



TO: Professional Practice Committee

FROM: David H. Hamilton *David H. Hamilton*

SUBJECT: Proposed Amendment of Sections 52.26 and 61.13 of the Regulations of the Commissioner of Education Relating to the Application of Topical Fluoride Varnish by Registered Dental Assistants

DATE: November 27, 2024

AUTHORIZATION(S): *Tom M. G. Bellotti*

SUMMARY

Issue for Decision

Should the Board of Regents adopt the proposed amendment of sections 52.26 and 61.13 of the Regulations of the Commissioner of Education relating to the application of topical fluoride varnish by registered dental assistants?

Reason for Consideration

Required by State statute (Chapter 457 of the Laws of 2024).

Proposed Handling

The proposed amendment will be presented to the Professional Practice Committee for recommendation and to the Full Board for adoption as an emergency rule at the December 2024 meeting. A copy of the proposed rule (Attachment A) and a statement of facts and circumstances justifying emergency action (Attachment B) are attached.

Procedural History

A Notice of Emergency Adoption and Proposed Rulemaking will be published in the State Register on December 24, 2024, for a 60-day public comment period. Supporting materials are available upon request from the Secretary to the Board of Regents.

Background Information

Fluoride varnish is a topical solution that remineralizes teeth and aids in preventing tooth decay. Like fluoridated toothpaste, fluoride varnish is used on the surface of the teeth. It strengthens the enamel making it more resistant to acids that cause decay.

Fluoride varnish is painted on all surfaces of the teeth with a small brush. It adheres to the teeth when it comes in contact with saliva in the mouth. Generally, it takes less than two minutes to apply and requires no special equipment or extensive training to master the technique.

Health care professionals currently authorized to provide fluoride varnish in this State include dentists, dental hygienists, physicians, nurse practitioners, registered nurses, and physician assistants.

Applying topical fluoride varnish to the teeth of young children is proven to reduce dental disease. Studies show that children who receive topical fluoride varnish every three months have fewer cavities than those who receive it less often or not at all. Topical fluoride varnish application is also the standard of care for pediatric offices and New York State Medicaid. Access to care results in too few children in New York State currently receiving such treatment.

On November 15, 2024, Chapter 457 of the Laws of 2024 (Chapter 457) was signed into law, effective immediately, to increase access to topical fluoride varnish for children. Chapter 457 adds registered dental assistants¹ to the list of health care professionals who are authorized to apply topical fluoride varnish to patients of all ages. Allowing additional health care professionals to apply fluoride varnish is expected to increase flexibility in offices and provide more opportunities to incorporate this service into visits.

Proposed Amendment

The proposed amendment of the Commissioner's regulations implements the provisions of Chapter 457 by:

- amending section 52.26 of the Commissioner's regulations to add applying topical fluoride varnish to the clinical content areas required for registered dental assisting education programs;
- amending section 61.13 of the Commissioner's regulations to add applying topical fluoride varnish to the types of supportive services a dentist may authorize a registered dental assistant to perform; and
- amending section 61.13 of the Commissioner's regulations to add the application of topical fluoride varnish to the procedures allowed be performed by registered dental assistants, even though the procedure is a service that dental hygienists may perform.

Related Regents Items

Not applicable.

¹ Chapter 457 also adds licensed practical nurses to the list of health care professionals who are authorized to apply topical fluoride varnish to patients.

Recommendation

It is recommended that the Board of Regents take the following action:

VOTED: That sections 52.26 and 61.13 of the Regulations of the Commissioner of Education be amended as, submitted, effective December 10, 2024, as an emergency action, upon the finding of the Board of Regents that such action is necessary for the preservation of the public health and general welfare in order to timely implement the provisions of Chapter 457 of the Laws of 2024, which became effective November 15, 2024.

Timetable for Implementation

If adopted at the December 2024 Regents meeting, the emergency rule will be effective December 10, 2024. It is anticipated that the proposed rule will be presented to the Board of Regents for permanent adoption at the April 2025 meeting, after the publication in the State Register and expiration of the 60-day public comment period required under the State Administrative Procedure Act. Because the emergency action will expire before the April 2025 meeting, it is anticipated that an additional emergency action will be presented for adoption at the February 2025 Regents meeting. If adopted at the April 2025 meeting, the proposed rule will become effective as a permanent rule on April 23, 2025.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 207, 6504, 6507, 6608 of the Education Law and Chapter 457 of the Laws of 2024.

1. Subparagraphs (iii) through (v) of paragraph (3) of subdivision (a) of section 52.26 of the Regulations of the Commissioner of Education are renumbered subparagraphs (iv) through (vi) and a new subparagraph (iii) is added to read

(iii) applying topical fluoride varnish;

2. Paragraphs (18) and (19) of subdivision (b) of section 61.13 of the Regulations of the Commissioner of Education are renumbered paragraphs (19) and (20) and a new paragraph (18) is added to read as follows:

(18) applying topical fluoride varnish;

3. Paragraph (5) of subdivision (c) of section 61.13 of the Regulations of the Commissioner of Education is amended to read as follows:

(5) dental supportive services prescribed in section 61.9 of this Part which are services that a dental hygienist may perform, unless such services are expressly permitted as dental supportive services in paragraphs (b)(1) through [(17)] (19) of this section; and

8 NYCRR §§52.26 and 61.13

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE
EMERGENCY ACTION

To address the topical fluoride varnish access issue for children, on November 15, 2024, Chapter 457 of the Laws of 2024 (Chapter 457) was signed into law, effective immediately. Chapter 457 amends the Education Law by adding registered dental assistants to the list of health care professionals that can apply topical fluoride varnish on the teeth of patients to specifically improve children’s access to it. Allowing additional health care professionals² to apply fluoride varnish is expected to increase flexibility in offices and provide more opportunities to incorporate this service into visits. Studies show that children who receive topical fluoride varnish every three months have fewer cavities than those who receive have it less often or not at all.

Since the Board of Regents meets at fixed intervals, the earliest the proposed amendment could be adopted by regular (nonemergency) action after the expiration of the 60-day public comment period provided for in the State Administrative Procedure Act (SAPA) sections 201(1) and (5) would be the April 2025 Regents meeting. Furthermore, pursuant to SAPA 203(1), the earliest effective date of the proposed rule, if adopted at the April 2025 meeting, would be (insert date), the date the Notice of Adoption would be published in the State Register.

Therefore, emergency action is necessary at the December 2024 meeting, effective December 10, 2024, for the public health and preservation of the general

² Chapter 457 also adds licensed practical nurses to the list of health care professionals who can apply topical fluoride varnish of patients of all ages.

welfare in order to immediately implement Chapter 457, which became effective November 15, 2024.

It is anticipated that the proposed rule will be presented to the Board of Regents for adoption as a permanent rule at the April 2025 Regents meeting, which is the first scheduled meeting after the 60-day public comment period mandated by SAPA for state agency rulemaking. However, since the emergency action will expire before the April Regents meeting, it is anticipated that an additional emergency action will be presented for adoption at the February 2025 Regents meeting.