

June 28, 2017

Devashree Brittingham, Executive Director
Delaware Board of Medical Licensure and Discipline
Cannon Building
861 Silver Lake Blvd.
Dover, DE 19904

RE: DPR Proposed Medical Licensure and Discipline Board Telemedicine Regulation [20 DE Reg. 953 (6/1/17)]

Dear Ms. Brittingham:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Delaware Board of Medical Licensure and Discipline proposal to clarify the language in the Medical Practice Act pertaining to telemedicine and telehealth. Council understands that the regulation was originally published in November but based on the results of a public hearing and comments submitted on the November initiative, the Division revised its proposed regulation which is now being republished. The sole focus of the proposed regulation is physician participation in telemedicine. Council would like to share the following observations.

First, a representative of the Michael J. Fox Foundation for Parkinson's Research promoted an authorization to allow "audio-only" telemedicine. This view is not foreclosed by statute since House Bill No. 69 (enacted in 2015) refers disjunctively to "telemedicine" as "real time two-way audio, visual, or other telecommunications....". In contrast, Nemours recommended, based on studies, that telemedicine be limited to contemporaneous audio and visual communication. The Division deferred to the views of Nemours. Council endorses this approach which is supported by both federal Medicare and Delaware State Medicaid standards. See 42 C.F.R. 410.78(a)(3) and DMMA telemedicine regulations at 16 DE Reg. 314 (9/1/12) and 19 DE Reg. 20 (7/1/15).

Second, Nemours also "supported a ban on opioid prescribing via telehealth technology, with the exception of buprenorphine and naloxone prescribed for the purposes of treating drug addiction." At 954. The proposed regulation may be ambiguous in the context of the recommended exception for overdose "blockers". Section 19.3 recites that "(n)o opioid prescribing is permitted via telemedicine with the exception of addiction treatment programs..." that have received a Division of Substance Abuse and Mental Health (DSAMH) waiver. It would be unfortunate if a

community physician could not prescribe an opioid reversing drug such as buprenorphine or naloxone via telehealth technology. Naloxone is available to trained law enforcement officers, school nurses and trained laypersons without a prescription. See also 16 Del.C. §§138 and 3001G. Such access suggests that the drugs are not readily subject to abuse. Since a February 26, 2016 article notes that many commercial health insurance policies only cover the drugs if purchased with a prescription, community physicians are still appropriate prescribers of the drugs. The Division may wish to clarify that such prescriptions are exceptions to the “no opioid prescribing” ban in §19.3.

Third, many of the patient participants in telemedicine will be persons with disabilities with a right to “effective communication” in the health care context under the Americans with Disabilities Act (ADA). For example, if a physician opts to use telemedicine with a patient who is deaf, the physician may be required to enlist an interpreter. To ensure consideration of the ADA in the telemedicine context, the Delaware Division of Medicaid and Medical Assistance (DMMA) added the following provision to its telemedicine regulation:

The provision of services through telemedicine must include accommodations, including interpreter and audio-visual modification, where required under the Americans with Disabilities Act (ADA), to ensure effective communication.

See 16 DE Reg. 314, 316-318 (September 1, 2012). The Division should consider inserting a similar standard in §19.0 or, at a minimum, a conforming regulatory note.

Thank you for your consideration of our observations. Please contact me or Wendy Strauss at the GACEC office if you have questions.

Sincerely,

Terri A. Hancharick
Vice Chairperson

TAH:kpc