

Telehealth Services

Effective date: 12/22/21

Pursuant to the authority vested in the Commissioner of Health by sections 2999-cc(2)(y) and (4) and 2999-ee of the Public Health Law, Article 4 of Subchapter E of Chapter II of Title 18 (Social Services) of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended, to be effective on filing with the Secretary of State, by adding Part 538 to read as follows:

PART 538 State Reimbursement for Telehealth Services

Section 538.1 Authorized providers. For purposes of medical assistance reimbursement during the federally declared public health emergency related to the COVID-19 pandemic, all Medicaid providers authorized to provide in-person services are authorized to provide such services via telehealth, as long as such telehealth services are appropriate to meet a patient's health care needs and are within a provider's scope of practice.

Section 538.2 Acceptable telehealth modalities. In addition to the telehealth modalities set forth in section 2999-cc of the public health law, reimbursement shall be made for telehealth services provided by use of telephone and other audio-only technologies.

REGULATORY IMPACT STATEMENT

Statutory Authority:

Public Health Law section 2999-cc(2)(y) provides the Commissioner of Health with the authority to determine, in consultation with the Commissioners of the Office of Mental Health, the Office of Addiction Services and Supports, or the Office for People with Developmental Disabilities, other categories of providers authorized to provide telehealth services.

Public Health Law section 2999-cc(4) requires promulgation of regulations to cover the modality of audio-only telephone communication as telehealth in the medical assistance and child health insurance programs.

Public Health Law section 2999-ee provides the Commissioner of Health with the authority to specify in regulation additional acceptable modalities for the delivery of health care services via telehealth, including audio-only telephone communications, in consultation with the Commissioners of the Office of Children and Family Services, the Office of Mental Health, the Office of Addiction Services and Supports, or the Office for People with Developmental Disabilities.

Legislative Objectives:

The legislative objective is to provide the Commissioner of Health with authority to determine the appropriate providers and modalities of telehealth necessary to increase access to health care services for Medicaid enrollees, especially for behavioral health, oral health,

maternity care, care management, services provided in emergency departments and services provided to certain high-need populations.

Needs and Benefits:

These regulatory amendments are needed to ensure continuity of care provided to Medicaid enrollees during the transition from telehealth services provided during the public health emergency and after the public health emergency ends. During the public health emergency, pursuant to Executive Orders that waived certain New York State laws and regulatory requirements related to telehealth, all Medicaid providers were authorized to utilize telehealth, including audio-only telephone or other audio-only technology. Since these Executive Orders expired on June 24, 2021, this regulation is required to authorize Medicaid providers to continuously provide services pursuant to these flexibilities to ensure continuity of care.

During the course of the public health emergency, Medicaid providers have adopted widespread use of telehealth, including through audio-only telephonic modalities and other audio-only technologies, as a means of delivering services to Medicaid beneficiaries. Providers have reported that this expansion of telehealth has improved access to care, improved patient experience, and improved provider satisfaction. Telehealth also has the potential to improve patient outcomes, although measurement of these outcomes requires further research. Furthermore, expanded use of telehealth during the pandemic has resulted in Medicaid program savings related to avoidance of emergency room and urgent care visits, and decreased utilization of Medicaid-covered non-emergency medical transportation services.

As many of these flexibilities are intended to be made permanent after the public health emergency through enactment of regulations by the Department, and given that Centers for Medicare and Medicaid Services has authorized continued use of telehealth through modalities that align with Article 29-G of the Public Health Law, the Department is issuing these emergency regulations in order to ensure ongoing and continuous access to telehealth services for Medicaid members. This continuous access is particularly important for members of the Medicaid population who are unable to access services in person, or who continue to be at risk for COVID-19, because they are ineligible for the vaccine, including children under age 12 and individuals for whom the vaccine is currently medically contraindicated.

Costs to Regulated Parties:

There are no costs imposed on regulated parties by these regulations because the amendments provide reimbursement for health care services provided via telehealth.

Costs to the Administering Agencies, the State, and Local Governments:

Costs to administering agencies and the State associated with these amendments will be covered by existing State budget appropriations and anticipated federal financial participation. There are no costs imposed on local governments by these regulations because the amendments provide reimbursement for health care services provided via telehealth.

Local Government Mandates:

The proposed regulations do not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

The proposed regulations impose minimal paperwork requirements on regulated parties to claim Medicaid reimbursement for telehealth services provided to Medicaid enrollees.

Duplication:

There are no other State or Federal requirements that duplicate, overlap, or conflict with the statute and the proposed regulations.

Alternatives:

The Department considered the option of not promulgating these emergency regulations, which would create an abrupt halt to certain telehealth flexibilities authorized during the public health emergency and which have proven vital to Medicaid members. In consultation with the Office of Mental Health and Office of Addiction Services and Supports, the Department

determined that providing continuity of care to Medicaid enrollees during the transition is a public health priority and as such, decided to move forward with these emergency regulations.

Federal Standards:

There are no minimum Federal standards regarding this subject.

Compliance Schedule:

These amendments shall be effective on filing with the Secretary of State.

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**STATEMENT IN LIEU OF
REGULATORY FLEXIBILITY ANALYSIS**

No regulatory flexibility analysis is required pursuant to section 202-b(3)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse economic impact on small businesses or local governments, and it does not impose any new reporting, record keeping or other compliance requirements on small businesses or local governments.

Cure Period:

Chapter 524 of the Laws of 2011 requires agencies to include a “cure period” or other opportunity for ameliorative action to prevent the imposition of penalties on the party or parties subject to enforcement when developing a regulation or explain in the Regulatory Flexibility Analysis why one was not included. This regulation creates no new penalty or sanction. Hence, a cure period is not necessary.

**STATEMENT IN LIEU OF
RURAL AREA FLEXIBILITY ANALYSIS**

No rural area flexibility analysis is required pursuant to section 202-bb(4)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse impact on rural areas, and it does not impose any new reporting, record keeping or other compliance requirements on public or private entities in rural areas.

STATEMENT IN LIEU OF JOB IMPACT STATEMENT

No job impact statement is required pursuant to section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will not have an adverse impact on jobs and employment opportunities.

EMERGENCY JUSTIFICATION

These regulations must be promulgated on an emergency basis to continue certain telehealth flexibilities that were authorized during the State public health emergency and to avoid a disruption in certain health care services provided to Medicaid enrollees once the public health emergency ends. During the public health emergency, pursuant to Executive Orders which waived certain New York State laws and regulatory requirements related to telehealth, all eligible Medicaid providers were authorized to utilize telehealth, including audio-only telephone or other audio-only technology. This regulation is required to authorize Medicaid providers to continue to provide services pursuant to the same flexibilities afforded during the public health emergency until permanent regulations are able to be promulgated.