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Telehealth Policy to Transform Healthcare

Neil Hytinen
Chief Public Affairs Officer
Rhode Island Department of Health
3 Capitol Hill
Providence, RI 02908

Re: Telemedicine Provisions found in 216-RICR-40-05-1

Mr. Hytinen,

It has come to our attention that a rule, 216-RICR-40-05-1, was recently promulgated by the Department of Health in Rhode Island that includes a standard of care for telemedicine and the use of asynchronous technologies in the rendering of remote care. Please let this letter serve as a foundation of our concerns and let us know what the appropriate pathway is to request a review of this rule as we believe it will not only impact many of our members but will ultimately make access to care more difficult for many Rhode Islanders.

By way of background, 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 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 primary concern regarding the rule can be found at Section 1.5.9(H)(2) under the title "Standard of Care." The rule states that "[a]synchronous evaluation of a patient, without contemporaneous real-time, interactive exchange between the physician and patient, is not appropriate." Across the country, providers are relying increasingly on asynchronous (or store-and-forward) telemedicine technologies, including email, text messaging, and internet telecommunications, to establish relationships, perform patient evaluations, and appropriately prescribe medication in many fields. Additionally, the use of asynchronous technologies, which can be utilized even with mediocre bandwidth connections, allows patients who lack access to reliable internet connections to communicate effectively with their providers from the comfort of their homes.

Furthermore, this rule may have unintended consequences that were not considered during the rulemaking process. As Rhode Island grants full independent practice authority to nurse practitioners - including prescriptive authority - this rule would grant nurse practitioners a "larger" scope of practice as it arbitrarily limits the ability of physicians to utilize asynchronous technologies in the evaluation of patients; however, it has no such impact on nurse practitioners. Similarly, ophthalmologists are now more limited in their prescriptive abilities compared to optometrists. To be clear, the ATA advocates for *all* providers to be able to use their professional discretion in determining which modality is appropriate to meet each patient's unique needs. Unfortunately, this rule, without any clinical support nor scientific justification, physicians can no longer use a well-established modality in the delivery of care.

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There are also several physician specialties that would be essentially barred from offering their services in a manner that has been present in the medical field for well over a decade – for example, radiology, pathology and dermatology. It is well established that asynchronous evaluation and diagnosis of radiographs, lab results, and certain dermatological conditions meets the standard of care and has become a staple in the care cycle for many patients; however, should these rules persist, Rhode Island patients would no longer be able to receive their care in such a way. While this may be an unintended result of poor public policy, it may also be viewed as anti-competitive in a manner similar to the underlying case in the *North Carolina State Board of Dental Examiners v. Federal Trade Commission* Supreme Court case. This rule will ultimately make care less convenient, less efficient, and more expensive for patients and will unnecessarily and arbitrarily limit providers from using their professional education, discretion, and expertise in formulating the most appropriate treatment plan for their patients.

This rule also significantly deviates from the policy principles enumerated in the Federation of State Medical Board's most recent update *Model Policy for the Appropriate Use of Telemedicine Technologies in the Practices of Medicine,* which was ratified by the organization in April 2022. In its "Standard of Care" section, it clearly articulates that "a physician patient relationship may be established via either synchronous or asynchronous telemedicine technologies without any requirement of a prior in-person meeting, so long as the standard of care is met." Furthermore, the Model Policy also contemplates asynchronous evaluations when stating that the evaluation and treatment of a patient must include "a documented medical evaluation and collection of relevant clinical history commensurate with the presentation of the patient to establish diagnoses and identify underlying conditions and/or contraindications to the treatment recommended/provided must be obtained prior to providing treatment, including issuing prescriptions, electronically or otherwise." It goes on to state that the use of live video is only "as needed to make a diagnosis if the standard of care in-person would have required physical examination." The ATA concurs with this analysis – if the standard of care requires a synchronous encounter, then the provider must do so; however, there are many instances where an asynchronous encounter is sufficient to meet the standard of care.

Perhaps more problematic is this new rule, applied strictly by the Board, would require the results of every COVID-19 test taken in Rhode Island by a physician to be communicated to the Rhode Island patient via, at minimum, a phone call in addition to any asynchronous communication. Particularly for the communication of a negative result, this requirement is clinically unjustified, wastes scarce medical professional resources, and adds needless costs to patients and payors.

Finally, the Rhode Island legislature has also weighed in on this issue as recently as the 2021 General Assembly session. House bill 6032 - which was signed by the Governor on July 6, 2021 – updates the definition of "telemedicine." The definition had previously required a "real time, two-way audiovisual" communication; however, the new definition adds any "electronic media or other telecommunications technology including, but not limited to: online adaptive interviews, remote patient monitoring devices… or store-and-forward technology." With this addition, the legislature was unambiguous in its decision to allow practitioners to offer services via asynchronous modalities. This rule is contrary to the legislative intent and language of the Rhode Island General Assembly and, with preemption in mind, is likely unenforceable.

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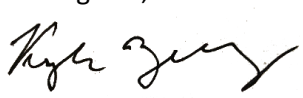
This is a critical public policy issue and it is essential that crafted as thoughtfully as possible. Rhode Island residents deserve access high-quality, affordable health care as easily and safely as possible. Unfortunately, this rule restricts, with no clinical justification, a modality widely accepted by the medical field. We are hopeful that there is a pathway forward to re-examining this rule with full stakeholder engagement. If you have any questions or would like to further discuss the telemedicine industry's perspective, please contact me at kzebley@ataaction.org

Kind regards,



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