



# COVID-19 and Telehealth

Cory A. Talbot  
(Apr. 30, 2020)



# Overview

The COVID-19 Telehealth Program

Federal and State waivers

Issues to consider

Looking ahead after COVID-19

# The COVID-19 Telehealth Program



[This Photo](#) by Unknown Author is licensed under [CC BY-SA](#)

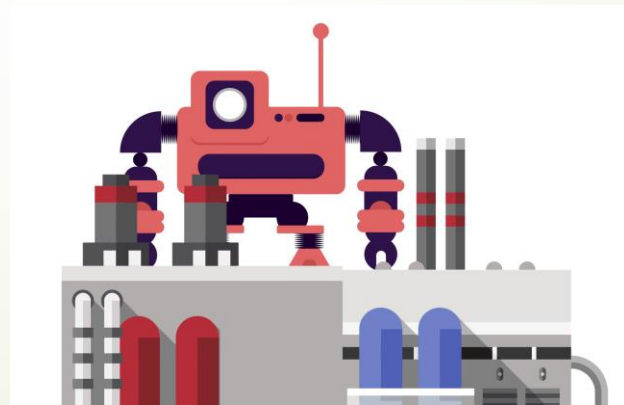
# What is the COVID-19 Telehealth Program?

- ▶ Part of the Coronavirus Aid, Relief, and Economic Security (CARES) Act.
- ▶ Distribute \$200 million in emergency funding to public and nonprofit health care providers to increase telehealth services during the COVID-19 pandemic.
- ▶ The FCC has set an award ceiling of \$1 million per applicant.




# What is the COVID-19 Telehealth Program (cont.)?

- ▶ Participating health care providers can have their “telecommunications services, information services, and devices necessary to provide critical connected care services” fully funded.
- ▶ Funds can be used to cover eligible equipment or services purchased on or after March 13, 2020, including services with monthly recurring charges, such as broadband connectivity or remote patient monitoring devices, through September 30, 2020.



# Who is eligible to apply for funds under the COVID-19 Telehealth Program?

- ▶ **Nonprofit and public** health care providers that fall within section 254(h)(7)(B) of the 1996 Telecommunications Act:
  - ▶ post-secondary educational institutions offering health care instruction, teaching hospitals, and medical schools;
  - ▶ community health centers or health centers providing health care to migrants;
  - ▶ local health departments or agencies;
  - ▶ community mental health centers;
  - ▶ not-for-profit hospitals;
  - ▶ rural health clinics;
  - ▶ skilled nursing facilities; or
  - ▶ consortia of health care providers consisting of one or more of the foregoing entities.
- ▶ Exception: Rural and non-rural health clinics are eligible to receive funding.
- ▶ American Dental Association seeking to expand to dentistry.



# What services and devices are eligible for COVID-19 Telehealth Program funding?

- ▶ Devices and services necessary to provide telehealth services, such as the following:
  - ▶ *Telecommunications Services and Broadband Connectivity Services*: Voice services, for health care providers or their patients.
  - ▶ *Information Services*: Internet connectivity services for health care providers or their patients; remote patient monitoring platforms and services; patient reported outcome platforms; store and forward services, such as asynchronous transfer of patient images and data for interpretation by a physician; platforms and services to provide synchronous video consultation.
  - ▶ *Connected Devices/Equipment*: Tablets, smart phones, or connected devices to receive connected care services at home (e.g., broadband-enabled blood pressure monitors; pulse oximetry monitors) for patient or health care provider use; or telemedicine kiosks/carts for health care provider sites.
- ▶ Funding does not cover personnel, IT, administrative, and training costs necessary to support the provision of telehealth services.

# How are applications considered?

- In evaluating applications, the FCC will consider the following criteria:
  1. The conditions to be treated using the COVID-19 Telehealth Program funding.
  2. The goals and objectives for use of the COVID-19 Telehealth Program funding.
  3. The timeline for deployment of the proposed service(s) or devices funded by the COVID-19 Telehealth Program.





# How are applications considered (cont.)?

- ▶ In evaluating applications, the FCC will consider the following criteria (cont.):
  4. The factors/metrics the applicant will use to help measure the impact of the services and devices funded by the COVID-19 Telehealth Program.
  5. The geographic area and population served by the applicant and whether that geographic area has been under any pre-existing strain (e.g., large underserved or low-income patient population; health care provider shortages; rural hospital closures; limited broadband access and/or Internet adoption).
  6. The health care providers' targeting of funding to high-risk and vulnerable patients.

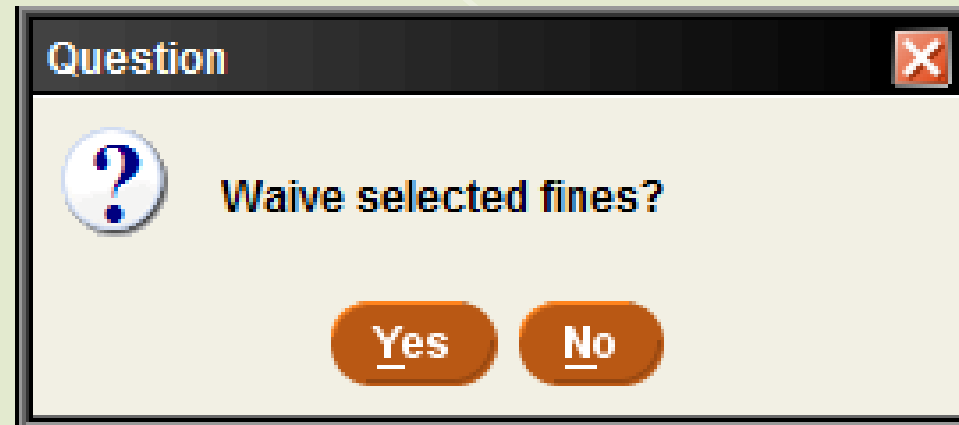


# How do eligible health care providers apply for funding under the Program?

- Before applying, health care providers will need to do the following:
  1. Seek an eligibility determination from the Universal Service Administrative Company for each site included in the application;
  2. Obtain an FCC Registration Number; and
  3. Register with the federal System for Award Management.
- Once those steps are taken, eligible health care providers may submit applications through FCC online application page at <https://www.fcc.gov/covid-19-telehealth-program>.



# Federal and State Waivers



[This Photo](#) by Unknown Author is licensed under [CC BY](#)

# What is changing in response to COVID-19?

- ▶ Telehealth waivers and other changes from the Centers for Medicare & Medicaid Services (CMS)
- ▶ Enforcement discretion under HIPAA
- ▶ Flexibility to address cost-sharing obligations in federal health care programs
- ▶ In looking at federal changes, don't forget to look at what states are doing and what your contracts require

# Expanded Medicare Coverage and payment for Telehealth Services

- **January 31:** the Secretary of the Health and Human Services (HHS) declares a public health emergency. See “Determination that a Public Health Emergency Exists” (COVID-19 Declaration).
  - This public health emergency lasts 90 days from January 27 unless HHS declares that the public health emergency no longer exists.
  - The time period can be extended for subsequent 90-day periods.
- **March 6:** in response to the COVID-19 pandemic, Congress provided emergency funding for federal agencies, including an expansion of Medicare coverage for telehealth services and authorization for HHS to waive certain Medicare telehealth payment requirements during the public health emergency.





# Expanded Medicare Coverage and Payment for Telehealth Services (cont.)

- Traditional CMS standards:
  - Prohibited reimbursement for telehealth services provided to a Medicare beneficiary at home, except for “virtual check-ins.”
  - Covered telehealth services include remote monitoring services, physician interpretation of diagnostic tests, and other non-face-to-face care management.
- Expansion of services:
  - Medicare beneficiaries will be able to receive a specific set of services through telehealth including evaluation and management visits (common office visits), mental health counseling and preventive health screenings.
  - This will help ensure Medicare beneficiaries, who are at a higher risk for COVID-19, are able to visit with their doctor from their home, without having to go to a doctor's office or hospital which puts themselves and others at risk.

# Expanded Medicare Coverage and Payment for Telehealth Services (cont.)

- ▶ Medicare changes are effective for services starting March 6.
- ▶ **Temporary** changes to address COVID-19:
  - ▶ Patient location: Medicare originating site requirements are waived, allowing telehealth services to be provided regardless of where the beneficiaries are located, including their residence and outside designated rural areas.
  - ▶ Practicing across state lines: the CMS waiver allows practitioners to furnish telehealth services across state lines.
    - ▶ **Caution**: The Federation of State Medical Boards has a helpful list of the states that have modified in-state licensure requirements for telehealth in response to COVID-19:
      - ▶ <https://www.fsmb.org/siteassets/advocacy/pdf/states-waiving-licensure-requirements-for-telehealth-in-response-to-covid-19.pdf>



This Photo by Unknown Author is licensed under [CC BY-SA](#)



# Expanded Medicare Coverage and Payment for Telehealth Services (cont.)


- ▶ **Temporary** Changes to address COVID-19 (cont.):
  - ▶ Types of telehealth: Telephones with audio and video capability can be used to provide telehealth services.
  - ▶ Relationship: Physicians may see both new and established patients for telehealth and remote patient monitoring and virtual check-in using communications technology.
  - ▶ Expanded services: CMS significantly expanded the list of services that can be provided by telehealth to include emergency department visits, initial nursing facility and discharge visits, home visits, and therapy services.
    - ▶ List of covered telehealth services: <https://www.cms.gov/Medicare/Medicare-General-Information/Telehealth/Telehealth-Codes>





# Expanded Medicare Coverage and Payment for Telehealth Services (cont.)

- ▶ **Temporary** Changes to address COVID-19 (cont.):
  - ▶ Newly eligible providers: Federally Qualified Health Centers (FQHCs) and Rural Health Clinics (RHCs) can provide telehealth services to patients wherever they are located, including in their homes.
  - ▶ Supervision of physicians: Physicians may supervise services through audio and video communication, instead of only in person.
  - ▶ Modality: CMS clarified in its Final Interim Rule that, for telehealth services, a “telecommunications system” would mean “multimedia communications equipment that includes, at a minimum, audio and video equipment permitting two-way, real-time interactive communication between the patient and distant site physician or practitioner.”



# HIPAA and the COVID- 19 Pandemic

- ▶ The HHS Office for Civil Rights (OCR) issued a “Notification of Enforcement Discretion” to authorize covered providers to use widely available communications applications without the risk of penalties ordinarily imposed by OCR for HIPAA violations for the good faith provision of telehealth services.

# HIPAA and the COVID-19 Pandemic (cont.)

- ▶ Covered providers may use popular “non-public facing” applications to deliver care.
  - ▶ HHS examples of video chat applications: Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, Zoom, and Skype.
  - ▶ HHS examples of text-based applications: Signal, Jabber, Facebook Messenger, Google Hangouts, WhatsApp, and iMessage.
- ▶ Covered providers may not provide telehealth on any platforms that are “public-facing,” such as Facebook Live, Twitch, and TikTok.

# HIPAA and the COVID-19 Pandemic (cont.)

- Additional protections:
  - Provide such services through technology vendors that are HIPAA compliant and will enter into HIPAA business associate agreements (BAAs).
    - HHS examples: Skype for Business / Microsoft Teams, Updox, Vsee, Zoom for Healthcare, Doxy.me, Google G Suite Hangouts Meet, Cisco Webex Meetings / Webex Teams, Amazon Chime, GoToMeeting, and Spruce Health Care Messenger.
  - Take reasonable precautions for patient privacy such as closing the office door, lowering voice, not using speakerphone, etc.



# HIPAA and the COVID-19 Pandemic (cont.)

- **Caution:** HHS lists each of these platforms, but also disclaims any endorsement.
  - What does that mean?
  - Is Zoom, for instance, still reasonable?



# March 17 OIG Policy Statement

- ▶ Based on the COVID-19 Declaration, a public health emergency has existed since January 27.
- ▶ **The main point:** physicians and other practitioners *“will not be subject to administrative sanctions for reducing or waiving any cost-sharing obligations Federal health care program beneficiaries may owe for telehealth services furnished consistent with the then applicable coverage and payment rules, subject to the conditions specified herein.”*



# March 17 OIG Policy Statement

- ▶ So, what are “the conditions specified herein”?
  1. “A physician or other practitioner reduces or waives cost-sharing obligations (*i.e.*, coinsurance and deductibles) that a beneficiary may owe for telehealth services furnished consistent with the then-applicable coverage and payment rules.”
  2. “The telehealth services are furnished during the time period subject to the COVID-19 Declaration.”



# March 17 OIG Policy Statement

- ▶ As a practical matter, what does this mean?
- ▶ Ordinarily, waivers of cost sharing amounts can be violations of the Federal Anti-Kickback Statute.
  - ▶ However, for services that fit in the March 17 OIG Policy Statement, “OIG will not view the provision of free telehealth services alone to be an inducement or as likely to influence future referrals . . . .”
- ▶ The March 17 OIG Policy Statement does not require physicians or other practitioners to reduce or waive any cost-sharing obligations.
- ▶ The March 17 OIG Policy Statement doesn't impact other rules, regulations, or responsibilities.
  - ▶ For instance, physicians or other practitioners must still “bill only for services performed and to comply with legal authorities related to proper billing, claims submission, cost reporting, or related conduct.”







# Online Prescribing Requirements

- ▶ *Temporary adjustment during the public health emergency:* HHS has issued a statement regarding online prescribing requirements, stating that the public health emergency exception to the in-person medical examination requirement would apply to both non-scheduled controlled substances and all Schedule II-V controlled substances so long as the following requirements were met:
  1. the prescription is issued for a legitimate medical purpose by a practitioner acting in the usual course of his/her professional practice;
  2. the telemedicine communication occurs using an audio-visual, real-time, two-way interactive communication system; and
  3. the practitioner is acting in accordance with applicable Federal and State law.

# Don't forget!

- ▶ *Federal v. State*: the adjustments we've discussed are federal. Check your state!
  - ▶ If your services cross state lines, check both states!
- ▶ *Licensure*: what adjustments has your state made for licensure?
- ▶ *Consent*: be sure you know what you need for informed consent, especially if telehealth services cross state lines



This Photo by Unknown Author is licensed under [CC BY-NC](#)

# Don't forget!

- *Standard of care*: this is an open question, but generally there is no different standard for change from telehealth and in-person care
- *Insurance*: check your insurance before providing expanded telehealth services, e.g., across state lines.



This Photo by Unknown Author is licensed under [CC BY-NC](#)

What's next for telehealth?



# Congress is still looking at changes



Bipartisan support for additional expansion of telehealth services, including broadband internet access



Especially for seniors and other high-risk individuals during the public health emergency

# The CMS Toolkit

- CMS released a telehealth toolkit last week to help states remove barriers to telehealth services in their Medicaid and Children's Health Insurance Programs (CHIP) during the COVID-19 pandemic.



This Photo by Unknown Author is licensed under [CC BY](#)

# The CMS Toolkit

- The toolkit “aggregates information and highlights questions that states may ask themselves when establishing new telehealth policy, including telehealth policies for pediatrics.”



## State Checklist

The following checklist of policy questions is intended to serve as a tool for states to assess telehealth in their state. Consideration should be given to populations, services, providers, payment rates, technology, and other areas as noted below.

Category	Questions	State Policy Reference (Statute, Regulation, etc.), If Applicable	Next Step
Populations	Can a new patient-provider relationship be established via telehealth?	Enter state policy references for populations.	Enter next steps for populations.
	Are there limitations on what type of technology can be used to obtain consent?	Enter state policy references for populations.	Enter next steps for populations.
	Are there language or other communication needs unique to different populations?	Enter state policy references for populations.	Enter next steps for populations.
	Are there limitations on the populations who may receive services delivered via telehealth?	Enter state policy references for populations.	Enter next steps for populations.



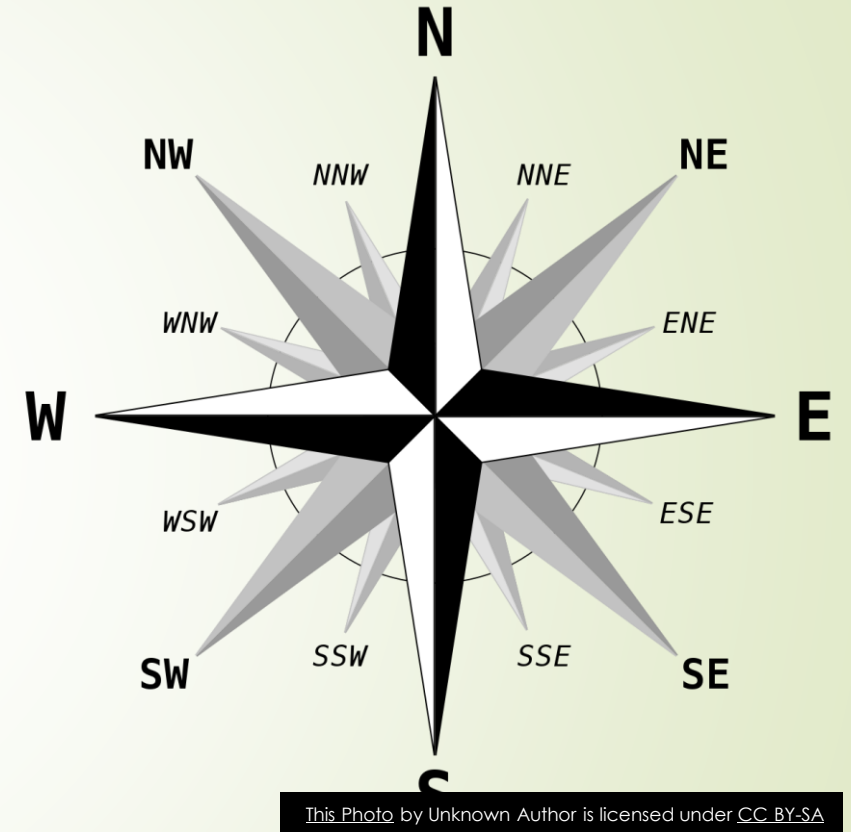
# The CMS Toolkit

- ▶ The toolkit “is intended to help states identify which aspects of their statutory and regulatory infrastructure may impede the rapid deployment of telehealth capabilities in their Medicaid program.”
- ▶ “States have a great deal of flexibility” to cover telehealth services in their Medicaid and CHIP programs and “may wish to re-evaluate scope of practice laws, including restrictions imposed by state boards of medicine, to ensure maximum utilization of telehealth flexibilities.”
- ▶ The toolkit also suggests how states can address issues regarding privacy, provider licensing, and pediatric telehealth services.



# Resources

- <https://www.coronavirus.hollandhart.com/>
- Keep an eye on guidance from HHS at [telehealth.hhs.gov](https://telehealth.hhs.gov)
- Center for Connected Health Policy: <https://www.cchpca.org/resources/covid-19-telehealth-coverage-policies>



Questions?  
Need more information?

Cory A. Talbot

[catalbot@hollandhart.com](mailto:catalbot@hollandhart.com)

801-799-5971

Holland & Hart LLP

Salt Lake City, Utah

801-799-5800

