



February 2, 2022

Ms. Stephanie Loucka
Executive Director, State Medical Board of Ohio
30 E. Broad Street, 3rd Floor
Columbus, OH 43215

RE: ATA ACTION COMMENTS ON PROPOSED TELEHEALTH RULES

Dear Ms. Loucka:

On behalf of ATA Action, I am writing to express our concerns about language in proposed new rule 4731-37-01 regarding telehealth and amendments to rule 4731-11-09 regarding controlled substance and telehealth prescribing.

ATA Action, the American Telemedicine Association's affiliated trade association focused on advocacy, advances policy to ensure all individuals have permanent access to telehealth services across the care continuum. ATA Action supports the enactment of state and federal telehealth coverage and fair payment policies to secure telehealth access for all Americans, including those in rural and underserved communities. ATA Action recognizes that telehealth and virtual care have the potential to truly transform the health care delivery system – by improving patient outcomes, enhancing safety and effectiveness of care, addressing health disparities, and reducing costs – if only allowed to flourish.

Our organization appreciates the Medical Board's attention to advancing thoughtful telehealth policy. We believe that many provisions in the proposed rules are improvements upon the state's current regulatory framework for telehealth. We were encouraged to see the revised rules on January 24th and want to thank the Board for discussing them with us and other stakeholders on the 27th. However, we still have three concerns with the Board's proposed rules, which we believe will significantly limit access to telehealth services in Ohio.

1) Definition of Asynchronous Communication Technology

Our first issue with the proposed rules comes with the definition of asynchronous communication technology (4731-37-01(A)(3)), which ATA Action finds unnecessarily restrictive and confusing.

First, as written, the definition could be interpreted to limit the kinds of “stored clinical data” that may be transmitted via asynchronous technologies to video clips, sound/audio files, and photo images. This could unnecessarily exclude other types of clinical data – such as vital signs, lab test results, patient medical histories, and/or patient descriptions of symptoms – that are often part of asynchronous telehealth visits. Second, the definition includes a reference to

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asynchronous communication technologies in a “single media format,” whose meaning – and purpose in the definition – is unclear. The ATA recommends against using undefined terms whose meanings can change over time and which can create uncertainty for providers about the permissibility of using otherwise appropriate technologies. Instead, we suggest policymakers adopt language which reiterates that the standard of care in any given telemedicine interaction must be the same as that in an in-person interaction, which the Board policy already does.

Finally, the definition singles out particular modalities – including “text messages, such as electronic mail, without visualization of the patient – from qualifying as asynchronous care. The ATA believes licensed providers should be governed by the standard of care in determining which technologies are appropriate for rendering telemedicine services in any given situation to ensure that a wide breadth of technologies can be utilized in the delivery of virtual health care without sacrificing the quality of that care. Indeed, HB 122 sought to make the maximum choice of technology available to patients and enable licensed providers to decide which modalities are appropriate to meet the standard of care for the condition presented by the patient.

For all these reasons, ATA Action recommends the Board revise the definition of asynchronous as follows:

*Asynchronous communication technology, also called store and forward technology, means the transmission of a patient’s stored clinical data from an originating site to the site where the healthcare professional is located. The health care professional at this distant site can review the stored clinical data at a later time from when the data is sent and without the patient being present. Stored clinical data that may be transmitted via asynchronous communication technology **includes but is not limited to** video clips, sound/audio files, and photo images that may be sent along with electronic records and written records about the patient’s medical condition. ~~Asynchronous communication technology in a single media format does not include telephone calls, images transmitted via facsimile machines, and text messages, such as in electronic mail, without visualization of the patient. Photographs or video images that are visualized by a telecommunications system must be both specific to the patient’s medical condition and sufficient for furnishing or confirming a diagnosis and/or a treatment plan.~~*

2) Referral to In-Person Care

Our next concern is with proposed new rule 4731-37-01(B)(4). The language reads:

4) If a health care professional determines at any time during the provision of telehealth services that a telehealth visit will not meet the standard of care for the medical condition of the patient or if additional in-person care is necessary, the health care professional shall do all of the following:

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(a) The health care professional shall immediately schedule the patient for an in-person visit with the health care professional and promptly conduct that visit or refer the patient for an in-person visit with one of the following licensed health care professionals who can provide the services in-person that are appropriate for the patient and the condition for which the patient presents:

(i) another health care professional with whom the health care professional has a cross-coverage agreement,

(ii) in the case of a physician, a physician assistant with whom the physician has a supervision agreement or a certified nurse practitioner with whom the physician has a standard care arrangement; or

(iii) in the case of a physician assistant, a physician with whom the physician assistant has a supervision agreement.

(b) The health care professional shall document the in-person visit or the referral in the patient's medical record.

Instead of ensuring that patients only receive care of the highest quality, this rule would have the effect of making it much more difficult for telehealth providers to operate in Ohio. As currently written, this proposed rule would mandate that in order to deliver telehealth services, an Ohio-licensed provider must have both a physical location to see a patient “immediately” if necessary and cross-coverage relationships with multiple health care professionals who could deliver requisite care in person. For example, a primary care physician who determines during a telehealth visit that a patient needs to see a specialist in person for a skin condition would be required to have a cross-coverage relationship with a dermatologist located near the patient.

This requirement is not only an impractical and burdensome barrier for telehealth providers, it holds telehealth services to a higher standard than in-person care settings. When Ohio patients go to a provider’s office in person, and the provider determines that the patient needs more specialized care, the provider is not required to “schedule” an appointment with a specialist in person or even provide the patient with a referral. Further, the proposed rule makes little clinical sense when the treating physician determines during the telehealth visit that the patient needs emergency care. What value does rescheduling an appointment with an in-person provider have to someone who needs to go to the emergency room of a hospital?

ATA Action agrees with the State Medical Board that the standard of care must be the same for all health care services – regardless of whether providers render that care in person or virtually – in the interest of patient safety. We also recognize that there are some health care services which can only be addressed properly via a face-to-face interaction between a patient and his or her provider. Accordingly, our members have protocols in place to ensure that telehealth providers who determine that telehealth technologies are not sufficient to meet the standard of care can connect patients with in-person providers.



We recommend the Board revise 4731-37-01(B)(4) to state:

“If a health care professional determines at any time during the provision of telehealth services that a telehealth visit will not meet the standard of care for the medical condition of the patient or that additional in-person care is necessary, the health care professional shall provide or refer a patient to appropriate in-person health care services.”

3) Storage of Patient’s User Name

Our last issue is with 4731-37-01(C)(3). The proposed rule reads:

(3) The health care professional shall provide the telehealth services in a manner that complies with the privacy and security requirements for the patient and their protected health information required by the law of this state and federal law. Also, the health care professional shall ensure that any username or password information and any electronic communications between the health care professional and the patient are securely transmitted and stored.

This language puts the onus of ensuring the secure storage and transmission of a patient’s username and password on the provider during patient-provider communications. ATA Action believes that this responsibility should fall on the facility or health care entity, not the provider.

Thank you for your consideration. We encourage you to amend the proposed rules in the interest of expanding Ohioans’ access to high-quality, affordable health care. Please let us know how we can be helpful in your efforts to adopt common-sense telehealth policy in Ohio. If you have any questions or would like to discuss further the telehealth industry’s perspective, please contact me at kzebley@ataaction.org.

Kind regards,

A handwritten signature in black ink, appearing to read "Kyle Zebley", is written over a light gray circular stamp.

Kyle Zebley
Executive Director
ATA Action