ata ACTION
Telehealth Policy to Transform Healthcare

March 1, 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 comment on and express our concerns about language in proposed new rule 4731-37-01 relating to telehealth.

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 telehealth policy that increases access to care while ensuring patient safety. We believe that many of the provisions in the proposed rules – including its recognition of both synchronous and asynchronous modalities as acceptable modes for delivering virtual care and the removal of an in-person mandate for controlled substances via telehealth – are steps in the right direction for Ohio's telehealth regulation. We also want to thank the Board for being receptive to our comments and working alongside us to craft telehealth regulations that will optimize the telehealth experience for Ohio patients.

With that said, ATA Action still has several concerns with the Board's latest draft of its proposed rules. We believe that these areas of concern will significantly limit access to telehealth services in Ohio if left unaddressed.

Definition of Asynchronous Communication Technology

Our first issue with the proposed rules comes with the definition of asynchronous communication technology found at 4731-37-01(A)(3). ATA Action believes that this definition is unnecessarily restrictive and could cause confusion among telehealth providers.

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First, the definition suggests that an asynchronous communication between a patient and provider **must always** involve the transmission of "stored clinical data" in the form of video clips, sound/audio files, or photo images. This unnecessarily excludes 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. Indeed, providers in Ohio – as well as at major health systems throughout the country such as Mayo Clinic, Mercy Hospital, and Intermountain Health – often rely on robust and appropriate asynchronous online visits that may not incorporate videos or images to treat conditions like colds, seasonal allergies, UTIs, and sexual health conditions. The current definition of asynchronous communication technology should be revised so as not to create uncertainty for providers who are otherwise using asynchronous communication consistent with the standard of care.

Secondly, the definition singles out particular modalities – including "text messages, such as electronic mail, without either visual or audio files of the patient included with the text message" – from qualifying as asynchronous care. ATA Action believes licensed providers should be able to use whichever telehealth technologies they wish so long as those technologies are sufficient to meet the standard of care for the condition presented by the patient and to meet the security standards outlined in the rule. Instead of favoring certain modalities over others, the Board should promulgate regulations that tie providers' decisions as to which telehealth technologies are appropriate to diagnose and treat patients directly to the standard of care. Such a provision would ensure that the full range of telehealth technologies could be utilized in the delivery of virtual health care without sacrificing the quality of that care. As enacted with an effective date of March 23, 2022, H.B. 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 these reasons, ATA Action recommends the Board revise the definition of asynchronous communication technology 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*~~*.*

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Referral to In-Person Care

Our next several concerns are with proposed new rule 4731-37-01(B)(4), which includes four different referral obligations depending on the needs of the particular patient. We believe the referral requirements, as drafted, undermine a central premise of telehealth and HB122: ensuring patients can connect to available providers to receive quality and affordable care when and where they need it. 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 the following:

> *(a) If the patient must be seen immediately but not in an emergency room, 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) If the patient does not need to be seen immediately, the health care professional shall schedule the patient for an in-person visit and conduct that visit within an amount of time that is appropriate for that patient and their condition presented.*
>
> *(c) If the patient must be seen by a specialist other than the health care professional, the health care professional shall make a referral to a specialist, licensed in this state, whom the healthcare professional knows has an appropriate scope of practice and is capable of conducting an in-person visit appropriate for the diagnosis and treatment of the patient's condition and ensure that all necessary medical files are shared upon request.*
>
> *(d) If the patient needs emergency care, the health care professional shall help the patient identify the closest emergency room and provide notification to the emergency room of the patient's potential arrival.*

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Telehealth Policy to Transform Healthcare

> *(e) The health care professional shall document the in-person visit or the referral in the patient's medical record.*
>
> *(f) All referrals must be made in an amount of time that is appropriate for that patient and their condition presented.*

When a provider starts a telehealth interaction, it is unknown whether the patient will ultimately require care beyond what can be provided via telehealth. Thus, under the Board's proposed rule, any Ohio-licensed provider who seeks to deliver telehealth services would need to be prepared to meet the referral standard for each potential scenario (immediate non-emergency care, non-immediate care, specialty care, and emergency care).

Yet, two of these scenarios – immediate non-emergency care (a) and non-immediate care (b) – seem to mandate that Ohio-licensed providers have a physical location to conduct an in-person visit with the patient or formalized cross-coverage relationships with providers nearby any potential patient.

Practically speaking, insisting that the patient see the specific provider with which he or she interacted virtually would preclude Ohio-licensed providers from rendering care to any patient who is not located within that provider's vicinity unless the provider somehow had cross coverage relationships throughout every part of the state. This would make it substantially more difficult for patients and providers to interact, restricting patient access to care in the process. For example, a family physician in Toledo would not be able to continue to treat through telehealth his or her college-age patients who attend Ohio State in Columbus unless that physician has a relationship with other providers in Columbus or the patient was willing to travel back home. Moreover, these provisions would cause confusion in terms of compliance. Would it be sufficient for telehealth providers who have established referral relationships with providers in the Cleveland area to refer Cincinnati-based patients for an in-person visit with those providers?

Not only are these proposed referral requirements impractical and limiting in terms of providers' ability to deliver telehealth services in Ohio, but they also hold 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 provide the patient with a referral to a *specific specialist* who "is capable of conducting an in-person visit appropriate for the diagnosis and treatment of the patient's condition," as is complicated in (C). Rather, current practice – as noted in the last Board meeting by a Board member – is for a provider to say, "you need to see a [insert type of] specialist." If the Board intends to hold telehealth providers to heightened referral obligations, ATA Action questions whether similar guidance will be issued for in-person care settings.

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Finally, we are concerned with language in point (d) relating to patients who need emergency care. We agree that health care professionals – whether delivering care through telehealth technologies or other tools – have in place appropriate protocols to deal with emergency situations if and when they occur. In some situations, that would include immediately notifying emergency services. The proposed rule, however, would require telehealth providers to help patients identify the closest emergency room and provide notification to the emergency room of the patient's potential arrival. In addition to placing a specific responsibility on telehealth providers that are not placed on providers at physical locations under current practice, this provision could potentially put patients' lives at risk in delaying a patient getting to emergency care as soon as possible. It would not help patients experiencing a heart attack or stroke to have their providers spend time walking them through which emergency room is closest and calling that emergency room in advance. In such situations, it is absolutely vital that the patient gets to a health care facility as soon as possible. Any provision related to patients requiring emergency services should mandate that health care professionals have in place appropriate protocols to deal with emergency situations if and when they occur. Most often, that would include immediately notifying emergency services.

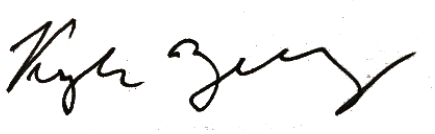
ATA Action agrees with the State Medical Board that the standard of care must be the same for all health care services – regardless of whether providers render that care in person or virtually – in the interest of patient safety. We also recognize that there are some health care services which can only 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 provide clear guidance as to telehealth providers continuity of care obligations:

"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."

Thank you for the opportunity to comment. We encourage the Board to amend the proposed rules for the sake of expanding Ohio patients' access to the health care they want, need, and deserve. 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,



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