NATIONAL GOVERNORS ASSOCIATION

M E M O R A N D U M

April 27, 2020

To: Governors
From: Bill McBride, Executive Director
Re: Gubernatorial Strategies for Telehealth

This memo was updated on April 27, 2020.

As COVID-19 continues to spread throughout the nation, states are taking sweeping actions to restrict individuals from congregating and encouraging self-quarantine to flatten the curve of the virus. One of the key strategies in this effort is using telehealth – allowing individuals to receive virtual care – which can reduce the spread of the virus and expand health care capacity by keeping potentially ill individuals in their homes, reducing exposure of health care workers, and reducing the number of people needing care in facilities.

To date, at least 51 states and territories have already taken some steps to increase access to telehealth services by increasing the types of reimbursable covered services, reducing consumer costs, reducing participation requirements and barriers for providers, and increasing the modalities through which services may be offered. However, there are many variations across states regarding implementation approaches depending on existing authorities, including gubernatorial authority, regulation, and legislation (where necessary).

The following considerations reflect opportunities for state activity, including state examples focused on:

- ✓ Ensuring that individuals have coverage of telehealth services with limited or no cost sharing for those services
- ✓ Waiving state specific professional licensure requirements or granting temporary licenses to enable telehealth services and activating the Emergency Management Assistance Compact (EMAC).
- ✓ Coordinating with health systems and hospitals to ensure capacity and capabilities to deliver telehealth services.
- ✓ Streamlining and simplifying provider participation in telehealth
- ✓ Expanding how and where telemedicine can be delivered and still qualify for reimbursement.
- ✓ Facilitating continued access for individuals receiving medication-assisted treatment (MAT)

Governors seeking to improve coverage and access to telehealth services may consider:

Ensuring that individuals have coverage of telehealth services with limited or no cost sharing. There is significant variability across states regarding what telehealth services are reimbursable under Medicaid and private health insurance as well as cost-sharing for consumers. Some governors have included coverage and payment parity requirements in their executive orders, meaning telehealth services must be reimbursed at the same rate as in-person services. Some states also have eliminated cost sharing for all medically necessary services provided via telehealth or costs specific to COVID-19 for certain populations.

Examples of executive actions taken during the COVID-19 response include:

- Colorado's Department of Insurance issued a policy directive for commercial insurance calling for outreach and education to enrollees about telehealth service availability and coverage of COVID-19 related services provided in network without cost sharing, including co-pays, deductibles, and coinsurance that might otherwise apply.

- Massachusetts Governor Baker issued an executive order expanding access to telehealth services for clinically appropriate medically necessary covered services via telehealth for the Medicaid population at the same rate as in person services as set forth in this bulletin, issued by the Massachusetts' Medicaid program. The state also is requiring the state's group insurance commission and all carriers regulated by the Division of Insurance to cover clinically appropriate medically necessary covered services via telehealth at the rates detailed in the Massachusetts bulletin.

- Pursuant to legislation signed by Governor Murphy, New Jersey's Department of Banking and Insurance issued a bulletin directing carriers in the individual, small, and large group markets to cover, without cost-sharing, any health care services or supplies delivered or obtained via telehealth.

- New York's Department of Health State Medicaid Program issued a Special Addition Newsletter pursuant to the current state of emergency exempting all telehealth services from Medicaid copayments regardless of whether services are related to COVID-19.

Waiving state specific professional licensure requirements or granting temporary licenses to enable telehealth services and activating the Emergency Management Assistance Compact (EMAC). Under normal operations, in most situations health care providers must maintain licenses in each state in which they render services to patients. Some states participate in interstate compacts for certain professionals, which have varying benefits. For physicians, interstate compacts ease the application process for licensure but do not eliminate the need for a license in each state where the provider renders services (the nurse compact however does provide reciprocity in all participating states).

In response to COVID-19, states have taken a wide range of approaches to expand access to telehealth services. While state specific approaches may be easy to adhere to for providers who are only offering services in one state, significant variability may be more challenging for providers who are serving patients across the nation (e.g. a student health center from a university providing mental health services to students home for remainder of school year). The most streamlined policy modifications provide full reciprocity or waiver of licensure requirements to health care providers. Requiring registration, notification, or expedited temporary licenses require additional work. Some states are requiring that providers are associated with specific facilities or have received state approval.

States taking action to expand access through licensure waivers or reciprocity agreements may also consider additional liability protections for medical professionals operating under a temporary or emergency license (see NGA memo related to the health workforce).

Another option a limited number of states are pursuing is to activate the Emergency Medical Assistance Compact (EMAC), which is a multi-disciplinary mutual aid compact whereby, upon gubernatorial activation, states may receive assistance from other states. According to the EMAC website, "The EMAC legislation solves the problems of liability and responsibilities of cost and allows for credentials, licenses,

and certifications to be honored across state lines." When originally drafted, EMAC legislation did not contemplate the use of telehealth across states lines. For that reason, upon activating EMAC, states may consider including language that waives state specific limitations regarding telehealth practitioners and instead recognize the authorities of the state in which the practitioner is licensed. EMAC alone, however, does not address coverage and reimbursement or state specific restrictions on telehealth that states may need to address. For states considering using EMAC, a national collaborative developed a resource and template for an executive order which can be modified and used to make telehealth providers agents of the state and a mutual aid resource through EMAC.

Examples of states that have taken steps to address licensure and reciprocity for COVID-19 include:

- Florida's Surgeon General Rivkees issued an emergency order that allows certain out-of-state health care providers to render telehealth services to individuals in Florida "to respond to or mitigate the effects of COVID-19." The order also allows certain physicians to use telehealth services instead of in-person examinations to prescribe controlled substances and medical marijuana. Although Florida passed a law in 2019 that allowed out-of-state health care providers to provide telehealth services based on certain eligibility requirements, the Emergency Order allows providers to act more quickly with fewer administrative and regulatory requirements.

- Indiana Governor Holcomb issued an executive order allowing out-of-state providers to practice telehealth, as long as they have an equivalent license in a different state. The Indiana Professional Licensing Agency then issued guidance allowing out-of-state providers to be temporarily certified to practice telemedicine in Indiana.

- Nebraska Governor Ricketts issued an executive order waiving requirements for in state licenses for multiple health care professionals. The Nebraska Department of Health and Human Services issued an FAQ clarifying that out-of-state providers who work in Nebraska pursuant to the executive order, are authorized to use telehealth under the same statutory provisions that permit Nebraska health care providers to use telehealth.

- Texas' Medical Board is allowing physicians from other states to obtain a limited emergency license or hospital-to-hospital credentialing on a limited basis pursuant to Texas Administrative code governing physician as well as other health care providers practice and limited license for disasters and. Texas is also fast-tracking temporary licenses for out-of-state nurses and allowing nurses to practice telehealth in accordance with the state's Nurse Practice Act and Board Rules.

Coordinating with health systems, hospitals, and other providers to ensure capacity and capabilities to deliver telehealth services. While coverage and reimbursement policies are critical to the delivery of telehealth, as part of broader coordination, states should ensure that major health systems, hospitals, and other providers, such as behavioral health providers, have the infrastructure, capacity, and clarity around policies needed to provide telehealth services. This will help states identify gaps where states need to identify alternative solutions to address the care of their residents. In addition, states should consider consumer access to technologies required to receive telehealth services, particularly for vulnerable populations which may have more limited access.

Streamlining and simplifying provider participation in telehealth. In responding to COVID-19, states may need to take steps to ensure that a broader group of providers will be able to provide telehealth

services, including those who have not offered telehealth previously. In addition, some states have historically limited the types of providers considered eligible for reimbursement via telehealth, such as requiring that patients have a face-to-face encounter with a provider before moving to a telehealth arrangement. States may also expand access by reducing restrictions on the platforms and types of software that may be used. As part of the COVID-19 response, many states have taken action to eliminate barriers for entry for providers and to allow virtual establishment of provider-patient relationships. For example:

- Arkansas Governor Hutchinson issued a proclamation allowing providers to establish relationships with patients via telehealth.

- Kentucky took steps to allow providers to administer behavioral health service without establishing care in person and expanded the platforms that providers can use to administer care. Kentucky's Department of Medicaid Services issued guidance updating the type of behavioral health services now able to be done remotely as well as information about types of software that can now be used to administer services. The Kentucky Department of Insurance followed with guidance that reduced restrictions on type of devises, software, and platforms that can be used for telehealth.

- Pursuant to legislation signed by Governor Murphy, New Jersey's Department of Human Services Division of Medical Assistance and Health Services published a newsletter waiving a requirement that a provider review a patient's medical history and medical records before an initial telehealth encounter in Medicaid. The memo also waives all site of service requirements for both the originating and distant cites in Medicaid (see following consideration).

- New York's Office of Mental Health issued guidance allowing self-attestation to allow delivery of tele-mental health services during the COVID-19 disaster declaration and to expand modality, professionals who can deliver services, and types of services.

Expanding how and where telemedicine can be delivered and still qualify for reimbursement. As part of a COVID-19 response, in order to expand the number of providers who can engage in telehealth services and ensure that individuals can remain at home and receive services, states will need to take certain steps to address regulatory barriers. Specifically, a number of states now reimburse for services delivered by telephone, as well as other modalities such as live video technology and the electronic sharing of images, pathology results or other medical history. In addition, historically many states, as well as some federal programs, required that the patient must be within a provider's office, hospital, or other health care facility- known as the originating site- to receive telehealth services. In the context of COVID-19, however, the goal is to reduce the level of interaction between people and avoid unnecessary use of health care services. As a result, some federal programs state Medicaid, and state's regulating private insurance programs are allowing use of the home as an originating site for patients. For example:

- Massachusetts Governor Baker issued an executive order requiring that the state's group insurance commission and carriers may not impose limitations or specific requirements regarding the type of technology uses for telehealth, thereby allowing audio-only services. The order specifies that the GIC and carriers must establish reasonable requirements for telehealth that may not be more restrictive than requirements for the state's Medicaid program as outlined in a bulletin issued by the Assistant Secretary for MassHealth, Daniel Tsai.

- New York's Department of Health State Medicaid Program issued a Special Addition Newsletter pursuant to the current state of emergency specifying that New York Medicaid is covering telephonic evaluation and management services as part of broader telehealth policy to reduce congregation of individuals where COVID-19 might spread for all appropriate services where an established provider-patient relationships exists.

- More than 35 states reimburse Federally Qualified Health Centers (FQHCs) and Rural Health Centers (RHCs) as distant site providers for purposes of telehealth services. Remaining states may benefit from lifting restrictions requiring FQHCs and RHCs to serve as both originating and distant sites so that patients can receive telehealth services in the home and at health centers.

Facilitating continued access for individuals receiving medication-assisted treatment (MAT) by ensuring that addiction treatment providers are aware of the Drug Enforcement Agency (DEA) guidance described below, which allows DEA-registered practitioners to issue prescriptions for controlled substances to patients for whom they have not conducted an in-person medical evaluation. Under Substance Abuse and Mental Health Administration (SAMHSA) guidelines, counseling is required component of MAT administration for Opioid Treatment Programs (OTPs). In addition, State Opioid Treatment Authorities (SOTAs), state boards of medicine or pharmacy, or Medicaid programs may require counseling services for patients receiving buprenorphine through Office-Based Opioid Treatment (OBOTs). As the SAMHSA, Centers for Medicare & Medicaid Services, and DEA continue to issue updated guidance to promote access to MAT services during the COVID-19 crisis, states can take steps to ensure that none of their state or state Medicaid counseling and ancillary service requirements for patients receiving MAT at OTPs or OBOTs is more stringent than applicable federal requirements. State Medicaid programs may also work with providers to clarify that delivering these counseling and ancillary services telephonically is an allowable and reimbursable service. For example:

- Kansas Governor Kelly's executive order lifts enforcement requirements that would require physicians to conduct an in-person exam prior to issuance of a prescription or order the administration of medication, including controlled substances

- The Maine Department of Health and Human Services issued guidance on MaineCare reimbursement for telehealth services. The guidance includes emergency rules which allow for telehealth over the telephone and the issuance of a prescription via telehealth.

Congressional and Administrative Actions Related to Telehealth
As part of its COVID-19 response, the federal government has published guidance on telehealth that may inform state actions on certain issues. Below is a summary of and links to recent guidance.

The Federal Communications (FCC) Telehealth Program—On April 2, the FCC issued a funding announcement establishing the Telehealth Program which will provide $200 million in funding to help health care providers provide telehealth services to patients at home or other mobile locations. The funding can be used for telecommunications services, information services, and devices necessary to provide critical connected care services. Health care providers interested in applying may reference the FCC application guidance.

Coronavirus Aid, Relief and Economic Stability Act (CARES) – The law includes provisions to (i) expand Health and Human Services authority to use Section 1135 waivers to extend to providers of telehealth services, (ii) revisions to permit Medicare payment for telehealth services delivered by Federally Qualified Health Centers and Rural Health Clinics during emergency periods, clarification that high deductible health plans may cover telehealth visits prior to the deductible, and (iii) provisions to relax criteria for eligibility for telehealth network and resource center grant programs. The Centers for Medicare & Medicaid Service (CMS) also released further guidance on telehealth services from Federally Qualified Health Centers and Rural Health Clinics.

The Families First Coronavirus Response Act (H.R. 6201) – The Act requires group health plans (including self-insured ERISA plans) and health insurance issuers in the individual and group markets to cover COVID-19 testing and related services without cost sharing and without prior authorization or other medical management requirements during a telehealth visit. The Act also permits coverage of telehealth services for a beneficiary who had been seen by a provider (or a member of the provider's practice) within the past three years and had received a service that could have been paid for by Medicare if the person had been enrolled in Medicare.

CMS

- **Informational Bulletin:** On April 2, CMS published an informational bulletin which identifies opportunities to expand treatment for substance use disorder through telehealth. The guidance includes two sections: Rural Health Care and Medicaid Telehealth Flexibilities and Medicaid Substance Use Disorder Treatment via Telehealth.
- **Medicaid Guidance:** On March 17, CMS published guidance and FAQs that address state options and flexibilities related to paying Medicaid providers for delivery of telehealth services through state plan fee-for-service payments, including examples. In accordance with previous guidance, it specifies that **s**tates do not have to submit a state plan amendment (SPA) to CMS for Medicaid coverage or reimbursement unless they are seeking to reimburse for telemedicine services differently from face-to-face visits.
- **Medicare Guidance:** On March 17, CMS published guidance that expands coverage of telehealth services for Medicare beneficiaries, expanding options for originating sites to health care facilities and homes, increasing types of providers who can offer services, and waiving cost-sharing for telehealth visits, among other things. The guidance has a retroactive effective date of March 6.

HHS Office of the Inspector General (OIG): On March 17, the OIG issued a complementary policy statement to the Medicaid and Medicare guidance indicating that health care practitioners "will not be subject to administrative sanctions for reducing or waiving any cost-sharing obligations Federal health care program beneficiaries may owe for telehealth services furnished consistent with the then applicable coverage and payment rules" during the time period covered by the Secretary's declaration of a public health emergency.

HHS Office of Civil Rights (OCR): OCR Guidance published on March 17, 2020 clarifies that OCR will waive enforcement penalties for health care providers providing telehealth in good faith during the COVID-19 nationwide public health emergency.

U.S. Drug Enforcement Agency (DEA): In response to the Secretary of HHS declaring a public health emergency, DEA issued guidance on March 17, 2020, that clarifies that DEA-registered providers are

allowed to prescribe controlled substances for patients for whom they have not had an in-person consultation as long as the provider is prescribing in alignment with their normal professional practice, the telemedicine visit occurs over a live (real time), audio visual two-way interactive communication system, and the provider is adhering to state and federal laws throughout the remainder of the public health emergency declaration.

Substance Abuse and Mental Health Administration (SAMHSA): On March 19, 2020, SAMHSA released guidance regarding 42 CFR Part 2, which governs the protection and disclosure of substance use disorder information by providers participating in federally assisted substance use disorder programs (Part 2 providers). The guidance clarifies that because Part 2 providers may not be able to obtain written consent for disclosure of information because they are providing services via telehealth technology that such disclosure to medical personnel is not prohibited if a bona fide medical emergency exists. Under this exception, providers must use their own judgment regarding the whether a bona fide medical emergency exists.

Other Resources

There are a number of other resources that may be helpful to states in considering how to leverage telehealth as part of their COVID-19 response. Below are some examples of these resources:

- The Center for Connected Health Policy is continuously updating a summary of telehealth coverage policies at the federal and state level which they are updating on an ongoing basis accessible via their website under "What's New."
- The Federation of State Medical Boards is tracking states modifying in-state licensure requirements for telehealth in response to COVID-19
- MIT professors and chairs of the COVID-19 Policy Alliance, a team of experts from medicine, hospitals, telehealth, logistics, and cloud computing worked together to develop a state coordinated telehealth platform concept described in a paper to implement testing and treatment via telehealth without spreading the virus.
- The Northeast Telehealth Resource Center has compiled the Telehealth Webliography for COVID-19 Pandemic, which has an extensive list of resources regarding telehealth.
- The Alliance for Connected Care is tracking all federal health related actions and has prepared a summary of all state actions related to telehealth and related licensing issues.
- Aledade has created a state level telehealth overview tracker for primary care.
- The University of Maryland Institute for Innovation and Implementation is maintaining a map to track COVID-19 telehealth Medicaid actions.

For questions or concerns related to the contents of this memo, please contact NGA staff:

- *Lauren Block (lblock@nga.org; 202.641.4226)*
- *Kelsey Ruane (kruane@nga.org; 443.254.0341)*
- *Hemi Tewarson (htewarson@nga.org, 301.237.6812)*