

Comments on Proposed Rule No. OMH-04-19-00002-P

HEALTH LAW SECTION

Health #1

March 15, 2019

On behalf of the Health Law Section of the New York State Bar Association (“NYSBA”), we are submitting the following comments on the above-referenced Office of Mental Health (“OMH”) rulemaking. NYSBA’s Health Law Section includes nearly 1,350 New York health care law attorneys who devote all or a substantial portion of their practices to the representation of health care providers and practitioners, including those providing services subject to the proposed rulemaking.

In the rulemaking, OMH proposes to amend 10 NYCRR Part 596 relating to the provision of telepsychiatry services in OMH-licensed programs. Existing regulations establish standards and parameters for the approval of the use of telepsychiatry in certain OMH-licensed programs that elect to offer this service. The proposed rulemaking implements statutory amendments expanding the settings in which practitioners and patients may sit during the delivery of telemental health services and increasing the opportunity for the use of telemental health services in the New York State regulated mental health system.

We support the expansion of the telepractice modality to include not only telepsychiatry but all “telemental health” counseling services rendered by mental health counselors licensed by the Office of the Professions, New York State Education Department in the OMH-licensed setting. The proposed expansion is consistent with increasing access to telehealth services throughout the State of New York. In addition, we have the following comments on the proposed rule.

Section 596.5(c)(1): Staffing Requirements

In proposed Section 596.5(c)(1), approval to provide telemental health services would be based on, among other things, a demonstration “that the services are being requested not to fulfill regulatory staffing requirements but because they are necessary to improve the quality of care of individuals receiving services.” We suggest removing the proposed phrase “not to fulfill regulatory staffing requirements,” because it is unnecessary and inconsistent with the overall goal of reducing costs for the provision of services under the Medicaid program. The objective of telehealth generally is to improve quality and increase access to care for individuals in need of services. We believe this proposed requirement would impose undue costs on the telemental health counselor, inconsistent with the statutory intent and the requirements of the Medicaid program.

Section 596.6(b)(1): Initial Assessment

In proposed Section 596.6(b)(1), a provider must have written protocols and procedures addressing, among other things, an “initial assessment in person to determine whether the telepractice modality is appropriate, given the patient’s treatment needs.” We suggest clarifying this requirement to specify that any qualified health care provider may perform the initial assessment to determine the appropriateness of telepractice for a specific patient’s needs.

Section 596.6(b)(2)(i) and (ii): Informed Consent and Minors

Proposed Section 596.6(b)(2)(i) and(ii) would require the provider, for patients under age 18, to share certain information about telemental health services with, obtain informed consent from, and provide information on verifying a practitioner’s professional license to, the patient’s parent or guardian. In the alcohol and substance abuse-related context, however, there are some instances, *see* Mental Hyg. Law § 22.11, in which parental consent is not necessary for minors to receive treatment. We suggest reconciling the informed consent requirements under the proposed regulation with the rules relating to minors in the alcohol and substance abuse-related context.

Section 596.6(a)(4)(i): Technical Specifications for Technology and Equipment

Proposed Section 596.6(a)(4)(i) would require the distant/hub site telemental health practitioner to use technology and equipment “of sufficient quality, size, resolution and clarity such that the provider of services can safely and effectively provide the telemental health services.” This proposed requirement is vague and fails to provide meaningful guidance to the practitioner. If there are specific technical requirements for the technology that OMH believes practitioners should use (for example, “video technology with a resolution of 640 x 360”), we suggest that OMH provide guidance on any such requirements so that practitioners can conform their technology acquisitions accordingly.

Section 596.6(a)(5): Display of License of Current Registration During Encounter

Proposed Section 596.6(a)(5) would require that telemental health practitioners “must display their license and current registration at the distant or hub site so that it is clearly visible during a telemental health encounter and patients must have access to that information for their view.” The requirement that the license and registration must be visible (*i.e.*, in the patient’s line-of-sight) during the encounter is not practical and does not further the intent of the regulation. As an alternative, we suggest revising this proposed provision to require the telemental health practitioner to make its professional license number and a copy of the current registration or the information it contains available to patients.

Section 596.6(a)(11)(iii): Involuntary Removal or Retention

Existing regulations preclude the use of telepsychiatry services “to satisfy any specific statutory examination, evaluation or assessment requirement necessary for the involuntary removal from the community, or involuntary retention in a hospital” under the Mental Hygiene Law. The proposed rulemaking extends this limitation to telemental health services. In our view, this is unduly restrictive. An examination, evaluation or assessment via telemental health can be just as efficacious as an in-person examination, evaluation or assessment. To allow such an examination, evaluation, or assessment to be performed via telemental health would further the goals of increasing patient access to care. We suggest revising the regulations to allow telemental health providers to conduct statutory examination, evaluation or assessment requirements for involuntary removal or retention.

Section 596.7(b)(8)(iii) and (iv): Reimbursement for Telemental Health

In Section 596.7(b), the proposed regulation would require the telemental health practitioner at the distant/hub site, among other things, to be “affiliated with the originating/spoke site facility” and, “if the originating/spoke site is a hospital, credentialed and privileged at the originating/spoke site facility.” In the case of a hospital, it is unclear how these two requirements are different. Presumably, a practitioner who is credentialed and privileged at a hospital is affiliated with that hospital, and vice versa. We suggest condensing the two subsections into one and revising them to read, “(iii) affiliated with the originating/spoke site facility or, if the originating/spoke site is a hospital, credentialed and privileged at the originating/spoke site facility.”

In addition to these comments in proposed Section 596.3(a): There is a reference to “telepsychiatry” that should be changed to “telemental health,” and in proposed Section 596.6(b)(3), a typographical error in the word “technologies.”

We appreciate the opportunity to provide this input on the proposed rule and your consideration of our comments.