NEW YORK ISSUES UPDATED GUIDANCE BROADLY EXPANDING MEDICAID TELEHEALTH

Hodgson Russ Healthcare Alert
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On May 1, 2020, the New York State Department of Health issued comprehensive guidance on the use of telehealth, including telephonic services, during the COVID-19 State of Emergency. The updated guidance revises and clarifies the existing rules and provides broad authorization for Medicaid providers to use a wide variety of communication methods, including audio-only telephone, for delivering healthcare services remotely during the Emergency. Here are the top ten things you need to know about New York's Medicaid telehealth policies.

Background: Medicaid Telehealth in New York

New York Medicaid covers the delivery of healthcare services through telehealth. In February 2019, DOH published a Special Edition Medicaid Telehealth Update outlining DOH's Medicaid telehealth policy coverage and reimbursement policy guidelines. With the spread of coronavirus, New York has revisited many (but not all) of the rules in an effort to expand access under Medicaid to telehealth services.

On March 12, 2020, Executive Order 202.1 temporarily suspended New York's telehealth statute and regulations "to allow additional telehealth provider categories and modalities, to permit other types of practitioners to deliver services within their scopes of practice and to authorize the use of certain technologies for the delivery of health care services to established patients." In a series of Medicaid Updates beginning in March 2020, DOH issued guidance on the types of clinicians, facilities, and services and modalities eligible for billing during the COVID-19 Emergency. Most recently, DOH issued the following Special Edition Medicaid Updates:

(i) NYS Medicaid Coverage and Reimbursement Policy for Services Related to Coronavirus Disease 2019 (COVID-19), Vol. 26, No. 7 (replacing Medicaid Update Nos. 3 and 4);

(ii) NYS Medicaid Program Launches Online Medicaid Provider Enrollment during COVID-19 Public Health Emergency, Vol. 36, No. 8; and

(iii) Comprehensive Guidance Regarding Use of Telehealth including Telephonic Services during the COVID-19 State of Emergency, Vol. 36, No. 9 (replacing Medicaid Update No. 5), with Frequently Asked Questions Regarding Use of Telehealth including Telephonic Services during the

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COVID-19 State of Emergency (FAQs).

The Medicaid telehealth expansion applies to new and established patients, when clinically appropriate, and to dates of service beginning March 1, 2020. The updated guidance will remain in place for the remainder of the Emergency, unless DOH issues additional guidance before then.

Medicaid Telehealth in New York during the COVID Era

1. **Modality**. Medicaid reimburses enrolled providers for "telehealth." By statute, New York limited "telehealth" to three modalities: (i) telemedicine (synchronous, two-way audio visual communications); (ii) store and forward technology (asynchronous, electronic transmission of health information); and (iii) remote patient monitoring (synchronous or asynchronous collection and transmission of medical data). A major pivot is that now Medicaid will also reimburse healthcare providers for telephonic assessment and monitoring services and telephonic evaluation and management services in cases where face-to-face visits may not be recommended, if the service is appropriate for delivery by telemedicine or telephone and required to care properly for the patient.

   Note: In developing policies and procedures, providers should consider documenting the appropriateness of and need for the delivery of service by telemedicine or telephone.

2. **Medicaid Enrollment**. The updated guidance applies only to providers who are enrolled to bill Medicaid fee-for-service or under contract with a Medicaid managed care plan.

   Note: For those who are not enrolled, New York has implemented an expedited COVID-19 provisional temporary enrollment process to enable practitioners, including out-of-state practitioners, to enroll quickly in New York Medicaid and assist with the COVID-19 emergency.

3. **Services**. The guidance supports a "policy that members needing care should be treated through telehealth provided by all Medicaid qualified practitioners and service providers, including telephonically, wherever possible to avoid member congregation with potentially infected patients." To advance that policy, Medicaid will reimburse providers for two broad categories of telephonic services: (i) evaluation and management; and (ii) assessment and management. The services must be clinically appropriate, within the scope of the provider's practice and appropriately documented in the clinical record.

   Note: As the situation continues to develop, DOH's position on eligible telehealth will likely to evolve as well. Watch for more changes.

4. **Location**. Medicaid reimburses providers for telehealth in a broad range of originating and distant sites, as appropriate to care for the patient. During the Emergency, the originating site – where the patient is located – can be any location, without limitation, and the distant site – where the provider is located – can be any location within the United States or its territories, including a federally qualified health center (FQHC) or a provider's home.

   Note: The updated guidance contains detailed information on the use of place of service codes and service location designations, which vary based on provider type and setting, for telehealth and telephonic encounters.

5. **Billing**. For some services, Medicaid pays providers for telemedicine and telephonic services at the prevailing historic rates for face-to-face visits. For others, Medicaid pays providers at specialized telemedicine or telephonic rates. The updated guidance describes the rules and, for telephonic encounters, establishes six lanes, or pathways, for reimbursement during the Emergency.

   Note: In addition to the DOH guidance, the Office of Mental Health, Office for People with Developmental Disabilities, Office of Addiction Services and Supports and Office of Children and Family Services have issued agency-specific information.

6. **Informed Consent**. During the Emergency, the practitioner needs to confirm the member's identity and provide basic information about the services the member will be receiving via telehealth or telephone. Currently, written consent is not required, but the practitioner is responsible for documenting consent in the medical record. As under the prior February 2019 guidance, the provider may not record sessions without the member's or legal representative's consent.

   Note: The updated guidance does not change Medicaid program requirements for authorized services, all of which continue to apply. In developing policies and procedures, providers should continue to refer to existing requirements, including the February 2019 Special Edition Medicaid Telehealth Update to identify requirements that remain in effect.

7. **Technology**. During the Emergency, providers can use commonly available audio-visual technology, such as smart phones and tablets, or audio-only telephones. This mirrors federal Medicare changes under the "Telehealth Services During Certain Emergency Periods Act of 2020," described here and the CARES (Coronavirus Aid, Relief, and Economic Security) Act, described here.

   Note: The updated guidance allows providers "to bill for telephonic services if they cannot provide the audiovisual technology traditionally referred to as 'telemedicine.'" In developing policies and procedures, providers should consider documenting access issues, such as technological barriers, impeding the use of other forms of telehealth.

8. **Privacy and Security**. During the Emergency, New York follows the federal Office for Civil Rights (OCR) "Notification of Discretion for Telehealth," described here, under which a HIPAA-covered healthcare provider may use any non-public facing remote communication product that is available to communicate with patients to provide telehealth. Providers may use popular applications that allow for video chats, such as FaceTime, Zoom, or Skype, in accordance with OCR's exercise of discretion related to the "good faith provision of telehealth services during the COVID-19 nationwide public health emergency." In contrast, covered providers should not use so-called public-facing applications, such as Facebook Live, Twitch, and TikTok, to deliver telehealth services. Providers should notify patients that these third-party applications potentially introduce privacy risks and enable all available encryption and privacy modes when using these applications.

   Note: In developing policies and procedures, providers should consider a process to notify the patient of potential privacy risks and obtain patient consent to the third-party application used in the encounter.

9. **Attestation**. For Article 28 clinics and other DOH-certified service providers, there are no special attestation requirements for the use of telehealth services. Other providers, however, need to comply with the regulations, guidelines and attestation processes, if any, of their respective oversight agencies.

   Note: The Office of Mental Health, the Office for People with Developmental Disabilities, the Office of Children and Family Services and the Office of Addiction Services and Supports have issued agency-specific information on the use of telehealth and telephonic services, including attestation requirements.

10. **Medicaid Managed Care**. Medicaid managed care plans must cover telehealth services, as described in the updated guidance, but may establish claiming requirements, such as specialized coding, that vary from the Medicaid fee-for-service billing rules. DOH requires Medicaid managed care plans to reimburse network providers at the same rate that applies to face-to-face services, in the absence of a State-mandated or negotiated rate for telehealth or telephonic services. DOH also requires plans to cover appropriate telehealth and telephonic services from all network providers, rather than limiting access solely to telehealth vendors.

    Note: Providers should continue to address questions about Medicaid managed care reimbursement and documentation requirements to the member's plan.

Looking Ahead

The COVID-19 crisis has accelerated the adoption of telecommunications technology and ushered in a new era for telehealth. Moving forward, telehealth will almost certainly remain an important mode of healthcare delivery. It is not too soon to start thinking about the future of telehealth and how you can incorporate telecommunications technology into your

clinical operations to meet patient needs.

The adoption of strategic policies and processes can help to avoid potential pitfalls later. For more information on telehealth programs, or for questions regarding this alert, please contact Jane Bello Burke (518.433.2404) or Joshua Feinstein (716.848.1318).

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

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