November 5, 2013

Mr. Lyle Kelsey  
Executive Director  
Oklahoma Board of Medical Licensure and Supervision  
101 NE 51st St  
Oklahoma City, OK 73105

Reference: Notice of Proposed Permanent Rulemaking Title 435 Chapter 10

Dear Mr. Kelsey:

The American Telemedicine Association appreciates the opportunity to comment on the notice of proposed permanent rulemaking to adopt new regulatory practice guidelines for telemedicine in Oklahoma. We also appreciate the intent of the Oklahoma State Board of Medical Licensure and Supervision to craft these rules in ways that improve health outcomes, patient compliance and choice, and reduce barriers to care.

ATA recognizes the need to implement mechanisms to assure that all health services that are delivered either in-person or via telehealth are of the highest quality and provided in a safe manner. In reviewing the proposed regulations we note several areas where changes in the regulation would strengthen this intent while avoiding unnecessary disruptions in service. These are noted below.

With a 15 year history of telehealth parity, Oklahoma has positioned itself as a model for state telehealth policy. Generally, we support the outlined proposed rules. However, we find a few areas are overly prescriptive and interfere with the original intent of the rulemaking which is to improve access to care. Telehealth collaborations must be facilitated by streamlined processes that encourage physician participation if the transformative value of telehealth is to be fully achieved. Yet parts of these proposed rules may reduce physician engagement and participation in telehealth programs across the state. Specifically, ATA recommends that the OK Medical Board revise the duplicative and stringent language, and allow hospitals to rely on physicians’ medical judgment in the delivery of critical care services.

**Definition of Telemedicine**

ATA recommends that the OK Medical Board not create and codify a third and distinct definition of telemedicine. Currently, the state already recognizes two definitions of telemedicine. Oklahoma statute § 36-6802 explicitly refers to the definition of telemedicine as “the practice of health care delivery, diagnosis, consultation, treatment, transfer of medical data, or exchange of medical education information by means of audio, video, or data
communications. Telemedicine is not a consultation provided by telephone or facsimile machine.” Further, OK Administrative Code 317:30-3-27 defines telemedicine as “the practice of health care delivery, diagnosis, consultation and treatment and the transfer of medical data through interactive audio, video or data communications that occur in the real-time or near real-time and in the physical presence of the member.” It also separately defines telehealth as “the use of telecommunication technologies for clinical care (telemedicine), patient teaching and home health, health professional education (distance learning), administrative and program planning, and other diverse aspects of a health care delivery system.” The OAC includes separate definitions for “interactive telecommunications” and “store and forward”.

Codifying the definition of telemedicine contained in the proposed rules would prove an administrative burden for the Medical Board and other agencies involved in regulating healthcare practices via telehealth, and highly confusing and disruptive for healthcare providers already complying with the prescribed standard of care. ATA recommends that the Medical Board remove the following language from their proposed definition of telemedicine: “This definition excludes phone or Internet contact or prescribing and other forms of communication, such as web-based video, that might occur between parties but that does not meet the equipment requirements as specified in OAC 435:10-7-13. Telemedicine does not include treatment of chronic pain or robotic surgery.”

The language used in this definition directly conflicts with the Medical Board’s insistence that providers must “practice telemedicine in compliance with standards endorsed by the American Telemedicine Association” (OAC 435:10-7-13). In fact, ATA published the May 2013 Practice Guidelines for Video-Based Online Mental Health Services which provides clinical, technical and administrative guidelines for providers and patients who use personal computers with a webcam or mobile communications device (e.g., smart phone, laptop, or tablet) with two-way camera capability to initiate and/or receive a telehealth encounter. We strongly recommend that the OK Medical Board consider the scope of these guidelines before issuing final regulations.

**Physician/Patient Relationship**

ATA commends the OK Medical Board for waiving the requirement that a physician have a “face-to-face” encounter with a patient before using telehealth. We fully support policy changes that prevent new barriers to telehealth, such as practice rules that impose higher standards for telehealth services than in-person care. ATA recommends that the OK Medical Board adopt and apply existing telemedicine policies outlined in OK Statutes § 36-6804-H to establish guidelines for the establishment of a physician-patient relationship: “For purposes of the delivery of mental health care via telemedicine, the use of telemedicine shall be considered a face-to-face, physical

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contact and in-person encounter between the health care provider and the patient, including the initial visit”.

**Telemedicine and Technical Requirements**

Regarding proposed section 435:10-7-13 (b), ATA supports references to our guidelines in the proposed rules. Regarding references to CMS, we note that the only telemedicine policy guidance offered by CMS to the states includes the following:

- “Reimbursement for Medicaid covered services, including those with telemedicine applications, must satisfy federal requirements of efficiency, economy and quality of care.
- States are not required to submit a (separate) SPA for coverage or reimbursement of telemedicine services, if they decide to reimburse for telemedicine services the same way/amount that they pay for face-to-face services/visits/consultations”.

We also recommend that (435:10-7-13 3A-G) regarding technical guidelines be deleted. Once again, the prescriptive nature of the language inhibits physician judgment and requires the use of interactive, real-time communications. The state of Oklahoma’s regulatory language for Medicaid has already provided a definition for store-and-forward services as well as store-and-forward technology. The OK Medical Board should not restrict the types of technologies allowed when using telemedicine. That decision should be determined by the provider based on the technology’s clinical application. Limiting telemedicine to interactive video conferencing eliminates the use of teleradiology or telepathology, already in use in many state medical centers. Further, ATA believes that bandwidth speeds, the use of high definition video resolution, and display monitor size should be determined by the provider based on the technology’s clinical application. It should also be noted that video quality is not solely contingent upon monitor size, but on technical specifications including resolution, luminance, contrast ration and calibration. Mandating bandwidth speeds, frame rates and download speeds locks in technology requirements that are constantly changing.

As referenced above, ATA published technical guidelines which address video conferencing applications, device characteristics, connectivity, and privacy in the *Practice Guidelines for Video-Based Online Mental Health Services*. We strongly recommend that the Oklahoma Medical Board consider the scope of these guidelines before issuing final regulations.

Instead, we recommend that the Oklahoma Medical Board adopt the technical standards developed by the ATA and outlined in the *Core Standards for Telemedicine Operations*.3

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• Organizations shall ensure that equipment sufficient to support diagnostic needs is available and functioning properly at the time of clinical encounters.
• Organizations shall comply with all relevant safety laws, regulations, and codes for technology and technical safety.
• Organizations shall have appropriate redundant systems in place that ensure availability of the network for critical connectivity.

Confidentiality

Regarding the proposed HIPAA related provisions, it should also be noted that the electronic transmission of information and not the technology are subject to HIPAA compliance standards. Further, the stored or saved an audio-video session files are subject to the HIPAA Security Rule provisions which classify such clinical information as “data at rest”. To ensure the patient’s privacy during telemedicine encounters, clinicians should consider the use of private networks or encrypted videoconferencing software. Appropriate protections must be applied, regardless of whether the data are at rest or being transmitted in real-time.

Conclusion

ATA greatly appreciates OK Medical Board’s timely and expedient attention to this crucial rulemaking. We recommend improvements as articulated above and urge expeditious issuance of the final rulemaking.

Sincerely,

Jonathan D. Linkous
Chief Executive Officer