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How Behavioral Health Care Rules Are Evolving For COVID-19

By **Purvi Maniar and Sarah Jean Kilker**
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Purvi Maniar

As the COVID-19 crisis deepens, the U.S. medical system is facing significant uncertainty and is at risk of being overwhelmed. To promote social distancing, protect vulnerable populations, and relieve the pressure on in-person medical services, government and private payors are rapidly implementing various strategies to enable health care providers to continue to care for patients and manage significant increases in demand during the public health emergency.

During this time of significant uncertainty, social unrest and isolation, the need for behavioral health services is likely to increase as individuals with mental health and substance use disorders, or SUDs, are particularly vulnerable and in need of continued and potentially enhanced levels of treatment.

Sarah Jean Kilker

In-person addiction treatment services are being halted at a time when they may be most needed in order to provide support and avoid relapse during times of increased stress due to social isolation, economic stress and unemployment. In addition, behavioral health patients may face challenges obtaining new or continued prescriptions for much needed medications, including controlled substances.

In response to these concerns, federal and state regulators are taking measures to help facilitate continued and increased safe access to mental health and SUDs treatment, including expanded telemedicine, relaxed Health Insurance Portability and Accountability Act enforcement, and increased permissions for prescribers of controlled substances, including opioid treatment therapies.

The following is a summary of measures that are currently in place related to the provision of mental health and SUDs care. This is a fluid environment, however, and regulations and policies are evolving almost daily in response to the unique situations created by the COVID-19 pandemic.

Based on the changes to date as well as signals from regulatory agencies during this unprecedented time, we believe that regulators will also exercise enforcement discretion related to technical noncompliance with applicable regulations that have not yet been revised to respond to the crisis.

Medicare

Effective March 6, and for the duration of the COVID-19 public health emergency, the U.S. Department of Health and Human Services has eliminated all rural and site limitations for originating sites for telemedicine services.[1] This change allows for all Medicare beneficiaries to take advantage of telemedicine visits and for a patient's home to be an eligible originating site for a telemedicine encounter. Providers are able to bill for these visits at the same rate as if the patient was seen in the office.

Originating site requirements for Medicare patients were already eliminated for telemedicine treatment of SUDs as of July 1, 2019, through the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment (SUPPORT) for Patients and Communities Act. Because of the HHS pronouncement, even non-SUDs behavioral health Medicare patients will now be able to take advantage of the relaxed originating site rule. Mental health counseling and psychiatric evaluations are among the many examples of behavioral health encounters that may now be conducted via telemedicine for Medicare patients.

Additionally, HHS will not conduct audits to establish whether a prior relationship existed between the patient and provider for telemedicine claims submitted during the public health emergency.[2] This is especially beneficial for senior citizens and immunosuppressed patients that do not have a prior relationship with a behavioral health provider, but whose needs may be exacerbated by isolation during the course of the pandemic. Psychiatrists, psychologists, licensed social workers, licensed marriage and family therapists, licensed clinical counselors, and licensed chemical dependency counselors are all covered providers under Medicare.[3]

Medicaid

Telemedicine requirements and reimbursement policies under Medicaid vary from state to state based on each state's regulations and Medicaid programs. Although this limits federal mandates, states have broad flexibility to cover these telemedicine services. For instance, federal approval is not needed for state Medicaid programs to reimburse providers for telemedicine services at the same rate as in-person encounters. In order to make such an update to rates for telemedicine services, an amendment to the state plan is necessary.

During this crisis, states have been expanding access to behavioral health services for their Medicaid patients.

For example, in New York, providers who submit a self-attestation form will be able to provide telemental health services to patients regardless of whether they are subject to any COVID-19 quarantine.[4]

In Missouri, telehealth services may be provided by behavioral health providers (including for counseling/psychology and applied behavioral analysis for autism) to a Medicaid participant while at home via the telephone.[5]

In California, Medi-Cal mental health practitioners and SUDs practitioners may, in addition to traditional telemedicine modalities, utilize other methods, such as virtual/telephonic communication to provide medically necessary mental health services.[6]

Telemedicine Prescribing

The U.S. Drug Enforcement Administration responded to the COVID-19 pandemic by implementing exceptions to the Ryan Haight Act.[7]

For the duration of the crisis, DEA-registered practitioners may issue prescriptions for controlled substances, such as some medications used to treat anxiety or attention-deficit/hyperactivity disorder, using telemedicine to patients for whom they have not previously conducted an in-person medical evaluation, provided that (1) the prescription is issued for a legitimate medical purpose by a practitioner acting in the usual course of his/her professional practice, (2) the telemedicine communication is conducted using an audiovisual, real-time, two-way interactive communication system, and (3) the practitioner is acting in accordance with applicable federal and state law.

However, pandemic related lockdowns in countries like China and India could disrupt the pharmaceutical supply chain as the crisis wears on, adding another challenge to providing behavioral health care.[8]

Addiction Treatment

Many SUDs patients around the country rely on frequent in-person counseling and treatment to maintaining sobriety and stable mental health status.[9] Social distancing and facility closures make in-person treatment impracticable and not possible in many cases. Creative solutions are necessary to continue to provide crucial SUDs treatment programs, including addiction counseling and opioid treatment programs.

HHS' Substance Abuse and Mental Health Services Administration issued updates for providers seeking to prescribe methadone and buprenorphine via telemedicine to SUDs patients during the COVID-19 crisis.[10]

SAMHSA has made the decision to preemptively exercise its authority to exempt opioid treatment programs from the requirement to perform an in-person physical evaluation for any new patient who will be treated with buprenorphine if a program physician, primary care physician, or an authorized health care professional under the supervision of a program physician, determines that an adequate evaluation of the patient can be accomplished via telemedicine. This exemption does not apply to new patients treated with methadone. Existing methadone patients may continue treatment via telemedicine.

In addition, as of March 16, SAMHSA is allowing states to request blanket exceptions for all stable SUDs patients in an opioid treatment program to receive 28 days of take-home doses of medication for opioid use disorder (this is an increase from a maximum of 14 days).[11] The state may also request up to 14 days of take-home medication for those patients who are less stable but whom the opioid treatment program believes can safely handle this level of take-home medication. Pennsylvania[12] and Ohio[13] are states that have already used this guidance to relax take-home rules for opioid treatment.

State Licensure

State licensure law has often been an impediment to practicing telemedicine when the patient and behavioral health provider are located across state lines. Due to the increased need for access to behavioral health services and the need to limit travel of both patients and providers, the White House

announced on March 18 that HHS will issue a regulation to provide for health care providers to practice across state lines.

As of the time of publication, HHS has not produced the foreshadowed regulation. However, many states are already taking action to pave the way for providers, including telemedicine providers, to practice across state lines. The Federation of State Medical Boards is maintaining a list of states that have temporarily relaxed licensed regulations in response to the COVID-19 crisis.[14] The increased flexibility could be critical in addressing known shortages of licensed behavioral health providers throughout the country at a time when there is a surge in the need for quality behavioral health services.

Privacy Law Updates

As discussed above, HHS authorized the use of telephones that have audio and video capabilities that may not meet HIPAA privacy and security requirements in order to provide Medicare telemedicine services during the COVID-19 crisis.

As outlined in a bulletin released March 28,[15] the HHS Office for Civil Rights will exercise enforcement discretion[16] and waive penalties for HIPAA violations against health care providers that serve patients in good faith using technologies such as FaceTime or Skype. The Centers for Medicare & Medicaid Services encourages providers to notify patients that these third-party applications may introduce privacy risks, and providers should enable all available encryption and privacy modes when using such applications.

It is important to note that Code of Federal Regulations Title 42, Part 2, is applicable to certain SUD information, and state laws can be more stringent than HIPAA. In response to questions arising during the COVID-19 crises, SAMHSA released guidance[17] regarding when it is appropriate for a provider to disclose patient data pursuant to a medical emergency, such as a medical emergency that arises while managing a SUDs patient's COVID-19 diagnosis.

However, the sharing of patient information is going to be simplified going forward, as lawmakers have finally amended some of the more restrictive privacy portions of Part 2. As part of the $2 trillion stimulus package passed in response to the COVID-19 pandemic, Part 2 restrictions are now relaxed to more closely align with HIPAA regulations. For instance, providers will now only need to obtain a SUDs patient consent once in order to share patient information for treatment, payment, and health care operations.

Many states have their own laws and regulations that are not preempted by HIPAA or Part 2 regarding privacy and security requirements for health data. In those cases, a separate state action will be likely be necessary to waive state privacy requirements. However, we expect that states, along with SAMHSA and other agencies, will exercise enforcement discretion in connection with technical noncompliance during the emergency so long as the providers otherwise meet appropriate standards of care.

As the COVID-19 pandemic continues to unfold, we can expect to see additional regulatory revisions at the state and federal levels to make mental health as well as SUDs care accessible during this critical time.

We are likely to see providers, payors, and policymakers continue to collaborate at an unprecedented pace to provide safe and accessible care to meet the needs of patients. The temporary changes made

during the crisis could very well be the precursor for the delivery of which behavioral health care in the future, such as through increased telemedicine and more flexible licensure regulations.

Finally, we expect that to the extent providers are appropriately responding to continued and increased behavioral health needs of patients in light of the public health emergency, regulators will exercise enforcement discretion with respect to technical noncompliance with applicable regulations.

Purvi B. Maniar is a partner and Sarah Jean Kilker is an associate at Norton Rose Fulbright.

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[1] https://www.cms.gov/newsroom/fact-sheets/medicare-telemedicine-health-care-provider-fact-sheet.

[2] https://www.cms.gov/files/document/medicare-telehealth-frequently-asked-questions-faqs-31720.pdf.

[3] https://www.medicare.gov/coverage/doctor-other-health-care-provider-services.

[4] https://omh.ny.gov/omhweb/guidance/use-of-telemental-health-disaster-emergency.pdf

[5] https://dss.mo.gov/mhd/providers/pages/provtips.htm#200317telehealth

[6] https://www.dhcs.ca.gov/Documents/COVID-19-Behavioral-Health%20Information-Notice-20-009.pdf

[7] https://www.deadiversion.usdoj.gov/coronavirus.html.

[8] https://www.cnbc.com/2020/03/24/us-drug-shortage-fears-grow-as-india-locks-down-due-to-the-coronavirus.html

[9] https://www.nytimes.com/2020/03/26/health/coronavirus-alcoholics-drugs-online.html

[10] https://www.samhsa.gov/sites/default/files/faqs-for-oud-prescribing-and-dispensing.pdf.

[11] https://www.samhsa.gov/sites/default/files/otp-guidance-20200316.pdf.

[12] https://www.inquirer.com/health/coronavirus/spl/pennsylvania-coronavirus-addiction-treatment-opioids-methadone-20200319.html.

[13] https://www.dispatch.com/news/20200320/ohio-oks-take-home-methadone-under-strict-new-guidelines-due-to-covid-19-pandemic.

[14] https://www.fsmb.org/siteassets/advocacy/pdf/state-emergency-declarations-licensures-requirementscovid-19.pdf

[15] https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf

[16] https://www.hhs.gov/about/news/2020/03/17/ocr-announces-notification-of-enforcement-discretion-for-telehealth-remote-communications-during-the-covid-19.html

[17] https://www.samhsa.gov/sites/default/files/covid-19-42-cfr-part-2-guidance-03192020.pdf