

Health Care Practice Group

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New Hampshire Action

Expansion of Telehealth and Issuance of Emergency Licenses to Out-of-State Health Care Providers

On March 18, Governor Sununu issued Emergency Order #8 Pursuant to Executive Order 2020-4, which requires all private health insurers regulated by the New Hampshire Insurance Department, the state's Medicaid program, and all Medicaid Managed Care Organizations to permit in-network providers to deliver clinically appropriate, medically necessary covered services to members via telehealth. The order: 1) applies to all modes of telehealth, including video and audio, audio-only, and other electronic media; 2) applies broadly to all medical providers; 3) clarifies that payment for telehealth services shall not be lower than payment for services delivered via traditional methods; 4) prohibits insurers from imposing any cost-sharing on members for medically necessary treatment delivered via telehealth related to COVID-19; and 5) confirms that there shall be no restriction on eligible originating sites for telehealth services.

The Office of Professional Licensure and Certification ("OPLC") issued guidance confirming that "[t]he State's temporary expansion of telehealth services applies to all medical providers including, but not limited to, those professions licensed, certified, or registered by the Office of Allied Health Professionals, Board of Medicine, Board of Nursing, Board of Psychology, Board of Mental Health Practice, Board of Licensing for Alcohol and Other Drug Use Professionals, Board of Licensed Dietitians, and the Board of Dental Examiners."

On March 23, Governor Sununu issued Emergency Order #15, which allows out-of-state medical providers to perform medically necessary services in New Hampshire, notwithstanding the fact that they are not licensed in New Hampshire, so long as the following conditions are met:

1. the provider's profession is one that requires a license in New Hampshire;
2. The medical provider is licensed and in good standing in another United States jurisdiction;
3. The medical services provided within New Hampshire are in-person or through appropriate forms of telehealth, as set forth in Emergency Order #8; and
4. The medical provider presents to the Office of Professional Licensure & Certification evidence that they are licensed in good standing in another jurisdiction. Such medical providers shall be issued an emergency New Hampshire license at no cost, which shall remain valid during the declared state of emergency.

Medical providers shall be subject to the jurisdiction of the appropriate state licensing body while providing services within New Hampshire.

OPLC has promulgated regulations setting forth the procedure for applying for and obtaining an emergency license. OPLC has also issued an application form used for applying for an emergency license. The application requires: 1) basic demographic info; 2) information about whether the applicant has ever received disciplinary action against any professional license or certification; 3) a list of all states where the provider is actively licensed; 4) verification of licensure from one of the states listed, which can be as simple as a printout from the state's license verification website; and 5) a signed certification of accuracy.

Emergency Order #15 also permits in-state and out-of-state medical providers to perform health care services through all modes of telehealth to New Hampshire children enrolled within a New Hampshire school or in a school in another state, provided:

1. the services are in furtherance of an Individualized Education Program ("IEP") administered by the school in which the New Hampshire child is enrolled; and
2. the medical provider is a New Hampshire licensee or receives an emergency New Hampshire license in accordance with Emergency Order #15.

On April 1, the New Hampshire Medicaid Program issued a Telehealth Informational Bulletin, which contains guidance for NH Medicaid enrolled providers on Emergency Order #8, including on the following topics: eligible provider types; eligible services; originating sites; distant sites, e-visits; proper coding of telehealth; and obtaining consent for treatment.

Helpful Resources:

- [Emergency Order #8](#)
- [Emergency Order #15](#)
- [DHHS COVID-19 Resource Page](#)
- [NH Medicaid Telehealth Informational Bulletin](#)
- [OPLC Guidance on Telehealth During the COVID-19 State of Emergency](#)
- [OPLC Emergency License Regulations](#)
- [OPLC Emergency License Application](#)

Federal Action

CMS Expands Medicare Coverage of Telehealth Services

On March 17, 2020, the U.S. Department of Health and Human Services ("HHS"), Centers for Medicare & Medicaid Services ("CMS") expanded telehealth coverage under Medicare in accordance with its Section 1135 waiver authority and the Coronavirus Preparedness and Response Supplemental Appropriations Act. As of March 6, 2020, Medicare beneficiaries can receive a wider range of telehealth services, including evaluation and management visits, mental health counseling, and preventive health screenings. CMS has also removed the requirements that the patient live in a rural area and travel to a local medical facility to receive the telehealth services. Under this new policy, beneficiaries can receive telehealth services from any "originating site," including their own homes. A range of providers, such as doctors, nurse practitioners, clinical psychologists, and licensed clinical social workers, will be able to offer telehealth to their patients. CMS is also not enforcing any requirement that a beneficiary have an established relationship with the provider providing the telehealth services.

On March 30, CMS released an Interim Final Rule with Comment Period (effective March 1) which implements several changes to the payment rules for services provided via telehealth and clarifies the coding and billing requirements for the new expanded telehealth coverage.

Helpful Resources:

- [CMS Fact Sheet](#)
- [CMS FAQs](#)
- [CMS List of Telehealth Services](#)
- [CMS General Provider Telehealth and Telemedicine Took Kit](#)
- [CMS Interim Final Rule](#)
- [Telemedicine and COVID-19 FAQ from CodingIntel](#)

OIG Announces Non-Enforcement of Prohibitions Against Waiving Cost-Sharing for Telehealth Services

On March 17, the HHS Office of Inspector General (“OIG”) issued a policy statement confirming that it will not subject physicians and other practitioners to administrative sanctions related to the waiver of cost-sharing for telehealth arrangements that satisfy both of the following conditions:

1. A physician or other practitioner reduces or waives cost-sharing obligations (i.e., coinsurance and deductibles) that a beneficiary may owe for telehealth services furnished consistent with the then-applicable coverage and payment rules; and
2. The telehealth services are furnished during the time period subject to the COVID-19 Public Health Emergency Declaration.

Helpful Resources:

- [OIG Policy Statement](#)
- [OIG Fact Sheet](#)

OCR Announces Enforcement Discretion for Good-Faith Use of Telehealth

On March 17, HHS’ Office of Civil Rights (“OCR”) issued a “Notification of Enforcement Discretion for telehealth remote communications during the COVID-19 nationwide public health emergency” (“Notification”). In its Notification, OCR acknowledged that during the current national public health emergency, “covered health care providers subject to the HIPAA Rules may seek to communicate with patients, and provide telehealth services, through remote technologies . . . [that] may not fully comply with the requirements of the HIPAA rules.” OCR announced that it will exercise its enforcement discretion to not impose penalties for noncompliance with the HIPAA Rules in connection with covered entities’ good faith provision of telehealth using non-public facing audio or video communication products during the COVID-19 nationwide public health emergency. OCR explained further that its discretion applies to providers’ use of popular applications that allow for video chats, including Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, or Skype, but that it does not apply to video communication applications that are public facing, such as Facebook Live, Twitch, or TikTok.

Helpful Resources:

- [OCR Notification](#)
- [OCR FAQs](#)

SAMHSA Issues Guidance on Disclosure of Substance Use Disorder Records Without Written Consent of the Patient

On March 19, HHS' Substance Abuse and Mental Health Services Administration ("SAMHSA") issued guidance on the applicability of the substance use disorder confidentiality provisions at 42 C.F.R. Part 2 to the provision of telehealth services. SAMHSA noted that provider office closures and compliance with social distancing recommendations is likely to result in the interruption of in-person substance use disorder treatment. SAMHSA acknowledged that if providers are turning to telehealth options to provide treatment, they may face difficulty obtaining prior written patient consent for disclosure of substance use disorder records. SAMHSA confirmed that obtaining the patient's written consent is not required to the extent that providers determine that the disclosure of information without written consent is necessary to meet a bona fide medical emergency in which the patient's prior informed consent cannot be obtained, pursuant to 42 C.F.R. § 2.51.

Helpful Resources:

- [SAMHSA Guidance](#)

DEA Confirms Providers Can Prescribe Controlled Substances via Telehealth

The U.S. Drug Enforcement Administration ("DEA") has confirmed that, pursuant to HHS Secretary Azar's declaration of a Public Health Emergency, prescribers may prescribe schedule II-V controlled substances to patients for whom they have not conducted an in-person medical evaluation, provided all of the following conditions are met:

1. The prescription is issued for a legitimate medical purpose by a practitioner acting in the usual course of his/her professional practice;
2. The telemedicine communication is conducted using an audio-visual, real-time, two-way interactive communication system; and
3. The practitioner is acting in accordance with applicable Federal and State laws.

DEA has also exercised its authority to provide flexibility to ensure authorized practitioners may admit and treat new patients with opioid use disorder ("OUD") during the public health emergency. DEA, along with SAMHSA, announced that practitioners may prescribe buprenorphine to new and existing patients with OUD via telephone without requiring such practitioners to first conduct an examination of the patient in person or via telemedicine.

Helpful Resources:

- [DEA's COVID-19 Information Page](#)
- [DEA's Guidance on Prescribing Buprenorphine](#)

Alexander W. Campbell, Cinde Warmington and Kara J. Dowal contributed to this health care practice group legal update.

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