 45-day dentist preexamination requirement set forth in the prior version of § 40-15-80(C)(3). Compl. ¶ 19; *see* S.C. Code Ann.§ 40-15-80(B) (2000).

The Complaint asserts that the 2000 amendments prevented the Board from requiring “a dentist examination as a condition of a dental hygienist’s providing preventive services in a school setting.” Compl. ¶ 19; *see also infra* at 24-27. In signing the 2000 amendments, the South Carolina Governor’s office stated that the “new law removes a regulation that hindered access to dental care” and noted that doing so would “allow[] dental hygienists to offer preventive dental care in places such as schools . . . [where] [d]entists rarely practice full-time.” Compl. ¶ 20; State of S.C., Office of the Governor, *New Law Makes Children’s Dental Care More Accessible* (May 26, 2000) (press release) (cited in Resp. Ex. (“RX”)-4 (ex. 7)).

Following enactment of the 2000 amendments, Health Promotion Specialists (“HPS”), an organization composed of dental hygienists that contracted with supervising dentists, began

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[2] In contrast, a hygienist in a private office setting required “direct supervision” by a dentist that included that the dentist “personally diagnoses the condition to be treated . . . .” § 40-15-85(A) (2000). The 2000 amendments also clarified that the DPA was “not intended to establish independent dental hygiene practice,” § 40-15-80(F) (2000), and required dental hygienists in public health settings to have professional liability insurance, § 40-15-80(G) (2000). Further, the 2000 law permitted dental hygienists “employed within the public health system” to provide “primary preventive care” services “under the direction and control of the State Director of Public Health Dentistry but [did] not require that the director be present when authorized services are provided. If a licensed dentist is available, an examination and diagnosis must be made by him before a sealant is placed on a tooth.” § 40-15-110 (2000).

using dental hygienists to provide preventive dental care on-site to children in South Carolina schools. Compl. ¶ 22. By July 2001, HPS had screened over 19,000 children and had provided services to over 4,000, of whom almost 3,000 were Medicaid-eligible. Compl. ¶ 23.

3. The Board's 2001 Emergency Regulation and Subsequent Actions

On July 13, 2001, the Board promulgated emergency regulation 39-18 (the "Emergency Regulation") to "clarify the type of authorization" required for dental hygienists to administer care in school settings under Section 40-15-85(B) of the amended DPA. 25-7 S.C. Reg. 79; Compl. ¶ 25. The Emergency Regulation needed only the approval of the Board, a majority of whose members were dentists with a financial interest in reimposing the preexamination requirement. Compl. ¶ 26; § 40-15-20.

Through the Emergency Regulation, the Board interpreted the general supervision standard of Section 40-15-85(B) as it applied to dental hygienists and specified that this standard required a licensed dentist to examine clinically each patient and actually determine the need for any treatment "not more than forty-five (45) days prior to the date the dental hygienist is to perform the procedure for the patient." 25-7 S.C. Reg. 79, 39-18(A); Compl. ¶ 25. The Complaint alleges that the Board's Emergency Regulation "re-imposed the same examination requirement that the General Assembly removed in 2000: that a supervising dentist had to examine the patient no more than 45 days prior to treatment." Compl. ¶ 25. The Complaint further alleges that this action "reduce[d] substantially the number of children (particularly economically disadvantaged children) who received preventive dental care." Compl. ¶ 28.

In 2001, HPS challenged the Emergency Regulation in state court. The state court denied HPS's motion for a temporary restraining order because HPS had not exhausted its

administrative remedies, and because the court agreed with the Board that the Emergency Regulation reasonably clarified the term "general supervision" in the 2000 amendments to include dental preexaminations. *Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry,* No. 01-CP-40-3148 (S.C.C.P. County of Richland Aug. 24, 2001). However, the state appellate court affirmed the decision solely on the exhaustion grounds. *Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry,* No. 2003-UP-232 (S.C. Ct. App. Mar. 26, 2003).

In August 2001, the Board published a proposed permanent regulation that was substantially identical to the Emergency Regulation. Compl. ¶ 30; ALJ Report at 2-4. As required by state law, a South Carolina administrative law judge ("ALJ") held a public hearing to determine whether the proposed permanent regulation was "a reasonable exercise of the Board's authority." Compl. ¶ 31; ALJ Report at 2, 17. The state ALJ's determination would guide the General Assembly in determining whether to effectuate the proposed permanent regulation. *Id.* In February 2002, the ALJ issued his conclusion that "the Board's proposed permanent regulation was unreasonable and contravened state policy to the extent it reinstated the dentist preexamination requirement that the legislature had eliminated in 2000." Compl. ¶ 32; *see also* ALJ Report at 17-18. The ALJ held that the state legislature intended through the 2000 amendments to delete the preexamination requirement in order "to increase access to preventive oral health care for low-income children." Compl. ¶ 33; *see also* ALJ Report at 17-18.

The Board did not submit the proposed permanent regulation to the General Assembly for review, and the permanent regulation did not take effect. Compl. ¶ 34. In accordance with South Carolina state law, the Emergency Regulation terminated in January 2002, 180 days after

adoption. Compl. ¶ 26. Following the Emergency Regulation's termination, several firms, including HPS, resumed providing preventive dental care to thousands of school children in South Carolina. Compl. ¶¶ 35-36.

4. 2003 DPA Amendments

In May 2003, the General Assembly again amended the DPA, altering the supervision requirements for dental hygienists operating in certain settings and specifically referencing their authority to provide preventive dental care in certain public health settings without a requirement for preexamination by a dentist. The new S.C. Code Ann. § 40-15-110 (A)(10) (2003), expressly provides that "[n]othing in this chapter may be construed to prevent . . . a licensed dental hygienist employed within or contracted through the public health system from providing . . . primary preventive care that is reversible." This section further states that the services that may be provided in a public health setting include "oral prophylaxis, application of topical fluoride including varnish, and the application of dental sealants." *Id.* Although such services "are to be performed under the direction of" a specified state official or his designee, the new section does not require a dentist's presence and there is no reference to a preexamination requirement. *Id.*[3]

[3] The 2003 statute retains the basic definition of "general supervision" (§ 40-15-85(2)), but expands the range of settings in which it may apply -- including, *e.g.*, private office settings. Another new provision, § 40-15-102, further defines the services that may be performed under "general supervision" in a private office and in some school settings and imposes further "restrictions" on the provision of those services in those settings. §§ 40-15-102(B)-(D). Such restrictions relate principally to examination by a dentist. § 40-15-102(C). Nevertheless, consistent with § 40-15-110's express allowance of hygienist services in public health settings, such settings are specifically exempted from the additional restrictions of § 40-15-102. *See* § 40-15-102(D).

5. The Board's March 2003 Meeting and the October 2003 Resolution

In March 2003, two months before the General Assembly enacted the 2003 amendments, the Board met to consider the statutory revisions. The Complaint alleges that at this meeting, the Board "maintained that *in all settings where a dental hygienist provides treatment -- whether public health or private practice -- a licensed dentist has to see the patient and provide a treatment plan*." Compl. ¶ 38 (emphasis added); *see also* S.C. Bd. of Dentistry, Mins. from Conference Call, 4 (Mar. 6, 2003) (RX-13 (attach. B)).

On October 16, 2003, following the Commission's issuance of the Complaint in this matter, the Board issued a resolution (the "Resolution") stating that preexaminations of a patient were *not* required as a precondition to a dental hygienist's working in a public health setting, and that the Board would not seek any change to that policy. *See* RX-13 (attach. A).

V. MATERIALS BEFORE THE COMMISSION

The Commission is limited in what it may consider to resolve a motion to dismiss for failure to state a claim. In addition to the complaint, the Commission may consider documents attached to or referenced in the complaint whose authenticity is unchallenged, as well as matters of official or judicial notice that are "not subject to reasonable dispute," without converting the motion to one for summary judgment. *United States v. Ritchie*, 342 F.3d 903, 908-09 (9th Cir. 2003) (citing Fed. R. Evid. 201(b)); *In re K-Tel Int'l, Inc. Secs. Litig.*, 300 F.3d 881, 889 (8th Cir. 2002) (in addition to pleadings, the court may consider "materials 'embraced by the pleadings' and materials that are part of the public record") (citation omitted); *Pryor v. NCAA*, 288 F.3d 548, 559-60 (3d Cir. 2002). Matters of official notice include those contained in public records,

such as judicial decisions, statutes, regulations, and "records and reports of administrative bodies." *Ritchie*, 342 F.3d at 909 (citation omitted).

Here, state statutes, regulations, court decisions, and other official government records material to the issues are properly referenced in the Complaint and/or are properly the subject of judicial notice.[4] The Commission may also consider material reflecting an industry's understanding or definition of technical or scientific terms at the time legislation is enacted as possible indicia of the legislature's understanding of the term. *See Order of Ry. Conductors of America v. Swan*, 329 U.S. 520, 525 (1947). Thus, we may consider the American Dental Association's ("ADA") Comprehensive Policy Statement on Dental Auxiliaries in effect in 2000, RX-3 (ex. C, attach.), which includes the ADA's various standards for supervision of dental auxiliaries.

In addition to these submissions, the Board has made a number of factual assertions in its briefs and has referenced several documents, including affidavits, letters, brochures, and Internet websites, that discuss factual issues that the Complaint does not reference and that are not

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[4] These materials include: the 2000 amendments to the South Carolina DPA (RX-2); the 2003 amendments to the DPA (RX-12); the Board's Emergency Regulation 39-18 and proposed permanent regulation 39-18 (RX-3 (ex. B)); the Office of the Governor's 2000 press release (RX-4 (ex. 7)); the order in *Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry*, *supra* (RX-8); the ALJ Report (RX-10); and the minutes of the Board's March 6, 2003, conference call (RX-13 (attach. B)). Additionally, the Board has proffered its October 16, 2003 Resolution (RX-13 (attach. A)). This post-complaint document relates to the Board's mootness defense, and the Commission can judicially notice such a document as an official government record. However, we will not give the document any particular weight at this time, much less resolve the Board's mootness defense on the basis of this one submission. We consider this document only in the context of our discussion in Part VI.B., *infra*, referring the case to the FTC administrative law judge for more complete discovery relating to the mootness issue.

appropriate subjects of judicial notice.[5] The Board explains that it submitted some of these materials to provide "background information," while the rest were "submitted not for the truth of the matters asserted therein," but for some other undisclosed purpose. *See* Resp.'s Reply Mem. in Support of Mot. to Dismiss ("Reply"), Appendix A. Although the Commission always has discretion to consider extra-pleading material and to convert a motion to dismiss to one for summary judgment, *see, e.g., Poole v. County of Otero*, 271 F.3d 955, 957 n.2 (10th Cir. 2001); 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1366 (2d ed. 1990 & Supp. 2004), we decline to do so here. We believe that it would be inappropriate to consider the Board's proffered limited evidence at this stage. The Board's factual material is not comprehensive and can best be described as "scanty, incomplete, or inconclusive" and unlikely "to facilitate the disposition of the action" at this stage. Wright & Miller, § 1366, at 493 and 676 n.16.1. Permitting selective evidence at this stage would also unfairly prejudice Complaint Counsel, who have not yet had an opportunity to conduct discovery or respond to the proffered evidence. The Board may instead submit any relevant material -- whether it relates to the case's general "background," the Board's mootness defense, or some other relevant issue -- following discovery at the summary judgment stage or at trial.[6]

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[5] Complaint Counsel specifically object to the following documents attached to the Board's motion to dismiss: RX-1 (and attachments A, B and C); RX-3 (and attached exhibit A and a portion of exhibit C); RX-4 (and attached exhibits 2 and 6); and RX-5, RX-6 and RX-7. Compl. Counsel's Opp'n to Resp't Mot. to Dismiss, App. A.

[6] The mere fact that the Commission perused the materials submitted by the Board to determine whether to consider them does not automatically convert the Board's Motion to Dismiss into one for summary judgment. *See Homart Dev. Co. v. Sigman*, 868 F.2d 1556, 1561-62 (11th Cir. 1989).

VI. CONCLUSIONS OF LAW

A. Whether the State Action Doctrine Applies to the Board's Actions

The Board asserts that the challenged acts were those of the State of South Carolina and, as such, are exempt from federal antitrust liability under the state action doctrine. First, the Board claims that its status as an agency of the state of South Carolina necessarily or "*ipso facto*" makes its actions those of the state. Alternatively, the Board argues that it is covered by the state action doctrine because it acted pursuant to a "clearly articulated" state policy to displace competition. The Board also argues that, even if it erred by adopting the Emergency Regulation, such error did not deprive it of state action protection. We are unpersuaded by these arguments and therefore deny the Motion to Dismiss on this ground.

1. The State Action Doctrine

It is well-settled that the state action doctrine protects a state government, acting as sovereign, from liability under the federal antitrust laws. The Supreme Court first articulated this doctrine in *Parker v. Brown*, 317 U.S. 341 (1943), where the Court upheld California's Agricultural Prorate Act against a Sherman Act challenge. Although the legislation at issue clearly restricted competition among California's agricultural commodities growers, the Court concluded that the Sherman Act did not restrain the state, acting through its legislature, from undertaking anticompetitive actions. The Court based its holding on the recognition that, under a dual system of government, the state is "sovereign, save only as Congress may constitutionally subtract from [its] authority," and the Court would not lightly infer Congressional intention to "nullify a state's control over its officers and agents." *Id*. at 351. Where the Sherman Act was

silent and gave "no hint that it was intended to restrain state action or official action directed by a state," the Court refused to read such intent into the act. *Id*.

Subsequent Supreme Court case law has confirmed and elaborated on the state's ability to restrain competition. In *Hoover v. Ronwin*, the Supreme Court explained that *Parker* imparts automatic, or *ipso facto*, protection from antitrust liability to state legislative acts. *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984) ("when a state legislature adopts legislation, its actions constitute those of the State . . . and *ipso facto* are exempt from the operation of the antitrust laws") (citation omitted). The Court has also extended this *ipso facto* treatment to a state's supreme court when the court acts in a legislative, rather than in a judicial, capacity. *Id*. at 568 (*citing Bates v. State Bar of Arizona*, 433 U.S. 350, 360 (1977)). *See also Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 63 (1985) ("*Parker* immunity is available only when the challenged activity is undertaken pursuant to a clearly articulated policy of the State itself, such as a policy approved by a state legislature . . . or a State Supreme Court . . . .") (citations omitted).

Where the actor is neither the state legislature nor the supreme court, but is instead a political subdivision of a state or a private party ostensibly acting pursuant to state authorization, the Court has applied a more rigorous analysis to determine whether the entity is excluded from the federal antitrust laws. In such cases, the Court has held that the party is not *ipso facto* entitled to state action protection; rather, the party must demonstrate that it acted pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition in favor of regulation and that the state actively supervised the actions. *Cal. Retail Liquor Dealers Ass'n v. Midcal Alum., Inc.,* 445 U.S. 97, 105 (1980) (citations omitted). *Midcal*'s analytical framework

provides guidance as to when state action protection is applicable to private parties as well as to nonsovereign state entities regulating private parties. *See, e.g., Southern Motor Carriers*, 471 U.S. at 57-66 (applying standard); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 631-40 (1992) (applying *Midcal* analysis to state-licensed title insurance rate bureaus).

2. <u>The Board Is Not *Ipso Facto* Protected by *Parker* and Its Progeny</u>

The Board is undoubtedly a state regulatory agency with broad powers to supervise the fields of dentistry and dental hygiene in South Carolina.[7] As discussed above, however, the Supreme Court has accorded *ipso facto* state action status only to state legislatures or supreme courts. The Court has not decided whether a state Governor may ever be sovereign for state action purposes. *See Hoover*, 466 U.S. at 568 n.17. However, it has indicated that "state agencies" regulating private parties are not *ipso facto* excluded from antitrust scrutiny. *See Southern Motor Carriers*, 471 U.S. at 57 ("[t]he circumstances in which *Parker* immunity is available to private parties, *and to state agencies or officials regulating the conduct of private parties,* are defined most specifically by our decision in [*Midcal*]," applying its two-part test) (emphasis added). For those "nonsovereign state representative[s]," [c]loser analysis is required . . . to ensure that the anticompetitive conduct of the State's representative was contemplated by the State." *Hoover*, 466 U.S. at 568-69.

Despite this clear precedent limiting the application of *ipso facto* state action coverage, the Board maintains that its actions are automatically exempt from federal antitrust law because

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[7] "The practice of dentistry and dental hygiene . . . shall be under the supervision of [the Board]." S.C. Code Ann.§ 40-15-10. Section 40-15-40 authorizes the Board to "adopt rules and regulations not inconsistent with this chapter for its own organization and for the practice of dentistry and dental hygiene . . . and for carrying out the provisions of this chapter, and [to] amend, modify and repeal any rules and regulations from time to time."

of its status as a state agency. The Board points to the fact that it is a body created by state statute, S.C. Code Ann. § 40-15-10 *et seq*., whose members are appointed and removed by the Governor, § 40-15-20, and are required by state law to hold regular meetings, and whose financial and employment matters are regulated by the Director of the Department of Labor, Licensing and Regulation. § 40-1-50(D). Mem. in Support of Mot. to Dismiss at 24-25. The Commission, however, concludes that the Board is not sufficiently sovereign to be necessarily exempt from the antitrust laws.

The Board relies on several cases holding that state executive departments may be entitled to *ipso facto* protection in the same manner as a state legislature or supreme court. *See, e.g.*, *Neo Gen Screening, Inc. v. New England Newborn Screening Program*, 187 F.3d 24, 28-29 (1st Cir. 1999) (regarding "full fledged" state executive departments); *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc*., 810 F.2d 869, 875-76 (9th Cir. 1987) (state executive agency *ipso facto* exempt); *Deak-Perera Hawaii, Inc. v. Dept. of Transp.*, 745 F.2d 1281 (9th Cir. 1984) (same). Some courts and commentators would limit this exception to the Governor's office, 1 Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application* ¶ 224, at 405 (2d ed. 2000), or to the Governor himself and not other executive branch agencies. *See, e.g.*, William H. Page, *Interest Groups, Antitrust, and State Regulation: Parker v. Brown in the Economic Theory of Legislation,* 1987 Duke L.J. 618, 637 n.113 (1987). We need not, however, determine whether state executives or departments are ever *ipso facto* covered by the state action doctrine because that issue is not before us. Instead, the Board is best characterized as a "subordinate" state special purpose instrumentality or industry regulatory body.

Further, courts have long rejected extending *ipso facto* state action treatment to such governmental entities because they lack sufficient attributes of state sovereignty. *See, e.g., Southern Motor Carriers*, 471 U.S. at 62-63 (state Public Service Commissions that set intrastate motor common carriers' rates, "[a]cting alone," are not sovereign and cannot immunize private anticompetitive conduct); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790-92 (1975) (state bar association, which was a state agency for certain purposes, was not the "State" under the *Parker* doctrine); *Cine 42nd Street Theater Corp. v. Nederlander Org., Inc.,* 790 F.2d 1032, 1044 (2d Cir. 1986) (state Urban Development Corporation, created by statute and designated a "governmental agency" and a "political subdivision," was not "sovereign" for *Parker* purposes). Declining to treat such non-elected governmental entities as equivalent to the state itself comports fully with the policies of the state action doctrine because such entities lack the political accountability to formulate state competition policy. *See, e.g.*, William H. Page & John E. Lopatka, *State Regulation in the Shadow of Antitrust: FTC v. Ticor Title Insurance Co.*, 3 Sup. Ct. Econ. Rev. 189, 205-07 (1993) (state action protection based on "political legitimacy" of state entity).

Courts have also consistently declined to afford *ipso facto* state action status to state licensing or regulatory boards that are composed at least in part of members of the regulated industry. *See Earles v. State Bd. of Certified Pub. Accountants of Louisiana*, 139 F.3d 1033, 1040-41 (5th Cir. 1998) (state licensing board consisting of private accountants not the "state," and its actions "subjected to greater scrutiny" under the *Midcal* clear articulation analysis); *FTC v. Monahan*, 832 F.2d 688, 689-90 (1st Cir. 1987) (Breyer, J.) (state pharmacy board, consisting of private pharmacists, is a "subordinate governmental unit" and therefore undeserving of *ipso facto* state action status); *Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549, 612-

13 (1988) (state optometric licensing board not entitled to *ipso facto* state action treatment). In fact, the Supreme Court has noted that, other than the legal profession, it was unaware of "any trade or other profession in which the licensing of its members is determined directly by the sovereign itself . . . ." *Hoover,* 466 U.S. at 580 n.34.[8]

For these reasons, we reject the Board's contention that it is entitled to *ipso facto* state action treatment and turn to whether the Board's challenged action -- enacting the Emergency Regulation that required dental preexaminations -- was taken pursuant to a "clearly articulated" state legislative policy.

3. <u>The Board's Emergency Regulation Does Not Satisfy the Clear Articulation Test</u>

As discussed above, the Supreme Court in *Midcal* articulated the test for determining whether the actions of a private party or a nonsovereign state entity like the Board are exempt from antitrust law under the state action doctrine. This test requires, first, that the challenged conduct proceed from a "clearly articulated and affirmatively expressed" state policy to *displace* competition and, second, that the state "actively supervise[ ]" the conduct. *Midcal*, 445 U.S. at 105 (citations omitted). These two elements together address the economic and federalism concerns underlying the state action doctrine by "reconcil[ing] the interests of the states in adopting noncompetitive policies with the strong national policy favoring competition," Areeda & Hovenkamp, *supra*, ¶ 221, at 374, and by ensuring that the antitrust laws will be displaced only where there is a "a deliberate and intended state policy." *Ticor Title Ins. Co.*, 504 U.S. at

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[8] Moreover, the Board's reliance on other cases, *see, e.g., Neuwirth v. Louisiana State Bd. of Dentistry*, 845 F.2d 553, 556 (5th Cir. 1988), is misplaced because state action treatment is not dependent on Eleventh Amendment standards, and, in any event, the Eleventh Amendment is not a bar to suit such as this one brought by the federal government.

636. This principle also ensures that the state entity is held politically accountable for its anticompetitive policies.

In *Midcal,* the Court reviewed a California wine pricing system that required all wine producers and wholesalers in the state to file fair trade contracts or price schedules with the state. *Midcal*, 445 U.S. at 99. The California system specifically barred any state-licensed wine merchant from selling wine to a retailer at a price below the scheduled price. Because the "legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance," *id.* at 105, the Court held that the pricing system satisfied the clear articulation test.[9]

A line of post-*Midcal* cases more fully defines the parameters of the clear articulation standard. In *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40 (1982), the Court held that the City of Boulder's moratorium on cable television expansions did not meet the clear articulation standard, even though Colorado's constitution vested municipalities with

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[9] The *Midcal* Court held, however, that the state pricing scheme did not satisfy the "active supervision" requirement and affirmed the California state court ruling that the scheme violated the Sherman Act. *Id.* The "active supervision" test requires that "the State has exercised sufficient independent judgment and control so that the details of the [restraint] have been established as a product of deliberate state intervention, not simply by agreement among private parties." *Ticor Title Ins. Co.,* 504 U.S. at 634-35.

The Board argues that the active supervision test does not apply to any governmental entity. The Supreme Court has held that municipalities, unlike private parties, are not subject to the active supervision requirement and are protected by the state action doctrine if they are acting pursuant to a clearly articulated state policy. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46-47 (1985). The Court indicated in dicta that "it is likely that active state supervision would also not be required" when the relevant actor is a "state agency," but declined to resolve the issue. *Id.* at 46 n.10. Thus, the role of active supervision for the myriad varieties of governmental and quasi-governmental entities, including state regulatory boards, remains unclear. *See* FTC, Office of Policy Planning, Report of the State Action Task Force 15-19, 37-40, 55-56 (Sept. 2003) ("FTC Staff Report"). Because our analysis of the clear articulation requirement provides sufficient reason to deny the Board's motion to dismiss, we need not address whether active supervision is required under these circumstances.

extensive powers of self-government in local and municipal matters. The Court found that despite the state's broad grant of power to localities, Colorado's position was "one of mere *neutrality*" with respect to the challenged conduct. *Boulder*, 455 U.S. at 55 (emphasis in the original). Consequently, the Court refused to find that "the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances." *Id.* at 56.

By contrast, the Court in *Southern Motor Carriers* analyzed a Mississippi statute that authorized a state commission to regulate common carriers. In directing the commission to establish "just and reasonable" rates for intrastate transportation of commodities, the legislature clearly articulated "that intrastate rates would be determined by a regulatory agency, rather than by the market." *Southern Motor Carriers*, 471 U.S. at 63-64 (citation omitted). The Court found that the challenged rate-setting program followed a clearly articulated policy to displace competition, even though the details of the rate-setting were under the agency's discretion. In doing so, the Court stated that the clear articulation test does not require "express authorization for every action that an agency might find necessary to effectuate state policy." *Id*. at 64.

Within the clear articulation parameters set forth in *Boulder* and *Southern Motor Carriers*, the Court has described factors relevant to determining whether a nonsovereign entity's anticompetitive conduct follows a clear state policy. In *City of Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 370-73 (1991), for example, the Court held that a city council's ordinance restricting "the size, location, and spacing of billboards" met the clear articulation standard because the anticompetitive effects of such zoning restrictions were a "foreseeable result" of the statutes authorizing the city to regulate the use and construction of

structures on city land. This test was satisfied because "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants." 499 U.S. at 373. The Court also found foreseeability a useful tool in determining clear articulation in *Town of Hallie*, 471 U.S. at 41-42, where state law specifically authorized Wisconsin cities to delineate the area within which they would provide certain sewage services.[10] Unincorporated townships located next to the City of Eau Claire alleged that the city had "used its monopoly over sewage treatment to gain an unlawful monopoly over the provision of sewage collection and transportation services." *Id*. at 37. The Court rejected this contention and concluded that "the statutes clearly contemplate that a city may engage in anticompetitive conduct. Such conduct is a foreseeable result of empowering the City to refuse to serve unannexed areas." *Id.* at 42.[11]

Based on these post-*Midcal* cases, we can conclude that, while clear articulation does not require a state entity to show "express authorization" for every specific anticompetitive act, *Southern Motors Carriers*, 471 U.S. at 64, it does anticipate that the anticompetitive action will have a significant nexus to, or degree of "foreseeability" stemming from, an identifiable state policy. *City of Columbia,* 499 U.S. at 373. "Foreseeability" in this context, however, must be

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[10] *Southern Motor Carriers* -- decided the same day as *Town of Hallie* -- did not apply the foreseeability analysis, indicating that such analysis, while relevant, is not always necessary to determine clear articulation.

[11] Two pre-*Midcal* cases that denied state action treatment also provide insight into the clear articulation analysis. *See Goldfarb,* 421 U.S. at 790-92 (denying state action exemption because, although lawyers were subject to ethical codes issued by the state Supreme Court, the state court did not require or approve of state bar opinions placing minimum fee schedules for title searches); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 584-85 (1976) (denying state action exemption for a public utility that distributed free light bulbs as part of a light bulb exchange program, despite state's approval of utility's tariff that included the exchange program, where, at most, state policy was "neutral" with respect to the program).

restricted to only those regulatory schemes in which the anticompetitive conduct would "ordinarily or routinely result" from the authorizing legislation in order to ensure that there was a deliberate and intended state policy. *See* FTC Staff Report 33-34. In any event, a state's "general grant of power" to a political subdivision, without more, is insufficient for purposes of clear articulation under the state action doctrine. *Boulder*, 455 U.S. at 56.[12]

Here, the Board contends that its enactment of the Emergency Regulation satisfies the *Midcal* test, arguing that "[w]hen a state regulatory board has been given comprehensive authority to regulate a profession, such broad grant of authority has been held sufficient to satisfy the 'clear articulation' requirement for state action immunity." Mem. in Support of Mot. to Dismiss at 33 (*citing Earles, supra*). The Board further asserts that its enactment of the Emergency Regulation was the "foreseeable result" of South Carolina's grant of "comprehensive power to regulate both the practice of dentistry and the auxiliary practice of dental hygiene." *Id.* We do not agree that the Board has established grounds for dismissal based on these assertions.

It is undisputed that South Carolina's statutory regime gives the Board broad general authority to regulate the fields of dentistry and dental hygiene. *See, e.g.*, S.C. Code Ann.§§ 40-15-10; 40-15-40 (2003). South Carolina law also vests the Board with authority to regulate many specific aspects of dentistry and dental hygiene in the state, including licensing,

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[12] Certain lower courts have confused general authority to regulate with a state policy to displace competition. *See, e.g., Earles*, 139 F.3d at 1042; *Sandy River Nursing Care v. Aetna Casualty*, 985 F.2d 1138 (1st Cir. 1993). Other courts have made this distinction, analyzing whether the state intended to displace competition concerning the particular conduct at issue in addition to whether the governmental body was provided regulatory authority. *See, e.g., Cost Management Servs., Inc. v. Washington Natural Gas Co.*, 99 F.3d 937 (9th Cir. 1996); *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1267-68 (3d Cir. 1994); *see also* Areeda & Hovenkamp, *supra,* ¶ 225, at 437.

specialization, advertising, and disciplining improper conduct.[13] This comprehensive legislative scheme necessarily allows the Board to displace competition in the provision of dentistry and dental hygiene services. For example, it is certainly an ordinary and foreseeable consequence of such a scheme that the Board will limit those practices to persons with adequate training and upon successful examination and will bar lay persons from such practices, even though doing so clearly limits in some sense "competition" for dental services.

Nevertheless, it cannot similarly be shown that the particular conduct alleged to be improper here -- imposition of the preexamination requirement by the Board in its Emergency Regulation -- was the foreseeable result of the DPA as amended in 2000. Prior to 2000, dental hygienists in South Carolina could apply sealants and oral prophylaxis in school settings only if four specific requirements were met: written parental permission; authorization from a licensed dentist; that the student not be the active patient of another dentist; and preexamination by the authorizing dentist within 45 days of treatment. S.C. Code Ann. § 40-15-80(C) (1999); Compl. ¶ 18. In 2000, the General Assembly amended the law to permit such treatment only with written parental permission and under the "general supervision" of a dentist. S.C. Code Ann. § 40-15-80(B) (2000); Compl. ¶ 19. "General supervision," in turn, required only that a dentist "has authorized the procedures to be performed but [did] not require that a dentist be present when the procedures are performed." S.C. Code Ann. § 40-15-85(B)(2000). Whatever room

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[13] For example, the DPA requires that a license can be issued only after examination, §§ 40-15-100, 40-15-140; provides various grounds to discipline dentists and dental hygienists, §§ 40-15-190(A), 40-15-140; regulates the manner in which dentists may advertise, § 40-15-130; imposes additional requirements on dentists who want to specialize in areas of practice, § 40-15-220; and requires that only dentists may control the use of dental equipment in a dental office and that dentists retain control over the selection of a course of treatment of a patient. § 40-15-135.

these amendments left for regulation by the Board, the one thing that is clear is that the General Assembly sought "to make it easier for dental hygienists to deliver preventive dental care services in school settings," Compl. ¶ 18, by deleting the 45-day preexamination requirement.

By removing this specific impediment to the ability of dental hygienists to provide preventive treatment in schools, South Carolina's legislature has recast the boundaries between two sets of regulated professionals -- the dentists and the hygienists -- in order to promote rather than displace competition between them in the provision of these services. This result is evidenced by the statement of the South Carolina's Governor's Office that the 2000 amendments "remove[d] a regulation that hindered access to dental care" and would "allow[] dental hygienists to offer preventive dental care in places such as schools . . . [where] [d]entists rarely practice full-time." State of S.C., Office of the Governor, *New Law Makes Children's Dental Care More Accessible*, RX-4 (ex.7).

The Board's primary basis for asserting that it reimposed the 45-day preexamination requirement pursuant to a "clearly articulated" state policy is the statute's "general supervision" standard that requires a dentist's authorization, § 40-15-85(B) (2000). As noted above, however, the "general supervision" provision does not, on its face, impose a requirement of prior examination by a dentist, much less "clearly articulate" a state policy that hygienists' ability to offer preventive dental services in school settings was to be subject to such a restriction. In parsing the General Assembly's 2000 enactment, we of course read the statute as "a symmetrical and coherent regulatory scheme" and "an harmonious whole." *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations omitted). We find it relevant that while the 2000 enactment added the "general supervision" requirement, it simultaneously

and expressly eliminated the preexamination requirement that existed previously. Applying the "commonplace of statutory construction that the specific governs the general," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992), we can only conclude that the "general supervision" requirement does not authorize reimposition of the preexamination requirement that the Assembly had just eliminated.[14]

The Board attempts to bolster its argument by referring to widely-available industry standards issued by the ADA as they existed in 2000, on the apparent supposition that the South Carolina legislature intended to use the term "general supervision" in conformity with those standards. As a general matter, the courts have recognized that the state action doctrine "involves a question of law, generally an issue of statutory construction." *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992, 997 (3d Cir. 1982); *see Telecor Communs., Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1139 (10th Cir. 2002), *cert. denied*, 538 U.S. 1031 (2003); *Trigen-Oklahoma City Energy Corp. v. Okla. Gas & Elec. Co.*, 244 F.3d 1220, 1225 (10th Cir.), *cert. denied*, 534 U.S. 993 (2001). Nevertheless, as discussed above, in limited circumstances it is

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[14] Moreover, any consideration of the 2003 amendments -- although of minimal value in interpreting the prior enactment, *see* 2A Norman J. Singer, *Statutes and Statutory Construction* § 48:20, at 488-89 (6th ed. 2000) -- would only reinforce our view of the meaning of "general supervision" in both versions of the statute. While the legislature essentially left the definition of "general supervision" unchanged in 2003 (§ 40-15-85(2)), it addressed the issue of the need for dentist examination by imposing *additional* requirements for the provision of services under "general supervision" in certain settings. *See* § 40-15-102(C). Such additional requirements would be unnecessary if, as the Board supposed, the "general supervision" requirement itself mandated prior examination by a dentist. Moreover, the 2003 statute also specifically provided for the provision of certain hygienist services in public health settings without any preexamination requirement, *see* §§ 40-15-102(D), 40-15-110(10), while leaving in place the overall requirement that services provided in school settings be subject to "general supervision" (§ 40-15-80(B)). Again, the clear inference to be drawn from this combination of provisions is that the South Carolina legislature has not understood "general supervision" to encompass a prior examination requirement.

appropriate, even in addressing the meaning of a statutory enactment, to look to extrinsic sources that may have a bearing on the way in which the legislature used a particular term. *See* pp. 11-12, *supra*. The Board's reliance on the ADA's use of the term "general supervision," however, cannot overcome the statutory analysis set forth above, because there is no reason to conclude - that the South Carolina legislature adopted the ADA's "general supervision" standard. Indeed, all indications are to the contrary. While the ADA's definition of that term specifically requires that the dentist "has personally diagnosed the condition to be treated," *ADA Comprehensive Policy on Dental Auxiliaries* (attached to RX-3 (ex. C)), S.C. Code Ann.§ 40-15-85(B) (2000) strikingly omits this language from its provision defining "general supervision." By contrast, when the South Carolina legislature has intended to adopt an ADA definition *in toto*, it has done so expressly, as in its nearly verbatim incorporation of the ADA's definition of "direct supervision." *Compare, e.g.*, S.C. Code Ann. § 40-15-85(A) (2000) *with* RX-3 (ex. C at 8).[15]

The Board has not shown that its enactment of the Emergency Regulation reimposing the 45-day preexamination requirement was the foreseeable result of the 2000 amendments. *See Telecor Communs.*, 305 F.3d at 1139-40 (state action protection did not apply to private party defendant because its activities, rather than expressly permitted by a state policy, were contrary to the state's policy of fostering competition in the pay phone market). On the contrary, the Board's regulation appears to be in direct conflict with the South Carolina statute and inconsistent with the policy ideals behind the state action doctrine: that federalism permits the state as sovereign to displace the national policy of open competition with regulation, but only if

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[15] Indeed, certain provisions in the DPA (concerning the licensing of dental specialties) specifically refer to ADA standards or requirements. *See, e.g.,* S.C. Code Ann. §§ 40-15-220, 40-15-250, 40-15-260 (2003).

such anticompetitive intent is clearly shown. In this way, federal antitrust policy will not be "unnecessarily and inappropriately subordinated to state policy." *Bates*, 433 U.S. at 362.

The Board's reliance on case law concluding that a state licensing board's broad grant of regulatory power necessarily contemplates certain anticompetitive conduct, *see, e.g, Earles*, 139 F.3d at 1042, is misplaced and does not cure the basic defect in its argument. Although the Board continued to have general authority over the practice of dentistry and dental hygiene, the 2000 amendments facially eliminated the preexamination requirement. We therefore cannot conclude that the Board's Emergency Regulation reinstituting such a requirement was an action pursuant to a clearly articulated state policy to displace competition. Instead, the South Carolina legislature's specific direction to permit dental hygienists to provide preventive dental care in schools without preexaminations represents a discrete, pro-competitive "carve-out" from the Board's general authority over the practice of dentistry and dental hygiene. *See, e.g., Cost Management Servs.,* 99 F.3d at 942-43 (fact that state had displaced competition in the market for sale of natural gas with a regulatory structure did not provide a state action exemption for off-tariff pricing).

Finally, we also disagree with the Board's argument that the 2000 amendments maintained the state's "clearly articulated" policy to require dental preexaminations because the 2000 law removed only the requirement that a dentist be physically present when a hygienist performs certain services in schools. Mem. in Support of Mot. to Dismiss at 27-28. It is far from clear, however, whether a dentist was required to be physically present in school settings prior to 2000: the pre-2000 law made no reference to a physical presence requirement in the provision specifically governing the application of sealants and oral prophylaxis in school

settings, § 40-15-80(C) (1999), and the law expressly permitted oral screenings and the application of topical fluoride "without the presence of a dentist on the premises." § 40-15-80(B) (1999). If the aim of the 2000 statute was to delete the physical presence requirement, one would have expected such a requirement to be clearly shown in the pre-2000 law, such as by including it in its list of other requirements for the application of sealants and oral prophylaxis -- *e.g.*, parental consent, dentist preexamination -- set forth in Section 40-15-80(C). Further, the Board's interpretation of the 2000 law would create anomalous conditions, such as requiring preexaminations under the "general supervision" provision for fluoride treatments in school settings even though no such requirement existed before 2000.

Contrary to the Board's arguments, the plain language of the 2000 amendments indicates that the state General Assembly intended to allow dental hygienists to perform certain preventive dental treatments in schools without a prior dental examination. After all, the Assembly deleted specific language that had imposed a preexamination requirement. Moreover, as shown above, the Board has failed to show that the "general supervision" language provides a basis for its actions. In light of the 2000 statutory amendments, we cannot agree with the Board's argument that its Emergency Regulation was "clearly articulated" by state policy.[16]

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[16] The Board asserts that the state court finding that the 2000 amendments required a dental preexamination, *see Health Promotion Specialists, supra,* constitutes an interpretation of state law that binds the Commission. We reject this argument. Although the Commission may consider state trial court interpretations of state law, we -- like federal courts -- are not bound by such interpretations. *See, e.g., King v. Order of United Commercial Travelers*, 333 U.S. 153, 159-62 (1948). This rule is particularly applicable where the state decision was based, in part, on the argument (now abandoned by the Board) that the 2000 law effected no substantive change in the law.

4. The Board's 2001 Emergency Regulation That Contravened South Carolina's Legislative Policy Was More Than a Mere "Error" of State Administrative Law

The Board also argues that, even if it erred in interpreting the 2000 amendments, its promulgation of the Emergency Regulation did not so far exceed the bounds of its statutory authority to regulate as to constitute the kind of "egregious level of error" necessary to lose its state action protection. Mem. in Support of Mot. to Dismiss at 28-31; Reply at 12-19. To support its argument, the Board relies on a statement in *City of Columbia* that, under the state action doctrine, "it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the [political subdivision's] action under state law." *City of Columbia,* 499 U.S. at 372. Thus, a political subdivision would still be entitled to state action protection if it "possess[ed] the power to engage in the challenged conduct" through delegated statutory authority, even if its actual implementation of this authority were substantively or procedurally defective. *Id.* (citation omitted).

This argument is based upon a fundamental misreading of the cited *City of Columbia* passage. There the Court distinguished carefully between, on the one hand, the basic "authority to regulate" and, on the other hand, the specific authority "to suppress competition." *Id*. With respect to the former, the Court recognized that the authority of state bodies had to be read broadly, lest *any* state law error in the defendant's actions render those actions "unauthorized," and thus subject to antitrust attack. The Court rejected a rule that would thus "'transform[] . . . state administrative review into a federal antitrust job.'" *Id*. (quoting Areeda & Hovemkamp, *Antitrust Law* ¶ 212.3b (Supp. 1989)). With respect to the authority to suppress competition, however, the Court emphasized the necessity of a clearly articulated state policy that authorizes the political subdivision to engage in anticompetitive conduct.

The Board's argument in the present case ignores this distinction and would eviscerate the "clear articulation" standard. Complaint Counsel have not argued that the 2001 Emergency Regulation was simply "unauthorized" under state law, in the sense of being procedurally defective or substantively incorrect in a manner that is not directly related to competitive concerns. Rather, Complaint Counsel challenge the Emergency Regulation because it is *contrary* to a specific directive of the state legislature -- one that placed an express limitation on how far the Board was permitted to go in suppressing competition. If an action of this sort could be written off as a "mere error" of state law, such a theory would swallow the clear articulation rule. An action of a subordinate state entity that ignores an express legislative limitation of this sort must fall outside the state action exemption.

5. State Action Holding

Based on the above analysis, we cannot conclude that the Board's enactment of the 2001 Emergency Regulation was protected state action. We have no reason to conclude that the Board's actions are those of the state as sovereign, so as to be *ipso facto* exempt state action. Nor can we conclude that the Board acted pursuant to a clearly articulated policy of the South Carolina legislature to displace competition. On the contrary, its actions appear to have contravened the clear legislative intent in the 2000 amendments to eliminate the preexamination requirement. Finally, the apparent flaw in the Board's actions is not a mere error of state administrative law, but relates directly to the limitations the state legislature has imposed on the Board's authority to restrict competition.

For all these reasons, we deny the Board's Motion to Dismiss on state action grounds. In so doing, we do not foreclose entirely further proceedings on the state action issue. Although the

fundamental principles of statutory construction discussed above negate rather than support the defense in this situation, it remains conceivable, for reasons discussed previously, that the Board could adduce additional materials relevant to the interpretation of the 2000 statute. *See* pp. 11-12, 26-27, *supra*.[17] We leave any further consideration of this issue, along with other issues on the merits, to be addressed in such future administrative proceedings as may be necessary in the event we find a live controversy, after the limited inquiry described below regarding possible mootness.

B. Whether This Case Is Moot

The issue of whether this case is moot raises a question of disputed fact that the Commission cannot properly resolve on Respondent's Motion to Dismiss. For the reasons set forth below, however, we refer this matter to the administrative law judge for limited discovery on the issue of whether the challenged conduct is likely to recur.

1. Respondent's Mootness Claim

The Board asserts that the Commission should dismiss this case as moot because the 2003 amendments to the DPA, combined with the Emergency Regulation's expiration and the Board's actions since 2002, now ensure that hygienists are not subject to the dentist preexamination requirement and preclude the Board from engaging in the challenged conduct. In addition, the Board argues that, even if the matter is not technically moot, the Commission

[17] As emphasized above, any such inquiry must be narrow, in light of the legal nature of the issues of statutory interpretation to be addressed. In particular, post-enactment statements, particularly those from nonofficial sources (such as from the South Carolina Dental Hygiene Association website, RX-5), are not to be considered in the course of interpreting a statute. Singer, *supra* note 14, §§ 48:11, 48:20, at 456-62, 488-89.

should still dismiss the Complaint because there is no need for the relief contemplated by the Complaint.

2. Mootness Claims and Analysis

To prove that a case is moot, the moving party must show more than just that the challenged conduct has ceased; rather, the movant must establish that there is no reasonable expectation that the conduct could recur. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) ("voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot"). Where the respondent contends that it will not repeat prior conduct, it bears a heavy burden to establish that a proceeding is moot. *See The Coca-Cola Co.*, 117 F.T.C. 795, 917 (1994).

In order to meet this burden, the Board primarily relies upon the changes to the statutory framework in South Carolina. The Board specifically cites the 2003 amendments to the DPA, which it contends now prevent it from imposing a dentist preexamination requirement on hygienists offering treatment in public settings. It also cites the expiration of the Emergency Regulation, which the Board has not attempted to revive. The Board relies on several cases, *e.g., Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994), finding cases moot where allegedly discriminatory or unconstitutional state statutes were repealed. However, this case does not involve the repeal of a challenged law and the 2003 amendments did not change some area of the 2000 law that formed the basis of the Complaint. Instead, the Complaint alleges violative conduct by the Board under the 2000 law -- conduct that would similarly violate the 2003 law. Moreover, the Complaint alleges facts that suggest that the Board may again

engage in the type of conduct the Complaint challenges. *See* Compl. ¶ 38. Accordingly, we cannot find this action moot at this time.

The Complaint alleges that the Board met in March 2003 and considered the proposed revisions to the DPA that the General Assembly thereafter enacted. Under the heading "The Current Threat to the Delivery of Preventive Dental Services in South Carolina," Paragraph 38 of the Complaint alleges that the Board "maintained that in all settings where a dental hygienist provides treatment -- whether public health or private practice -- *a licensed dentist has to see the patient and provide a treatment plan*" (emphasis added). *See also* S.C. Bd. of Dentistry, Mins. From Conference Call (RX-13 (attach. B at 4)).

In ruling on a motion to dismiss, the Commission must accept all well-pled factual allegations as true and must construe all inferences in Complaint Counsel's favor. *See supra* Section III. We therefore accept as true that the Board met to discuss what would become the 2003 amendments and interpreted these statutory revisions to require a preexamination by a dentist in all settings before a dental hygienist can provide treatment. The Board similarly found a preexamination requirement in the 2000 amendments, which led it to enact the Emergency Regulation. Paragraph 38 thus raises the inference that the Board will once again restrict, through some emergency enactment or other action, the ability of dental hygienists to provide treatment in school settings. In other words, the Complaint alleges facts that would clearly justify the Commission in ordering relief.

The Board's October 16, 2003, Resolution (RX-13 (attach. A)) does not alter the inference that the Board may engage in the challenged conduct in the future. First, we note that the Board did not adopt the Resolution until after the Commission had issued the Complaint, and

the Board could abandon the Resolution at any time. More important, to the extent that the Resolution offers an explanation or context for Paragraph 38 of the Complaint, we find that it simply raises a question of disputed fact that the Commission cannot resolve in a motion to dismiss. *See, e.g., Schering-Plough Corp.*, 2001 FTC LEXIS 198 (Oct. 31, 2001).

Finally, the Board argues that there is no need for relief even if the matter is not "technically" moot. Motion to Dismiss at 22. We reject this argument. Because Paragraph 38 of the Complaint suggests that the Board will again engage in actions similar to those challenged, we find that the Complaint sets forth grounds for injunctive relief to address such actions. We thus decline to dismiss the Complaint on such grounds at this stage of these proceedings. *See FTC v. Citigroup Inc.*, 239 F. Supp. 2d 1302, 1306 (N.D. Ga. 2001) (denying Rule 12(b)(6) motion to dismiss and stating that an injunction may be issued if a violation is ongoing or likely to recur).

3. Mootness Holding

Accepting, as we must, all of the Complaint's factual allegations and construing all inferences in the light most favorable to Complaint Counsel, we find that the Board has not met its burden of establishing that Complaint Counsel can prove no set of facts that would entitle them to relief. Accordingly, this case does not appear to be moot or otherwise subject to dismissal for failure to state a claim. However, our conclusion regarding mootness is based primarily on the factual allegations and inferences raised by Paragraph 38 of the Complaint, which raises the relatively narrow issue of whether there is a meaningful chance for recurrence of the challenged conduct.

During oral argument on this Motion, Respondent's counsel agreed to engage in limited discovery to assist the Commission in resolving the mootness issue. *South Carolina State Bd. of Dentistry,* Oral Argument on Mot. to Dismiss, Hr'g Tr. 71, 75-76 (Jan. 13, 2004). We find this suggestion helpful. Thus, based upon each party's interest in avoiding a potentially unnecessary trial, we exercise our discretion to refer this matter to the administrative law judge for limited discovery for ninety (90) days and an initial assessment of the likelihood that the Board may engage in future unlawful conduct under the 2003 statute. In particular, the Commission requests that the administrative law judge make findings of fact and resolve the context and significance of the Board's March 2003 meeting and the Board's October 2003 Resolution. We leave to the administrative law judge's discretion whether to hold a hearing or to request a briefing to assist the Commission in resolving the Board's mootness defense. Apart from this limited referral, we retain jurisdiction over this matter.

VII. CONCLUSION

For all the reasons stated above, the Commission denies the Board's Motion to Dismiss on state action grounds. Further, we will retain jurisdiction over this case and hold in abeyance the Board's Motion to Dismiss on mootness grounds. We refer the matter to the administrative law judge to conduct limited discovery and to make findings of fact and an initial decision regarding the Board's mootness defense.