



## Common Sense Initiative

**Mike DeWine**, Governor  
**Jon Husted**, Lt. Governor

**Sean McCullough**, Director

### MEMORANDUM

**TO:** Nathan Smith, State Medical Board of Ohio

**FROM:** Michael Bender, Business Advocate

**DATE:** September 22, 2022

**RE:** **CSI Review – Medical Board Telehealth Rules (OAC 4731-37-01, 4731-11-09, 4730-1-07, 4730-2-07, 4759-11-01, 4761-15-01, and 4778-1-06)**

On behalf of Lt. Governor Jon Husted, and pursuant to the authority granted to the Common Sense Initiative (CSI) Office under Ohio Revised Code (ORC) section 107.54, the CSI Office has reviewed the abovementioned administrative rule package and associated Business Impact Analysis (BIA). This memo represents the CSI Office's comments to the Board as provided for in ORC 107.54.

#### Analysis

This rule package consists of two new rules, five amended rules, and one rescinded rule proposed by the State Medical Board of Ohio (Board). This rule package was submitted to the CSI Office on May 16, 2022, and the public comment period was held open through May 31, 2022. Unless otherwise noted below, this recommendation reflects the version of the proposed rules filed with the CSI Office on May 16, 2022.

Ohio Administrative Code (OAC) 4731-37-01, a new rule, specifies definitions related to telehealth services and authorizes health care professionals to provide telehealth services on the condition that they comply with certain requirements which include following all standard of care requirements. OAC 4731-11-09 is rescinded and replaced by a rule with the same number, as proposed revisions comprise more than fifty percent of the rule. OAC 4731-11-09, the proposed new rule, specifies additional definitions with regards to telehealth services and permits a physician or physician assistant to prescribe a controlled substance to a new patient through telehealth services for hospice or palliative care, substance use disorder, a mental health condition, an emergency situation, or an exception authorized by federal law. OAC 4730-1-07 provides for the chapters of the OAC that apply to physician assistants. The rule is amended to incorporate proposed rule OAC 4731-37-01. OAC

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4730-2-07 provides for the standards for a physician assistant to prescribe a drug or therapeutic device. The rule is amended to incorporate proposed rule OAC 4731-37-01. OAC 4759-11-01 provides for the chapters of the OAC that apply to dietitians. The rule is amended to incorporate proposed rule OAC 4731-37-01. OAC 4761-15-01 provides for the chapters of the OAC that apply to respiratory care professionals. The rule is amended to incorporate proposed rule OAC 4731-37-01. OAC 4778-1-06 provides for the chapters of the OAC that apply to genetic counselors. The rule is amended to incorporate proposed rule OAC 4731-37-01.

During early stakeholder outreach, the Board engaged with numerous stakeholders to obtain input regarding the development of its rules implementing the telehealth law, Substitute House Bill 122, which was passed in December 2021. The Board sought feedback on its preliminary rules throughout January and February 2022, conducting public meetings, videoconferences, and telephone calls in addition to posting the proposed rules on its website, circulating them with interested parties, and emailing them to all licensees. In total, the Board received seven written comments before initial circulation and sixty-three comments during the initial comment period. The Board subsequently incorporated many of the stakeholder comments into the proposed rules filed with the CSI Office. During the CSI public comment period, the Board received comments from the American Telemedicine Association (ATA), ATA Action, 1-800 Contacts, Babylon Health, BlueStar Health, Circle Medical – A UCSF Affiliate (Circle Medical), Hims, One Medical, 20/20NOW, the Academy of Medicine of Cleveland & Northern Ohio (AMCNO), the Ohio State University Wexner Medical Center (OSUWMC), Ohio State University Physicians (OSUP), the Ohio Council of Behavioral Health & Family Services Providers (Ohio Council), the Ohio Hospital Association (OHA), Teladoc Health, the Ohio Academy of Nutrition and Dietetics (OAND), MDLIVE, the Ohio Society for Respiratory Care (OSRC), the Ohio Association for the Treatment of Opioid Dependence (OATOD), and the Cleveland Clinic. Comments addressed issues such as the requirement to refer the patient to another health care professional for an in-person visit if the appropriate standard of care cannot be met virtually, helping the patient identify an emergency room if emergency care is needed, patient consent for telehealth treatment, utilizing text messages for telehealth services, and patient records.

The OATOD expressed its support for the proposed rules. The ATA, ATA Action, 1-800 Contacts, Babylon Health, BlueStar Health, Circle Medical, Hims, One Medical, 20/20NOW, the OSUWMC, OSUP, the OHA, Teladoc Health, and MDLIVE believed that the referral provision as drafted would hold telehealth providers to a higher standard of care than that required for an in-person visit, thereby placing telehealth providers at a competitive disadvantage and increasing health care costs for Ohio consumers. The Board responded by revising the rules so that the provision required a general referral to another appropriate health care professional rather than a referral to a specific health care professional with whom the telehealth provider has a cross-coverage agreement. The ATA, ATA Action, 1-800 Contacts, Babylon Health, BlueStar Health, Circle Medical, Hims, and One Medical also expressed concerns that the provision requiring the telehealth provider to assist the patient in

identifying the closest emergency room if the patient needs emergency care could risk patient safety by delaying their arrival to the emergency room. The Board revised the rules to only keep this requirement if the patient can travel safely without emergency transport services while requiring the provider to either advise the patient to call 911 if they cannot travel safely without emergency transport services or, if the patient is incapacitated, to call 911 and remain on the communication technology. The Ohio Council, OAND, and OSRC requested that the rules also apply to health care professionals providing telehealth services to patients who are out of state. The Board replied that its authority and jurisdiction were limited to patients who were within the state of Ohio when the telehealth services occur and did not make this suggested change as a result, adding however that it would provide guidance on its website on how to obtain information regarding out of state telehealth practice.

The AMCNO and Cleveland Clinic thought that the definition for “consent for telehealth treatment” would create a different standard of care by requiring practitioners who provide telehealth services to explain the risks and benefits of and alternatives to remote care. The Board did not revise the definition, stating that it was the result of substantial input from stakeholders and that the intent is simply to educate the patient so they can properly give consent to receiving telehealth treatment. The Cleveland Clinic also urged the Board to expand the definitions of “asynchronous communication technology” to include text messages without visualization of the patient and “emergency situation” more broadly so more patients could obtain a needed schedule II substance. The Board did not make these changes, explaining that it did not wish to expand the definition of “asynchronous communication technology” past what is allowed under federal law or define “emergency situation” more broadly given the opioid overdose epidemic and the exceptions already in the draft of the rules. Teladoc Health made additional suggestions of amending the rules to require health care professionals who provide telehealth services to obtain patient consent for the transmission of patient records and to clarify that health care professionals involved in formal consultation while providing telehealth services must only obtain the medical records relevant to the medical condition which is the subject of the consultation rather than all the patient’s medical records. The Board revised the rules to reflect the suggestion concerning relevant medical records but did not amend the rules to require patient consent to transmit patient records, citing current practice and consistency with the federal Health Insurance Portability and Accountability Act Privacy Rule.

The business community impacted by the rules includes physicians, physician assistants, dietitians, respiratory care professionals, and genetic counselors. The adverse impacts created by the rules include the time needed to learn and comply with the proposed rules and disciplinary actions taken by the Board against health care professionals who violate them such as a monetary fine. The Board states that the adverse impacts to business are justified to provide standards for the practice of telehealth by designated health care professionals as required by the telehealth law, thereby protecting patient health and safety in the delivery and receipt of telehealth services.

### **Recommendations**

Based on the information above, the CSI Office has no recommendations on this rule package.

### **Conclusion**

The CSI Office concludes that the Board should proceed in filing the proposed rules with the Joint Committee on Agency Rule Review.