May 31, 2022

Sean McCullough
Director, Ohio Common Sense Initiative
Office of Governor Mike DeWine
77 S. High St., 30th Floor
Columbus, OH 43215

RE: PROPOSED RULE 4731-37-01 RELATED TO TELEHEALTH

Dear Director McCullough:

On behalf of the undersigned organizations, we are writing to express our opposition to certain provisions in proposed rule 4731-37-01 regarding telehealth services and request that the Common Sense Initiative consider the anti-competitive nature of the language forwarded in the proposed rule. We are concerned that proposed rule 4731-37-01 will lead to a decrease in the use of appropriate telehealth technologies and, as a result, **have the unintended consequence of forcing high-quality, affordable health care to leave the state.**

During his State of the State address this year, Governor DeWine specifically highlighted his signing of House Bill 122 and noted that in "the last two years, we've realized that when you need health care and behavioral health services, a virtual visit can save time and money… So we've eased restrictions on telehealth services to expand access to care."

Language in the proposed rules may have the unintended consequence of not only contradicting the plain language and intent of House Bill 122 but ultimately make Ohio less competitive in the field of health care and drive up the cost of health care in the state. Our organizations are particularly concerned by the referral and follow-up care provisions as currently written in 4731-37-01(B)(4) which undermine a central objective of House Bill 122 and the Governor's office: expanding access to qualified providers who can deliver health care services whenever and wherever Ohioans need it, all in an affordable and convenient manner. The language reads as follows:

(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 department, 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 or an advanced practice registered nurse 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 an advanced practice registered nurse with whom the physician has a standard care arrangement;

(iii) In the case of a physician assistant, a physician with whom the physician assistant has a supervision agreement; or

(iv) Any health care professional requested by the patient who is appropriate for the condition with which the patient presents.

(b) If the patient does not need to be seen immediately, the health care professional shall do one of the following:

(i) 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; or

(ii) Refer the patient to a health care professional in the same specialty to conduct an in-person visit within an amount of time that is appropriate for the patient and their condition.

(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 for the medical condition of the patient.

(d) If the patient needs emergency care, the health care professional shall help the patient identify the closest emergency department and, if necessary, in the health care professional's discretion, provide notification to the emergency department of the patient's potential arrival.

When a provider first interacts with a patient via telehealth, it is unknown whether the patient will ultimately require care beyond what can be provided virtually. Under the Board's proposed rule, any Ohio-licensed provider who seeks to deliver telehealth services would thus need to be prepared to meet the referral standard for each potential scenario: patients who need a) immediate non-emergency care, b) non-immediate care, c) specialty care, and d) emergency care. These referral standards, which to our knowledge do not exist in any other state, would increase business operations costs for any provider using telehealth technologies and create significant back-end logistical barriers that may push some providers out of the market entirely.

Further, meeting the referral requirements for several of these scenarios contemplates mandating that telehealth providers – or their contracted partners – be within a narrow geographic proximity of any potential patient in the entire state. This restriction would not only defeat a central purpose of House Bill 122 but also place telehealth providers at a **significant competitive disadvantage** compared to their counterparts rendering care in person, all without any clinical justification from the Board. It also limits effective cross-state utilization of Ohio-licensed providers when needed. Closer inspection of the requirements that would be imposed upon telehealth providers by each of these scenarios were these rules to be adopted as currently written reveals their costly and anti-competitive nature.

Mandating an in-person presence near the patient: The first example of the rules' anti-competitive nature comes in 4731-37-01(B)(4)(a). This referral requirement relating to telehealth providers treating patients who must be seen immediately but not in an emergency setting **effectively mandates that Ohio-licensed providers either operate a physical location to conduct an in-person visit with the patient or maintain formalized cross-coverage relationships with providers nearby any potential patient**.

The undersigned organizations and additional stakeholders have shared with the State Medical Board of Ohio that such a mandate would preclude Ohio-licensed providers from rendering care to any patient who is not located within that provider's vicinity or for whom the provider does not have the staff to immediately schedule unless the provider had somehow established cross-coverage relationships throughout every part of the state. This is not only impractical but would also be the first such restriction in the nation to our knowledge, a restriction that would make it much more difficult for providers operating telehealth businesses in Ohio under House Bill 122 to open and maintain their practices.

If implemented, this rule could drastically reduce – rather than expand – the number of Ohio-licensed providers offering telehealth services in the state, restricting patient access to care in the process. For example, a family physician in Toledo would no longer be able to offer telehealth services to his or her college-age patients who attend Ohio State in Columbus unless that physician had a contractual relationship with other providers in Columbus or the patient was willing to travel back home. The clinically unsubstantiated requirement forwarded by the Board would thus **burden Ohio patients with spending their valuable time and money** making these journeys to the physical offices of their preferred providers.

Requirements for other scenarios contemplated in the proposed rule hold telehealth services to a higher standard than care delivered in person, making it more difficult for telehealth providers to operate their businesses and treat patients effectively when compared to their in-person counterparts.

Requiring a specific referral: Language in 4731-37-01(B)(4)(c) mandates that telehealth providers refer patients who need to see a specialist to a *specific specialist*. 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 provide the patient with a referral to a specific specialist "whom the healthcare professional knows has an appropriate scope of practice for the medical condition of the patient." Rather, current practice would be for providers to communicate to the patient which kind of specialist could treat them best. Again, this language necessitates from providers a certain level of "local knowledge" that runs counter to the purpose of House Bill 122, an insurmountable obstacle for many Ohio-licensed telehealth providers to overcome. If the Board intends to hold telehealth providers to heightened referral obligations, we question whether similar guidance will be issued for providers delivering care in person. This also runs counter to long-standing anti-referral regulatory policies aimed at protecting patient choice, options, and care.

Heightened responsibilities for emergency referrals: Additionally, we are concerned with language in 4731-37-01(B)(4)(d) relating to patients who need emergency care. We agree that health care professionals – whether delivering care through telehealth technologies or other tools – should have in place the appropriate protocols to deal with emergency situations if and when they occur. In many situations, that would include immediately notifying emergency services. The proposed rule, however, would require telehealth providers to help patients identify the closest emergency room. In addition to placing a specific responsibility on telehealth providers that is not placed on providers at physical locations, this provision could potentially put patients' lives at risk in delaying their visits to the emergency room. 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. 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. Again, that would often include immediately notifying emergency services.

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Proposed revision: We agree with the State Medical Board that, in the interest of patient safety, the standard of care must be the same for all health care services – regardless of whether providers render that care in person or virtually. We also recognize that there are some health care issues which can only be addressed properly via an in-person 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. We agree with the proposed language suggested by the Ohio State University Wexner Medical Center (OSUWMC) in their March 1, 2022 comment letter to the State Medical Board with a few clarifying modifications as indicated in brackets:

> *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 will either see the patient in-person in a reasonable timeframe or make [an] appropriate referral as is standard of care, which could include scheduling the patient [or providing information to the patient] for a telehealth or in-person visit with another health care professional."*

The Board may also consider promulgating referral language similar to that proposed by the Federation of State Medical Boards (FSMB) in its recently approved document titled "The Appropriate Use of Telemedicine Technologies in the Practice of Medicine." The FSMB's language reads as follows:

> *If a patient is inappropriate for care via telemedicine technologies or experiences an emergent situation, complication, or side effects after an encounter using telemedicine technologies, physicians should have a standing plan in place and have the responsibility to refer the patient to appropriate care (e.g. acute care, emergency room, or another provider) to ensure patient safety. It is insufficient for physicians to simply refer all patients to the emergency department; each situation should be evaluated on an individual basis and referred based on its severity and urgency.*

Permitting patients and providers to interact with each other via telehealth technologies without placing arbitrary restrictions on these telehealth interactions is becoming standard practice in states across the country. Implementing referral requirements that place arbitrary and unnecessary burdens on telehealth providers **will not only put providers utilizing virtual care at a competitive disadvantage but also drive up health care costs for Ohio consumers,** something Governor DeWine has already recognized.

Research done by insurance company Cigna found that telehealth patients save more than $100 dollars per visit when compared to those who see providers in person – savings they lose when their access to telehealth services is impeded. According to recent research presented at the American Academy of Pediatrics National Conference, telehealth visits save families an average of $50 in travel costs and an hour of time in their busy schedules. If the rules are approved in their current form, Ohio patients – especially those in rural and other underserved communities – will be forced to spend that money and time traveling to brick-and-mortar offices just to get the heath care they could have received effectively, comfortably, and conveniently from their homes or places of work. Put simply, making it more difficult for patients and providers to interact via telehealth will make it more expensive and burdensome for Ohioans to get the care they need.

Thank you for the opportunity to comment. As written, proposed rule **4731-37-01 would place anticompetitive burdens on providers hoping to operate telehealth practices in Ohio and levy unnecessary costs on Ohio patients.** We urge the Initiative to consider the effects that the proposed rule will have on Ohio businesses and consumers in the interest of ensuring that Ohioans have access to high-

quality, affordable health care when and where they need it. Please let us know if there is anything else that we can do to help you promote practical telehealth policy in Ohio.

Undersigned member organizations,

1-800 Contacts
The American Telemedicine Association
ATA Action
Babylon Health
BlueStar TeleHealth
Circle Medical - A UCSF Health Affiliate
Hims
One Medical