The Evolution of Emergency Regulatory Changes for Telehealth Access During the Public Health Emergency

Carmel Shachar

Executive Director
Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics

@CarmelShachar

Federal Public Health Emergency

- The Secretary of the Department of Health and Human Services (HHS) may, under section 319 of the Public Health Service (PHS) Act, determine that:
  - a disease or disorder presents a public health emergency (PHE); or
  - that a public health emergency, including significant outbreaks of infectious disease or bioterrorist attacks, otherwise exists
- PHE lasts for 90 days and can be extended repeatedly
- COVID PHE started on Jan 27, 2020
- Current extension runs through April 16, 2022

PHE Impact on Telehealth

- HIPAA flexibility
- Medicare and Medicaid policies governing telehealth
- Telehealth licensing requirements

A lot of the telehealth pandemic boom is based on regulatory relaxations that exist only during a PHE. Removing the PHE could cause significant challenges if not done with a thoughtful transition plan.

PHE Impact on Telehealth: HIPAA Flexibility

- Goal has been to facilitate access to care through various telehealth modalities
- OCR Notice of Enforcement Discretion: “A covered health care provider that wants to use audio or video communication technology to provide telehealth to patients during the COVID-19 nationwide public health emergency can use any non-public facing remote communication product that is available to communicate with patients”
- AMA has asked for a year long “glide path”

PHE Impact on Telehealth: Medicare and Medicaid Policies

Patient Location	• No geographic restriction on patient
Provider Location	• Able to provide services at home
Modality:	• Allows for some audio-only
Services	• Approximately 240 different codes allowed, some will be kept post-PHE
Reimbursement	• Payment parity

PHE Impact on Telehealth: Telehealth Licensing Requirements

- State based licensing is one of the major barriers to telehealth
  - Virtually impossible to develop a national practice
- 21 states waiving or modifying their licensing requirements based on PHE
  - NJ: expedited applications for out of state doctors applying for NJ licenses
  - CT: established specific telehealth license
- Started a patchwork, continues to be a patchwork, will end in a patchwork

Thanks!

@CarmelShachar

cshachar@law.harvard.edu