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NOTICE OF PROPOSED RULEMAKING INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 410
OREGON HEALTH AUTHORITY
HEALTH SYSTEMS DIVISION: MEDICAL ASSISTANCE PROGRAMS

FILED
10/28/2021 4:00 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Amends Overarching Telemedicine Rule Authorizing Coverage Of Remote Health Care Services Delivered Using Telecommunication Technologies

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 11/21/2021 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

A public rulemaking hearing may be requested in writing by 10 or more people, or by a group with 10 or more members, within 21 days following the publication of the Notice of Proposed Rulemaking in the Oregon Bulletin or 28 days from the date the Notice was sent to people on the agency mailing list, whichever is later. If sufficient hearing requests are received, the notice of the date and time of the rulemaking hearing must be published in the Oregon Bulletin at least 14 days before the hearing.

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NEED FOR THE RULE(S)

The continued federally designated public health emergency has influenced how health care providers and patients interact. Amendments were needed for this rule to reflect current and developing practice standards utilizing telecommunication technologies as a modality of delivering health care services to individuals. Rule amendments necessary to align with language from 2021 legislation (HB 2508) which passed and was enrolled by the 81st Oregon Legislative Assembly and signed into law by Governor Kate Brown effective June 1, 2021. Rule amendments authorize the Division to operationalize intended coverage of telemedicine services as described in the Authority's Health Evidence Review Commission's (HERC) Prioritized List of Health Services and Guideline Notes.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

Federal designation / renewal of public health emergency:

<https://www.phe.gov/emergency/news/healthactions/phe/Pages/COVID-15Oct21.aspx>

Enrolled legislation: <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureDocument/HB2508>

HERC Prioritized List Guideline Note A5: [https://www.oregon.gov/oha/HPA/DSI-](https://www.oregon.gov/oha/HPA/DSI-HERC/SearchablePLdocuments//Prioritized-List-GN-A005.docx)

[HERC/SearchablePLdocuments//Prioritized-List-GN-A005.docx](https://www.oregon.gov/oha/HPA/DSI-HERC/SearchablePLdocuments//Prioritized-List-GN-A005.docx)

FISCAL AND ECONOMIC IMPACT:

The Department/Authority does not anticipate there will be a fiscal impact from these rule changes.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost

of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) This amendment has no additional cost or administrative burdens for the state agency, local government or the public.

(2)

(a) The number of small businesses potentially impacted to be < 200. This could include independent medical / physician based practices, other licensed independent practices such as Advance Practice Nurses (Nurse Practitioners), independent therapy practices (physical, occupational, speech therapy), independent nutrition therapy (licensed dietitians).

(b) No additional documentation or administrative burden as standard documentation applies to support the clinical services provided and billed.

(c) No additional supplies or administrative activities are required or mandated.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

Small businesses were notified were notified of the RAC participation invitation through outreach which included Traditional Health Worker Commission, Health Equity Committee, Health Care Interpreters, Oral Health providers, Community Partner Outreach Program, Speech/Physical/Occupational therapists' state associations, Oregon Health Leadership Council, directors of all the various state licensing boards for health care professions, Oregon Primary Care Association. There were nearly 50 RAC members in attendance at the meeting with varied representation.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

AMEND: 410-120-1990

RULE SUMMARY: This overarching telemedicine rule authorizes the Division to cover medically necessary and appropriate physical, behavioral and oral health services within Oregon Health Plan (OHP) covered benefit plans. The rule applies to OHP beneficiaries on fee for service coverage. The amendment aligns rule with state legislation passed by Oregon's 81st Legislative Assembly during the 2021 regular session as HB 2508 and the Act was signed into law effective June 1, 2021 in Chapter 117. This rule authorizes the Division to operationalize the intended coverage of Telehealth, Teleconsultations and Online / Telephonic Services as described in the Health Evidence Review Commission's (HERC) prioritized list and guideline notes which can be found at: <https://www.oregon.gov/oha/HPA/DSI-HERC/Pages/Prioritized-List.aspx>

CHANGES TO RULE:

410-120-1990

Telehealth, Telemedicine and Telehealth Delivered Health Care Services

~~(1) For the purpose of this general rule, the Authority defines telehealth as the use of electronic information technologies to support and promote long-distance clinical healthcare, patient and professional health-related education, public health and health administration.~~

~~(a) Information related to telehealth services may be transmitted via landlines and wireless communications, including the Internet and telephone networks;~~

~~(b) Services can be synchronous (using audio and video, video only or audio only) or asynchronous (using audio and video) and its administrative rules applicable to the medical assistance program.~~

~~(2) "Asynchronous" means not simultaneous or concurrent in time. For the purpose of this general rule, asynchronous telecommunication technologies for telemedicine or telehealth services may include audio and video, audio without video, audio, or text-based media) client or member portal and may include transmission of data from remote monitoring devices. Communications may be between providers, or between one or more providers and one or more patients, family members /caregivers /guardians.~~

~~(2) Telehealth encompasses different types of programs, services and delivery mechanisms for medically appropriate services for covered physical, behavioral and oral health conditions within the p~~

(3) "Audio only" means the use of audio technology, permitting real-time communication between a health care provider and a member for the purpose of diagnosis, consultation or treatment's defined benefit package. This overarching fee for service rule applies to all program-specific rules or as set forth in the individual program provider rules. Providers are prohibited from excluding or otherwise limiting OHP members to using exclus. "Audio only" does not include:¶¶

(a) The use of facsimile, electronic mail or text messages;¶¶

(b) The delivery of telehealth services, except where a health care provider that is customarily has implemented section (7) of this rule.¶¶

(3) Patient choice and accommodation for telehealth shall encompass the following standards and services:¶¶

(a) Providers shall provide meaningful access to telehealth services by assessing patients' capacities to use specific approved methods of telehealth delivery that comply with accessibility standards including alternate formats, and provides the optimal quality of care for the patient given their capacity; delivered by audio telephone technology and customarily not billed as separate services by a health care provider, such as the sharing of laboratory results.¶¶

(4) "Meaningful access" means client or member-centered access reflecting the following statute and standards:¶¶

(a) Pursuant to Title VI of the Civil Rights Act of 1964 and, Section 1557 of the Affordable Care Act and the corresponding Code of Federal Regulation (CFR) at 45 CFR Part 92 (Section 1557) and The Americans with Disabilities Act and Amendments Act of 2008 (ADA), providers' telemedicine or telehealth services shall accommodate the needs of individuals who have difficulty communicating due to a medical condition, who need accommodation due to a disability, advanced age or who have limited English proficiency (LEP) and including providing access to auxiliary aids and services as defined in Code of Federal Regulation (CFR) at 45 CFR Part 92 (Section 1557); ¶¶

(c) Providers shall provide meaningful access to health care services for LEP and Deaf and hard of hearing patients and their families by working with qualified and certified health care interpreters, to provide language access services as described in OAR 333-002-0040; ¶¶

(d) Providers' 45 CFR Part 92; ¶¶

(b) National Culturally and Linguistically Appropriate Services (CLAS) Standards at <https://thinkculturalhealth.hhs.gov/clas/standards>; and ¶¶

(c) As applicable to the client or member, Tribal based practice standards: <https://www.oregon.gov/OHA/HSD/AMH/Pages/EBP.aspx>; ¶¶

(d) "Synchronous" means an interaction between a provider and a client or member that occurs at the same time using an interactive technology. This may include audio only, video only, or audio and video and may include transmission of data from remote monitoring devices.¶¶

(5) "Telecommunication technologies" means the use of devices and services for telemedicine or telehealth services shall be culturally and linguistically appropriate as described in the relevant standards: delivered services. These technologies include videoconferencing, store-and-forward imaging, streaming media including services with information transmitted via landlines, and wireless communications, including the Internet and telephone networks.¶¶

(A6) National Culturally and Linguistically Appropriate Services (CLAS) Standards:

<https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=2&lvlid=53>: "Telehealth" includes telemedicine and also includes the use of electronic information and telecommunications technologies to support long-distance clinical healthcare, client or member and professional health-related education, public health, and health administration. ¶¶

(B7) Tribal based practice standards: <https://www.oregon.gov/OHA/HSD/AMH/Pages/EBP.aspx>. ¶¶

(C) Services shall be provided using a trauma informed approach: "Telemedicine" means the mode of delivering remote clinical health services using information and telecommunication technologies to provide consultation and education or to facilitate diagnosis, treatment, care management or self-management of a client or member's healthcare.¶¶

(8) "Trauma Informed Approach" means approach undertaken by providers and healthcare or human services programs, organizations, or systems in providing mental health and substance use disorders treatment wherein there is a recognition and understanding of the signs and symptoms of trauma in, and the intensity of such trauma on, individuals, families, and others involved within a program, organization, or system. It, and then consider takes into account those signs, symptoms, and their intensity and fully integrates that knowledge when implementing and providing potential paths for recovery from mental health or substance use disorders. The Trauma Informed Approach also means that providers and healthcare or human services programs, organizations, or systems can actively resist re-traumatization of the individuals being served within their respective entities. ¶¶

(49) Privacy and security standards for telehealth services shall be met by satisfying the following:¶¶

(a) Prior to the delivery of services via a telehealth modality, a patient oral, recorded, or written "Trauma informed services" means those services provided using a Trauma Informed Approach.¶¶

(10) These rules apply to telemedicine or telehealth communications between providers, or between one or more providers and one or more clients or members, family members, caregivers and guardians.

(11) Providers shall ensure OHP clients or members are offered a choice of how services are received, including services offered via a telemedicine or telehealth modalities and in-person services, except where the Authority issues explicit guidance during a declared state of emergency or if a facility has implemented its facility disaster plan.

(a) If services are not able to be completed by a provider within the scope of their licensure, the provider shall refer the client or member to the appropriate service and service provider; and

(b) The provider shall maintain documentation of the referral and reason; and

(c) Document the client or member's choice of service.

(12) Client or member choice and accommodation for telemedicine or telehealth shall encompass the following standards and services:

(a) Providers who offer telemedicine or telehealth delivered services shall offer meaningful access to services by assessing client or members' capacities to use specific approved methods of telemedicine or telehealth delivery that comply with accessibility standards including alternate formats, and provides the optimal quality of care for the client or member given considerations of client or member access to necessary devices, access to a private and safe location, adequate internet, digital literacy, cultural appropriateness of telemedicine or telehealth services, and other considerations of client or member readiness to use telemedicine or telehealth;

(b) Providers shall offer meaningful access to health care services for LEP and Deaf and hard of hearing clients or members and their families by working with qualified or certified health care interpreters, to provide language access services as described in OAR 333-002-0040. Such services shall not be significantly restricted, delayed, or inferior as compared to programs or activities provided to English proficient individuals;

(c) Providers shall collaborate with clients or members to identify and offer modalities for delivering health care services which best meets the needs of the member and considers the client or member's choice and readiness for the modality of service selected;

(d) Providers shall offer telemedicine or telehealth services which are culturally and linguistically appropriate as described in the relevant standards:

(A) National Culturally and Linguistically Appropriate Services (CLAS) Standards:

<https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=2&lvlid=53>;

(B) Tribal based practice standards: <https://www.oregon.gov/OHA/HSD/AMH/Pages/EBP.aspx>.

(13) Privacy and security standards for telemedicine or telehealth services shall be met by satisfying the following:

(a) Prior to the delivery of services via a telemedicine or telehealth modality, a client or member's written, oral, or recorded consent to receive services using a telemedicine or telehealth delivery method in the language that the patient or member understands must be obtained and documented by Providers annually the health system, clinic or provider in the client or member's health record. Consent must include an assessment of client or member readiness to access and participate in telemedicine or telehealth delivered services, including conveying all other options for receiving the health care service to the client or member. Consent must be updated at least annually thereafter. For LEP and Deaf and hard of hearing patients or members and their families, providers must use qualified and/or certified health care interpreters when obtaining patient or member consent;

(b) Consistent with ORS 109.640, provision of birth control information and services via a telemedicine or telehealth modality shall be provided to any person regardless of age without consent of parent or legal guardian;

(c) Consistent with ORS 109.640, provision of any other medical or dental diagnosis and treatment via a telemedicine or telehealth modality shall be provided to any person 15 years of age or older without consent of parent or legal guardian;

(d) Services provided using a telemedicine or telehealth platform shall comply with Health Insurance Portability and Accountability Act (HIPAA), <https://aspe.hhs.gov/report/health-insurance-portability-and-accountability-act-1996>, and with the Authority's Privacy and Confidentiality Rules (Chapter 943 Division 14) except as noted in section (79) below;

(e) The patient or member may be located in the community, or in a health care setting;

(f) OHP enrolled providers may be located in any location where patient or member privacy and confidentiality can be ensured;

(g) Persons providing interpretive services and supports shall be in a location where patient or member privacy and confidentiality can be ensured.

(514) Telemedicine or telehealth providers shall meet the following requirements:

(a) Shall be enrolled with the Authority as an Oregon Health Plan (OHP) provider, per 410-120-1260;

(b) Shall provide services via telemedicine or telehealth that are within their respective certification or licensing board's scope of practice and comply with telemedicine or telehealth requirements including, but not limited to;

- (A) Documenting patient or member and provider agreement of consent to receive services; ¶
- (B) Allowed physical location of provider and patient; or member. ¶
- (C) Establishing or maintaining an appropriate provider-patient or member relationship. ¶
- (c) Providers billing for covered telemedicine or telehealth services are responsible for: ¶
 - (A) Complying with HIPAA and the Authority's Privacy and Confidentiality Rules and security protections for the patient/member in connection with the telemedicine or telehealth communication and related records requirements (OAR chapter 943 division 14 and 120, OAR 410-120-1360 and 1380, 42 CFR Part 2, if applicable, and ORS 646A.600 to 646A.628 (Oregon Consumer Identity Theft Protection Act) except as noted in section (716) below; ¶
 - (B) Obtaining and maintaining technology used in telemedicine or telehealth communication that is compliant with privacy and security standards in HIPAA and the Authority's Privacy and Confidentiality Rules described in subsection (A) except as noted in section (716) below; ¶
 - (C) Developing and maintaining policies and procedures to prevent a breach in privacy or exposure of patient or member health information or records (whether oral or recorded in any form or medium) to unauthorized persons and timely breach reporting; ¶
 - (D) Maintaining clinical and financial documentation related to telemedicine or telehealth services as required in OAR 410-120-1360 and any program specific rules in OAR Ch 309 and Ch 410; ¶
 - (E) Complying with all federal and state statutes as required in OAR 410-120-1380. ¶
- (615) The Authority will only pay for telemedicine or telehealth services meeting all of the following requirements: ¶
 - (a) Services provided shall be medically and clinically appropriate for covered conditions within the Health Evidence Review Commission's (HERC) prioritized list and in compliance with relevant guideline notes; ¶
 - (b) The Authority shall provide reimbursement for telemedicine or telehealth services at the same reimbursement rate as if it were provided in person. As a condition of reimbursement, providers shall agree to reimburse Certified and Qualified Health Care Interpreters (HCIs) for interpretation services provided via telemedicine or telehealth at the same rate as if interpretation services were provided in-person, per OARs 410-141-3515(12) and 410-141-3860(12); ¶
 - (c) When allowed by individual certification or licensing boards' scope of practice standards, telemedicine or telehealth delivered services for covered conditions are covered: ¶
 - (A) When an established relationship exists between a provider and patient as or member defined by ~~as a~~ patient or member who has received in-person professional services from the physician or other qualified health care professional within the same practice within the past three years; and ¶
 - (B) For establishing a patient or member-provider relationship. ¶
 - (d) All physical, ~~and behavioral and~~ telemedicine or telehealth, and oral teledentistry services except School Based Health Services (SBHS) shall include Place of Service code 02; ¶
 - (e) All claim types except Dental services, shall use modifiers GT or 95 when the telemedicine or telehealth delivered service utilizes a synchronous audio and video modality. When provision of the same service via synchronous audio and video is not available or feasible (e.g., the patient or member declines to enable video, or necessary consents cannot reasonably be obtained with appropriate documentation in patient or member's medical record) the claim should not include any modifiers but should continue billing Place of Service as 02. ¶
- (716) In the event of a declared emergency or changes in federal requirements, the Authority may adopt flexibilities to remove administrative barriers and support telemedicine or telehealth delivered services: ¶
 - (a) The Authority will follow guidance from the US Department of Health and Human Services (HHS) Office for Civil Rights (OCR) which may allow enforcement discretion related to privacy or security requirements; ¶
 - (b) The Authority may expand network capacity through remote care and telemedicine or telehealth services provided across state lines; ¶
 - (c) The Authority may expand ~~access to telehealth services for new patient~~ the definition of an established client or member-provider relationship beyond the standard of an in-person encounter every three (3) years.

Statutory/Other Authority: ORS 413.042

Statutes/Other Implemented: ORS 414.025, 414.065