



April 13th, 2020

Jeffrey Oldham
General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711-2428

Re: Office of Civil Rights' Notification of Enforcement Discretion on Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency

Dear Mr. Oldham:

As organizations that support Texas' physicians and health care providers, the organizations listed above and listed below thank you for your work to facilitate the use of telemedicine and telehealth in Texas during the COVID-19 public health emergency. Your efforts in authorizing the waiver of certain statutes and regulations related to telemedicine and telehealth (along with directing relevant state agencies to adopt emergency rules) have been critical in helping physicians and health care providers treat patients while mitigating the spread of COVID-19.

In particular, we appreciate your efforts and coordination with: (1) the Texas Medical Board (TMB) to expand the permissible technologies for creating a "practitioner-patient relationship" under Tex. Occ. Code §111.005 and (2) the Texas Department of Insurance to promote health plan payment parity for telemedicine and telehealth services with in-person services during this emergency.

As part of your continued efforts to promote the health of Texans and facilitate the utilization of telemedicine and telehealth during the COVID-19 emergency, we respectfully request that you consider an additional area of relief, consistent with federal efforts on this subject matter.

As you may know, on March 17, the U.S. Department of Health and Human Services, Office of Civil Rights (OCR) issued a “Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency.”¹ In this notice, OCR stated:

OCR will exercise its enforcement discretion and will not impose penalties for noncompliance with regulatory requirements under the HIPAA [Privacy, Security, and Breach Notification] Rules against covered health care providers in connection with the good faith provision of telehealth during the COVID-19 nationwide public health emergency. This notification is effective immediately.²

Additionally, OCR noted that “[t]his 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.”³

As the federal enforcement agency for HIPAA Privacy, Security, and Breach Notification Rules, this notification, along with its attendant FAQs,⁴ was an important recognition that physicians and health care providers need to be able to use telemedicine and telehealth (including available *non-public facing* technology) to treat patients during this emergency without the fear of risking federal enforcement action.

However, federal OCR recognition has not provided sufficient comfort to Texas physicians and health care providers who continue to fear state enforcement actions related to Texas laws and regulations that incorporate by reference federal privacy, security, or breach notification requirements, impose state analogues to those federal requirements, or impose related requirements. (See, e.g., 22 Tex. Admin. Code 174.6(b), a TMB rule setting forth minimum standards for telemedicine, which provides that “[a]dequate measures must be implemented to ensure that patient communications, recordings and records are protected consistent with Federal and State privacy laws;” see also Tex. Occ. Code §111.003, which provides that “[a]

¹ See 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” available at: <https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html> (last accessed March 31, 2020).

² *Id.*

³ *Id.*

⁴ See U.S. Department of Health and Human Services Office of Civil Rights “FAQs on Telehealth and HIPAA during the COVID-19 nationwide public health emergency” available at: <https://www.hhs.gov/sites/default/files/telehealth-faqs-508.pdf>.

treating physician or health professional who provides or facilitates the use of telemedicine medical services or telehealth services shall ensure that the confidentiality of the patient's medical information is maintained as required by Chapter 159 or other applicable law;" *see also* Tex. Occ. Code §164.053(a)(1), which permits the TMB to discipline a physician for "[committing] an act that violates any state or federal law if the act is connected with the physician's practice of medicine;" *see also* Tex. Bus & Comm. Code §521.053, which is Texas' breach notification law; *see also* Tex. Health & Safety Code §181.154, which requires a "covered entity" as defined by state law to provide notice to an individual if the individual's protected health information is subject to electronic disclosure.)⁵

During these most challenging of times, physicians and health care providers need to be relieved from complying with these dual enforcement provisions or, at least, relieved of concern that any inconsistencies will be enforced against them at the state level. **Accordingly, pursuant to your authority under Section 418.016(a) of the Government Code, we ask that you temporarily suspend state statutory and regulatory provisions to the extent necessary to align with OCR's notification and FAQs and prevent enforcement⁶ of Texas laws and regulations against physicians and health care providers in connection with the good faith provision of telemedicine or telehealth that: (1) incorporate by reference federal privacy, security, or breach notification requirements; (2) impose state analogues; or (3) impose related requirements that would act against the letter or spirit of OCR's notification and FAQs.**

Again, we note that OCR's notification includes a "good faith" limitation, which we believe strikes a good balance for Texas' patients and physicians. Additionally, we note that OCR uses the broadly defined term "telehealth," while Texas law sometimes uses the mutually exclusive terms of "telemedicine"⁷ to refer to remote health care services provided by physicians and their delegates and "telehealth" to refer to remote health care services provided by other health care professionals.⁸ We, therefore, ask that any action taken on this issue be drafted in a manner that clearly captures both telemedicine and telehealth services under Texas law.

Finally, as the COVID-19 public health emergency and federal measures to address the emergency evolve, we also ask that you consider any subsequent federal waivers or exercises of enforcement discretion that impact privacy, security, and breach notification requirements for implementation at the state level.⁹

⁵ Note that this list is merely illustrative. It is not all-encompassing or complete.

⁶ This would include enforcement of any kind (e.g., disciplinary actions by state licensing boards, actions by the Attorney General for civil penalties, etc.).

⁷ See TEX. OCC. CODE § 111.001(4).

⁸ See TEX. OCC. CODE § 111.001(3).

⁹ See, e.g. SAMHSA's similar guidance; available at: <https://www.samhsa.gov/sites/default/files/covid-19-42-cfr-part-2-guidance-03192020.pdf>

We expect the need for relief in this area to continue to grow as physicians and health care providers encounter new compliance challenges associated with attrition and staffing changes related to the COVID-19 public health emergency. Thus, prompt action to this end is critical.

We appreciate all that you are doing for Texans, including Texas physicians, health care providers, and patients, during this emergency. Thank you for your consideration.

Sincerely,

David C. Fleeger, MD
President
Texas Medical Association

Ted Shaw
Chief Executive Officer
Texas Hospital Association

Nora Belcher
Executive Director
Texas e-Health Alliance

Jose Camacho
Executive Director/General Counsel
Texas Association of Community Health
Centers

Tom Banning
Chief Executive Officer
Texas Academy of Family Physicians

Kevin Warren
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Texas Health Care Association

Danette Castle
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Diana Martinez
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