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Massachusetts' telehealth landscape post-pandemic

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Gov. Charlie Baker announced that the commonwealth's COVID-19 public health emergency — or PHE — would end on June 15. Since the PHE was declared in March 2020, Massachusetts' regulatory landscape involving the delivery of health care via telehealth and other digital health technology has changed dramatically, both through temporary waivers designed to help combat the spread of COVID-19, and permanent changes that will define Massachusetts' telehealth standards moving forward.

This article creates a roadmap for counsel advising Massachusetts health care providers on issues involving digital health as they approach a landscape that is materially different as a result of the pandemic.

Permanent changes

Telehealth practice standards. Massachusetts' regulatory framework concerning the practice of medicine and other medical professions via telehealth was among the least developed in the country before the pandemic. However, certain steps that lawmakers and regulators took in 2020 and early 2021 have moved the commonwealth in line with most other states across the country.

Conceptually, the most fundamental change came from the Board of Registration in Medicine, or BORIM, which approved a permanent policy on telemedicine in June 2020 clarifying that a face-to-face encounter is not required before a practitioner treats a patient via telehealth.

The June 2020 policy had first been adopted in March 2020 shortly after the onset of the COVID-19 pandemic, but only on an interim basis. While the previously unstated policy was generally assumed to be true before the pandemic, its emergence still helps provide clarity for providers and their counsel moving forward.

Substantively, the most impactful change came via the Legislature, through enacting S. 2984 on Jan. 1, 2021. That law, "An Act Promoting a Resilient Health Care System that Puts Patients First," introduced long-awaited telehealth provisions, including clarification regarding what digital health modalities and methods of communication can be utilized to provide treatment via telehealth.

The new sweeping definition of telehealth in Massachusetts includes "synchronous or asynchronous audio, video, electronic media or other telecommunications technology, including, but not limited to: (i) interactive audio-video technology; (ii) remote patient monitoring devices; (iii) audio-only telephone; and (iv) online adaptive interviews, for the purpose of evaluating, diagnosing, consulting, prescribing, treating or monitoring of a patient's physical health, oral health, mental health or substance use disorder condition."

Before S. 2984, BORIM regulations defined telemedicine as "the provision of services to a patient by a physician from a distance by electronic communication in order to improve patient care, treatment, or services."

The specificity of the new definition makes clear that the most common modalities utilized to treat patients via telehealth in today's health care marketplace — synchronous audio-video communication (i.e., video-chats), remote patient monitoring (RPM), synchronous audio-only communication (telephone), and "smart" questionnaires — can be employed in Massachusetts when deemed clinically appropriate by the treating practitioner.

Moreover, by adopting a non-exhaustive list of modalities, this telehealth definition is structured to adapt over time and evolve with the standard of care as new technological tools advancing patient care continue to emerge.

Commercial insurance coverage and reimbursement. The next noteworthy change that S. 2984 introduces is standards surrounding the coverage and reimbursement of telehealth.

Before S. 2984, Massachusetts law permitted the coverage of services furnished via telehealth, but did not explicitly require such coverage, or outline standards regarding payment for services delivered via telehealth; said differently, Massachusetts had neither coverage nor payment parity laws concerning telehealth.

> As the pandemic subsides, one of the most important tasks for health care providers and their counsel involving telehealth will be anticipating the forthcoming changes to Massachusetts laws involving telehealth that will impact care delivery.

Most of S. 2984's coverage and reimbursement requirements are not permanent, as discussed below. However, changes introduced regarding tele-behavioral health services are permanent. As a result, health insurers in Massachusetts are now required to cover behavioral health services delivered via telehealth to the same extent that such services are covered when furnished in-person, and must pay the same amount for behavioral health services delivered via telehealth and in-person.

Proxy credentialing. S. 2984 also introduced changes that will materially impact Massachusetts hospitals' capacity to utilize remote providers to solve coverage shortages.

The Centers for Medicare & Medicaid Services (CMS) requires Medicare-participating hospitals to implement credentialing processes that clinicians must complete to gain admission to the facility's medical staff. When remote providers are engaged to provide coverage on a short-term basis because of sudden staffing challenges, undergoing a cumbersome credentialing process can be administratively burdensome to facilities already stretched thin.

As such, both CMS and the Joint Commission have adopted standards approving "proxy credentialing," a process that enables the originating site facility — i.e., the facility at which the patient is located — to rely on the credentialing process of the distant site — i.e., the facility where the physician is located — to credential the distant site physician as required to treat patients at the originating site facility.

Proxy credentialing is a tremendous tool for hospitals seeking to expand access to care via telehealth. For Massachusetts hospitals in rural or medically underserved communities, in particular, proxy credentialing can facilitate greater access to care generally and to expert practitioners when needed. For academic medical centers and large health systems in Boston, proxy credentialing can streamline the process for making physicians available to patients statewide.

Temporary changes

As the pandemic subsides, one of the most important tasks for health care providers and their counsel involving telehealth will be anticipating the forthcoming changes to Massachusetts laws involving telehealth that will impact care delivery.

Massachusetts' regulatory landscape is still evolving and likely will continue to do so for several years in the wake of the PHE being lifted on June 15. Below is a list of changes that took place during the COVID-19 pandemic that may soon be unwound.

Licensure. Like all other U.S. jurisdictions, Massachusetts modified its licensure requirements to facilitate greater treatment via telehealth during the COVID-19 pandemic.

Normally, physicians may only treat patients located in Massachusetts if they are licensed to practice medicine in the commonwealth. However, the Department of Public Health established a temporary licensure process for out-of-state practitioners on April 3, 2020, to remain effective until rescinded by DPH or the end of the PHE.

Massachusetts stopped issuing new licenses under this authority as of July 2020, but licenses issued before then remain effective. However, once the PHE was lifted on June 15, all temporary licenses issued during the PHE are no longer effective. This could change, however, if Massachusetts chooses to extend licensure flexibility for out-of-state providers beyond the pandemic, as Connecticut lawmakers did via HB 5596, which extends licensure flexibility for practitioners licensed in other states through June 2023.

Coverage and reimbursement. Through the provisions of S. 2984, Massachusetts insurers have been required to provide coverage parity and payment parity for telehealth services. However, those requirements are only in place until 90 days after the PHE was lifted.

Importantly, primary care services and chronic disease management services are treated differently, and insurers are required to observe payment and coverage parity for such services delivered via telehealth until at least Jan. 1, 2023.

Prescribing controlled substances via telehealth. Rules surrounding prescribing controlled substances via telehealth involve both federal and state authorities. While primary authority rests with the U.S. Drug Enforcement Administration, BORIM maintains an internet prescribing policy that requires a physician to perform an appropriate examination before prescribing via telehealth.

In April 2020, the DPH Bureau of Substance Addiction Services issued interim guidance, which, like corresponding DEA guidance, provided greater latitude for practitioners to prescribe controlled substances via telehealth during the pandemic. However, there is no indication that such guidance, at the federal level or in Massachusetts, will remain in place when the pandemic subsides.

MassHealth. Before the pandemic, MassHealth (Massachusetts Medicaid) already covered a limited number of behavioral health services delivered via telehealth. During the pandemic, however, MassHealth drastically expanded its coverage of telehealth through All Provider Bulletins 289, 291, 294, 298 and 303, essentially implementing a policy that, as long as certain requirements were satisfied, any clinical service could be furnished via telehealth if deemed clinically appropriate in the eyes of the treating practitioner.

In March 2021, MassHealth announced that its expanded telehealth policies would remain in place until 90 days beyond the termination of the PHE. Thus, the specific telehealth-related flexibilities MassHealth introduced during the PHE will be in place until September.

Where this leaves us

As Massachusetts transitions out of the COVID-19 pandemic, attorneys counseling health care providers can confidently advise that state law allows providers to treat patients via telehealth, and that behavioral health services provided via telehealth must be covered and reimbursed just as they would be if delivered in-person.

For the time being, primary care and chronic care services must be treated in the same way, though it is too soon to tell if those requirements will become permanent. Hospitals should also note that proxy credentialing is now clearly permitted in Massachusetts.

While the developments above represent a significant step forward for Massachusetts, the state's telehealth landscape continues to evolve, and that evolution will continue through the rest of 2021 and beyond.

With regard to commercial insurance coverage and parity requirements for telehealth services, the Massachusetts Health Policy Commission, in consultation with the Center for Health Information and Analytics, the Executive Office of Health and Human Services, and the Division of Insurance, will issue a report within two years of the legislation's effective date on the use of telehealth services and the effect on health care access and system cost, including assessing any barriers, and provide recommendations on ways to expand use of services via telehealth, including provision of services by professionals licensed and residing in other states.

MassHealth has published a general framework for its coverage and reimbursement of telehealth services once the PHE terminates, but has advised that it will issue more fulsome and detailed guidance concerning its telehealth policies moving forward once the PHE ends.

Therefore, MassHealth providers can reasonably anticipate expanded telehealth coverage by MassHealth moving forward, but the details of such policies remain to be seen.

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