

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Health Policy

BILL: SB 330

INTRODUCER: Senator Brodeur

SUBJECT: Medicaid Modernization

DATE: November 2, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Smith	Brown	HP	Favorable
2.			AHS	
3.			AP	

I. Summary:

SB 330 authorizes the Agency for Health Care Administration (AHCA) to reimburse for remote patient monitoring and store-and-forward services as optional services in the Florida Medicaid program, subject to specific appropriations. If the services are rendered, the bill would have a minor operational and indeterminate fiscal impact on Florida Medicaid. *See* section V of this analysis.

The bill provides an effective date of July 1, 2022.

II. Present Situation:

Telehealth

Relevant Terminology

Section 456.47, F.S., defines the term “telehealth” as the use of synchronous or asynchronous telecommunications technology by a telehealth provider to provide health care services, including, but not limited to, assessment, diagnosis, consultation, treatment, and monitoring of a patient; transfer of medical data; patient and professional health-related education; public health services; and health administration. The term does not include audio-only telephone calls, e-mail messages, or facsimile transmissions.

“Synchronous” telehealth refers to the live, real-time, or interactive transmission of information between a patient and a health care provider during the same time period. The use of live video to evaluate and diagnosis a patient would be considered synchronous telehealth.

“Asynchronous” telehealth refers to the transfer of data between a patient and a health care provider over a period of time and typically in separate time frames. This is commonly referred to as “store-and-forward.”

Store-and-forward allows for the electronic transmission of medical information, such as digital images, documents, and pre-recorded videos, through telecommunications technology to a practitioner, usually a specialist, who uses the information to evaluate the case or render a service after the data have been collected.¹ The transfer of X-rays or MRI images from one health care provider to another health care provider for review in the future would be considered asynchronous telehealth through store-and-forward technology.

“Remote patient monitoring” refers to the collection, transmission, evaluation, and communication of individual health data to a health care provider from the patient’s location through technology such as wireless devices, wearable sensors, implanted health monitors, smartphones, and mobile apps.² Remote monitoring is used to monitor physiologic parameters, including weight, blood pressure, blood glucose, pulse, temperature, oximetry, respiratory flow rate, and more. Remote monitoring can be useful for ongoing condition monitoring and chronic disease management. Depending upon the patient’s needs, remote monitoring can be synchronous or asynchronous.

Florida Telehealth Providers

In 2019, the Legislature passed and the Governor approved CS/CS/HB 23, which created s. 456.47, F.S. The bill became effective on July 1, 2019.³ It authorized Florida-licensed health care providers⁴ to use telehealth to deliver health care services within their respective scopes of practice.

The bill also authorized out-of-state health care providers to use telehealth to deliver health care services to Florida patients if they register with the Department of Health (DOH) or the applicable board⁵ and meet certain eligibility requirements.⁶ A registered out-of-state telehealth provider may use telehealth, within the relevant scope of practice established by Florida law and rule, to provide health care services to Florida patients but is prohibited from opening an office in Florida and from providing in-person health care services to patients located in Florida.

Telehealth providers who treat patients located in Florida must be one of the licensed health care practitioners listed below⁷ and be either Florida-licensed, licensed under a multi-state health care licensure compact of which Florida is a member state, or registered as an out-of-state telehealth provider:

- Behavioral Analyst

¹ Center for Connected Health Policy, National Telehealth Policy Resource Center, *Store-and-Forward (Asynchronous)* available at <https://www.cchpca.org/about/about-telehealth/store-and-forward-asynchronous> (last visited Oct. 21, 2021).

² American Board of Telehealth, *Telehealth: Defining 21st Century Care*, available at <https://www.americantelemed.org/resource/why-telemedicine/> (last visited Oct. 21, 2021).

³ Chapter 2019-137, s. 6, Laws of Fla.

⁴ Section 456.47(1)(b), F.S.

⁵ Under s. 456.001(1), F.S., the term “board” is defined as any board, commission, or other statutorily created entity, to the extent such entity is authorized to exercise regulatory or rulemaking functions within the DOH or, in some cases, within the DOH’s Division of Medical Quality Assurance.

⁶ Section 456.47(4), F.S.

⁷ Section 456.47(1)(b), F.S. These are professionals licensed under s. 393.17; part III, ch. 401; ch. 457; ch. 458; ch. 459; ch. 460; ch. 461; ch. 463; ch. 464; ch. 465; ch. 466; ch. 467; part I, part III, part IV, part V, part X, part XIII, and part XIV, ch. 468; ch. 478; ch. 480; part II and part III, ch. 483; ch. 484; ch. 486; ch. 490; or ch. 491.

- Acupuncturist
- Allopathic physician
- Osteopathic physician
- Chiropractor
- Podiatrist
- Optometrist
- Nurse
- Pharmacist
- Dentist
- Dental Hygienist
- Midwife
- Speech Therapist
- Occupational Therapist
- Radiology Technician
- Electrologist
- Orthotist
- Pedorthist
- Prosthetist
- Medical Physicist
- Emergency Medical Technician
- Paramedic
- Massage Therapist
- Optician
- Hearing Aid Specialist
- Clinical Laboratory Personnel
- Respiratory Therapist
- Psychologist
- Psychotherapist
- Dietician/Nutritionist
- Athletic Trainer
- Clinical Social Worker
- Marriage and Family Therapist
- Mental Health Counselor

The Legislature also passed HB 7067 in 2019 that would have required an out-of-state telehealth provider to pay an initial registration fee of \$150 and a biennial registration renewal fee of \$150, but the bill was vetoed by the Governor and did not become law.⁸

On March 16, 2020, Surgeon General Scott Rivkees executed DOH Emergency Order 20-002 authorizing certain out-of-state physicians, osteopathic physicians, physician assistants, and advanced practice registered nurses to provide telehealth in Florida without the need to register

⁸ Transmittal Letter from Governor Ron DeSantis to Secretary of State Laurel Lee (June 27, 2019) *available at* <https://www.flgov.com/wp-content/uploads/2019/06/06.27.2019-Transmittal-Letter-3.pdf> (last visited Oct. 21, 2021).

as a telehealth provider under s. 456.47(4), F.S.⁹ Five days later, the Surgeon General executed DOH Emergency Order 20-003¹⁰ to also authorize certain out-of-state clinical social workers, marriage and family therapists, mental health counselors, and psychologists to provide telehealth in Florida without the need to register as a telehealth provider under s. 456.47(4), F.S. These emergency orders were extended and expired on June 26, 2021.¹¹ Out-of-state health care practitioners are no longer authorized to perform telehealth services for patients in Florida unless they become licensed or registered in Florida.

Florida Medicaid Program

The Medicaid program is a joint federal-state program that finances health coverage for individuals, including eligible low-income adults, children, pregnant women, elderly adults, and persons with disabilities.¹² The Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS) is responsible for administering the federal Medicaid program. Florida Medicaid is the health care safety net for low-income Floridians. Florida's program is administered by the AHCA and financed through state and federal funds.¹³

A Medicaid state plan is an agreement between a state and the federal government describing how the state administers its Medicaid programs. The state plan establishes groups of individuals covered under the Medicaid program, services that are provided, payment methodologies, and other administrative and organizational requirements.

In order to participate in Medicaid, federal law requires states to cover certain population groups (mandatory eligibility groups) and gives states the flexibility to cover other population groups (optional eligibility groups). States set individual eligibility criteria within federal minimum standards. The AHCA may seek an amendment to the state plan as necessary to comply with federal or state laws or to implement program changes. States send state plan amendments to the federal CMS for review and approval.¹⁴

Florida Medicaid enrollees generally receive benefits through one of two service-delivery systems: fee-for-service (FFS) or managed care. Under FFS, health care providers are paid by the state Medicaid program for each service provided to a Medicaid enrollee. Under managed care, the AHCA contracts with private managed care plans for the coordination and payment of

⁹ Department of Health, State of Florida, *Emergency Order DOH No. 20-002* (Mar. 16, 2020) available at <http://floridahealthcovid19.gov/wp-content/uploads/2020/03/filed-eo-doh-no.-20-002-medical-professionals-03.16.2020.pdf> (last visited Oct. 21, 2021).

¹⁰ Department of Health, State of Florida, *Emergency Order DOH No. 20-003* (Mar. 21, 2020) available at <https://s33330.pcdn.co/wp-content/uploads/2020/03/DOH-EO-20-003-3.21.2020.pdf> (last visited Oct. 21, 2021).

¹¹ Florida Board of Medicine, *Important Updates for Health Care Providers Regarding Expiration of Emergency Orders* (July 1, 2021) available at https://r.bulkmail.flhealthsource.gov/mk/mr/JV-U0AMitwBXIP7zcFx3Djqu1KfE1B57JaGN-nnNySmOjEY5xGSsIyII28XjOGeZ4yKv9rWQUryqAibmdrixNZdgE9Q61dmUoHRF1Rnyijg-ewyAl_rZBT8c (last visited Oct. 18, 2021).

¹² Medicaid.gov, *Medicaid*, available at <https://www.medicaid.gov/medicaid/index.html> (last visited Oct. 21, 2021).

¹³ Section 20.42, F.S.

¹⁴ Medicaid.gov, *Medicaid State Plan Amendments*, available at <https://www.medicaid.gov/medicaid/medicaid-state-plan-amendments/index.html> (last visited Oct. 21, 2021).

services for Medicaid enrollees. The state pays the managed care plans a capitation payment, or fixed monthly payment, per recipient enrolled in the managed care plan.

In Florida, the majority of Medicaid recipients receive their services through a managed care plan contracted with the AHCA under the Statewide Medicaid Managed Care (SMMC) program. The SMMC program has two components, the Managed Medical Assistance (MMA) program and the Long-term Care program. Florida's SMMC offers a health care package covering both acute and long-term care. The SMMC benefits are authorized by federal authority and are specifically required in ss. 409.973 and 409.98, F.S.

The AHCA contracts with managed care plans on a regional basis to provide services to eligible recipients. The MMA program, which covers most medical and acute care services for managed care plan enrollees, was fully implemented in August 2014 and was re-procured for a period beginning December 2018 and ending in 2023.

Medical Necessity Requirements

Florida Medicaid covers services that are medically necessary, as defined in its Medicaid state plan pursuant to Rule 59G-1.010 of the Florida Administrative Code. Care, goods, and services fit the definition of "medically necessary" if they are:

- Necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain;
- Individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs;
- Consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational;
- Reflective of the level of service that can be safely furnished, and *for which no equally effective and more conservative or less costly treatment is available statewide*; and
- Furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider.

Telemedicine Coverage under the Florida Medicaid Program

Florida Medicaid covers telemedicine in both the managed care and fee-for-service delivery systems.

Medicaid health plans have broad flexibility in covering telemedicine services.¹⁵ In the 2018 negotiations for the re-procurement of Medicaid health plan contracts, health plans agreed to cover additional telemedicine modalities at no cost to the state, including remote patient monitoring and store-and-forward services.¹⁶ Services provided through these additional telemedicine modalities are not included in the capitation rates the AHCA pays to the plans.¹⁷

¹⁵ Agency for Health Care Administration, Florida Medicaid Health Care Alert, *Medicaid Telemedicine Guidance for Medical and Behavioral Health Providers* (Mar. 18, 2020) available at https://ahca.myflorida.com/Medicaid/pdf/ahca/provider_alerts/2020_03/Medicaid_Telemedicine_Guidance_20200318.pdf (last visited Oct. 21, 2021).

¹⁶ Agency for Health Care Administration, *2021 Senate Bill 852 Fiscal Analysis* (Feb. 1, 2021) (on file with the Senate Committee on Health Policy).

¹⁷ *Id.*

Medicaid health plans are required to cover telemedicine services in “parity” with face-to-face services, meaning the health plan must cover services via telemedicine in a manner no more restrictive than the health plan would cover the service face-to-face.¹⁸ For example, a health plan may not require the prior authorization of a service delivered via telemedicine if it does not require prior authorization of that service delivered face-to-face.¹⁹

Under the fee-for service delivery system and in times of non-emergency, Florida Medicaid generally reimburses only for synchronous telemedicine services provided through the use of audio-visual equipment.²⁰ On March 18, 2020, the AHCA issued a Florida Medicaid Health Care Alert to provide telemedicine guidance for all medical and behavioral health care providers during the COVID-19 state of emergency.²¹ Throughout the duration of the state of emergency, the AHCA expanded telehealth to include and provide for the reimbursement of certain store-and-forward and remote patient monitoring modalities rendered by licensed physicians, APRNs, and PAs functioning within their scope of practice.²² The AHCA also expanded services provided through telemedicine that may be reimbursed under the FFS delivery system to include certain therapies, medication management, behavioral health, and medication-assisted treatment services.²³ The state of emergency expired on June 26, 2021, as Executive Order 21-94 expired.

The Federal Health Insurance Portability and Accountability Act (HIPAA)²⁴

HIPAA Privacy Rule²⁵

The federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) protects personal health information. The HIPAA Privacy Rule sets national standards for when protected health information (PHI) may be used and disclosed.

Only certain entities and their business associates are subject to HIPAA’s provisions. These “covered entities” include: health plans, health care providers; and health care clearinghouses.

The Privacy Rule gives individuals privacy and confidentiality rights with respect to their protected PHI, including rights to examine and obtain a copy of their health records in the form and manner they request, and to ask for corrections to their information. Also, the Privacy Rule permits the use and disclosure of health information needed for patient care and other important purposes.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Supra* note 15.

²² *Id.*

²³ Agency for Health Care Administration, Florida Medicaid Health Care Alert, *Medicaid Telemedicine Flexibilities for Behavioral Health Providers During the COVID-19 State of Emergency* (Apr. 16, 2020) available at http://portal.flmmis.com/FLPublic/Provider_ProviderServices/Provider_ProviderSupport/Provider_ProviderSupport_Provide rAlerts/tabId/48/Default.aspx (last visited Oct. 21, 2021).

²⁴ Centers for Medicare & Medicaid Services, *Medicare Learning Network Booklet, HIPAA Basics for Providers: Privacy, Security, and Breach Notification Rules* (May. 2021) available at <https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/Downloads/HIPAAPrivacyandSecurity.pdf> (last visited Oct. 29, 2021).

²⁵ 45 C.F.R. Part 160 and Subparts A and E of Part 164.

The Privacy Rule protects PHI held or transmitted by a covered entity or its business associate, in any form, whether electronic, paper, or verbal. PHI includes information that relates to any of the following:

- The individual's past, present, or future physical or mental health or condition;
- The provision of health care to the individual; or
- The past, present, or future payment for the provision of health care to the individual.

HIPAA Security Rule²⁶

The HIPAA Security Rule specifies safeguards that covered entities and their business associates must implement to protect electronic PHI (ePHI) confidentiality, integrity, and availability.

Covered entities and business associates must develop and implement reasonable and appropriate security measures through policies and procedures to protect the security of ePHI they create, receive, maintain, or transmit. Each entity must analyze the risks to ePHI in its environment and create solutions appropriate for its own situation. What is reasonable and appropriate depends on the nature of the entity's business as well as its size, complexity, and resources.

Under the Security Rule, covered entities must:

- Ensure the confidentiality, integrity, and availability of all ePHI they create, receive, maintain, or transmit;
- Identify and protect against reasonably anticipated threats to the security or integrity of the ePHI;
- Protect against reasonably anticipated, impermissible uses or disclosures; and
- Ensure compliance by their workforce.

When developing and implementing Security Rule compliant safeguards, covered entities and their business associates may consider all of the following:

- Size, complexity, and capabilities;
- Technical, hardware, and software infrastructure;
- The costs of security measures; and
- The likelihood and possible impact of risks to ePHI.

Covered entities must review and modify security measures to continue protecting ePHI in a changing environment.

HIPAA Breach Notification Rule²⁷

The HIPAA Breach Notification Rule requires covered entities to notify affected individuals; the federal HHS; and, in some cases, the media of a breach of unsecured PHI. Generally, a breach is an impermissible use or disclosure under the Privacy Rule that compromises the security or privacy of PHI.

²⁶ 45 C.F.R. Part 160 and Subparts A and C of Part 164.

²⁷ 45 C.F.R. Subpart D.

The impermissible use or disclosure of PHI is presumed to be a breach unless the covered entity demonstrates a low probability that the PHI has been compromised based on a risk assessment of, at a minimum, the following factors:

- The nature and extent of the PHI involved, including the types of identifiers and the likelihood of re-identification;
- The unauthorized person who used the PHI or to whom the disclosure was made;
- Whether the PHI was actually acquired or viewed; and
- The extent to which the risk to the PHI has been mitigated.

Most notifications must be provided without unreasonable delay and no later than 60 days following the breach discovery. Notifications of smaller breaches affecting fewer than 500 individuals may be submitted to HHS annually. The Breach Notification Rule also requires business associates of covered entities to notify the covered entity of breaches at or by the business associate.

Notification of Enforcement Discretion during Public Health Emergency

Covered health care providers acting in good faith will not be subject to penalties for violations of the HIPAA Privacy Rule, the HIPAA Security Rule, or the HIPAA Breach Notification Rule that occur in the good faith provision of telehealth during the public health emergency.²⁸

On March 17, 2020, the federal Department of Health & Human Services (HHS) Office for Civil Rights (OCR) issued a Notification of Enforcement of Discretion, meaning that the OCR may exercise its enforcement discretion and not pursue penalties for HIPAA violations against health care providers that serve patients through everyday communication technologies during the public health emergency.²⁹ If a provider follows the terms of the Notification and any applicable OCR guidance, it will not face HIPAA penalties if it experiences a hack that exposes protected health information from a telehealth session.³⁰

Jurisdiction and Venue for Telehealth-related Actions³¹

For purposes of s. 456.47, F.S., any act that constitutes the delivery of health care services is deemed to occur at the place where the patient is located at the time the act is performed or in the patient's county of residence. Venue for a civil or administrative action initiated by the DOH, the appropriate board, or a patient who receives telehealth services from an out-of-state telehealth provider, may be located in the patient's county of residence or in Leon County.

²⁸ U.S. Department for Health and Human Services Office for Civil Rights, *FAQs on Telehealth and HIPAA during the COVID-10 nationwide public health emergency* (Mar. 2020) available at <https://www.hhs.gov/sites/default/files/telehealth-faqs-508.pdf> (last visited Oct. 29, 2021).

²⁹ Press Release, U.S. Department of Health and Human Services, *OCR Announces Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency* (Oct. 29, 2021) available at <https://www.hhs.gov/about/news/2020/03/17/ocr-announces-notification-of-enforcement-discretion-for-telehealth-remote-communications-during-the-covid-19.html> (last visited Oct. 29, 2021).

³⁰ *Supra* note 28.

³¹ Section 456.47(5), F.S.

III. Effect of Proposed Changes:

Section 1 amends s. 409.906, F.S., to authorize the AHCA to reimburse under the Florida Medicaid program for the following optional services:

- Remote patient monitoring services. This includes:
 - Remote monitoring of physiologic parameters;
 - The supply of devices with daily recording or programmed alert transmission; and
 - Remote physiologic monitoring treatment management services that require interactive communication between the recipient and provider.
- Remote evaluation of recorded video and images, including interpretation and follow-up with the recipient within 24 business hours, not originating from a related evaluation and monitoring service provided within the previous 7 days or leading to an evaluation and monitoring service or a procedure within the next 24 hours or at the soonest available appointment. This text mirrors national billing codes. In practice, the AHCA would implement it according to those national billing codes and corresponding guidelines. This means that the AHCA would be authorized to reimburse for the remote evaluation of recorded video and images with the interpretation of the video and images and follow-up communicated to the patient within 24 business hours of the evaluation. Under the authority of this paragraph, the AHCA may not reimburse for the remote evaluation of recorded video and images if the remote evaluation:
 - Takes place during an in-person visit;
 - Takes place within seven days after an in-person visit; or
 - Triggers an in-person visit within 24 hours or at the soonest available appointment.

Like all Medicaid services, these remote patient monitoring and store-and-forward services may be provided only when medically necessary.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:³²

If the optional Medicaid services authorized in the bill are rendered, then the bill would have a minor operational and indeterminate fiscal impact on the Florida Medicaid program. The bill could lead to an increase in the use of telemedicine for the provision of diagnostic, preventive, and treatment services. The number of additional telehealth services that would be provided is unknown. The bill poses an indeterminate fiscal impact on Medicaid managed care plan capitation rates.

Additionally, the AHCA would need to revise the telemedicine State Plan Amendment that is currently in effect, update its rules, update the Florida Medicaid Management Information System, and communicate changes to enrolled providers and managed care plans, all of which are part of the AHCA's routine business practices.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 409.906 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

³² Agency for Health Care Administration, *2022 Senate Bill 330 Fiscal Analysis* (Oct. 31, 2022) (on file with the Senate Committee on Health Policy).

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
