

## DEPARTMENT OF HEALTH CARE FINANCE

NOTICE OF FOURTH EMERGENCY AND PROPOSED 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. & 2018 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, on an emergency basis, of a new 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).

Telemedicine services are designed to improve access to healthcare services, improve patient compliance with treatment plans, improve health outcomes through timely disease detection and treatment options; and increase capacity and choice for treatment in the District of Columbia’s Medicaid program. These rules establish standards for governing eligibility for Medicaid beneficiaries receiving health services via telemedicine under the Medicaid fee-for-service program and establish conditions of participation and reimbursement policies for providers who deliver healthcare services to Medicaid beneficiaries 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 (2018 Supp.)), Medicaid will cover and reimburse healthcare services appropriately delivered through telemedicine if the same services would be covered when delivered in person. These rules establish: (1) eligibility criteria for the receipt of telemedicine services; and (2) conditions of participation for providers who deliver telemedicine services as part of the District of Columbia’s Medicaid program.

Emergency action is necessary for the immediate preservation of the health, safety, and welfare of beneficiaries who face barriers to accessing Medicaid services. Beneficiaries may be unable to access traditional in-person Medicaid services because they face unique health challenges that make traveling to receive healthcare services difficult, or because a specialty provider is not located in their community or healthcare services area. Telemedicine provides a new service delivery pathway to enable these beneficiaries to receive ongoing Medicaid services via telecommunications. These services will be essential to ensure that beneficiaries will have continued access to health care. Therefore, to ensure that the beneficiary’s health, safety and welfare are not threatened by the lapse in access to ongoing healthcare services provided by qualified providers, it is necessary that these rules be published on an emergency basis.

A Notice of Emergency and Proposed Rulemaking was published in the *D.C. Register* on July 8, 2016 at 63 DCR 009435. Four (4) sets of comments were received from the District of Columbia Department of Behavioral Health, American Speech-Language Hearing Association, Children’s Law Center, and Unity Health Care. DHCF made substantive changes to the rulemaking in response. After a Notice of Second Emergency and Proposed Rulemaking was published in the *D.C. Register* on May 5, 2017 at 64 DCR 004249, one (1) set of comments was received from

the District of Columbia Hospital Association (DCHA). DHCF made changes in response to DCHA comments and amended the rulemaking to comply with Telemedicine regulations published by the District of Columbia Department of Health at Chapter 46 of Title 17 DCMR. A Notice of Third Emergency and Proposed Rulemaking was published on February 23, 2018, at 65 DCR 001957 in the *D.C. Register*, one (1) set of comments was received from the District of Columbia Behavioral Health Association (DCBHA). DHCF has reviewed the comments received from DCBHA and is proposing substantive changes to the rulemaking as summarized below.

*Originating and Distant Site Providers: Free Standing Mental Health Clinics (FSMHCs)*

DCBHA requests clarification that Free Standing Mental Health Clinics (FSMHCs) are eligible both as originating site providers and distance site providers. In the prior rulemaking, clinics are identified in Subsections 910.7(d) and 910.8(d) as a provider type eligible to operate as an originating site provider and a distant site provider. FSMHCs are not explicitly identified as an eligible originating site provider or an eligible a distant site provider in the prior rulemaking. However, FSMHCs provide services set forth under the District of Columbia Medicaid State Plan (State Plan) "Clinic" benefit. Therefore, FSMHCs are eligible to serve as an originating site provider and distant site provider for the provision of health care services via telemedicine. DHCF is not proposing amendments to Subsections 910.7(d) and 910.8(d) at this time.

*Originating and Distant Site Providers: Providers Certified by the Department of Behavioral Health*

DCBHA requested that DHCF include behavioral health providers certified by the Department of Behavioral Health (DBH), other than Core Service Agencies (CSAs), as eligible originating and distant site providers. DBH certifies an array of behavioral health providers that provide behavioral health services covered under the State Plan. In the prior rulemaking, only CSAs are identified as eligible originating and distant site providers in Subsections 910.7(i) and 910.8(i). DHCF agrees that Mental Health Rehabilitation Service (MHRS) providers, Adult Substance Abuse Rehabilitation Service (ASARS) providers, and Adolescent Substance Abuse Treatment Expansion Program (ASTEP) providers certified by DBH should be included as eligible originating and distant site providers. For these reasons, DHCF is proposing amendments to Subsections 910.7 and 910.8 to include MHRS, ASARS, and ASTEP providers as eligible originating and distant site providers.

This Fourth Emergency and Proposed rulemaking was adopted on July 17, 2019 and shall become effective upon publication in the *D.C. Register*. The emergency rules will remain in effect for one hundred and twenty (120) days or until, November 14, 2019, unless superseded by publication of a Notice of Final Rulemaking in the *D.C. Register*.

The Director of DHCF also gives notice of the intent to take final rulemaking action to adopt these rules in not less than thirty (30) days after the date of publication of this notice in the *D.C. Register*.

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

A new Section 910, MEDICAID-REIMBURSABLE TELEMEDICINE SERVICES, is added to read as follows:

**910 MEDICAID-REIMBURSABLE TELEMEDICINE SERVICES**

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 fee-for-service program, and to establish conditions of participation for providers who deliver healthcare services to Medicaid beneficiaries via telemedicine.

910.2 Telemedicine is a service delivery model that delivers healthcare services as set forth in Subsections 910.10 and 910.11 through a two-way, real time interactive video-audio communication for the purpose of evaluation, diagnosis, consultation, or treatment.

910.3 The originating site shall be the place where an eligible Medicaid beneficiary is located at the time the healthcare services furnished for payment via a telecommunications system occurs.

910.4 The distant site shall be the place where the eligible Medicaid provider, who furnishes and receives payment for the covered service(s) via a telecommunication system, is located.

910.5 To be eligible for Medicaid reimbursement of telemedicine services under these rules, a Medicaid beneficiary shall meet the following criteria:

- (a) Be enrolled in the District of Columbia Medicaid program pursuant to Chapter 95 of Title 29 of the District of Columbia Municipal Regulations;
- (b) Be physically present at the originating site at the time the telemedicine service is rendered; and
- (c) Provide written consent to receive telemedicine services in lieu of in-person healthcare services, consistent with all applicable District laws.

910.6 A telemedicine provider shall meet the following program requirements:

- (a) Be enrolled as a Medicaid Provider and comply with all the requirements set forth under Chapter 94 (Medicaid Provider and Supplier Screening, Enrollment, and Termination) of Title 29 DCMR including having a completed, signed, Medicaid Provider Agreement;

- (b) Comply with all technical, programmatic and reporting requirements as set forth in this section;
- (c) Be licensed in accordance with Subsection 910.9; and
- (d) Comply with any applicable consent requirements under District laws, including but not limited to Section 3026 of Title 5-E of the District of Columbia Municipal Regulations if providing telemedicine services at a District of Columbia Public School (DCPS) or District of Columbia Public Charter School (DCPCS).

910.7 An originating site provider shall consist of the following provider types:

- (a) Hospital;
- (b) Nursing Facility;
- (c) Federally Qualified Health Center (FQHC);
- (d) Clinic;
- (e) Physician Group/Office;
- (f) Nurse Practitioner Group/Office;
- (g) DCPS;
- (h) DCPCS; and
- (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).

910.8 A distant site provider shall consist of the following provider types:

- (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.

910.9 When the provider and patient receiving healthcare services are located in the District of Columbia, all individual practitioners shall be licensed in accordance with the District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code §§ 3-1201 *et seq.* (2016 Repl. & 2018 Supp.)). For healthcare services rendered outside of the District, the provider of the services shall meet any licensure requirements of the jurisdiction in which the patient is physically located.

910.10 Medicaid reimbursement of healthcare services rendered at the originating site shall include only those healthcare services which are covered under the State Plan and implementing regulations.

910.11 Medicaid reimbursement of healthcare services rendered at the distant site shall include only the following healthcare services:

- (a) Evaluation and management;
- (b) Consultation of an evaluation and management of a specific healthcare problem requested by an originating site provider;
- (c) Behavioral healthcare services including, but not limited to, psychiatric evaluation and treatment, psychotherapies, and counseling; and
- (d) Speech therapy.

910.12 To be eligible for Medicaid reimbursement, a telemedicine provider shall utilize the reimbursement codes designated for telemedicine available at [www.dhcf.dc.gov](http://www.dhcf.dc.gov).

910.13 A telemedicine provider shall comply with the following technology requirements:

- (a) Use a camera that has the ability to, either manually or by remote control, provide multiple views of a patient and has the capability of altering the camera's resolution, and focus as needed during the consultation;

- (b) Use audio equipment that ensures clear communication and includes echo cancellation;
- (c) Ensure internet bandwidth speeds sufficient to provide quality video to meet or exceed fifteen (15) frames per second;
- (d) Use a display monitor size sufficient to support diagnostic needs used in the telemedicine services; and
- (e) Use video and audio transmission equipment with less than a three hundred (300) millisecond delay.

910.14 Effective January 1, 2017, DHCF shall send a Telemedicine Program Evaluation survey to providers, no more than every three (3) months, via email or regular US mail. A provider shall have thirty (30) calendar days to respond to the survey via email or regular US mail.

910.15 A telemedicine provider shall develop a confidentiality compliance plan in accordance with Health Insurance, Portability, and Accountability Act of 1996, approved August 21, 1996 (Pub. L. No. 104-191, 110 Stat. 1936) (HIPAA) administrative simplification guidance from the Department of Health and Human Services, Office of Civil Rights, available at: <http://www.hhs.gov/sites/default/files/hipaa-simplification-201303.pdf> to incorporate appropriate administrative, physical, and technical safeguards around data encryption (both for data in transit and at rest) and to protect the privacy of telemedicine participants and ensure compliance with the HIPAA and the Health Information Technology for Economic and Clinical Health (HITECH) Act of 2009, approved February 17, 2009 (Pub. L. No. 111-5, §§ 13001-424, 123 Stat. 226).

910.16 When clinically indicated, an originating site provider or its designee shall be in attendance during the patient's medical encounter with the distant site professional. An originating site provider shall not be required to be in attendance when the beneficiary prefers to be unaccompanied because the beneficiary feels the subject is sensitive. Sensitive topics may include counselling related to abuse, or other psychiatric matters. An originating site provider shall note their attendance status in the patient's medical record.

910.17 When DCPS or DCPCS is the originating site provider, a primary support professional shall be in attendance during the patient's medical encounter, consistent with Subsection 910.16.

910.18 A primary support professional is an individual designated by the school to provide supervisory services for school-based healthcare services. A primary support professional includes a paraprofessional, classroom teacher, resource

room staff, library media specialist, and any other certified or classified school staff member.

- 910.19 Each telemedicine provider shall maintain complete and accurate beneficiary records of services provided (not to include videos) for each beneficiary that document the specific healthcare services provided to each beneficiary for a period of ten (10) years or until all audits are completed, whichever is longer.
- 910.20 All beneficiary, personnel and telemedicine program administrative and fiscal records shall be maintained so that they are accessible and readily retrievable, upon request, for inspection and review or audit by DHCF, the federal Centers for Medicare and Medicaid Services, and other authorized government officials or their agents.
- 910.21 A provider shall not be reimbursed by Medicaid for healthcare services delivered via telemedicine when:
- (a) A provider is only assisting the beneficiary with technology and not delivering a healthcare service; or
  - (b) The healthcare service is incomplete.
- 910.22 Reimbursement shall be prohibited for an incomplete healthcare service when the service is not fully rendered due to technical interruptions or other service interruptions resulting in the partial delivery of care.
- 910.23 Telemedicine providers shall be subject to the standard billing practices that are in place for the healthcare services provided in accordance with the relevant regulations, policies, or transmittals issued by the DHCF.
- 910.24 Where a FQHC provides any of the allowable healthcare services described within this Section at the originating or distant site, the FQHC shall be reimbursed at the applicable rate, prospective payment system (PPS), alternative payment methodology (APM), or fee-for-service rate, consistent with Chapter 45 (Medicaid Reimbursement for Federally Qualified Health Centers) of Title 29 DCMR and Subsection 910.27.
- 910.25 If an FQHC is both the originating and distant site provider, and both sites deliver the same healthcare service as outlined in Subsection 910.24, only the distant site will be eligible for reimbursement.
- 910.26 In accordance with the DCPS/DCPCS Medicaid payment methodology, when DCPS or DCPCS provides any of the allowable healthcare services at the originating or distant site, the provider shall only be reimbursed for distant site healthcare services that are Medicaid eligible and are to be delivered in a licensed education agency.

- 910.27 In accordance with the Mental Health Rehabilitation Services Medicaid payment regulations under Chapter 54 of Title 29 DCMR, and consistent with Chapter 34 of Title 22-A DCMR, when an originating site and a distant site are CSAs, and the same provider identification number is used for a serviced delivered via telemedicine, only the distant site provider shall be eligible for reimbursement of the allowable healthcare services described within this section.
- 910.28 Telemedicine providers shall not be reimbursed for a telemedicine transaction fee and/or facility fee.
- 910.29 Telemedicine providers shall not be reimbursed for store and forward and remote patient monitoring.

910.99 **DEFINITIONS**

When used in this section, the following terms and phrases shall have the meanings ascribed below:

**Bandwidth** - A measure of the amount of data that can be transmitted at one time through a communication conduit

**Core Service Agency** - A Department of Behavioral Health (DBH) certified community-based mental health provider that has entered into a Human Care Agreement with DBH to provide specified mental health rehabilitation services.

**Data Encryption** - The conversion of electronic data into another form which cannot be easily understood by anyone except authorized parties.

**Designee** - A person designated by the provider based on the person's clinical or administrative qualification to facilitate the delivery of health services by way of telemedicine at the originating site.

**Echo Cancellation** - A process which removes unwanted echoes from the signal on an audio and video telecommunications system.

**Facility Fee** - An add-on payment to a provider for the use of their facility for telemedicine.

**Fee-For-Service Program** - A healthcare payment system that provides Medicaid reimbursement to providers in accordance with a fee schedule, rather than through a Managed Care Organization.

**Incomplete Service** - A healthcare service that is not fully rendered for reasons to include any technical interruptions or other service interruptions that result in the partial delivery of care.

**Medical Encounter** - A healthcare service delivered through a through a two-way, real time, interactive video-audio communication system.

**Remote Patient Monitoring** - A digital technology that collects medical and/or health data from individuals in one location and electronically transmits that information securely to health care providers in a different location for assessment and recommendations.

**Store and Forward** - A technology that allows for the electronic transmission of medical information, such as digital images, documents, and pre-recorded videos through secure email transmission.

**Supervisory Services** – The oversight of services delivered via telemedicine by a primary support professional at the originating site.

**Transaction Fee** - An add-on payment to a provider for delivering a healthcare service via telemedicine.

Comments on these rules should be submitted in writing to Melisa Byrd, Senior Deputy/ State Medicaid Director, Department of Health Care Finance, Government of the District of Columbia, 441 4<sup>th</sup> Street, N.W., Suite 900, Washington, D.C. 20001, via telephone on (202) 442-8742, via email at [DHCFPublicComments@dc.gov](mailto:DHCFPublicComments@dc.gov), within thirty (30) days of the date of publication of this notice in the *D.C. Register*. Additional copies of these rules are available from the above address.