ataACTION
Telehealth Policy to Transform Healthcare

September 16, 2022

Amanda Quintana
New Mexico Medical Board
2055 South Pacheco Street, Bldg. 400
Santa Fe, NM 87505

RE: ATA ACTION OPPOSITION TO PROPOSED RULES OF A NEW PART TO TITLE 16, CHAPTER 10 REGARDING TELEMEDICINE.

Dear Ms. Quintana,

On behalf of ATA Action, I am writing you to comment on the proposed telemedicine rules promulgated by the New Mexico Medical Board ("Board").

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.

ATA Action has several concerns with the proposed telemedicine rules, which would make New Mexico an outlier on state telemedicine policy, diverge from statutory language and recommendations from the Federation of State Medical Boards, and unnecessarily restrict New Mexico residents' access to quality care. We recommend the Board address the issues identified below before proceeding with the rulemaking process.

A. The Proposed Rules will restrict access to care without clinical justification and are contrary to statutory language and the Federation of State Medical Board's Guidelines

ATA Action supports and advocates for "technology neutral" policies that allow providers to use their clinical judgment to determine the appropriate telehealth tools and technologies with their patients—whether synchronous or asynchronous—to uphold the standard of care and serve the best interest of their patients. We have significant concern that the proposed rules contain numerous requirements that will take away discretion for telehealth providers to determine the appropriate telehealth technology to deliver care for their patients and seem to implicitly require a videoconference for any new patient. Specifically, the proposed rules:

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- **Indicate that a physical examination or mental status examination is always required to form a relationship and make a diagnosis, even if not clinically necessary (Section 16.10.18.7)**: "Physician-patient relationship means a relationship between a physician and a patient that is for the purpose of maintaining the patient's well-being. At a minimum, this relationship is established by an interactive encounter between patient and physician involving an appropriate history and physical and/or mental status examination sufficient to make a diagnosis and to provide, prescribe or recommend treatment."

- **Preclude the use of asynchronous technology to form a physician-patient relationship (**16.10.18.8 (B)**:** "[T]he use of asynchronous, store and forward technologies . . . alone do not create a patient physician relationship and cannot be used for diagnosis or treatment."

- **Require telehealth providers to use face-to-face (video) telehealth interactions, even if not medically necessary, to prescribe medication to new patients (**16.10.18.8 (E)): **"**Issuing prescriptions must include a face-to-face telemedicine encounter, or occur in the context of an established patient-physician relationship."

We urge the Board to reconsider and revise this requirement for the following reasons:

1) As recognized by the FSMB, synchronous interactions are not always medically necessary to form a relationship or treat patients and such mandates create unnecessary barriers to access

The Federation of State Medical Boards ("FSMB"), which represents 71 state medical and osteopathic boards across the country, recently revised its telemedicine guidelines for the first time since 2014. The updated guidelines propose policies for lawmakers and state medical boards that enable the broad use of telehealth technologies while prioritizing patient safety. The FSMB makes clear 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." This directly contradicts the restrictive language around the establishment of a relationship using asynchronous modalities as found in the rules proposed by the Board. Further the FSMB Guidelines also do not mandate a physical or mental exam in all encounters or require a physician to undertake a face-to-face interaction prior to prescribing. Rather, the Guidelines suggest "physicians may exercise their judgment and prescribe medications as part of telemedicine encounters" where the standard of care is met "and the appropriate clinical consideration is carried out and documented."

ATA Action recognizes that while synchronous audio-visual technology might be appropriate for patients or providers during certain types of consults, research[1] demonstrates that such

[1] Asynchronous-Telehealth-Improving-Access-Empowering-Patients-and-Reducing-Costs-CLEAN.pdf (americantelemed.org)

communication is not medically necessary for all forms of telehealth and requiring it can lead patients to incur unnecessary costs or delays. For many patients the necessary data, information, and diagnostics for diagnosing conditions can be handled asynchronously. Should the healthcare provider determine that more information is necessary to meet the standard of care and appropriately diagnose the patient's complaint, then the provider will use his or her professional discretion to make such a request of the patient and either have the additional information sent asynchronously, set up an appropriate synchronous examination, arrange to see the patient in-person, or refer the patient to in-person care.

The proposed rules appear rooted in the unsupported assumption that asynchronous technologies -- regardless of the medical issue presented -- can never safely be used to deliver care or prescribe medication to a new patient. Yet, the rules seem to permit an asynchronous evaluation for that ***same medical issue*** for an established patient (16.10.18.8.C.1). Clinical care delivery is thus improperly dictated by whether a particular patient has a pre-existing relationship with a provider and/or access to a certain technology, rather than appropriately focusing on whether the provider has sufficient clinical and other information to safely and effectively prescribe or recommend treatment. By requiring a face-to-face exam to prescribe where the standard of care does not, the regulations would hold telemedicine to a different standard than in-person care, which conflicts with proposed requirement in 16.10.18.8E to hold both to the same standard of care.

This separate set of rules also creates a barrier to care for New Mexico residents that lack private access to a fast, reliable internet connection capable of two-way audio-video communication, including many rural and native residents. This potentially exacerbates the very real access problems that telemedicine holds the potential to address. New Mexico residents should not be prevented from using telemedicine solely because they lack the resources to communicate with a provider via video.

We suggest that the Board review and consider the FSMB's Model Guidelines and revise the proposed rules. If the Board proceeds with implementing this rule as drafted, we ask the Board to clarify why it believes face-to-face interaction is **always** medically necessary to prescribe medication for new patients, what necessary information a face-to-face interaction captures that an asynchronous one could not, and whether such information could be captured through requirements that do not unintentionally restrict access to care.

2) The proposed rules do not account for the current breadth of asynchronous capabilities and the video mandate to prescribe for new patients would make New Mexico an outlier

The proposed rules also fail to account how throughout the country, telehealth providers—including Kaiser, SSM Health, Mercy, Mayo Clinic, Prisma Health, and Planned Parenthood--use robust and comprehensive asynchronous visits to perform patient evaluations and identify underlying conditions prior to prescribing medication for both new and established patients in fields including primary care, dermatology, radiology, psychology, and ophthalmology. For

providers, asynchronous technologies accurately capture patient data, integrate evidence-based protocols and effective decision-support tools, give ample time to make informed judgments, and avoid the burdens of scheduling all parties to be available at a specific time.

Towards that end, the vast majority of states – including AZ, CO, TX, CA, OK-- have made it clear that a provider may use asynchronous technologies to establish a relationship and prescribe treatment, where appropriate, if it meets the standard of care. ATA Action is aware of no current state that mandates a physician always use a face-to-face interaction to prescribe treatment to a new patient, irrespective of the condition presented.

3) The Proposed Rules Run Counter to New Mexico Statutory Language and Intent

The technology mandates in the proposed rules are also in conflict with both statutory language and legislative intent passed by the New Mexico Legislature in various Code Sections:

- *"Telemedicine" allows health care professionals to evaluate, diagnose and treat patients in remote locations using telecommunications and information technology in real time or asynchronously, including the use of interactive simultaneous audio and video or store-and-forward technology, or remote patient monitoring and telecommunications in order to deliver health care services to a site where the patient is located, along with the use of electronic media and health information.* [NMSA Section 13-7-14(L)(6)] and [NMSA Section 59A-23-7.12(L)(6)]
- *"telemedicine" means the use of telecommunications and information technology to provide clinical health care from a site apart from the site where the patient is located, in real time or asynchronously, including the use of interactive simultaneous audio and video or store-and-forward technology, or off-site patient monitoring and telecommunications in order to deliver health care services.* [NMSA Section 26-2B-3(R)]
- *"telehealth" means the use of electronic information, imaging and communication technologies, including interactive audio, video and data communications as well as store-and-forward technologies, to provide and support health care delivery, diagnosis, consultation, treatment, transfer of medical data and education.* [NMSA 24-1G-3(C)]

The proposed rules' limits on the use of asynchronous telemedicine modalities for the purposes of creating a physician-patient relationship, diagnosing, treating, and prescribing is in direct contradiction to the intent of these laws. Indeed, each one of these definitions makes it unambiguously clear that both synchronous and asynchronous technologies are appropriate for the delivery of health care services and there is no limiting statutory language to qualify the appropriate use of any telehealth modality. Rather, the legislative language embraces the use of asynchronous with the express purpose to "provide and support health care delivery, **diagnosis**, … **treatment**." We recommend the Board revise the proposed rule to better align with the clinical decision-making discretion that the Legislature afforded to New Mexico providers using telemedicine technologies.

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4) Recommended Revisions to Support Technology-Neutral Policies

Rather than mandating a specific technology be used, we suggest the Board revise the proposed rules as follows:

16.10.18.7 DEFINITIONS:

A. **The health and well-being of patients depends upon a collaborative effort between the physician and patient. The relationship between the physician and patient is complex and is based on the mutual understanding of the shared responsibility for the patient's health care. Although it may be difficult in some circumstances to precisely define the beginning of the physician-patient relationship, particularly when the physician and patient are in separate locations, it tends to begin when an individual with a health-related matter seeks care from a physician. The relationship is clearly established when the physician agrees to undertake diagnosis and treatment of the patient, and the patient agrees to be treated, whether or not there has been an in-person encounter between the physician (or other appropriately supervised health care practitioner) and patient. 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**. (From FSMB Model Guidelines, p6) ~~. relationship between a physician and a patient that is for the purpose of maintaining the patient's well-being At a minimum, this relationship is established by an interactive encounter between patient and physician involving an appropriate history and physical and/or mental status examination sufficient to make a diagnosis and to provide, prescribe or recommend treatment, with the informed consent from the patient and availability of the physician or coverage for the patient for appropriate follow-up care. A medical record must be generated by the encounter.~~

D. Asynchronous means the use of electronic communications and store and forward technology that transmits a patient's personal health data, vital signs ~~and~~ **OR** other physiologic data or diagnostic images to a healthcare provider to review and deliver a consultation, diagnosis, or treatment plan at a later time.

16.10.18.8 PROVIDING CARE VIA TELEMEDICINE

B. Subject to paragraph (C), telemedicine shall not be utilized by a physician with respect to any patient in the absence of a physician-patient relationship, and if utilized, the applicable standard of care shall be satisfied. **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. ~~Note, the use of asynchronous, store and forward technologies, such as the use of text, mobile apps or static online questionnaires, emails, imaging alone do not create a patient physician relationship and cannot be used for diagnosis or treatment~~.

E. Treatment and consultation recommendations made in a telemedicine setting, including issuing a prescription via electronic means, will be held to the same standards of care as those in in-person settings. ~~Issuing prescriptions must include a face-to-face telemedicine encounter, or occur in the context of an established patient-physician relationship~~. Telemedicine prescribing should be limited those medications that can be safely prescribed in the absence of an in-person physical exam, or other assessment tools (e.g., EKG's, labs, etc), and meet state and federal regulatory requirements.

B. The Proposed Rules could create confusing obligations and a higher set of standards for telehealth providers

1) Medical Record Transfer Requirements

Additionally, Section 16.10.18.8(D)(7) of the proposed rules should be amended so that the transfer of sensitive medical data from the telemedicine provider to anyone other than the patient and the treating provider be done at the request and consent of the patient and not mandated in all situations. Leaving aside that many patients do not have a primary care provider, it may not always be appropriate for the patient's primary care provider to be informed of and in possession of records from a telemedicine encounter. This could be the case for any number of personal and private reasons. Patients may be utilizing telemedicine sexual healthcare and may not want the encounter shared with the primary care physician who also treats other family members in the small local community. Regardless of reason, sharing medical data should always be the patient's choice. Furthermore, many patients who utilize telemedicine do so because they do not already have a primary care physician, presenting the telemedicine provider with an impossible task. We recommend this section should be amended as follows: .

Section 16.10.18.8(D)(7):: . . . that the medical record created by the encounter, included the assessment, diagnostic impressions and treatment plan be made **available at the request of the patient and consent** to both the patient and the patient's primary treatment team to ensure coordination and continuity of care

2) Restrictions on Pharmacy Providers

Section 16.10.18.8(G) may be overly restrictive and cause confusion for providers who operate with contractually-affiliated pharmacies. While ATA Action agrees with the premise that "patients shall be free to choose their own pharmacy," there is concern that the use of the term "direct" may be overly restrictive without further clarification. Many telemedicine providers have access to direct-to-consumer pharmacies that deliver medications at an affordable price in a convenient way – often directly to the patient's home or office. While the patient should always

have the option to pick their prescription up from their local pharmacy, providers should be permitted to "direct" a patient towards an alternative pharmacy that perhaps the patient was unaware offered a more competitive price and product. If the Board proceeds with the Rule, we suggest changing the term "direct" to "require" to make it clear that the purpose of this Code section is not to limit educational "direction" but rather to ensure that patients are the ones who ultimately get to decide where they want their prescription filled.

Without revision, this proposed rule might could also conflict with the operations of health maintenance organizations with "closed" health systems that require their beneficiaries to utilize system contracted providers, including the plan pharmacy. Physicians within the health system are contractually obligated to send the prescriptions to the system pharmacies for fulfillment and the plan beneficiaries are contractually obligated to fill the prescriptions at the system pharmacies to receive plan pharmacy benefits. This proposed rule would intervene with those contractual obligations.

ATA Action also takes serous issue with the fact that this rule would only apply to telehealth providers. Should the Board choose to move this proposed rule forward, we believe it must be applied uniformly to in-person care and telemedicine providers. To not do so would be anti-competitive by imposing increased costs on providers using telemedicine and disadvantage out of state competition. Telehealth providers should be treated in the same manner as in-person providers in this regard and to promulgate rules that would do otherwise is both clinically unjustified and arbitrary.

3) Redundancy and Confusion Regarding Ethics Language

Section 16.10.18.8.D.(6) states that any existing or potential conflicts in the context of this relationship be fully and clearly disclosed to the patient or the patient's surrogate and that these existing or potential conflicts be included in the documentation of the encounter (for example, financial interests, other than fees charged, in any information, products or services provided by the physician). Section 16.10.18.8.D.(8) of the proposed rules then goes on to state "that per the AMA Code of Ethics, that the patient's wellbeing and welfare take precedence over business concerns." ATA Action agrees wholeheartedly that patient welfare comes before business concerns in patient care, but this section's inclusion of these statements could create confusion for providers and holds telehealth to a different standard. Must telemedicine providers document all elements of care to prove that patient wellbeing is prioritized? There is no such stated ethical requirement for in-person care providers and the Board gives no explanation why it is placing this standard upon telemedicine providers only. Further, there are already ethics guidelines in the administrative rules for all New Mexico licensed physicians that apply to both in-person and telehealth providers. To extend additional and detailed requirements to providers operating in telehealth care settings is duplicative and improperly suggests that telehealth providers might be more susceptible to ethic violations. ATA Action recommends these requirements are deleted entirely or moved to the Board's existing ethics policies applicable to all providers.

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C. Statutory Authority Concerns

Finally, ATA Action has concern that the cited authority -- Section 61-6-21 NMSA 1978 --does not give the New Mexico Medical Board authority to promulgate these regulations, Section 61-6-21 NMSA 1978 grants narrow authority to the Board to "establish mandatory continuing educational requirements for licensees under its authority," which exceeds the scope of the rule as drafted.

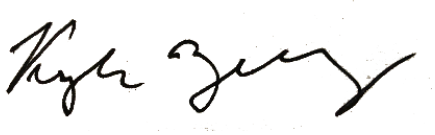
Further Section 61-6-11.1 NMSA 1978 does permissively grant the Board the authority to promulgate certain rules for telemedicine, that authoritative scope is limited to "establish[ing] by rule the requirements for licensure" for a "telemedicine license to allow the practice of medicine across state lines." If the Board intends to promulgate telemedicine regulations, we request the Board update the statutory authority or, if necessary, seek the appropriate authority from the New Mexico Legislature to do so.

Conclusion

In closing, we strongly encourage the Board to reconsider and revise the proposed rules to ensure that New Mexico residents and providers are able to access the breadth of virtual care services available. Without revision, several sections of the proposed rules apply problematic standards telemedicine providers -- without doing the same for in-person care providers—and ultimately, create clinically unnecessary barriers to care. The recently revised telehealth guidelines provided by the Federation of State Medical Boards are a strong resource and should be used by state medical boards promulgating rules on their telehealth policies. with no statutory authority or practical justification for doing so.

Thank you for your support for telehealth. We encourage you and your colleagues not to move forward with these rules until changes have been made to address the concerns we raised above. We would appreciate the opportunity to engage in additional discussion regarding the telehealth industry's perspective and how other states have considered these issues to adopt telehealth policy that expands access and protects patients. If we can assist in your efforts in anyway, please contact me at kzebley@ataaction.org.

Kind regards,



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