



June 1, 2022

The Honorable Ralph Alvarado  
Co-Chair, Kentucky Interim Joint Committee on Health, Welfare, & Family Services  
Kentucky State Senate  
702 Capitol Avenue, Annex Room 228  
Frankfort, KY 40601

The Honorable Kimberly Poore Moser  
Co-Chair, Kentucky Interim Joint Committee on Health, Welfare, & Family Services  
Kentucky House of Representatives  
702 Capitol Avenue, Annex Room 315  
Frankfort, KY 40601

**RE: ATA ACTION CONCERNS REGARDING PROPOSED RULE 907 KAR 003:170**

Dear Co-Chairs Alvarado and Poore Moser:

On behalf of ATA Action, I am writing you to express our concerns regarding provisions in proposed rule 907 KAR 003:170, a rule applying to telehealth service coverage and reimbursement within Kentucky's Medicaid program.

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 that 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 is concerned that several provisions in proposed rule 907 KAR 003:170 would **significantly restrict Kentucky Medicaid patients' access to telehealth services**. Our concerns are outlined below. We urge the Committee to consider the effects that approving the Department for Medicaid Service's proposed rule in its current form would have on Kentuckians' ability to receive high-quality, affordable health care whenever and wherever they need it.

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***Requirement for the option to receive in-person or synchronous telehealth care***

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Section 2 of the proposed rule mandates that any Medicaid recipient receiving asynchronous or audio-only telehealth services shall have the opportunity or option to request to be accommodated by his or her telehealth provider in an in-person setting or via a synchronous telehealth encounter. Such a mandate would obligate telehealth providers operating in Kentucky either to establish physical office locations in the state or obtain the technologies necessary to facilitate a synchronous, audiovisual interaction.

Our organization believes that telehealth providers should be able to utilize the full range of technologies available to them so long as they determine that those technologies enable them to meet the standard of care for the condition presented by the patient. Before treatment begins, patients consent to the use of whichever technologies the provider decides to use during the initial telehealth interaction. If a patient does not consent to the use of any given telehealth technology, or if a provider determines, in his or her professional opinion, that the available telehealth technologies are no longer sufficient to meet the standard of care for the patient's presented condition, then the provider will refer the patient to in-person care or to a provider who is prepared to use telehealth technologies to which the patient would consent. This is a common occurrence in the telehealth industry.

The requirement that all telehealth providers operating in Kentucky be capable of using synchronous, audiovisual modalities at all times complicates the health care delivery process and makes it more expensive. This requirement effectually eliminates the cost-effectiveness and efficacy of telehealth practices that appropriately use only asynchronous and/or audio-only modalities to render virtual care. Instead of simply referring patients for whom the standard of care cannot be met with asynchronous technologies or who prefer to be treated synchronously/in person to practices which can satisfy these patients' requests, asynchronous/audio-only telehealth practices would be forced to adjust their business models and invest in other technology platforms that may not be necessary for the patient's standard of care to be met. What is presented as an effort to protect patients' rights is a restrictive and clinically unnecessary burden on telehealth providers in practice.

A patient may choose an efficacious asynchronous encounter as an appropriate means to diagnose and treat his or her condition while lowering costs. Some asynchronous platforms that meet the standard of care help to break the cost curve on health care because of the efficacy of the platform and the platform's low overhead cost. Patients have the choice to use those lower-cost options or seek care through other modalities/providers at the time of service. Should the patient require follow-up care or different care altogether, it is more appropriate for that to be a collaborative discussion between the patient and the provider.

ATA Action asks that the Department include additional language in Section 2 which enables telehealth providers to refer patients to other providers who have the ability to interact with patients synchronously should patients request synchronous interaction.

***Possibility for additional restrictions to be placed on telehealth practices by licensing boards***

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At several points in the proposed rule, the Department authorizes licensing boards to instate additional restrictions on telehealth services if these bodies of oversight see fit.

Section 3(1) reads as follows:

- (1) (a) The telehealth policies established in this administrative regulation shall supersede any in-person requirement established within KAR Title 907.*
- (b) The requirement established in paragraph (a) of this subsection shall not supersede an in-person requirement established pursuant to:*
- 1. State or federal law, including via the state plan or a waiver;*
  - 2. A standard set by a professional criteria, such as the American Society of Addiction Medicine's (ASAM) Criteria, if applicable;*
  - 3. A **licensing body**; or*
  - 4. A billing code requirement established pursuant to a department utilized procedure code.*

Section 5, applying to out-of-state telehealth providers, reads as follows:

- (1) The department shall evaluate and monitor the healthcare quality and outcomes for recipients who are receiving healthcare services from out-of-state telehealth care providers.*
- (2) **The department shall implement any in-state or out-of-state participation restrictions established by a state licensing board for the impacted provider.***

Section 9, referring to a Department-maintained list of procedural codes, states the following:

- (1) In order to assist with the effective and appropriate delivery of services, the department may establish and maintain an informational listing of procedure codes that are:*
- (a) Not allowed to be provided via telehealth due to conflicts with the requirements established within state or federal law, or this administrative regulation; or*
  - (b) **Subject to additional restrictions related to telehealth, such as a requirement that any telehealth associated with a procedure be conducted via a connection that has both video and audio of the recipient and provider.***

ATA Action is concerned that the flexibilities granted to licensing boards overseeing the provision of telehealth services in Kentucky will result in the implementation of additional restrictions on providers of virtual care in what would already be an unnecessarily restrictive regulatory environment if the rule were successfully approved as drafted. Our organization maintains that state policy should not discriminate against effective telehealth technologies, instead relying on the professional discretion of the treating provider to determine if the selected technology is sufficient to meet the standard of care.

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ATA Action would also like to bring the Committee's attention to the definition of "telehealth" spelled out in Kentucky Revised Statute in its Public Health code at §211.332(5). This definition is far more permissive than the Department's understanding of telehealth.

(5) "Telehealth" or "digital health":

(a) Means a mode of delivering healthcare services through the use of telecommunication technologies, **including but not limited to synchronous and asynchronous technology, remote patient monitoring technology, and audio-only encounters**, by a health care provider to a patient or to another health care provider at a different location;

(b) Shall not include:

1. The delivery of health care services through electronic mail, text, chat, or facsimile unless a state agency authorized or required to promulgate administrative regulations relating to telehealth determines that health care services can be delivered via these modalities in ways that enhance recipient health and well-being and meet all clinical and technology guidelines for recipient safety and appropriate delivery of services; or
2. Basic communication between a health care provider and a patient, including but not limited to appointment scheduling, appointment reminders, voicemails, or any other similar communication intended to facilitate the actual provision of healthcare services either in-person or via telehealth; and

(c) Unless waived by the applicable federal authority, shall be delivered over a secure communications connection that complies with the federal Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. secs. 1320d to 1320d-9.

### ***Provisions regarding remote patient monitoring***

Section 7 contains provisions regarding telehealth services delivered via remote patient monitoring (RPM) devices. Across the country, medical professionals are utilizing RPM technologies to move care out of the hospital, clinic, or doctor's office and into the home, where providers can monitor, collect, and analyze a patient's physiologic data to create care management plans for patients, especially those with chronic conditions.

The Department places a series of arbitrary restrictions on the use of these devices. First, the Department stipulates in Section 7(2) that unless the Medicaid recipient receiving care via remote patient monitoring devices is pregnant, the patient must be afflicted with two or more of a series of enumerated risk factors. Some of these risk factors are completely arbitrary, such as "a documented history of poor adherence to ordered medication regimes" or "a documented history of consistently missed appointments with health care providers." ATA Action would like to reiterate that all technologies – including remote patient monitoring devices – should be available for use by telehealth providers so long as those technologies enable the provider to meet the standard of care for the condition presented by the patient. Providers should not be limited to using certain technologies only when patients present certain conditions or are exposed to certain risk factors.

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In Section 7(6) and 7(7), the Department claims the following:

- (6) *A recipient participating in a remote patient monitoring service shall:*
- (a) *Have the capability to utilize any monitoring tools involved with the ordered remote patient monitoring service. For the purposes of this paragraph, capability shall include the regular presence of an individual in the home who can utilize the involved monitoring tools; and*
  - (b) *Have the internet or cellular internet connection necessary to accommodate any needed remote patient monitoring equipment in the home.*
- (7) *The department may restrict the remote patient monitoring benefit by excluding:*
- (a) *Remote patient monitoring equipment;*
  - (b) *Upgrades to remote patient monitoring equipment; or*
  - (c) *An internet connection necessary to transmit the results of the services.*

While the Department ostensibly allows for the use of remote patient monitoring devices in the provision of telehealth services to Medicaid recipients, it claims that it may exclude the equipment utilized to deliver RPM services, upgrades to RPM equipment, and the internet connections needed to deliver these services. In essence, the Department would be able to eliminate RPM benefits entirely whenever it wished, cutting patients off from RPM services immediately.

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According to the Rural Health Information Hub, all but seven of Kentucky's 120 counties [contain](#) a health professional shortage area; 96 counties in the state are considered health professional shortage areas in their entirety. The poverty rate in rural Kentucky is just over 20%, significantly higher than the rate (13%) in the state's urban areas. 43 counties in Kentucky [do not have](#) an acute care or critical access hospital. This lack of access to affordable, high-quality care yields significant consequences. Citizens in Kentucky's rural counties, especially those in Appalachia, have shorter life expectancies than both the national and state averages. Making it more difficult for qualified telehealth providers to deliver high-quality, affordable care to Kentucky patients – many of whom have to travel hours just to access the nearest brick-and-mortar health care location – would be detrimental to Kentuckians' health and well-being.

**ATA Action believes that proposed rule 907 KAR 003:170 could severely restrict Kentucky Medicaid patients' access to telehealth services if approved in its current form.** Instead of adopting the rule as proposed, ATA Action requests that the Department incorporate the definition of telehealth and telehealth practice standards already enacted by the Kentucky Legislature under the recently amended Telehealth Law. Among other things, the Telehealth Law prohibits state licensing agencies (KRS 211.336) and the Department of Medicaid Services (KRS 205.5591) from promulgating regulations that would require an in-person exam unless such an exam were clinically necessary.

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We encourage the Committee to consider the consequences of this rule's approval in the interest of maintaining Kentucky Medicaid patients' access to affordable, high-quality health care. Please let us know if there is anything that we can do to assist you in your efforts to adopt practical telehealth policy in Kentucky. If you have any questions or would like to engage in additional discussion regarding the telehealth industry's perspective, please contact me at [kzebley@ataaction.org](mailto:kzebley@ataaction.org).

Kind regards,

A handwritten signature in black ink, appearing to read "Kyle Zebley", is written over a light gray circular watermark that contains the text "ATA ACTION".

Kyle Zebley  
Executive Director  
ATA Action