

## DEPARTMENT OF HEALTH CARE FINANCE

NOTICE OF FINAL RULEMAKING

The Director of the Department of Health Care Finance (DHCF), pursuant to the authority set forth in An Act to enable the District of Columbia to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat. 744; D.C. Official Code § 1-307.02 (2016 Repl. & 2019 Supp.)), and Section 6(6) of the Department of Health Care Finance Establishment Act of 2007, effective February 27, 2008 (D.C. Law 17-109; D.C. Official Code § 7-771.05(6) (2018 Repl.)), hereby gives notice of the adoption of an amendment to Section 910, entitled “Medicaid-Reimbursable Telemedicine Services,” of Chapter 9 (Medicaid Program) of Title 29 (Public Welfare) of the District of Columbia Municipal Regulations (DCMR).

This rule finalizes changes to the standards governing Medicaid reimbursement of health services provided via telemedicine to allow the District to ensure the accessibility of services to Medicaid. DHCF is finalizing policy changes, initially proposed to maintain accessibility of services for beneficiaries in response to the coronavirus disease (COVID-19) public health emergency, that will allow services to be provided through telemedicine in a beneficiary’s home, establish the requirements for technology to home-related telemedicine services, and make changes necessary to ensure that this service modality is available to Medicaid managed care beneficiaries.

DHCF is adding the beneficiary’s home as the originating site. Providing a service delivery pathway for telemedicine services in a beneficiary’s home will help ensure beneficiaries continue to receive health services, even if they are unable to access traditional in-person Medicaid services because of their health condition or ability to travel. DHCF is removing the reference to “fee-for-service” in Subsection 910.1 because the standards set forth in this section, and any corresponding requirements set forth under the terms of the managed care contract, also apply to minimum program requirements implemented under District Medicaid managed care program. Finally, DHCF is proposing clarification that distant site providers are responsible for ensuring that technology in use meets the standard of care when the beneficiary’s home is the originating site.

To this end, the rule finalizes three specific amendments: (1) the addition of a beneficiary’s home as an originating site in Subsection 910.7; (2) the removal of the reference to the fee-for-service program in Subsection 910.1; and (3) a clarification in new Subsection 910.30 that when the originating site is the beneficiary’s home that the distant site provider is responsible for ensuring that the technology in use meets the minimum requirements set forth in Subsection 910.3.

DHCF anticipates that most beneficiaries will access services provided via telemedicine using a smartphone or other consumer electronic devices. Most smartphones or tablets operating on either of the major cellular networks meet the video quality and latency requirements set forth in this section. Importantly, providers should note that the addition of the home as an originating site does not alter patient consent requirements set forth in this section, nor does it alter the ongoing requirement that care be delivered in a manner that is compliant with the Health

Insurance Portability and Accountability Act of 1996 (HIPAA), effective August 21, 1996 (104 Pub.L. 191; 110 Stat. 1936) and other applicable laws. DHCF reserves the authority to provide additional guidance to support HIPAA compliance in the telemedicine context as needed. Any guidance will be made available on the DHCF website at [www.dhcf.dc.gov](http://www.dhcf.dc.gov).

A Notice of Emergency and Proposed Rulemaking was published in the *D.C. Register* on March 20, 2020 at 67 DCR 003293. DHCF received seven (7) sets of comments from stakeholders including the District of Columbia Behavioral Health Association (DCBHA), District of Columbia Primary Care Association (DCPCA), Unity Health Care (Unity), Castle Hill Consulting (CHC), Whitman Walker Health (Whitman), Community of Hope (COH), and Georgetown Public Affairs. Based on careful review of the comments, DHCF is recommending technical changes to the rule, as discussed below.

#### *Home as the Originating Site*

The majority of commenters, including DCBHA, DCPCA, Unity, CHC, Whitman, and COH, wrote to communicate support of the addition of the home as the originating site and advocate for the change to be adopted on a permanent basis.

DHCF agrees with the recommendation of stakeholders and adopts the beneficiary's home as an originating site on a permanent basis. DHCF is also proposing technical changes to Subsection 910.7 to clarify intent. DHCF is adding language to state that both the providers and settings set forth in Subsection 910.7 are eligible originating sites.

#### *Audio-Only Services via Telemedicine*

On March 19, 2020, DHCF Transmittal #20-08 clarified that during the period of the public health emergency, DHCF would reimburse for audio-only telemedicine services. A number of commenters, including DCBHA, wrote to recommend that DHCF pursue a legislative amendment, allowing coverage of services provided via telemedicine to permit provision of services via audio-only engagements on a permanent basis.

DHCF provides coverage of services provided via telemedicine in accordance with the Telehealth Reimbursement Act of 2013, effective October 17, 2013 (D.C. Law 20-26; D.C. Official Code § 31-3861 (2013 Repl.)). The authorizing legislation defines telehealth as the delivery of health care services through the use of interactive audio, video, or other electronic media used for the purpose of diagnosis consultation or treatment. Coverage of services provided via audio-only telephones, electronic mail messages, or facsimile transmissions is explicitly excluded. Under the Mayor's emergency authority, in accordance with Section 5 of the District of Columbia Public Health Emergency Act of 1980, effective March 5, 1981 (D.C. Law 3-149; D.C. Official Code § 7-2304 (2018 Repl.)), DHCF has waived these provisions because there is a public health interest during the public health emergency. DHCF is unable to adopt changes to this rulemaking allowing reimbursement of audio-only telemedicine services on a permanent basis in the absence of legislative amendment. Therefore, DHCF is not proposing additional changes at this time through this rulemaking.

Subsection 910.5(c) currently requires that a beneficiary provide written consent to receive telemedicine services in lieu of in-person healthcare services, consistent with all applicable District laws.

DHCF is not adopting this recommendation. As clarified in guidance, providers have a number of options to demonstrate the beneficiary's consent to receive services via telemedicine. DHCF believes the beneficiary's privacy interests and right to be informed of their care options overcomes any administrative burden to providers in securing written consent to receive services via telemedicine. Subsection 910.5(c) is consistent with DHCF telemedicine guidance, so no additional changes are proposed at this time. Following the public health emergency, providers will be required to receive written consent from beneficiaries, at all times, prior to delivering services via telemedicine.

#### Distant Site Provider Staff Working Remotely

In March 2020 guidance, DHCF clarified that personnel delivering telemedicine services may work remotely, at the discretion of rendering providers, as long as all other requirements in this section are met. DCBHA wrote to recommend formal adoption of this clarification into the rulemaking by amending Subsections 910.4 or 910.8.

DHCF agrees with DCBHA's recommendation. DHCF is proposing a technical amendment to Subsection 910.8 to clarify that distant site providers includes any provider staff who are working remotely.

#### *Applicability to Other Licensed/Certified Medicaid Providers*

DCBHA requested that DHCF add language to Subsection 910.8 clarifying that Psychologists and Other Licensed Professionals newly eligible to provide Medicaid services through the District's 1115 Behavioral Health Transformation are also eligible distant site providers.

DHCF agrees with DCBHA's recommendation. DHCF's intent, as communicated in March 2020 guidance, is to reimburse for Medicaid covered services to the same extent those services can be delivered via telemedicine, while still meeting the standard of care. DHCF expects that the types of providers reimbursed, and the types of coverage offered under the District of Columbia Medicaid State Plan or waiver thereof, will continue to expand. With this in mind, DHCF is proposing technical changes to Subsection 910.8 to clarify that the distant provider sites listed under Subsection 910.8 is non-exhaustive and that services provided via telemedicine by other Medicaid providers is reimbursable.

#### *Remote Patient Monitoring*

Georgetown Public Affairs advocated in its comments for DHCF to cover remote patient monitoring for the period of the public health emergency. Georgetown Public Affairs' suggested model for adoption was based on Maryland Medicaid's coverage of remote patient monitoring services. Georgetown Public Affairs reasoned that a robust remote patient monitoring program is part of the solution to the addressing any surge in need for hospital treatment related to COVID-

19. Specifically, the commenter added that managing beneficiaries safely in their homes would decrease emergency room visits and acute hospital bed utilization.

Remote patient monitoring would require additional changes to the District's State Plan and is not possible under our current authority. For this reason, DHCF is declining to adopt coverage of remote patient monitoring at this time.

The Director adopted these rules as final on July 29, 2020 and they shall become effective on the date of publication of this rulemaking in the *D.C. Register*.

**Chapter 9, MEDICAID PROGRAM, of Title 29 DCMR, PUBLIC WELFARE, is amended as follows:**

**Section 910, MEDICAID-REIMBURSABLE TELEMEDICINE SERVICES, is amended as follows:**

**Subsection 910.1 is amended to read as follows:**

910.1        The purpose of this section is to establish the Department of Health Care Finance (DHCF) standards governing eligibility for Medicaid beneficiaries receiving healthcare services via telemedicine under the Medicaid program, and to establish conditions of participation for providers who deliver healthcare services to Medicaid beneficiaries via telemedicine.

**Subsection 910.7 is amended to read as follows:**

910.7        An originating site shall include the following provider types and settings:

- (a)    Hospital;
- (b)    Nursing Facility;
- (c)    Federally Qualified Health Center (FQHC);
- (d)    Clinic;
- (e)    Physician Group/Office;
- (f)    Nurse Practitioner Group/Office;
- (g)    District of Columbia Public Schools (DCPS);
- (h)    District of Columbia Public Charter Schools (DCPCS);
- (i)    Mental Health Rehabilitation Service (MHRS) provider, Adult Substance Abuse Rehabilitation Service (ASARS) provider, and Adolescent

Substance Abuse Treatment Expansion Program (ASTEP) provider certified by the Department of Behavioral Health (DBH) and eligible to provide behavioral health services set forth under the District of Columbia Medicaid State Plan (State Plan); and

- (j) Effective March 12, 2020, the beneficiary’s home or other settings identified in guidance published on the DHCF website at dhcf.dc.gov.

**Subsection 910.8 is amended to read as follows:**

910.8 A distant site provider shall include, but is not limited to, the following provider types, including any distant site provider staff rendering services remotely:

- (a) Hospital;
- (b) Nursing Facility;
- (c) FQHC;
- (d) Clinic;
- (e) Physician Group/office;
- (f) Nurse Practitioner Group/Office;
- (g) DCPS;
- (h) DCPCS; and
- (i) MHRS provider, ASARS provider, and ASTEP provider certified by DBH and eligible to provide behavioral health services set forth under the State Plan.

**Subsection 910.30 is amended to read as follows:**

910.30 When a beneficiary’s home is the originating site, the distant site provider shall ensure the technology in use meets the minimum requirements set forth in Subsection 910.13.