

DEPARTMENT OF REGULATORY AGENCIES

Division of Insurance

3 CCR 702-4

LIFE, ACCIDENT AND HEALTH

Emergency Regulation 20-E-16

CONCERNING COVERAGE AND REIMBURSEMENT FOR TELEHEALTH SERVICES DURING THE COVID-19 DISASTER EMERGENCY

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Section 1 Authority

This emergency regulation is promulgated and adopted by the Commissioner of Insurance under the authority of §§ 10-1-108(7), 10-1-109, 10-16-109, 10-16-123 and 10-16-708, C.R.S.

Section 2 Scope and Purpose

The purpose of this emergency regulation is to require carriers offering health benefit plans to reimburse providers for provision of telehealth services using non-public facing audio or video communication products during the COVID-19 nationwide public health emergency.

The Department of Health and Human Services (HHS) issued a declaration on January 31, 2020 of the existence of a national public health emergency due to COVID-19. The National Emergency Order was extended, effective October 23, 2020, through January 20, 2021. On March 11, 2020, Governor Polis issued Executive Order D 2020 003 declaring a disaster emergency due to the presence of COVID-19 in Colorado and has extended that declaration, on December 3, 2020, with Executive Order D 2020 268.

On March 17, 2020, the U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR) announced that it will waive potential Health Insurance Portability and Accountability Act (HIPAA) penalties for good faith use of telehealth during the nationwide public health emergency due to COVID-19. OCR is exercising its enforcement discretion to not impose penalties for noncompliance with the HIPAA Rules in connection with the good faith provision of telehealth using such non-public facing audio or video communication products during the COVID-19 nationwide public health emergency. This exercise of discretion applies to telehealth provided for any reason, regardless of whether the telehealth service is related to the diagnosis and treatment of health conditions related to COVID-19. This regulation shall remain in effect for 120 days or during any period in which a disaster declaration is in effect in the state of Colorado or nationally due to the presence of COVID-19, whichever is shorter.

The use of non-public facing remote communication products, including but not limited to audio only telephone calls, shall be considered HIPAA compliant for purposes of § 10-16-123, C.R.S. during the

nationwide public health emergency period when OCR has enforcement discretion regarding HIPAA compliance and providers in Colorado are making a good faith provision of telehealth services.

The Division of Insurance finds, pursuant to § 24-4-103(6)(a), C.R.S., that immediate adoption of this regulation is imperatively necessary for the preservation of public health, safety, or welfare as allowing individuals broader access to telehealth services during the COVID-19 public emergency is imperative to preserve the health of the citizens of Colorado. Therefore, compliance with the requirements of § 24-4-103, C.R.S., would be contrary to the public interest.

Section 3 Applicability

This regulation shall apply to all carriers offering individual, small group, and large group health benefit plans, managed care plans, and student health insurance coverage subject to the insurance laws of Colorado and the requirements of the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (2010), and the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010), together referred to as the "Affordable Care Act" (ACA). This regulation does not apply to stand-alone dental plans.

Section 4 Definitions

- A. "Carrier" shall have the same meaning as found at § 10-16-102(8), C.R.S.
- B. "Commissioner" means, for the purposes of this regulation, the Commissioner of Insurance or his or her designee.
- C. "Health benefit plan" shall have the same meaning as found at § 10-16-102(32), C.R.S.
- D. "Health care services" shall have the same meaning as found at § 10-16-102(33), C.R.S.
- E. "HIPAA" means, for the purposes of this regulation, the Health Insurance Portability and Accountability Act of 1996, which protects the privacy and security of certain health information.
- F. Based on U.S. Department of Health and Human Services Office for Civil Rights FAQs on Telehealth and HIPAA during the COVID-19 nationwide public health emergency, as provided on the adopted date of this regulation and available at <https://www.hhs.gov/sites/default/files/telehealth-faqs-508.pdf>, a "non-public facing remote communication product" shall mean an audio or video communication product that, as a default, allows only the intended parties to participate in the communication. Non-public facing remote communication products would include platforms such as Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, Whatsapp video chat, Zoom, or Skype and commonly used texting applications such as Signal, Jabber, Facebook Messenger, Google Hangouts, Whatsapp, or iMessage. In contrast, public-facing products such as TikTok, Facebook Live, Twitch, or a public chat room are not acceptable forms of remote communication for telehealth because they are designed to be open to the public or allow wide or indiscriminate access to the communication.
- G. "Provider" shall have the same meaning as found at § 10-16-102(56), C.R.S.
- H. "Remote monitoring" shall have the same meaning as found at § 10-16-123(4)(b.5), C.R.S.
- I. "Telehealth" shall have the same meaning as found at § 10-16-123(4)(e), C.R.S.

Section 5 Reimbursement for Telehealth Services

- A. A carrier offering a health benefit plan in this state shall:

1. Reimburse providers for the provision of medically necessary covered health care services that are appropriately provided through telehealth, including but not limited to behavioral health, mental health, substance use disorder, occupational therapy, speech therapy, physical therapy services, dental services that are included in a health benefit plan, and remote monitoring of patients; and
2. Consistent with the guidance issued by HHS on March 17, 2020 on HIPAA enforcement discretion, provision of telehealth services using audio only telephone calls and non-public facing remote communication products shall be considered HIPAA compliant for purposes of § 10-16-123, C.R.S.

B. Telehealth services delivered by providers shall be reimbursed at rates not lower than in-person services delivered by providers and in compliance with state behavioral health parity laws.

C. Carriers shall not impose specific requirements or limitations on the technologies used to deliver telehealth services, including any limitations on audio only or live video technologies.

D. Carriers shall not require a covered person have a previously established patient/provider relationship with a specific provider in order for that covered person to receive medically necessary health care services via telehealth from that provider.

E. Carriers shall not impose additional certification, location, or training requirements as a condition of reimbursing providers for using telehealth services.

F. Carriers shall notify providers of any instructions necessary to facilitate billing for telehealth. Carriers shall ensure this information is prominently displayed on a public-facing website. For purposes of processing payment of a claim, a carrier shall not require a health professional to provide documentation of a health care service or procedure delivered as a telehealth service beyond what is required for the same service or procedure in an in-person setting.

D. If a carrier's providers are unable to use telehealth to provide medically necessary health care services, carriers shall cover such telehealth services by a nonparticipating provider pursuant to § 10-16-704(2)(a), C.R.S.

Section 6 Severability

If any provision of this regulation or the application of it to any person or circumstances is for any reason held to be invalid, the remainder of this regulation shall not be affected.

Section 7 Incorporated Materials

The U.S. Department of Health and Human Services Office of Civil Rights' Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency (Notification) as published on the effective date of this regulation and does not include later amendments or editions of the Notification. A copy of the Notification may be examined during regular business hours at the Colorado Division of Insurance, 1560 Broadway, Suite 850, Denver, Colorado 80202. A certified copy of the Notification may be requested from the Colorado Division of Insurance, 1560 Broadway, Suite 850, Denver, CO 80202. A charge for certification or copies may apply. A copy may also be obtained online at: <https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html>.

Section 8 Enforcement

Noncompliance with this regulation may result in the imposition of any of the sanctions made available in the Colorado statutes pertaining to the business of insurance, or other laws, which include the imposition

of civil penalties, issuance of cease and desist orders, and/or suspensions or revocation of license, subject to the requirements of due process.

Section 8 Effective Date

This emergency regulation shall be effective December 15, 2020.

Section 9 History

The Emergency Regulation replaces Emergency Regulation 20-E-11 effective August 14, 2020.