

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF MEDICAID AND MEDICAL ASSISTANCE
Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)

FINAL

ORDER

Telemedicine

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services (“Department”) / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to amend existing rules in the Delaware Title XIX Medicaid State Plan regarding *Telemedicine Services*. The Department’s proceedings to amend its regulations were initiated pursuant to 29 **Delaware Code** Section 10114 and its authority as prescribed by 31 **Delaware Code** Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 **Delaware Code** Section 10115 in the July 2012 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by July 31, 2012 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

SUMMARY OF PROPOSAL

The proposed provides notice to the public that the Division of Medicaid and Medical Assistance (DMMA) intends to amend the Title XIX State Plan *to allow for the use of a telemedicine delivery system for providers enrolled under Delaware Medicaid*.

Statutory Authority

- 42 CFR Part 440, *Services*
- 42 CFR §410.78, *Telehealth services*

Background

For the purposes of Medicaid, telemedicine seeks to improve a patient’s health by permitting two-way, real time interactive communication between the patient, and the physician or practitioner at the distant site. This electronic communication means the use of interactive telecommunications equipment that includes, at a minimum, audio and visual equipment. This definition is modeled on Medicare’s definition of telehealth services (42 CFR §410.78).

According to the Centers for Medicare and Medicaid Services (CMS), the Medicaid program and the federal Medicaid statute (Title XIX of the Social Security Act) does not recognize telemedicine as a distinct service. CMS does note, however, that “telemedicine is viewed as a cost-effective alternative to the more traditional face-to-face way of providing medical care” (e.g., face-to-face consultations or examinations between provider and patient) that states can choose to cover under Medicaid and that there is “flexibility inherent in federal law to create innovative payment methodologies for services that incorporate telemedicine technology.”

States may seek a State Plan amendment to allow the use of telemedicine as a delivery system.

Summary of Proposal

The Division of Medicaid and Medical Assistance (DMMA) proposes to amend the Medicaid State plan to allow for Medicaid reimbursement for medically necessary telemedicine services, a mode of delivery of health care services for covered services rendered to Medicaid eligible recipients by enrolled Delaware Medicaid providers.

DMMA’s objectives in recognizing telemedicine-provided services include:

- Improved access to health care services and behavioral health services with no loss in quality, safety or access to existing medical services; and
- Improved access to medical subspecialties not widely available in a service area; and
- Improved recipient compliance with treatment plans; and
- Medical and behavioral health services rendered at an earlier stage of disease; and
- Improved health outcomes for patients; and
- Reduced Delaware Medical Assistance Program (DMAP) costs for covered services such as hospitalizations and transportation.

The proposed plan amendment, when approved, would allow the following telemedicine services, including delivery of consultation services, office visit evaluation and management services, individual psychotherapy services, pharmacologic

management, psychiatric diagnostic interview examinations, end stage renal disease related services, and individual medical nutrition therapy via an interactive telecommunications system. For these services, an interactive telecommunications system is considered to meet the requirements of a face-to-face encounter.

The appropriate State plan pages will be amended and the appropriate DMAP provider manuals will be updated with applicable coverage parameters and billing guidelines.

The provisions of this state plan amendment are subject to approval by the Centers for Medicare and Medicaid Services (CMS).

Fiscal Impact Statement

- The fiscal impact of adding telemedicine cannot be estimated.
- The projected number of telemedicine-provided services cannot be determined at this time as the actual number will depend on the number of Medicaid practitioners and beneficiaries who choose to use the technology, as appropriate.
- The coverage and limitations for telemedicine-provided services will mirror the respective service delivered face-to-face to eliminate the possibility of any financial impact on Medicaid.
- Providers who wish to deliver telemedicine-provided services will have to invest in the necessary interactive telecommunications equipment.

SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE AND EXPLANATION OF CHANGES

Insight Telepsychiatry, LLC, the Governor's Advisory Council for Exceptional Citizens (GACEC) and the State Council for Persons with Disabilities (SCPD) offered the following observations and recommendations summarized below. The Division of Medicaid and Medical Assistance (DMMA) has considered each comment and responds as follows.

Insight Telepsychiatry, LLC

As an active provider of telemedicine services in Delaware and throughout the mid-Atlantic region, we applaud the DMMA for its forward thinking in creating these proposed changes, particularly for recognizing the large needs for telemedicine services within the behavioral health arena.

Provider Licensure/Enrollment Requirements:

Of note is the requirement that all eligible telemedicine providers be located within the continental United States. As a local telemedicine entity that presently engages local telemedicine providers, we submit that this geographic requirement should be removed from the final rule.

Placing a geographic requirement around a concept like telemedicine that is specifically designed to break down boundaries and minimize the impact of location is counter-productive to the long-term intent of the revised rule. Given a national shortage of qualified providers, particularly within the field of mental health, we must keep every option open to the delivery of appropriate clinical services through carefully planned and managed telemedicine programs. Regulations and practice guidelines, coupled with careful monitoring from state medical boards and federal regulators will ensure that qualified professionals deliver services appropriately, and while the licensure and qualifications of the provider should be considered, location should not.

This point is particularly salient within the field of mental health, where our nation faces an increasing prevalence of behavioral health issues paired with a decreasing supply of qualified mental health professionals to serve these consumers. This trend is extremely well documented within the literature, and no recognizable end is in sight. With this trend, the limited supply of providers will grow increasingly in demand. This demand will see an increase in the salaries of these providers as well as considerable demands from providers for preferential work assignments and schedules. Simply put, providers will become more expensive and increasingly resistant to conducting afterhours call. The 24/7 requirements of medical emergencies and psychiatric crises are in direct conflict with a resistance by providers to deliver services beyond normal working hours.

Telemedicine, and its ability to reach across borders and time zones, represents a unique opportunity to leverage time differences. Through telemedicine the limited pool of providers can be granted the ability to work during what are normal business hours at their distant site while providing after hours services to an originating site within a distant time zone.

Agency Response: DMMA appreciates the interest expressed for permitting providers residing outside the continental United States to participate in the telemedicine program. However, two issues specifically preclude accommodating providers located out of the country.

First, under current Delaware licensure requirements, only providers who are licensed in the State of Delaware but who are located in another State may provide services through the means of telemedicine. On that basis alone, it is unlikely that a provider residing in another country will have a Delaware license.

Second, effective January 1, 2011, Section 6505 of the Affordable Care Act entitled, *Prohibition on Payments to Institutions or Entities Located Outside of the United States*, requires that a State shall not provide any payments for items or services provided under the State plan or under a waiver to any financial institution or entity located outside of the United

States (U.S.).

For purposes of implementing this provision, section 1101(a)(2) of the Social Security Act defines the term "United States" when used in a geographical sense, to mean the "States." The Act defines the term "State" to include the District of Columbia, Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa, when used under Title XIX (Medicaid).

Further, this provision specifically prohibits payments to telemedicine providers located outside of the U.S., Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

No change to the regulation was made as a result of this comment.

GACEC and SCPD

GACEC and SCPD have the following observations and recommendations.

First, authorizing telemedicine offers many advantages to individuals with disabilities, including less transportation time and expense in reaching providers and improved access to subspecialties not widely available in a local area. The concept therefore merits endorsement.

Agency Response: DMMA thanks the Councils for their endorsement.

Second, the standards omit any requirement that the use of telemedicine be considered only when it is consistent with effective communication. The Americans with Disabilities Act generally contemplates accommodations to ensure effective communication between medical providers and patients. See attachments. Therefore, it would be preferable to "highlight" this consideration in the regulation since it could otherwise be inadvertently overlooked. The following sentence could be added:

The provision of services through telemedicine must include accommodations, including interpreter and audio-visual modifications, if necessary to ensure effective communication.

Agency Response: DMMA agrees with the suggestion to highlight consideration of accommodations to ensure effective communication between medical providers and patients. Because not all providers will be in a position to provide these accommodations due to size, staffing, and costs, DMMA will slightly modify the suggested language and incorporate it into the telemedicine policy as follows: *"The provision of services through telemedicine must include accommodations, including interpreter and audio-visual modification, where required under the Americans with Disabilities Act (ADA), to ensure effective communication."*

Third, in Section 27, "Provider Qualifications", second paragraph, first bullet, the verb/predicate has been omitted and the word "within" is misspelled. Consider the following amendment: "Act within their scope of practice".

Agency Response: This was a publication error. The proposed text should have read, "Act *within* their scope of practice".

Fourth, in the "Covered Services" section, the reference to "illness or injury" is "underinclusive" since it would exclude diagnoses and treatment of "conditions" such as cerebral palsy or epilepsy. Medicaid covers more than illnesses and injuries. Compare attached DHSS definition of "medical necessity".

Agency Response: DMMA also agrees with the comment that telemedicine is available to clients for care beyond those who have sustained an illness or injury. The language under Covered Services will be modified to read as follows: *"DMAP covers medically necessary telemedicine services and procedures covered under the Title XIX State Plan. Telemedicine is not limited based on the diagnosed medical condition of the eligible recipient. All telemedicine services must be furnished within the limits of provider program policies and within the scope and practice of the provider's professional standards as described and outlined in the Delaware Medical Assistance Program (DMAP) Provider Manuals which can be found at:*

<http://www.dmap.state.de.us/downloads/manuals.html>"

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the July 2012 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Delaware Title XIX Medicaid State Plan regarding *Telemedicine Services* is adopted and shall be final effective September 10, 2012.

Rita M. Landgraf, Secretary, DHSS

DMMA FINAL ORDER REGULATIONS #12-41

REVISION:

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT
STATE/TERRITORY: **DELAWARE**
LIMITATIONS ON AMOUNT, DURATION, AND SCOPE OF MEDICAL AND
REMEDIAL CARE AND SERVICES PROVIDED TO THE CATEGORICALLY NEEDY

27. TELEMEDICINE SERVICES

The Delaware Medical Assistance Program (DMAP) covers medically necessary health services furnished to eligible DMAP members as specified in the Medicaid State Plan. To facilitate the ability of recipients to receive medically necessary services, DMAP allows for the use of a telemedicine delivery system for providers enrolled under Delaware Medicaid.

Telemedicine services under DMAP are subject to the specifications, conditions, and limitations set by the State. Telemedicine is the practice of health care delivery by a practitioner who is located at a site, known as the distant site, other than the site where the patient is located, known as the originating site, for the purposes of consultation, evaluation, diagnosis, or recommendation of treatment.

Providers rendering telemedicine must be able to use interactive telecommunications equipment that includes, at a minimum, audio and video equipment permitting two-way, real time, interactive communication between the recipient and the practitioner to provide and support care when distance separates participants who are in different geographical locations.

[The provision of services through telemedicine must include accommodations, including interpreter and audio-visual modification, where required under the Americans with Disabilities Act (ADA), to ensure effective communication.]

Telephone conversations, chart reviews, electronic mail messages, facsimile transmissions or internet services for online medical evaluations are not considered telemedicine.

All equipment required to provide telemedicine services is the responsibility of the providers.

PROVIDER QUALIFICATIONS

In order to provide telemedicine under DMAP, providers at both the originating and distant site must be enrolled with DMAP or have contractual agreements with the managed care organizations (MCOs) and must meet all requirements for their discipline as specified in the Medicaid State Plan.

In order for services delivered through telemedicine technology from DMAP or MCOs to be covered, healthcare practitioners must:

- Act within their scope of practice;
- Be licensed (in Delaware, or the State in which the provider is located if exempted under Delaware State law to provide telemedicine services without a Delaware license) for the service for which they bill DMAP;
- Be enrolled with DMAP/MCOs;
- Be located within the continental United States.

COVERED SERVICES

DMAP covers medically necessary telemedicine services and procedures covered under the Title XIX State Plan. ~~[for the diagnosis and treatment of an illness or injury as indicated by the eligible recipient's condition]~~ **Telemedicine is not limited based on the diagnosed medical condition of the eligible recipient.** All telemedicine services must be furnished within the limits of provider program policies and within the scope and practice of the provider's professional standards as described and outlined in DMAP Provider Manuals which can be found at: <http://www.dmap.state.de.us/downloads/manuals.html>

NON-COVERED SERVICES

If a service is not covered in a face-to-face setting, it is not covered if provided through telemedicine. A service provided through telemedicine is subject to the same program restrictions, limitations and coverage which exist for the service when not provided through telemedicine.

(Break in Continuity of Sections)

METHODS AND STANDARDS FOR ESTABLISHING PAYMENT RATES (Continued)

27. TELEMEDICINE SERVICES

Payment for services delivered at the distant site via telemedicine is made according to the standard Delaware Medical Assistance Program (DMAP) payment methodology for the comparable in-person service and provider type.

In addition to the payment for the actual service rendered, qualifying originating patient sites are reimbursed 98% of the Medicare rate for the facility fee for dates of services on or after July 1, 2012.

Fee schedules for telemedicine-provided services are available on the DMAP website at: <http://www.dmap.state.de.us/downloads>.

Except as otherwise noted in the Medicaid State Plan, State-developed fee schedule rates are the same for both government and private providers.

Separate reimbursement is not made for the use of technological equipment and systems associated with a telemedicine application to render the service.

16 DE Reg. 314 (09/01/12) (Final)