

**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.)

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

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BILL: SB 864

INTRODUCER: Senator Brodeur

SUBJECT: Telehealth

DATE: March 16, 2021

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Smith	Brown	HP	<b>Pre-meeting</b>
2.			AHS	
3.			AP	

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**I. Summary:**

SB 864 expands the definition of “telehealth” to include audio-only telephone calls. The bill also provides an exemption from out-of-state telehealth provider registration requirements for an out-of-state health care professional to provide services via telehealth to patients in Florida if the services are provided in consultation with any health care professional licensed in this state.

The bill does not pose a direct impact on Florida Medicaid but would allow Medicaid to elect to reimburse for audio-only telephone calls after the COVID-19 state of emergency ends.

The bill provides an effective date of July 1, 2021.

**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.”

### ***Florida Telehealth Providers***

In 2019, the Legislature passed and the Governor approved CS/CS/HB 23, which created section 456.47, F.S. The bill became effective on July 1, 2019.<sup>1</sup> It authorized Florida-licensed health care providers<sup>2</sup> 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 board<sup>3</sup> and meet certain eligibility requirements.<sup>4</sup> 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 below<sup>5</sup> 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
- Acupuncturist
- Allopathic physician
- Osteopathic physician
- Chiropractor
- Podiatrist
- Optometrist
- Nurse
- Pharmacist
- Dentist
- Dental Hygienist
- Midwife
- Speech Therapist
- Occupational Therapist
- Radiology Technician
- Electrologist

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<sup>1</sup> Chapter 2019-137, s. 6, Laws of Fla.

<sup>2</sup> Section 467.47(1)(b), F.S.

<sup>3</sup> 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.

<sup>4</sup> Section 467.47(4), F.S.

<sup>5</sup> Section 467.47(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.

- Orthotist
- Podiatrist
- 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.<sup>6</sup>

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 as a telehealth provider under s. 456.47(4), F.S.<sup>7</sup> This emergency order was extended<sup>8</sup> and will remain in effect until the expiration of the Governor's Executive Order No. 20-52 and extensions thereof.<sup>9</sup>

Five days later, the Surgeon General executed DOH Emergency Order 20-003<sup>10</sup> to also authorize certain out-of-state clinical social workers, marriage and family therapists, mental health

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<sup>6</sup> 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 Feb. 14, 2021).

<sup>7</sup> 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 Feb. 14, 2021).

<sup>8</sup> Department of Health, State of Florida, *Emergency Order DOH No. 20-011* (June 30, 2020) available at <https://floridahealthcovid19.gov/wp-content/uploads/2020/06/DOH-Emergency-Order-DOH-No.-20-011.pdf> (last visited Feb. 14, 2021).

<sup>9</sup> Under s. 252.36(2), F.S., no state of emergency declared pursuant to the Florida Emergency Management Act, may continue for more than 60 days unless renewed by the Governor. The state of emergency declared in Executive Order 20-52, was extended by Executive Orders 20-114, 20-166, 20-192, 20-213, 20-276, 20-316, and 21-45. Executive Order 21-45 will remain in effect until Apr. 27, 2021. Office of the Governor, State of Florida, *Executive Order 20-316* (Dec. 29, 2020) available at [https://www.flgov.com/wp-content/uploads/orders/2020/EO\\_20-316.pdf](https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-316.pdf) (last visited Feb. 9, 2021).

<sup>10</sup> 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 Feb. 14, 2021).

counselors, and psychologists to provide telehealth in Florida without the need to register as a telehealth provider under s. 456.47(4), F.S. This emergency order was also extended<sup>11</sup> and will remain in effect until the expiration of Executive Order No. 20-52 and extensions thereof.

### **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.<sup>12</sup> 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.<sup>13</sup>

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 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.<sup>14</sup>

### ***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.<sup>15</sup> Beginning on April 3, 2020, and throughout the COVID-19 state of emergency, the AHCA has provided for the reimbursement of audio-only telehealth services in the managed care and fee-for-service delivery systems when rendered by licensed physicians (including psychiatrists), advanced practice registered nurses, and physician assistants.<sup>16,17</sup> During the state of emergency, Medicaid

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<sup>11</sup> Department of Health, State of Florida, *Emergency Order DOH No. 20-005* (Apr. 21, 2020) available at <https://s333330.pcdn.co/wp-content/uploads/2020/04/DOH-Emergency-Order-20-005-extending-20-003.pdf> (last visited Feb. 14, 2021).

<sup>12</sup> Medicaid.gov, *Medicaid*, available at <https://www.medicaid.gov/medicaid/index.html> (last visited Mar. 3, 2021).

<sup>13</sup> s. 20.42, F.S.

<sup>14</sup> *Id.*

<sup>15</sup> 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/provider\\_alerts/2020\\_03/Medicaid\\_Telemedicine\\_Guidance\\_20200318.pdf](https://ahca.myflorida.com/Medicaid/pdf/provider_alerts/2020_03/Medicaid_Telemedicine_Guidance_20200318.pdf) (last visited Feb. 15, 2021).

<sup>16</sup> Agency for Health Care Administration, *Statewide Medicaid Managed Care (SMMC) Policy Transmittal: 2020-20* (Apr. 3, 2020) available at

[https://ahca.myflorida.com/Medicaid/statewide\\_mc/pdf/2018-23\\_plan\\_comm/PT\\_2020-20\\_COVID-19\\_State-of-Emergency\\_Telemedicine\\_Services.pdf](https://ahca.myflorida.com/Medicaid/statewide_mc/pdf/2018-23_plan_comm/PT_2020-20_COVID-19_State-of-Emergency_Telemedicine_Services.pdf) (last visited Mar. 11, 2021).

<sup>17</sup> Agency for Health Care Administration, *Senate Bill 700 Analysis* (Feb. 15, 2021) (on file with the Senate Committee on Health Policy).

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.<sup>18</sup>

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.<sup>19</sup> Beginning on April 16, 2020, and throughout the state of emergency, the AHCA has provided for the reimbursement of audio-only behavioral health services for Medicaid reimbursement under the fee-for service and managed care delivery systems when video capability is not available.<sup>20</sup> To be reimbursed, a behavioral health provider must document that the enrollee did not have access to audio and video technology necessary for the service to be fully provided via telemedicine.<sup>21</sup>

## **The Federal Health Insurance Portability and Accountability Act (HIPAA)<sup>22</sup>**

### ***HIPAA Privacy Rule<sup>23</sup>***

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.

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.

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<sup>18</sup> *Id.*

<sup>19</sup> Agency for Health Care Administration, *Senate Bill 852 Analysis* (Feb. 1, 2021) (on file with the Senate Committee on health Policy).

<sup>20</sup> 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 [https://ahca.myflorida.com/Medicaid/pdf/files/provider\\_alerts/2020\\_03/Medicaid\\_Telemedicine\\_Guidance\\_20200318.pdf](https://ahca.myflorida.com/Medicaid/pdf/files/provider_alerts/2020_03/Medicaid_Telemedicine_Guidance_20200318.pdf) (last visited Mar. 11, 2021).

<sup>21</sup> *Id.*

<sup>22</sup> Centers for Medicare & Medicaid Services, Medicare Learning Network Fact Sheet, HIPAA Basics for Providers: Privacy, Security, and Breach Notification Rules (Sept. 2018) available at <https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/Downloads/HIPAAPrivacyandSecurityTextOnly.pdf> (last visited Feb. 14, 2021).

<sup>23</sup> 45 C.F.R. Part 160 and Subparts A and E of Part 164.

***HIPAA Security Rule<sup>24</sup>***

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 Rule<sup>25</sup>***

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.

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.

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<sup>24</sup> 45 C.F.R. Part 160 and Subparts A and C of Part 164.

<sup>25</sup> 45 C.F.R. Subpart D.

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.<sup>26</sup>

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.<sup>27</sup> 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.<sup>28</sup>

### **Jurisdiction and Venue for Telehealth-related Actions<sup>29</sup>**

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.

## **III. Effect of Proposed Changes:**

**Section 1** of the bill amends s. 456.47(1)(a), F.S., to expand the definition of "telehealth" to include audio-only telephone calls. Currently, the term does not include audio-only telephone calls.

**Section 1** of the bill also amends s. 456.47(6), F.S., to remove a limitation on an exception to out-of-state telehealth provider registration requirements.

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<sup>26</sup> 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> (Feb. 14, 2021).

<sup>27</sup> 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* (Mar. 17, 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 Feb. 14, 2021).

<sup>28</sup> 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> (Feb. 14, 2021).

<sup>29</sup> Section 456.47(5), F.S.

Currently, an out-of-state health care professional who uses telehealth to provide services to patients in Florida is not required to register as an out-of-state telehealth provider under s. 456.47(4), F.S., only if the services are provided:

- In response to an emergency medical condition as defined in s. 395.002, F.S.,<sup>30</sup> or
- In consultation with a health care professional licensed in this state who has ultimate authority over the diagnosis and care of the patient.

The bill deletes the words “who has the ultimate authority over the diagnosis and care of the patient.” This would mean that an out-of-state health care professional who uses telehealth to provide services to patients in Florida is not required to register as an out-of-state telehealth provider under s. 456.47(4), F.S., if the provider is in consultation with any health care professional licensed in this state.

The applicable board, or the DOH if there is no board, may adopt rules to administer this section of statute.<sup>31</sup>

**Section 2** of the bill provides an effective date of July 1, 2021.

#### **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.

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<sup>30</sup> “Emergency medical condition” means a medical condition manifesting itself by acute symptoms of sufficient severity, which may include severe pain, such that the absence of immediate medical attention could reasonably be expected to result in serious jeopardy to patient health, including a pregnant woman or fetus, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part. With respect to a pregnant woman, an emergency medical condition means that there is inadequate time to effect safe transfer to another hospital prior to delivery, that a transfer may pose a threat to the health and safety of the patient or fetus; or that there is evidence of the onset and persistence of uterine contractions or rupture of the membranes.

<sup>31</sup> Section 456.47(7), F.S.

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

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

The bill does not pose a direct impact on Florida Medicaid but would allow the AHCA to elect to reimburse for audio-only telephone calls after the COVID-19 state of emergency ends. If the AHCA decides to authorize the reimbursement of audio-only telemedicine services at that time, it will need to update Rule 59G-1.057, F.A.C., and communicate the changes to enrolled providers and health plans, both of which are part of the AHCA's routine business practices.<sup>32</sup> The vast majority of Medicaid recipients are already covered for audio-only telehealth services through the Medicaid health plans, so the bill is unlikely to increase overall costs to the Florida Medicaid program.<sup>33</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The DOH notes that the expansion of the exception from out-of-state telehealth provider registration requirement may inadvertently circumvent the out-of-state telehealth provider registration process entirely, as the meaning of being "in consultation with a health care professional" is unclear without the context of that professional having established some sort of relationship with the patient.

**VIII. Statutes Affected:**

This bill substantially amends section 456.47 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.

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<sup>32</sup> Agency for Health Care Administration, Senate Bill 864 Bill Analysis & Economic Impact Statement (Mar. 11, 2021) (on file with the Senate Committee on Health Policy).

<sup>33</sup> Senate Bill 700 also expands the definition of telehealth in s. 456.47, F.S., to include audio-only telephone calls. Agency for Health Care Administration, *Senate Bill 700 Fiscal Analysis* (Feb. 15, 2021) (on file with the Senate Committee on Health Policy).

B. Amendments:

None.

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

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