



July 31, 2023

Office of the Governor  
Attn: Regulatory Compliance Division  
State Insurance Building  
1100 San Jacinto  
Austin, Texas 78701  
Attn: Erin Bennett, Director, Regulatory Compliance Division  
Office of the Governor

[RegulatoryCompliance@gov.texas.gov](mailto:RegulatoryCompliance@gov.texas.gov)

Janice McCoy  
Executive Director, Texas Optometry Board  
1801 Congress Ave Suite 9.300  
Austin, TX 78701-1319  
Submitted via email to Janice McCoy, [Janice.McCoy@tob.texas.gov](mailto:Janice.McCoy@tob.texas.gov)

**RE: ATA ACTION COMMENTS ON THE BOARD OF OPTOMETRY PROPOSED AMENDMENTS TO 22 TAC CHAPTER 279, §279.1 & 22 TAC CHAPTER 279, §279.3**

Dear Director Bennett, Director McCoy and members of the Texas Optometry Board,

On behalf of ATA Action, I am writing you to submit comments for your consideration regarding proposed amendments to 22 TAC Chapter 279, §279.1 & 22 TAC Chapter 279, §279.3 regarding initial examinations for contact lenses and spectacles respectively. ATA Action encourages the Regulatory Compliance Division of the Governor's Office and the Texas Optometry Board (the Board) to withdraw these proposed amendments.

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 is grateful to the Board for considering rules which will clarify the delivery of optometric care. However, ATA Action has major concerns with sections of the proposed amendments which could severely limit the ability of practitioners to utilize telehealth modalities in the delivery of optometric care and urge the Board to reconsider the proposed in-person examination requirements before proceeding. Enacting these amendments in their current form will significantly

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limit patient access to care on behalf of Texas licensed optometrists and ophthalmologists (together known as “eye care providers” or “ECPs”).

***The Proposed Rules Contradict Existing Board Rules, as well as the Recommendations of the American Optometric Association, and the Federation of State Medical Boards***

First, the proposed amendment’s new requirement for initial examinations to be conducted in-person directly contradicts existing Board Rule §279.16. Telehealth Services. There is nothing in this approved Board rule which requires or implies an in-person exam requirement prior to the prescription of contact lens or spectacles. In regards to treatment via telehealth, the Board has approved language in section (e) Evaluation and Treatment of the Patient which states: “Treatment and consultation recommendations made in an online setting, including issuing a prescription via electronic means, will be held to the same standards of appropriate practice as those in traditional in-person clinical settings.”<sup>1</sup> This rule the Board makes clear that treatment and consultation delivered via telehealth will currently be held to the same standard of appropriate practice as those in traditional in-person settings, therefore it is unclear why the board seeks to reduce the ability of telehealth providers to prescribe in Texas.

In the memorandum sent by the Board to the Director of the Regulatory Compliance Division on July 3, 2023 the Board justifies its desire to make these amendments based on the observation that many optometrists are not complying with §§351.353 and 351.453 of the Texas Optometry Act, for both in-person and telehealth exams.<sup>2</sup> These rules lay out the requirements for initial examinations and examinations required for a prescription respectively, and include no requirements to conduct this examination in-person. If the Board has identified providers who are using telehealth modalities and not meeting appropriate practice standards, then the Board should use its disciplinary processes against those providers, instead of restricting telehealth care for all providers and patients.

The Board justifies its proposed amendments by stating in the memo that “In-person, comprehensive eye exams will continue to be the gold standard for patient care.” However, this is not established by clinical evidence and creates an undue restriction on delivery of patient care. We encourage the Board to make sure that any rule affecting the ability of an optometrist in the state to use telehealth preserves the ability to exercise professional judgment when deciding which services can be provided via telehealth for the specific patient.

ATA Action believes that so long as the provider obtains the patient’s consent for the use of telehealth services, verifies the patient’s identity, and discloses his or her own identity and credentials—as already required by Texas law—he or she should be able to use any appropriate telehealth modality that is sufficient to evaluate and treat the patient for the condition presented – whether it be a synchronous or asynchronous modality. Prohibiting providers from conducting examinations for the purposes of contact lens and spectacle prescription using telehealth modalities

<sup>1</sup> Board Rules, Texas Optometry Board, §279.16. Telehealth Services, 9/1/2017. <https://www.tob.texas.gov/files/PDFdocs/Rules.pdf>

<sup>2</sup> Memorandum from Janice McCoy, Executive Director to Regulatory Compliance Division Director, RE: 22 TAC 279.1 & 22 TAC 279.3 July 3, 2023. [https://gov.texas.gov/uploads/files/organization/regulatory-compliance/TOB-Rule-Submission-Memorandum-Rules-279\\_1-279\\_3.pdf](https://gov.texas.gov/uploads/files/organization/regulatory-compliance/TOB-Rule-Submission-Memorandum-Rules-279_1-279_3.pdf)



will make it far more difficult for patients, especially the Texans who do live in rural or underserved areas. Instead of being able to acquire their needed prescriptions from convenient locations of their choice, many patients will be forced to take time out of their busy schedules and/or travel long distances to meet with those providers in person.

The Board's regulations also cannot supersede state statute. The Texas Optometry Act, §351.453 reads: "An optometrist or therapeutic optometrist may not sign, or cause to be signed, an ophthalmic lens prescription without first personally examining the eyes of the person for whom the prescription is made." There is no reason to suggest the Texas Legislature meant for the term "personal examination" to also mean the same thing as "in-person" examination. In fact, the Board should take note that when the Texas Medical Board attempted to invoke an "in-person" requirement on telehealth prescribing (and when the Texas Dental Board attempted to do the same) the Texas Legislature rejected it (the *Telemedicine and Telehealth Services Act*, S.B. 1107 (2017)).

In addition to not conforming with legislative intent, this rule would also be more restrictive than recognized industry policy. In their *Position Statement Regarding Telemedicine in Optometry* the American Optometric Association (AOA) states: "The American Optometric Association defines telemedicine in optometry as the remote provision of eye, adnexa, visual system and related systemic health care services (collectively "eye, health, and vision services"). Asynchronous and synchronous technologies can be used to provide this type of care including videoconferencing, internet-based services, store-and-forward imaging, streaming media, and terrestrial and wireless communications."<sup>3</sup> ATA Action believes the Board should heed the policy direction of the AOA and ensure that providers can continue to use utilize telehealth modalities to care for their patients.

Furthermore, ATA Action encourages the Board to consider the policy principles enumerated in the Federation of State Medical Board's ("FSMB") most recent update *Model Policy for the Appropriate Use of Telemedicine Technologies in the Practices of Medicine*,<sup>4</sup> which was ratified by the organization in April 2022. In its "Standard of Care" section of the previously mentioned report, the FSMB articulates that "Treatment and consultation recommendations made in a virtual setting, including issuing a prescription via electronic means, will be held to the same standards of appropriate practice as those in in-person settings," the exact language currently present in the Board's own telehealth rules. Professional healthcare boards, including the Texas Board of Optometry, across the country have endorsed this view and the Board's proposal to restrict examinations for contact lens and spectacle prescribing using telemedicine would set care back in Texas.

### ***The Proposed Amendments Restrict Practitioner Discretion Without Basis in Clinical Evidence***

The in-person examination requirement prior to the prescribing of spectacles or contact lenses trades Texas licensed, practitioner discretion for a government panacea restricting patient care. ATA

<sup>3</sup> *Position Statement Regarding Telemedicine in Optometry*, American Optometric Association, 2022. [https://www.aoa.org/AOA/Documents/Advocacy/position%20statements/AOA\\_Policy\\_Telehealth.pdf](https://www.aoa.org/AOA/Documents/Advocacy/position%20statements/AOA_Policy_Telehealth.pdf)

<sup>4</sup> Federation of State Medical Boards, *The Appropriate Use of Telemedicine Technologies in the Practice of Medicine*, April 2022, <https://www.fsmb.org/siteassets/advocacy/policies/fsmb-workgroup-on-telemedicineapril-2022-final.pdf>.



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Action, as well as the Federation of State Medical Boards and many other organizations, assert that ECPs are best suited to diagnose and recommend treatment based on each individual patient's condition, in which case the provider may be able to use an innovative new telehealth approach to do so while meeting the standard of care or elect to see that patient in person.

ATA Action also understands, based on years of clinical evidence and patient treatment (particularly during the COVID pandemic), that it is possible to meet the standard of care for ocular assessment of patients. Assessing the health of a patient's eyes is an important goal during provision of eye care, whether done in-person or via telehealth. An ocular health assessment is defined as an examination capable of diagnosing whether the patient has a visually significant disease or if the patient's disease state is stable or progressing. Eye exams for ocular health assessments often include a refraction (an assessment of the patient's refractive error) and when appropriate, may lead to a prescription for corrective eyewear.

To be clear, a comprehensive ocular health assessment is not always medically necessary every time a patient has a refraction and the ECP prescribes corrective eyewear. In some instances, an intermediate eye exam is appropriate. When a patient is not receiving a comprehensive eye examination, or a vision exam without an ocular health assessment, the ECP should ensure that the patient understands both the goal and the limitations of the services provided and is aware when and how to seek an appropriate comprehensive ocular health assessment or eye examination. Most importantly, the ECP should have the discretion to determine that an intermediate eye exam is appropriate for the patient's specific needs, rather than a broad sweeping government restriction.

We acknowledge that there are situations in which the standard of care for the condition presented by the patient cannot be met through telehealth modalities, synchronous or asynchronous. This could be due to any number of reasons such as inability to properly evaluate the patients condition outside of an in-person setting or due to technological barriers such as requiring equipment that the patient does not have access to at their location. In these instances, it is the responsibility of the provider to take steps to treat the patient in-person or direct them to seek other treatment that does meet the standard of care. Our organization believes that licensed practitioners should be able to utilize the full range of available telehealth technologies while delivering virtual care, so long as the technologies being used are appropriate to meet the standard of care for the condition presented by the patient.

### ***The Proposed Amendments Restrict Competition and Patient Choice***

Finally, it is crucial to acknowledge the potential consequences of implementing these amendments on patient choice and the competitive market. In the Board's July 3 memo regarding this rule it is stated: "The Board does not feel that the proposal creates a barrier to market competition. However, many comments from telehealth providers would argue that it limits their ability to compete against traditional face to face providers," while still seeking the Regulatory Compliance Division's (the Division) opinion.<sup>5</sup> Of course, there is little subjective uncertainty regarding what an in-person examination requirement would mean for telehealth business models that conduct patient interactions entirely via remote telehealth modalities: these models would likely be required to alter their business

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<sup>5</sup> July 3, 2023 Memorandum.



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practices, establish brick-and-mortar locations across the state, or exit the marketplace entirely. The most significant consequence for Texas patients being a loss of marketplace options, particularly the lower cost (and safe) options that telehealth providers are often capable of delivering.

Implementing in-person exam requirements for the purpose of prescribing contact lens or spectacles would make it impossible for telehealth providers to provide these services to their patients, thus removing them from the market completely. Not only does this contravene free market, competitive principles that Texas prides itself on but the greatest impacts will be felt by Texas patients in need of ocular care. By cutting telehealth providers out of this market entirely the number of available providers for patients will decrease. This will leave patients, especially those in rural areas, with fewer or in some cases no choice on where to obtain the ocular care they need.

The proposed rulemaking also draws similarity to prior attempts by both the Texas Medical Board and Texas Dental Board to place in-person restrictions within their regulations that would have limited the ability to telehealth providers to offer services in Texas. In particular, the Texas Medical Board was enjoined by U.S. District Court from enforcing such rules because the court determined it was likely the board's rules amounted to anti-competitive rulemaking in violation of the Sherman Anti-Trust Act (see *Teladoc, Inc. v. Texas Medical Board*, 112 F.Supp.3d 529 (2015)). The Federal Trade Commission also suggested that the Medical Board engaged in anti-competitive behavior as "active market participants" seeking to restrict competition (Brief for the FTC as Amicus Curiae, p. 23-35, 2016 WL 11848618 (Oct. 17, 2016)).

Ensuring continued access to ocular care via telehealth will become increasingly important as the population ages and innovative technologies become more effective. Eye disease is more prevalent as people age and as the Baby Boomer generation ages, potentially blinding eye disease will become more common. Telehealth methods are a critical way to address the workforce shortage of ECPs and to reduce healthcare disparities, especially for rural and urban underserved and disadvantaged populations. Published medical literature has demonstrated the effectiveness of telehealth modalities to address these critical gaps in specialty eye care access, particularly in rural locations.

Thank you for this opportunity to comment. 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. Please let us know if there is anything that we can do to assist you in your efforts to adopt practical telehealth policy in Texas. 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".

Kyle Zebley  
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