

**LETTER OPINION  
2005-L-22**

September 16, 2005

Ms. Rita Sommers  
North Dakota State Board of Dental Examiners  
PO Box 7246  
Bismarck, ND 58507-7246

Dear Ms. Sommers:

Thank you for asking whether persons who are not licensed dentists may apply dental fluoride varnish. It is my opinion that only licensed dentists and licensed dental hygienists may apply dental fluoride varnish.

**ANALYSIS**

Dental fluoride varnishes are fluoride-containing coatings applied to teeth to preserve them and possibly prevent cavities.<sup>1</sup> You asked whether physicians, nurse practitioners, public health nurses and other similar providers could apply dental fluoride varnish under the state Medicaid program.

Title XIX of the Social Security Act, commonly known as Medicaid, authorizes federal grants to states to provide medical assistance to certain low-income individuals and families, as well as qualified aged, blind, and disabled individuals. The Medicaid program is jointly financed by the federal and state governments and administered by states. 42 C.F.R. § 430.0. Medicaid funds may be used to provide dental care to eligible children. 42 C.F.R. § 441.56(c)(2).

The Department of Human Services believes that physicians and nurses may apply dental fluoride varnish under federal regulations allowing Medicaid recipients to obtain services from any "qualified Medicaid provider" who provides the services to them. Letter from David J. Zentner to Rita Sommers (June 20, 2005), citing 42 C.F.R. § 431.51, which is titled "Free choice of providers." You question whether

---

<sup>1</sup> Donly, Kevin J., DDS, MS, Fluoride Varnishes, Journal of the California Dental Association, March 2003.

this statement is correct. The Department's reliance on this rule for this proposition is misplaced. The rule does not give regulatory authority over health care to the Medicaid program. Rather, it gives Medicaid recipients the right to choose and receive services from a provider of his or her choice. See O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 785 (1980) and Catanzano v. Wing, 992 F.Supp. 593, 595 (W.D. N.Y. 1998) (42 U.S.C. § 1396a(a)(23) and the related rule, 42 C.F.R. § 431.51, give Medicaid recipients the right to obtain services from any qualified provider without government interference).

The federal government does not license health care professionals but it does determine which state-licensed individuals and entities may receive payment for treating patients under the various federal health care programs. Joan H. Krause, The Role of the States in Combating Managed Care Fraud and Abuse, 8 Annals of Health Law 179, 196 (1999). Although the Medicaid law does not directly state that health care licensing is governed by state law, Congress included language in several statutes indicating its intent not to encroach on this area, which is traditionally regulated by states. See e.g. 42 U.S.C. §§ 1396a(a)(49) and 1396r-2 (requiring states to report sanctions against health care practitioners taken by state licensing authorities); 42 U.S.C. §§ 1395 (providing that "[n]othing in [the Medicare law] shall be construed to authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided"); 42 U.S.C. § 1395w-25(a) (requiring that all Medicare+Choice organizations be licensed under state law as risk-bearing entities eligible to offer health insurance or health benefits coverage, with the exception of certain provider-sponsored organizations).

In addition, several Medicaid rules indicate the federal government did not intend to displace state health care practitioner licensing. For example, "physician services" is defined as "services furnished by a physician [w]ithin the scope of practice of medicine or osteopathy as defined by State law." 42 C.F.R. § 440.50(a)(1) (emphasis added). Similarly, "medical care or any other type remedial care provided by licensed practitioners" means "any medical or remedial care or services, other than physicians' services, provided by licensed practitioners within the scope of practice as defined under State law." 42 C.F.R. § 440.60(a) (emphasis added). "Nurse-midwife services" are defined as "services that [a]re furnished by a nurse-midwife within the scope of practice authorized by State law or regulation. . . ." 42 C.F.R. § 440.165(a)(1) (emphasis added). And, while not directly referencing state law, "dental services" are defined as "diagnostic, preventive, or corrective procedures provided by or under the supervision of a dentist in the practice of his profession, including treatment of [t]he teeth and structures of the oral cavity." 42 C.F.R. § 440.100(a)(1). A dentist is defined as "an individual licensed to practice dentistry or dental surgery." 42 C.F.R. § 440.100(b). Presumably, the license referenced in this rule is under state law since the federal government does not license dentists or other health care professionals

These provisions demonstrate that the federal government substantially relies on state licensing laws in defining qualified service providers under the Medicaid program. Thus, state licensing laws remain applicable under the Medicaid program and must be examined to determine which licensed professionals may apply dental fluoride varnish under Medicaid.

Under North Dakota law, the practice of dentistry includes “examination, diagnosis, treatment, repair, administration of local or general anesthetics, prescriptions, or surgery of or for any disease, disorder, deficiency, deformity, condition, lesion, injury, or pain, of the human oral cavity, teeth, gingivae and soft tissues, and the diagnosis, surgical, and adjunctive treatment of the diseases, injuries, and defects of the upper and lower human jaw and associated structures.” N.D.C.C. § 43-28-01(6). No person may practice dentistry unless licensed by the State Board of Dental Examiners. N.D.C.C. § 43-28-10. While a question of fact, there is little reason to doubt that the application of dental fluoride varnish is the practice of dentistry as defined in North Dakota law.

Further, dental hygienists may practice under the supervision of a licensed dentist. N.D.C.C. § 43-20-11. They have specific authority for “the topical application of drugs to the surface tissues of the mouth and to the surface of teeth if such acts are performed under the . . . supervision of a licensed dentist.” N.D.C.C. § 43-20-03. The application of dental fluoride varnish falls within a dental hygienist’s scope of practice when acting under the supervision of a licensed dentist.

Many states have preventive oral health programs to promote children’s access to dental fluoride varnish. Some states have programs to help Medicaid eligible children see dentists and dental hygienists for dental fluoride varnish. Several states also have amended their laws to allow dental fluoride varnish to be applied by other health care practitioners, particularly when limited to Medicaid recipients and other underserved populations.<sup>2</sup>

North Dakota law, however, does not allow licensed professionals, other than dentists and dental hygienists, to practice dentistry or apply fluoride varnish. Nor does it contain an exception from these licensure requirements for other professionals except in an emergency. N.D.C.C. § 43-28-02(3) (licensed physicians, surgeons and other practitioners may perform dentistry in emergency cases). The exception does not apply to the routine, nonemergency application of dental fluoride varnish.

---

<sup>2</sup> See, e.g., Tenn. Code Ann. § 63-5-109(14) (“the application of fluoride varnish to teeth of at risk, underserved persons in or under the auspices of a state, county, or municipal public health clinic by public health nurses or nurse practitioners” is exempt from the Tennessee Dental Practice Act).

LETTER OPINION 2005-L-22  
September 16, 2005  
Page 4

Therefore, it is my opinion that only licensed dentists and licensed dental hygienists may apply dental fluoride varnish. Other licensed professionals, including physicians, nurses, and other similar providers, are not authorized by state law to apply dental fluoride varnish.

Sincerely,

Wayne Stenehjem  
Attorney General

eee/vkk

cc: Carol K. Olson

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).