The Tide in Texas is Turning Toward Telemedicine

By Neil Issar | April 27, 2017

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As reported in the September 2016 and February 2017 issues of *Health Law Vitals*, Texas and other states are responding to the growing utilization of technology in the delivery of healthcare, with lawmakers passing and amending state laws related to telemedicine and telehealth. At the federal level, the Trump administration also appears to favor advancement of telehealth technology,[1] and Senators Cory Gardner (R-CO) and Gary Peters (D-MI) recently introduced a bill that would expand Medicare's coverage of telehealth services by permitting eligible hospitals, through the Center for Medicare and Medicaid Innovation, to test the effect of including telehealth services in Medicare healthcare delivery models.[2]

In Texas, the rising use of telemedicine may be buoyed by legislation being considered by the Texas Legislature: SB 1107 by Senator Charles Schwertner and the companion bill as filed, HB 2697, by Representative Four Price. A key provision of the legislation is authorizing the establishment of a physician-patient relationship via telemedicine by removing the face-to-face meeting or in-person consultation requirement. SB 1107 passed the Senate and is pending consideration by the House. HB 2697 was heard in committee in late March and was modified to address payers' concerns with the provisions regarding payment practices and coverage mandates. Additionally, new provisions in the committee substitute of HB 2697 will subject some of the state's Medicaid telemedicine policies to new rulemaking to establish separate identifiers for telemedicine providers and for services eligible for reimbursement and will eliminate the requirements for face-to-face meetings and health professional telepresenters. As the Texas Legislature is scheduled to adjourn on May 29, a change in the law is likely forthcoming.

The activity is a welcome change for Teladoc, a Dallas-based provider of telemedicine services—offering access to physicians by phone and online video consultations—that has repeatedly clashed with the Texas Medical Board ("TMB") over the past five years. The TMB previously engaged in rulemaking to require a face-to-face or in-person evaluation to establish a defined physician-patient relationship, and Teladoc responded with lawsuits seeking injunctions. The action was initially stayed until April 19, 2017, but the stay was recently extended until September 1, 2017. The proposed bills and regulatory changes suggest that the dispute could be resolved legislatively in Teladoc's favor. If SB 1107 / HB 2697 become law, the TMB could not supersede the statute by rulemaking, meaning that many of the TMB's 2015 telemedicine rules (including those at issue in the Teladoc lawsuit) would need to be modified.

Supporters of Teladoc have advocated for narrowing of the TMB's authority to impose restrictions on telemedicine because "expanded access to telemedicine would help rural residents more efficiently access care through telemedicine apps and websites."[3] In fact, rural access to telemedicine was specifically identified by Texas state leaders as a topic to study in advance of the regular session of the 85th Legislature.[4] The House Committee on Public Health published an interim report on the history of telemedicine, the benefits of its use in rural and underserved areas, the adequacy of Texas's technological infrastructure, and reimbursement practices for

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telemedicine.[5] And the Senate Committee on Health and Human Services reported on barriers to implementation and access to telemedicine in rural areas.[6]

Other telemedicine-related bills of interest that are being considered by the Texas Legislature include:

- **HB 1697** (Rep. Four Price): amends the Government Code to require the Health and Human Services Commission, with the assistance of pediatric tele-specialty providers, to establish and implement a pediatric tele-connectivity resource program for rural Texas. The program would award grants to non-urban healthcare facilities to connect them with pediatric specialists and subspecialists who provide telemedicine medical services. The goal of the bill is to improve access to pediatric subspecialists, such as neonatologists and pediatric trauma and emergency department specialists; connect rural hospitals to the state's advanced pediatric specialists; and reduce the number of fragile infants who must be transferred to large urban centers for specialty care.
- **HB 2123** (Rep. Larry Gonzales); **SB 922** (Senator Dawn Buckingham): HB 2123 and identical companion bill SB 922 amend the Government Code to ensure Medicaid reimbursement is provided to a school district or charter school for telehealth services provided through the school district or charter school even if the service-providing health professional is not the patient's primary care physician or provider ("PCP"). Reimbursement would still require the school district or charter school to be an authorized healthcare provider under Medicaid, the consent of the parent or legal guardian, and the presence of another health professional. A similar bill was passed last session allowing for telemedicine in primary or secondary schools even if the provider is not the PCP.[7]
- **SB 1428** (Senator Van Taylor): amends the Occupations Code such that physicians or health professionals providing only mental health telemedicine medical services are not required, among other things, to conduct a face-to-face or in-person evaluation to establish a physician-patient relationship.
- **SB 1585** (Senator Carlos Uresti): amends the Government Code to allow Medicaid reimbursement for respiratory care practitioners providing telemedicine, telehealth, and home telemonitoring services while acting under the delegation and supervision of a physician.
- **SB 2134** (Senator Eddie Lucio): amends the Health and Safety Code by adding a subchapter relating to an action plan to expand the use of telemedicine medical services, telehealth services, and related mobile applications for those services in Texas. The plan would also increase the availability of critical medical care and healthcare services to residents living in medically underserved areas.

In a related move, on March 17, 2017, the Texas Health and Human Services Commission adopted a modification to § 354.1432 of the Texas Administrative Code to require Medicaid patients to receive an initial evaluation prior to receiving telehealth services (with the exception of services to treat a mental health diagnosis or condition), but allowing this initial evaluation to be conducted in person *or through a telemedicine visit* that complies with TMB rules.[8]

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[1] *See* Francesca R. Ozinal, *Telehealth Outlook Under the Trump Administration*, TECHHEALTH PERSPECTIVES (Mar. 10, 2017).

[2] S. 787, 115th Cong. (2017).

[3] Lauren Ames, *Emerging issues in Texas telemedicine regulation* 5 (House Research Org. Report, No. 85-5, 2017).

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[4] *Id*. at 3.

[5] *Id.* (citing House rel="noopener noreferrer" Comm. on Public Health, Interim Report to the 85th Texas Legislature 21–28 (Dec. 2016).

[6] *Id.* (citing rel="noopener noreferrer" Texas Senate Comm. On rel="noopener noreferrer" Health and Human Servs., Interim Report to the 85th Legislature 92–101 (Nov. 2016).

[7] *See* H.B. 1878, 84th Leg., Reg. Sess. (Tex. 2015); S.B. 1689, 84th Leg., Reg. Sess. (Tex. 2015).

[8] 42 Tex. Reg. 1193, 1245 (Mar. 17, 2017).

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