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Honorable Bob Huff
Room 4090, State Capitol

ONLINE DRIVING-UNDER-THE-INFLUENCE PROGRAMS - #1618549

Dear Senator Huff:

QUESTION

May the State Department of Health Care Services, under existing law, issue a license to a driving-under-the-influence program if all or part of the program were to be operated online?

OPINION

The State Department of Health Care Services may not, under existing law, issue a license to a driving-under-the-influence program if any part of the program were to be operated online.

ANALYSIS

When a person is convicted of certain alcohol related driving offenses, the sentencing court is required or authorized to impose, as part of the person's sentence, participation in a driving-under-the-influence (DUI) program. (See, e.g., Veh. Code, §§ 23530 et seq.) In addition, the Department of Motor Vehicles (DMV) is required or authorized to restrict, suspend, or revoke that person's driving privilege after such a conviction. (See, e.g., Veh. Code, § 13352.) Similarly, the DMV is authorized to reinstate the person's driving privilege when certain conditions have been met, including the completion of a licensed DUI program by the convicted person. (*Ibid.*)

The Legislature established a comprehensive statutory scheme governing the provision and licensure of DUI programs. (Health & Saf. Code, div. 10.5, pt. 2, ch. 9

(§ 11836 et. seq.); hereafter chapter 9.)¹ In particular, section 11836 authorizes the State Department of Health Care Services (DHCS) “to issue, deny, suspend or revoke the license of a driving-under-the-influence program.” Accordingly, DHCS is the administrative agency responsible for licensing a DUI program and ensuring that a licensed program complies with statutory requirements. You have asked us whether, under existing law, DHCS has the authority to issue a license to a DUI program if all or part of the program were to be operated online. In that regard, an administrative agency has only those powers that have been granted to it expressly or impliedly. (*Stiger v. Flippin* (2011) 201 Cal.App.4th 646, 651.) Thus, in order to answer your question, we must first examine chapter 9, and other relevant statutory provisions, to determine whether the Legislature has either expressly or impliedly granted or prohibited DHCS the authority to license a DUI program wherein part or all of the program is to be operated online.

Notably, there is no provision within chapter 9, or any other related section of law, that expressly authorizes or prohibits the licensure of a DUI program offered, in whole or in part, online. Nevertheless, several provisions within chapter 9 imply that at least part of a DUI program must have a physical location or allow individuals to interact physically (hereafter a physical presence requirement). In our view, it would be inconsistent with the authority granted DHCS if that agency were to license a DUI program containing any online component that is connected to a statutory physical presence requirement.

For example, the initial process for DUI program licensure implies such a physical presence requirement regarding the DUI program provider by authorizing a county board of supervisors, when recommending a provider for licensure, to limit the provider’s operation to a particular area “within” that county. (See § 11836, subd. (d).) Section 11836.16 also impliedly includes a physical presence requirement by authorizing a provider to operate a “satellite office,” defined to mean “an offsite location of an existing licensed driving-under-the-influence program.” Moreover, section 11836.12 requires an “[o]n-site review” of a program by DHCS staff in order to ensure the program is “clean, safe, [and] free of alcohol or illicit drug use” Thus, in our view, there is a clear implication that at least part of the program must be offered in a physical location; otherwise, these provisions would be nonsensical. In addition, with respect to program compliance, section 11837.7 authorizes a person to “enter, in a nondisruptive manner, any class, lecture, group discussion, or any other program element to observe these activities.” While it is true that a class being conducted online could also be “entered” in the virtual sense, we conclude that, in the context of the language used, the provision contemplates a physical entry for observation purposes.

With regard to a DUI program participant, section 11837.2 provides for program referral based, in part, on the physical location of both the participant and the program. Thus, in our view, this too implies that at least part of the program, in order to be licensed,

¹ All further division, part, chapter, and section references are to the Health and Safety Code unless otherwise indicated.

must be operated physically within California. More importantly, section 11837.4 requires that “close and regular face-to-face interviews” with the participant be conducted as part of the program in order for the DUI program to be licensed. By necessary implication, a “face-to-face” portion of the program could not be completed online. Thus, we conclude that the Legislature has authorized DHCS to license only a DUI program that can comply with these physical presence requirements. Accordingly, in our opinion, DHCS does not have the authority to license a DUI program if all of the program were to be operated online.

However, you have also asked us whether DHCS has the authority to license a DUI program if part of the program were to be operated online. While it is our opinion that the statutory scheme contemplates that at least certain parts of the program must be operated physically within California in order to be lawfully licensed by DHCS, there is an argument to be made that DHCS has the authority to license a program wherein a limited component, not tied to a statutory physical presence requirement, is offered online. For example, section 11837.4, subdivision (b) gives DHCS authority to require by regulation other education related program elements not specifically provided for in statute. Thus, we conclude that the statutory scheme provides DHCS with the implied authority to license a DUI program wherein a limited portion of the program, not connected to a statutory physical presence requirement, is operated online.

Nevertheless, regulatory provisions adopted by an administrative agency are part of existing law. Thus, to fully answer your question, we must also examine whether licensing a DUI program wherein a limited part of the program is operated online would be consistent with those regulatory provisions. In that connection, all of the regulatory definitions relating to program components contemplate a physical presence requirement.² Notably, “group counseling sessions,” which participants are required to attend (Cal. Code Regs., tit. 9, § 9851, subd. (b)(2)), are facilitated by a counselor and involve meetings at which individuals share personal issues and “support and encourage” improvement in each other’s lives (*id.*, § 9800, subd. (a)(15)). We acknowledge that it may be technologically possible to operate a group counseling session from remote locations through a phone conference or a group video chat. Yet such a session would be in conflict with the apparent purpose behind the regulatory requirement to attend “group counseling sessions”—the interpersonal support contemplated would not be achieved if the sessions were operated with every participant in a different physical location.

Finally, in our view, the program sobriety requirement provided by regulation makes it a practical impossibility to have online DUI programs in California. Under existing law, all participants are required to be sober during the time they are participating in the program. (Cal. Code Regs., tit. 9, § 9874.) Moreover, this requirement is to be enforced by


² See Cal. Code Regs., tit. 9, §§ 9800 (defining “Face-to-Face Interview,” “Group Counseling Session,” and “Individual Counseling Session”) & 9874 (defining “program sobriety”). All of those definitions include a physical presence requirement.

DUI program providers when they suspect a participant is intoxicated as a result of drugs or alcohol because of symptoms relating to the way the participant smells, slurred speech, inattentiveness, staring off into space, and being argumentative. (*Id.*, § 9874, subds. (c) & (d).) When instructors have reason to suspect that an individual is intoxicated, the instructors may have the participant submit to an alcohol or drug test on the spot. (*Id.*, § 9874, subd. (d).) If having the participant submit to a test is not possible, then at least two instructors are required to document their observations, including appearance, behavior, speech, and any combination thereof, that indicate the individual is intoxicated. (*Ibid.*) It is unlikely that these program components can be complied with if any part of the program is operated online; for instance, a program instructor would be unable to confirm his or her suspicion of intoxication by “smell” in that context. Therefore, we conclude that the existing regulatory framework does not authorize the licensure of DUI programs operated even in part online.³

Accordingly, it is our opinion that the State Department of Health Care Services may not, under existing law, issue a license to a driving-under-the-influence program if any part of the program were to be operated online.

Very truly yours,

Diane F. Boyer-Vine
Legislative Counsel

By 
Amy J. Haydt
Principal Deputy

AJH:sjk

³ Consistent with our conclusion that DHCS has the implied statutory authority to license a DUI program wherein a limited portion of the program, not connected to a statutory provision with a physical presence requirement, would be operated online, it is also our view that if DHCS were so inclined, it could, through appropriate action under the Administrative Procedure Act (Gov. Code, § 11340 et seq.), amend its regulations to allow for such a program to be licensed.