

**10-144 C.M.R. Chapter 101, MaineCare Benefits Manual
Chapter I, Section 4, Telehealth Services**

**Summary of Public Comments and the Department's Responses
And List of Changes Made to the Final Rule**

The Department of Health and Human Services held a public hearing on July 6, 2023. Written and verbal comments were accepted through July 16, 2023. Comments were received from the following people:

Table of Commenters

1. Al Durgin, LCSW, Director of Continuous Quality Improvement, Spurwink
2. Coralie Giles, RN, President, Maine State Nurses Association, Bangor, ME
3. Elizabeth Mulcahy, DNP, FNP-C, Director of Telehealth, MaineHealth, Portland, ME
4. Jennifer Jello, Co-chair, Acquired Brain Injury Advisory Council
5. Margaret Hartsgrove, Central Maine Healthcare
6. Robert Jay White, Director of Compliance, Sweetser, Saco, ME
7. Sharon Stanley, Director of Operations Improvement, Maine Primary Care Association, Augusta, ME

Summary of Comments and Responses

1. **Comment:** Commenter 1 commented that they appreciate the proposed changes because they will improve access to services for members. The commenter noted they are particularly pleased with the changes that allows consent to be written, verbal, or electronic and commented that these three options for consent would benefit members in settings other than telehealth and should be available for most or all MaineCare services.

Response: The Department thanks the commenter for the comment. No changes to the final rule were made because of this comment.

2. **Comment:** Commenter 2 urged the Department to continue to ensure that telehealth is an optional supplement to in-person care and not a substitute for critical in-person treatment. The commenter commented that while telehealth is touted as a way for some people to increase access to care, substituting telehealth for care provided in person increases the risks of medical errors for a multitude of reasons, which the commenter described. The commenter further stated that audio-only interactions further limit the ability of a doctor or nurse to diagnose or assess a patient and that telehealth and telemonitoring can increase the burden on patients, their family members, and unlicensed home health workers to operate devices and manage their own care. The commenter noted that telemonitoring should be used only to track conditions in between regular in-person appointments, not to substitute for those appointments. The commenter concluded that there are other ways besides telehealth and telemonitoring to increase access to health care while continuing to provide in-person care by licensed health care providers, some of which MaineCare has already put in place.

Response: The Department thanks the commenter for the comment. Pursuant to Section 4.04-1(2), covered services delivered via telehealth must be of comparable quality to what they would be were they delivered in person. No changes to the final rule were made because of this comment.

3. **Comment:** Commenter 2 advised the Department to continue to ensure that MaineCare members have access to in-person care. The commenter commented that the Department should retain the requirements in Section 4.06-2 to notify patients that telehealth is voluntary and that MaineCare will pay for the Member's transportation to covered services. The commenter further advised that the Department should be vigilant to ensure that patients are not pressured into choosing telehealth and to ensure the accessibility of in-person services.

Response: The Department thanks the commenter for the comment. The Department will retain the requirements in Section 4.06-2(A)(2 and 3). No changes to the final rule were made because of this comment.

4. **Comment:** Commenter 2 suggested that the Department make changes to explicitly prohibit the use of telehealth reimbursement provisions to support dangerous acute hospital care at home programs. The commenter explained that hospital-at-home programs are endangering patients by shifting acute inpatient care into the home. These programs replace the 24-hour care and immediate emergency response in hospitals with telemonitoring devices and daily visits by nurses or paramedics. The commenter expanded on the risks of not having immediate responses available.

The commenter suggested that the Department clarify in the final rule that telemonitoring and telehealth are not appropriate for patients in need of acute care. The commenter made specific suggestions on how to do this and added that while acute hospital-level care is certainly a service medically inappropriate for delivery through telehealth, it is better to be explicit.

Response: The Department thanks the commenter for the comment. Section 4.05(B)(2) prohibits providers from delivering covered services via telehealth if it would be medically inappropriate. The Department disagrees that it needs to explicitly say that acute hospital care cannot be delivered via telehealth. No changes were made to the rule because of this comment.

5. **Comment:** Commenter 3 supported removing the requirement that providers may deliver covered services through telephonic telehealth only if interactive telehealth services are unavailable.

Response: The Department thanks the commenter for the comment. No changes were made to the rule because of this comment.

6. **Comment:** Commenter 3 supported the comment to allow members to provide written, verbal, or electronic consent to telehealth services.

Response: The Department thanks the commenter for the comment. No changes were made to the rule because of this comment.

7. **Comment:** Commenter 3 asked for clarification on whether a facility fee can be billed if the patient is at home.

Response: The Department thanks the commenter for the comment. A provider may bill for the facility fee if the member is at home if the provider supports the member's access to telehealth services in accordance with Section 4.07-2(B)(1). No changes were made to the rule because of this comment.

8. **Comment:** Commenter 3 supported the changes to Section 4.07-2(B)(1).

Response: The Department thanks the commenter for the comment. No changes were made to the rule because of this comment.

9. **Comment:** Commenter 3 supported removing the list of services that may not be delivered through telehealth because it allows for easier access to care, creates transparency for services availability, and will help them avoid incorrect billing.

Response: The Department thanks the commenter for the comment. No changes were made to the rule because of this comment.

10. **Comment:** Commenter 3 supported removing the table of codes and rates in Section 4.07-4.

Response: The Department thanks the commenter for the comment. No changes were made to the rule because of this comment.

11. **Comment:** Commenter 3 supported adding guidance to use modifier “93” when billing for services delivered through telephonic telehealth.

Response: The Department thanks the commenter for the comment. No changes were made to the rule because of this comment.

12. **Comment:** Commenter 3 supported modifying the definition of Originating (Member) Site because it will be helpful for patients who may wish to access telehealth from their workplace or another location.

Response: The Department thanks the commenter for the comment. No changes were made to the rule because of this comment.

13. **Comment:** Commenter 3 supported the changes in Sections 4.06-2(A)(5-7), 4.06-2(C-E), 4.03-1, and 4.05(B)(2).

Response: The Department thanks the commenter for the comment. No changes were made to the rule because of this comment.

14. **Comment:** Commenter 4 commented that they agree with many aspects of the proposed rule, including modification of the definition of originating site, the allowance of obtaining verbal consent, and the member’s right to object to videotaping or recording telehealth consultations.

Response: The Department thanks the commenter for the comment. To clarify, the right to object to videotaping and recording already existed in the rule. No changes were made to the rule because of this comment.

15. **Comment:** Commenter 4 commented that the addition of Section 4.03-1(D) could limit access to services for the small population of MaineCare members who are served by providers in neighboring states. The commenter noted MaineCare members who receive residential care in out-of-state facilities because no beds are available in Maine may not be able to access health care via telehealth if the provider is licensed in Maine. In this situation, the commenter noted MaineCare members would have to find new providers who may or may not take MaineCare or may have to travel greater distances to receive face-to-face services in Maine. To overcome this

barrier, some states have developed agreements with neighboring states that allow for telehealth services across borders, and Maine may want to consider this option.

Response: The Department thanks the commenter for the comment. Providers must be appropriately licensed, accredited, certified, and/or registered in the state where the member is located during the provision of the Telehealth Service. The Department does not have the authority, for example, to allow a licensed provider in Maine to deliver a service to a member in New Hampshire if the provider is not appropriately licensed in New Hampshire. Establishing inter-state telehealth agreements is beyond the scope of this rulemaking. No changes were made to the rule because of this comment.

- 16. Comment:** Commenter 5 asked whether the Department reviewed the rate for the originating site facility fee as part of this rulemaking because it appears as if the rate has not changed since 2016.

Response: The Department thanks the commenter for the comment. The Department did not review the rate for the originating site facility fee. No changes were made to the rule because of this comment.

- 17. Comment:** Commenter 6 commented that there is no apparent reason to limit a member's location to the United States when they receive a telehealth service. The commenter explained that a member could need services while they are in Canada or Mexico, for example, and that this is particularly true in the behavioral health field because members may experience mental health challenges while away from Maine and would benefit from receiving services from their established Maine-based provider.

The commenter also expressed that there is no apparent reason to limit the telehealth provider's location to the United States. The commenter noted that members with significant behavioral health needs may benefit from receiving services from their established provider while they are "outside of Maine."

The commenter concluded that use of telehealth should not be geographically restricted to the United States, and this rule should refer to the "jurisdiction" rather than the "state" in which the member is located.

Response: The Department thanks the commenter for the comment. Federal law prohibits Medicaid beneficiaries and providers from receiving and delivering services, respectively, outside the United States. No changes were made to the rule because of this comment.

- 18. Comment:** Commenter 6 commented that the rule should be qualified to say the provider needs to be appropriately licensed or credentialed "if required" in the jurisdiction in which the member is located. The commenter noted some states, such as Florida, have exemptions that allow providers holding out-of-state licenses to provide services there for brief periods of time without obtaining in-state licenses.

Response: The Department thanks the commenter for the comment. The use of "appropriately" is sufficient to account for States' varying licensing requirements and exemptions. No changes were made to the rule because of this comment.

- 19. Comment:** Commenter 6 appreciated the proposed changes because they will improve access to services for members. The commenter is particularly pleased with the change that allows consent to be written, verbal, or electronic. The commenter advocated that these three ways to consent

would benefit members receiving services in settings other than telehealth and should be available for most or all MaineCare services.

Response: The Department thanks the commenter for the comment. No changes were made to the rule because of this comment.

- 20. Comment:** Commenter 7 thanked MaineCare for proposing constructive and needed amendments to several provisions in the proposed rule. The commenter stated the changes would benefit Federally Qualified Health Centers (FQHCs) and would allow patients to easily access the care they deserve. In particular, the commenter relayed that they are pleased to see that the proposed rule adds additional services, removes the requirement that providers may deliver covered services through telephonic telehealth only if interactive telehealth services are unavailable, and removes the restriction in Section 4.07-2(B)(8) and 4.05(E) that the originating facility fee may only be billed when the originating site is in a health care provider's facility.

Response: The Department thanks the commenter for the comment. No changes were made to the rule because of this comment.

- 21. Comment:** Commenter 7 urged the Department to change the proposed requirement that a provider must be licensed in the state where the MaineCare member is located when a service is provided. The commenter is unclear on why this requirement is necessary and said it has the potential to deny payment for services even when applicable laws in Maine and any other state in which the provider or recipient of the service is located would allow for the delivery of the service. The commenter noted that during the public health emergency, state and federal laws were modified to allow for the delivery of services by a provider licensed in one state to a patient located elsewhere. The commenter mentioned those modifications could occur again, and it would be unreasonable to have a separate provision in place that limits reimbursement even when licensure requirements that apply on the date of service have been met. Such a provision could unnecessarily impede access to needed care for a MaineCare member.

The commenter added that if a different state where a MaineCare member is temporarily located has licensing laws that do not require licensure of an out-of-state telehealth provider, so long as that provider is licensed in the state where the provider is located, it would serve no purpose to refuse payment for services that a MaineCare member needs and receives across state lines. Instead, OMS should leave the question of where licenses are required to the licensing authorities of the several states (including Maine's) and reimburse telehealth services whenever they are provided within the scope of the provider's license.

The commenter proposed that the additional paragraph proposed for Section 4.03-1(D) be revised to read: Be appropriately licensed, accredited, certified, registered, or otherwise authorized by law to provide the Telehealth Service based on the location of the member and the provider at the time the service is rendered. The commenter also suggested the Department could simply delete proposed paragraph 4.03-1(D) from the final rule. Section 1 of MBM Ch. 1 already addresses this issue for all services, not just telehealth, by requiring that services must be "performed by enrolled providers within their scope of licensure and/or certification."

Response: The Department thanks the commenter for the comment. If a service is delivered via telehealth, that service technically occurs where the member is located. For that reason, providers must be appropriately licensed in the state where the member is located. The Department is not enforcing stricter licensing requirements. Rather, the Department is deferring to the licensing

requirements that exist wherever the member is located. No changes were made to the rule because of this comment.

- 22. Comment:** Commenter 7 commented the Department should consider removing the phrase “his or her” from Section 4.03-1(A) and substituting a gender neutral, more inclusive term such as “they” or “the Health Care Provider.”

Response: The Department thanks the commenter for the comment. As a result of this comment, the Department changed “his or her” in Section 4.03-1(A) to “their.”

- 23. Comment:** Commenter 7 commented that the term “videotaping” in Section 4.06-2(E) is archaic and might be replaced simply with a reference to video recording generally.

Response: The Department thanks the commenter for the comment. As a result of this comment, the Department changed “videotaping or other recording” in Section 4.06-2(E) to “audio and/or visual recording.”

List of Changes Made to Final Rule
Based on Comments Received and OAG Legal Review

1. As a result of a comment, the Department changed “his or her” in Section 4.03-1(A) to “their.”
2. As a result of a comment, the Department changed “videotaping or other recording” in Section 4.06-2(E) to “audio and/or visual recording.”
3. As a result of Office of Attorney General (OAG) review, deleted the definition for “Established Patient” because it is not meaningfully different than the definition for “Member.”
4. As a result of OAG review, the Department changed the definitions of “Telemonitoring” and “Telehealth” as those definitions were changed by P.L. 2021, ch. 291. The Department also added definitions for “Asynchronous Encounters” and “Synchronous Encounters” as those definitions were defined in P.L. 2021, ch. 291.
5. As a result of OAG review, the Department is retaining reference to the originating facility fee under Section 4.07-4, Reimbursement Rates, because it is reimbursed under this rule. The Department added a sentence explaining that the specific rate for the Telehealth Originating Facility Fee, per visit is listed on the MaineCare provider fee schedule, which is posted on the Department’s website in accordance with 22 MRSA Section 3173-J(7), and the reimbursement rate is legally enforceable as an APA rule, as they are properly incorporated by reference.