What the Expiration of the Public Health Emergency Means for Telehealth

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The Public Health Emergency (PHE) enacted by the federal government on January 31, 2020, and by the State of New Jersey on March 9, 2020 provided for increased flexibility for the provision of telehealth services. As a result, the healthcare industry witnessed an explosion of this delivery method for healthcare services with many providers and patients favoring its convenience. What started as a tool to allow the ongoing delivery of healthcare services in a pandemic-isolated world, quickly became a common tool in the industry and an expected norm by patients. However, with the PHE having expired here in New Jersey on June 4, 2021, and the federal PHE having expired on May 11, 2023, providers must reassess the status of the law to ensure ongoing compliance with applicable federal and state telehealth laws if they wish to continue providing services via this medium. As noted by Fatimah Muhammad in her FOCUS magazine article entitled *COVID-19 Public Health Emergency Transition*, all aspects of the delivery of care during the pandemic, including for the treatment of COVID-19 and otherwise, are now in flux and must be closely reviewed to ensure compliance with the laws going forward.

While many have noted that certain aspects of the telehealth flexibilities and waivers have been extended past the conclusion of the PHEs, there are also certain aspects of the telehealth laws that are returning to their pre-pandemic status. Thus, it is important for providers to not only take stock of how the laws are changing post-PHEs, but also to take note of when some of the extended flexibilities and waivers will expire in the future, absent further action by the federal and state governments.

Extensions of Telehealth Flexibilities Via the Consolidated Appropriations Act

One of the most notable legislative acts to extend many of the telehealth flexibilities came with the passage of the Consolidated Appropriations Act (CAA) of 2023.[1] The CAA extended many of the pandemic-era telehealth flexibilities including, but not limited to, the following items, through December 31, 2024:

- ***Telehealth services provided at home will continue to be covered by Medicare*** – The *originating site* has historically served as a significant restriction to where a patient could receive telehealth services. During the pandemic this definition was relaxed to include locations such as a patient's home or temporary residence and to eliminate the exclusivity of patient's being located only in rural areas. The CAA extended this relaxed definition through December 31, 2024. For behavioral health services, this relaxation of the definition has been made permanent.
- ***Audio-only telehealth will continue to be covered by Medicare*** – Post-PHE behavioral and mental audio-only telehealth services will be permanently covered by Medicare while certain non-behavioral telehealth services offered via audio-only will be covered through December 31, 2024.
- ***Federal Qualified Health Centers and Rural Health Clinics can continue to serve as distant site providers*** – Pursuant to the CAA, these providers can continue to offer telehealth services to Medicare beneficiaries rather than being limited to being an originating site provider for telehealth.
- ***Continued expanded list of qualified telehealth providers*** – The list of providers eligible to continue offering telehealth services to Medicare beneficiaries will remain expanded to include physical therapists, occupational therapists, speech language pathologists and audiologists. Prior to the PHE, only physicians, nurse practitioners, physician assistants, and limited other specified providers could provide telehealth services under Medicare. This expanded list of telehealth providers will remain in effect until December 31, 2024, unless additional action is taken to change the law.
- ***Continued utilization of at-home acute hospital care through telehealth*** – Under the CAA, the acute hospital care at home program was extended to allow the contin-

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ued utilization of acute care hospital services to patients in their homes, including through telehealth. Similar to some of the other extensions, for behavioral health services Medicare beneficiaries will be able to permanently receive these services at home, whereas for non-behavioral health services, Medicare beneficiaries will only be eligible to receive the services via telehealth from home through December 31, 2024.

- ***Delaying of the in-person requirement for telehealth mental health services*** – A relatively new CMS rule requires an in-person visit within six months of the first behavioral or mental telehealth service provided to a patient and an in-person visit with the patient at least every twelve months thereafter to qualify for Medicare coverage. This requirement has been delayed by the CAA and will not go into effect until after December 31, 2024. Many in the behavioral health space have questioned the need for this in-person visit and thus it remains to be seen if further changes will be made between now and the end of 2024.

While the CAA extended many of the flexibilities and waivers put in place during the PHE, there are several that have now expired with the conclusion of the PHE and will have a direct impact upon the continued provision of telehealth services.

Expiration of the Office of Civil Rights' Enforcement Discretions

The US Department of Health and Human Services Office of Civil Rights (OCR) exercised its enforcement discretion during the PHE to relax various requirements of the Health Insurance Portability and Accountability Act (HIPAA) rules.[2] This enforcement discretion was only to remain in effect during the pendency of the PHE to allow greater flexibility so that providers could creatively ensure healthcare delivery to patients while not fearing penalties from the government for certain failures to demonstrate absolute compliance with HIPAA.

In the months leading up to the expiration of the PHE, OCR announced that these enforcement discretions would expire, and HIPAA enforcement would return to its pre-pandemic standards post-PHE. However, prior to the May 11, 2023 expiration of the PHE, OCR announced it had decided to provide for a 90-calendar day transition period for covered healthcare providers to come back into compliance with the HIPAA rules with respect to the provision of telehealth. Thus, providers now have until August 9, 2023, at 11:59 p.m. before penalties will again begin to be imposed for certain aspects of HIPAA.

Prescribing of Controlled Substances Via Telemedicine

The ability of providers to prescribe certain controlled substances via telemedicine was also at risk of significant change upon the expiration of the PHE. During the course of the PHE, providers were permitted to prescribe controlled substances via telemedicine without the need for in-person examinations of the patients. However, with the expiration of the PHE, and pursuant to a pending new rule published in February 2023 by the federal Drug Enforcement Administration (DEA), in-person examinations would again be a requirement to ensure continuity of care. Under the proposed DEA rule, if a patient had not been seen in-person, and was in need of a controlled medication, providers would be limited to prescribing a 30-day supply of Schedule III-V non-narcotic controlled medications, or a 30-day supply of buprenorphine for the treatment of opioid use disorder without an in-person evaluation or referral from a physician that conducted an in-person evaluation. For Schedule II medications or Schedule III-V narcotic-controlled medications, an initial in-person exam would again be required before any such prescriptions.[3]

Despite this proposed rule remaining under review, the DEA recently published a statement advising that, "[w]e recognize the importance of telemedicine in providing Americans with access to needed medications, and we have decided to extend the current flexibilities for six months while we work to find a way forward to give Americans that access with appropriate safeguards."[4] Thus, the industry is awaiting further guidance from the DEA regarding what it will do with its pending proposed rule and whether it will reverse course on its current proposal to require in-person evaluations.

Virtual Direct Supervision Set to Expire

Another key PHE waiver was the permission by the Centers for Medicare and Medicaid Services (CMS) for providers to utilize remote, real-time, interactive audio-video technology to satisfy Medicare Part B's direct supervision rules for certain types of services. Historically, Medicare has required a supervising professional to be physically present in the same office suite and immediately available to furnish assistance and direction for it to qualify as "direct supervision" and thus be covered by Medicare. In CMS' 2023 Medicare Physician Fee Schedule final rule[5], CMS declined to extend the utilization of virtual direct supervision. As a result, it is set to expire at the end of the calendar year in which the PHE expires, which is December 31, 2023. Thus, providers will again need to be physically present in the same suite and immediately available to assist for services to be considered rendered under the direct supervision of a provider.

Parity of Medicare Payments for Telehealth

Another area of change for providers is the parity in Medicare payments that providers were receiving during the pandemic despite providing services via telehealth instead of in-

person. For services rendered via telehealth at non-facilities (*i.e.* at a patient's home), CMS has been reimbursing the telehealth services at the same rate as a regular, in-person visit. These higher reimbursement rates for telehealth services are scheduled to expire at the end of the year. It remains to be seen whether lawmakers or CMS will attempt to change this policy and either extend or make permanent the reimbursement rates.[6]

Parity of Payments in New Jersey for Telehealth

At the outset of the PHE, New Jersey mandated that health benefit plans similarly reimburse providers for telehealth services at the same rate as in-person services, with limited exceptions. In December 2021, New Jersey enacted a law extending this requirement for a two-year period.[7] Thus, through the end of 2023, New Jersey health benefit plans, Medicaid and NJ FamilyCare, and the State Health Benefits Program (SHBP) and School Employees' Health Benefits Program (SEHBP) must reimburse providers at the same rate as those rendering care in-person.

In 2020, the New Jersey Legislature passed a bill stating that during the PHE and state of emergency declared by the Governor in Executive Order 103, the State Medicaid and NJ FamilyCare programs shall provide coverage and payments for expenses incurred in the delivery of healthcare services through telemedicine or telehealth in accordance with the provisions of P.L.2017, c.117.[8] While the New Jersey PHE expired on June 4, 2021 via Executive Order 244, the state of emergency has continued to remain in place ever since.[9] Consequently, Medicaid and NJ FamilyCare continue to be a source of reimbursement and payment for telehealth services in New Jersey.

New Jersey Utilization of Out-Of-State Physicians

New Jersey has taken additional action regarding telehealth during and post-PHE. In 2020, New Jersey acted to allow out-of-state providers to treat residents of New Jersey both in-person and via telehealth. While those relaxations of the licensure rules were originally set to expire with the conclusion of the New Jersey PHE, the signing of Senate Bill 4139 extended the temporary authorization of such providers to practice within New Jersey. That extension is currently in effect and runs until 60-days after the conclusion of the federal PHE. Thus, providers must be prepared to move away from the utilization of out-of-state providers not licensed to practice medicine in the State of New Jersey.[10]

While the above discussion outlines several of the key flexibilities and waivers of the pandemic that are either continuing beyond the PHE, or which expired with the conclusion of the PHE, there are still many other flexibilities and waivers, both on a federal level and in New Jersey, that could be discussed herein, and which will impact providers across the State of New Jersey. Providers must be vigilant to ensure they remain updated on any new changes that occur, especially since this is a dynamic area of the law that is changing by the day. Thus, it is safe to assume the current status of these flexibilities and waivers will continue to evolve as we move further from the PHE, and federal/state legislatures and agencies evaluate the future of telehealth services.

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Endnotes

[1]H.R. 2617 - https://www.congress.gov/117/bills/hr2617/BILLS-117hr2617enr.pdf

[2]https://public-inspection.federalregister.gov/2023-07824.pdf https://www.hhs.gov/about/news/2023/04/11/hhs-office-for-civil-rights-announces-expiration-covid-19-public-health-emergency-hipaa-notifications-enforcement-discretion.html

[3]https://www.dea.gov/press-releases/2023/02/24/dea-announces-proposed-rules-permanent-telemedicine-flexibilities https://www.dea.gov/sites/default/files/2023-03/Telehealth_Practitioner_Narrative_312023.pdf

[4]https://www.dea.gov/documents/2023/2023-05/2023-05-03/statement-dea-administrator-anne-milgram-covid-19-telemedicine

[5]https://public-inspection.federalregister.gov/2022-23873.pdf

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[7]https://www.njleg.state.nj.us/bill-search/2020/S2559

[8]https://pub.njleg.gov/bills/2020/PL20/7_.PDF

[9]https://nj.gov/infobank/eo/056murphy/pdf/EO-244.pdf

[10]https://pub.njleg.gov/Bills/2020/S4500/4139_I1.HTM