



TELEHEALTH REGULATORY LANDSCAPE PRIOR TO AND DURING THE COVID-19 PANDEMIC

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Speakers

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Disclaimer

Agenda

- What is Telehealth?
- What was the regulatory landscape before the COVID-19 pandemic?
- How has the COVID-19 pandemic changed the practice of telehealth?
- Focus on telepsychiatry/tele-mental health during COVID-19
- Who knows what telehealth will look like in the future?

Telehealth Generally

- Telehealth is the delivery of health care services remotely (*i.e.*, by a provider to a patient who are not physically located in the same place), through the use of electronic information and communication technologies.
- Telehealth services include assessment, diagnosis, consultation, treatment, education, care management and/or self-management of a patient performed remotely.
- Whether a particular service is reimbursable as a telehealth service depends on a number of factors.
 - Each payor (federal, state, commercial) operates under similar but distinct rules.
 - Other relevant factors include type of service, type of provider, type of electronic modality used, location of patient and provider and provider's licensure.

Covered Telehealth Services Pre-COVID-19

■ Medicare

- CMS publishes and updates regularly via the Medicare Physician Fee Schedule the list of services that, if all of the other rules are met, are reimbursable when provided by telehealth.
<https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/PhysicianFeeSched/PFS-Federal-Regulation-Notices-Items/CMS-1715-F>
- In general, CMS makes additions or deletions to Medicare telehealth services effective on a January 1st basis.
 - There's a specific process to request additions or deletions from the list of covered telehealth services and CMS assigns each code to one of two categories.
 - Category 1 is for those services similar to professional consultations, office visits, and office psychiatry services currently on the list of telehealth services.
 - Category 2 is for those services not similar to those on the currently list of telehealth services.

Covered Telehealth Services Pre-COVID-19

- **New York State Department of Health / Medicaid**
 - All services within a provider's practice can be provided via telemedicine when clinically appropriate.
- **New York State Insurance Law**
 - **Coverage Parity.** Required under ISC § 3217-H, *Telehealth Delivery of Services*
 - (a) An insurer shall not exclude from coverage a service that is otherwise covered under a policy that provides comprehensive coverage for hospital, medical or surgical care because the service is delivered via telehealth, as that term is defined in subsection (b) of this section; provided, however, that an insurer may exclude from coverage a service by a health care provider where the provider is not otherwise covered under the policy
 - **Payment Party .** Not required under New York State Insurance Law

Covered Telehealth Services Changes

■ Medicare

- Scope of services during the emergency period are unchanged; all services otherwise covered by Medicare may be furnished via telehealth during the emergency period
- Services need not be COVID-19 related

■ New York State Department of Health / Medicaid

- Scope of services during the emergency period are unchanged. All services within a provider's practice can be provided via telemedicine when clinically appropriate.

Covered Telehealth Services – Side Note

- **Telehealth vs. Other Remote Services/Encounters (Medicare)**
 - Virtual Check-Ins
 - A virtual check-in pays professionals for brief (5-10 min) communications that mitigate the need for an in-person visit, whereas a visit furnished via Medicare telehealth is treated the same as an in-person visit.
 - E-Visits
 - An e-visit is when a beneficiary communicates with their doctors through online patient portals.

These types of remote encounters are reimbursable but not as telehealth services

Eligible Provider Types Pre-COVID-19

- Medicare
 - *A somewhat limited list*
 - Physicians, PAs, NPs, clinical nurse specialists, nurse-midwives, registered nurse-anesthetists, clinical psychologists, clinical social workers and registered dieticians
 - See 42 CFR 410.78
- New York State Department of Health / Medicaid
 - *A broader list*
 - Physicians, PAs, dentists, NPs, registered professional nurses (only for remote patient monitoring), podiatrists, optometrists, psychologists, social workers, speech language pathologists, audiologists, midwives, physical therapists, occupational therapists, certified diabetes educators, certified asthma educators, genetic counselors, credentialed alcoholism and substance abuse counselors, providers authorized under the Early Intervention program, hospitals, home care services agencies and hospices.

Eligible Provider Types Changes

■ Medicare

- The qualified provider list under Medicare was expanded during the emergency period under the Coronavirus Aid, Relief and Economic Security Act (“CARES Act”), to include physical therapists, occupational therapists, and speech language pathologists

■ New York State Department of Health / Medicaid

- During the emergency period, all restrictions on provider type were waived; all otherwise eligible Medicaid providers could provide telehealth services provided the services are appropriate for telehealth and within the provider's scope of practice

Eligible Modalities Pre-COVID-19

■ Medicare

- **Interactive telecommunications system** means multimedia communications equipment that includes, at a minimum, audio and video equipment permitting two-way, real-time interactive communication between the patient and distant site provider. 42 CFR 410.87(a)(3)
- Expressly excludes telephones, facsimile machines, and electronic mail systems
- Must be HIPAA-compliant

Eligible Modalities Pre-COVID-19

- **New York State Department of Health (Medicaid)**
 - Telemedicine (two-way audiovisual communications)
 - Store and forward technology (asynchronous, electronic transmission of one's health information in the form of patient-specific pre-recorded videos and/or digital images)
 - Remote patient monitoring (uses digital technologies to collect medical data and other personal health information from a patient in one location and electronically transmit that information securely to health care providers in a different location for assessment and recommendations)
 - HIPAA-compliant

Eligible Modalities Changes

■ Medicare

- CMS and OCR expanded the communications tools and modalities qualified providers may use to deliver telehealth services to Medicare beneficiaries
 - OCR, through a notice of enforcement discretion, is permitting providers during the emergency to use any non-public facing remote communication product that is available to communicate with patients
 - Providers may not use Facebook Live, Twitch, TikTok, and similar video communication applications that are public facing <https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html>
- During the emergency period, CMS is also reimbursing for E/M services delivered via telephone to new patients, not just established patients
- 42 CFR 410.87(a)(3) amended to remove exclusions for duration of emergency period

Eligible Modalities Changes

- **New York State Department of Health / Medicaid**
 - NYS DOH expanded the communications tools and modalities to include telephonic communications.
 - On June 17, 2020, Governor Cuomo signed into law S8416 that eliminates the prohibition on audio-only telephone communications under the definition of telehealth services. **Audio-only telephone communication will now be an acceptable telehealth modality going forward.** <https://news.bloomberglaw.com/health-law-and-business/telemedicine-coverage-expands-in-ny-under-bill-signed-by-cuomo>

Location of Patient and Provider Pre-COVID-19

- **Originating Site (or spoke):**
 - Site at which a patient is located at the time health care services are delivered by means of telehealth. 42 CFR 410.78(a)(4)
- **Distant Site (or hub):**
 - Site at which a telehealth provider is located while delivering health care services by means of telehealth. 42 CFR 410.78(a)(2)
- **The Role of State Licensure to Practice Medicine:**
 - In general, the provider must be licensed in the state in which the patient is located in order to deliver telehealth services
 - Federal requirement (Medicare Condition of Participation)
 - State Law (See NY Pub Health L § 2999-CC)

Location of Patient and Provider Pre-COVID-19

■ Medicare

- **Patient Location (Originating Site)** – Medicare only reimbursed for provision of telehealth services when the patient was located at an approved originating site outside of a metropolitan statistical area or within a rural health professional shortage area. 42 CFR 410.78(b)(4)
 - Pre-COVID-19, approved originating sites include physician offices, hospitals, SNFs and FQHCs among others
 - Pre-COVID-19, the patient's home was not an approved originating site
- **Provider Location (Distant Site)** – No site limitations; site must be secure

Location of Patient and Provider Pre-COVID-19

■ New York State Department of Health (Medicaid)

- **Patient Location (Originating Site)** – (1) Article 28 facilities, (2) Article 40 facilities, (3) facilities as defined in Subdivision 6 of Section 1.03 of the Mental Hygiene Law (includes clinics certified under Articles 16, 31 and 32), (4) certified and non-certified day and residential programs funded or operated by OPWDD, (5) private physician's or dentist's offices located within the state of New York, (6) any type of adult care facility licensed under Title 2 of Article 7 of the Social Services Law, (7) public, private and charter elementary and secondary schools located within the state of New York, (8) school-age child care programs located within the state of New York, (9) child daycare centers located within the state of New York, and (10) the patient's place of residence located within NYS or other temporary location within or outside NYS
- **Provider Location (Distant Site)** – Any secure location within the fifty United States or United States' territories where the telehealth provider is located while delivering telehealth services

Location of Patient and Provider Changes

■ Medicare

- **Patient Location (Originating Site)** - By federal waiver, the restrictions on originating sites (most notably with respect to patient homes) and geography have been temporarily waived
- **Provider Location (Distant Site)** – No change

■ New York State Department of Health (Medicaid)

- **Patient Location (Originating Site)** – During the emergency, originating sites can be anywhere the patient is located; no restrictions
- **Provider Location (Distant Site)** – During the emergency, all sites are eligible to be distant sites

Location of Patient and Provider

- The Role of State Licensure to Practice Medicine:
 - 1135 Waiver
 - During the emergency, CMS waived the requirement that an out-of-state provider be licensed in the state where the patient is located if the provider is licensed in another state and the following conditions are met: the provider 1) is enrolled in Medicare; 2) possesses a valid license to practice in the state, which relates to his or her Medicare enrollment; 3) is furnishing services in a state in which the emergency is occurring in order to contribute to relief efforts in her/his professional capacity; and, 4) is not excluded from practice in the state or any other state.
 - State level action
 - The 1135 waiver does not waive state and local licensure requirements. Many states have either temporarily waived some or all licensure requirements or are requiring providers to apply for temporary licensure.

Additional Medicare Telehealth Rule Exceptions Pre-COVID-19

Opioid Treatment

- Medicare originating site geographic conditions were removed and an individual's home was an acceptable originating site for treatment of a substance use disorder or a co-occurring mental health disorder.

Stroke

- Medicare originating site geographic conditions were removed and additional originating sites are added to diagnose, evaluate or treat symptoms of an acute stroke.

Renal Dialysis

- Medicare waived originating site geographic conditions for hospital-based and CAH-based renal dialysis centers, renal dialysis facilities and patient homes when practitioners furnished monthly home dialysis ESRD-related medical evaluations.

Medicare Advantage

- Starting January 1, 2020, some Medicare Advantage plans offered more telehealth benefits to enrollees.

Additional Considerations

■ New Patients vs. Existing Patients

- Pre-COVID-19, telehealth services were only reimbursable if furnished to existing or established patients; many of these restrictions have been waived during the emergency.

■ Credentialing and Privileging

- Generally, CMS requires that when providers at a distant site hospital are providing telehealth services to patients located at an originating site hospital, an agreement between the hospitals is required where the distant site hospital certifies that it meets certain Medicare conditions of participation. **This requirement was waived during the emergency.**

Additional Considerations

■ Informed Consent

- During the public health emergency, NYS DOH is permitting verbal consent as an acceptable method of obtaining a patient's informed consent to participate in a telehealth encounter.

■ Voluntary Providers and Free Telehealth Platform

- See OIG FAQ responding to the question of whether a hospital may provide access to its existing HIPAA-compliant, web-based telehealth platform for free to independent physicians on its medical staff to furnish medically necessary telehealth services during the time period subject to the COVID-19 Declaration.

<https://oig.hhs.gov/coronavirus/authorities-faq.asp>

Telepsychiatry/Tele-Mental Health

Overview:

- New York State has issued continued guidance on the use of telehealth services during the COVID-19 public health emergency to providers that are licensed, certified, designated or otherwise authorized to provide mental health and/or substance use disorder services.
- Providers must adapt and implement strategies that will allow them to continue caring for their clients during this crisis.

Tele-Mental Health Services Before COVID-19

- Mostly limited to rural areas, nursing home populations, etc. where the individuals do not have access to local mental health professionals in their communities or do not have the ability to travel.
- Individual state regulations affected the use of tele-mental health services.
- Many practitioners avoided tele-mental health due to reimbursement issues, state-to-state differences, licensure requirements, etc.

Tele-Mental Health Services During COVID-19

- Federal and state legislation and regulation has rapidly changed in response to the COVID-19 crisis to immediately increase the availability of tele-mental health services
- **CPEPs and Inpatient Programs**
 - Hospitals are encouraged to minimize the number of physicians on site and use telehealth
- **OMH (Office of Mental Health)**
 - Permissive use of telehealth for evaluations or examinations required as part of an involuntary removal from the community, involuntary retention in a hospital or Assisted Outpatient Treatment order pursuant to Article 9 of the Mental Hygiene Law

Tele-Mental Health Services During COVID-19

- **NY OPWDD (Office for Persons with Developmental Disabilities)**
 - All non-residential facilities and programs certified or operated by OPWDD are permitted and encouraged to be delivered via telehealth, whenever possible
 - Documentation and clinical records must continue to be maintained in accordance with MHL § 33.13
- **NY OASAS (Office of Addiction Support and Services)**
 - Certain requirements for prior written authorization from OASAS before using telemedicine have been waived
 - Use of video/telephone is permitted for billing purposes
 - Waiver forms available on oasas.ny.gov website

Tele-Mental Health Services During COVID-19

- DEA and Controlled Substances
 - DEA-registered practitioners can now issue prescriptions for controlled substances to patients for whom they have not conducted in-person medical evaluation after meeting certain criteria
- SAMHSA (Substance Abuse and Mental Health Services Administration)
 - Released guidance to ensure that substance use disorder treatment services are uninterrupted

Tele-Mental Health for Children/Adolescents

■ Challenges

- *Engaging the child at the computer.*
- *Privacy.*
- *Inability or limited ability to engage in art therapy, play therapy, etc.*

■ Benefits

- *Adolescents may prefer telehealth for counseling related to substance use disorder services and/or mental health services.*
- Family therapy can be delivered via telehealth
- Be mindful of the issues related to FERPA

Counseling Centers on Higher Education Campuses

- College students are faced with unprecedented changes, navigating remote learning platforms from home and grappling with added anxiety and stress
 - *Heightened risk factors*
- Practicing across state lines (as discussed earlier)
- Confidentiality during telehealth sessions
- Consent forms before engaging in telehealth
- Continued importance of documentation, maintaining patient records

General Risk Management Issues to Address With Telehealth Providers

- Terminating treatment
 - *If therapist/psychiatrist is unable to continue practicing virtually, he/she must have a plan for their patients/clients in accordance with their legal/ethical obligations*
- Communication is key!
 - *Importance of having information readily available, in writing, on a website*
- Documentation
 - *Consent Forms*
- Confidentiality

Telehealth Post-COVID-19

Who knows what telehealth will look like in the future?

QUESTIONS?

Thank you!