March 1, 2021

The Honorable Anna Eshoo
Chair
Subcommittee on Health, Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Brett Guthrie
Ranking Member
Subcommittee on Health, Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairwoman Eshoo, Ranking Member Guthrie, and Members of the Subcommittee on Health:

My name is Jeffrey A. Singer. I am a Senior Fellow in Health Policy Studies at the Cato Institute. I am also a medical doctor specializing in general surgery and have been practicing that specialty in Phoenix, Arizona for over 35 years. I would like to thank the Subcommittee on Health for convening a hearing on Tuesday, March 2, 2021 on "The Future of Telehealth: How COVID-19 is Changing The Delivery of Virtual Care." I appreciate this opportunity to provide my perspective, as a health care practitioner and policy analyst, to assist this panel in its assessment of existing policies regarding virtual care, with the goal of improving readiness as well as access to health care before, during, and after the next public health emergency.

The social distancing measures required to address the COVID-19 pandemic led to a newfound appreciation for the use of telemedicine, a technological advance that has been available for several decades.[1] Teleradiology, for example, which taps the skills of the world's experts in diagnostic imaging, has been in use since the beginning of this century.[2] Yet telehealth has only begun to receive the attention it deserves with the advent of the COVID-19 pandemic.

As emergency measures, most states' governors temporarily suspended the requirement that telehealth services can only be provided by practitioners licensed by their states. As a public health emergency measure, the Centers for Medicare and Medicaid Services, for the first time, began paying providers for telehealth services even if they were provided by practitioners licensed by states outside of the state in which the beneficiaries received care. CMS expanded on the list of telehealth services covered and made the policy permanent in December 2020.[3]

Last week Senator Brian Schatz (D-HI), Senator Jeanne Shaheen (D-NH), and Senator Tim Scott (R-SC) re-introduced the *Telehealth Modernization Act*, which would codify and expand telehealth coverage for seniors in the Medicare program.[4] While this is a step in the right direction, it doesn't address the major obstacle blocking all patients—Medicare and non-Medicare—from this great technological advance in 21st Century medicine: state licensing laws prohibit patients from receiving care from health care practitioners licensed out of state. While many states have temporarily suspended these laws for the duration of the public health emergency, the barriers will return to their status quo ante position when the emergency ends.[5]

A return to the status quo ante means a person can travel from, say, Phoenix, Arizona to Los Angeles, California to consult with and receive care from a renowned expert in some unique medical condition, but cannot do telehealth follow up visits with that practitioner unless that practitioner obtains a license in Arizona. In other words, a patient may travel to a doctor, but the doctor may not travel to the patient. *The fact that Medicare would pay the doctor for the out-of-state services does not help matters if the doctor is not allowed to provide the services.*

To the extent consistent with its authority to tear down barriers to interstate commerce under Article 1, Section 8 of the Constitution, Congress should define the "locus of care" as the state in which the practitioner is located as opposed to the state in which the consumer of the service resides. While states have constitutional authority to regulate the practice of medicine for residents within their borders, crossing state lines to provide telemedicine or short-term in-person care can reasonably be classified as interstate commerce.[6]

This change would increase access to care and allow patients to utilize expertise that may exist in areas of the country otherwise beyond their reach. It would also remove the protection from out-of-state competitors that health care providers otherwise enjoy. The increased competition would redound to the benefit of patients.

Congress can and should also apply this definition of the "locus of care" to practitioners licensed in one state who provide short-term in-person care in a state where they do not have a permanent location. Examples of providers to whom such an act would apply include those who usually work through agencies to provide care during short, temporary stints in medically underserved areas, those located very close to the border of a neighboring state, and out-of-state experts in rare and specialized medical conditions brought in to consult and help manage a fragile patient unstable for transfer. These examples are analogous to telemedicine practice.

Possessing an out-of-state license would not automatically enable a health care provider to practice at any health care facility within a new state. Health care facilities perform their own due diligence in vetting and credentialing health care staff applicants. The same vetting process could just as easily be performed on an applicant for staff privileges who is licensed in another state. That happens now when a provider relocates from another state after obtaining a license in the new state.

Defining the locus of care as the state in which a health care practitioner is licensed would make it easier for *locum tenens* ("fill in") providers and out-of-state specialists to provide itinerant temporary health services to remote and underserved communities, free from the burden of licensing applications and fees in the several states where these communities reside. In the event that a practitioner establishes an office within a state, the practitioner would then become subject to applicable state-based practitioner licensing laws.

Some states are not waiting for Congress to act. Arizona is currently considering legislation that would make it the first state to allow its patients to receive telehealth services from health care practitioners licensed in any of the other states and the District of Columbia.[7]

They would be subject to the laws governing the health care professions of the state of Arizona, as well as review and disciplinary action by the relevant professional licensing boards of the state of Arizona. Liability cases would be heard in Arizona courts and would be subject to Arizona liability law. In announcing his support of the legislation, Arizona Governor Doug Ducey stated:

> *A person who is visiting a family here or spends the winter here should be able to reach their doctor in their home state by telemedicine. A family in Mohave County who utilizes a hospital in Las Vegas, Nevada should be able to get follow up care via telemedicine. Today, someone who has the means to travel to a consultation with a specialist in another state can do so. Specialty doctors should not only be accessible via an expensive flight and hotel stay. If a specialty provider is willing to do a consult via telehealth, Arizona patients should have easy access to those services without unnecessary travel expenses and Arizona is going to lead the way.* ***If it's safe and it works during a pandemic, we should embrace it when we're not in an emergency as well.*** (Emphasis added.)[8]

While actions by the states to break down the barriers to telehealth are laudable, a state-by-state approach will take a great deal of time. And telehealth technology is ready to bring to patients now. Until state licensing obstacles are removed, the growth of this wonderful technology will remain stunted. And patients—not health care providers—will be the biggest losers.

Congress can act now to remove those barriers by exercising its constitutionally authorized powers to regulate commerce "among the several states" and define the "locus of care" as the state in which the practitioner is licensed.

Respectfully submitted,

Jeffrey A. Singer, MD, FACS
Senior Fellow
Department of Health Policy Studies
Cato Institute

[1] https://www.ncbi.nlm.nih.gov/books/NBK45445/
[2] https://www.cnn.com/2004/HEALTH/05/10/tele.health.final/index.html
[3] https://www.cms.gov/newsroom/press-releases/trump-administration-finalizes-permanent-expansion-medicare-telehealth-services-and-improved-payment
[4] https://www.scott.senate.gov/media-center/press-releases/scott-schatz-shaheen-introduce-bipartisan-legislation-to-increase-access-to-telehealth-in-the-midst-of-the-pandemic
[5] https://www.cato.org/publications/pandemics-policy/reform-regulation-health-care-providers
[6] https://www.cato.org/publications/policy-analysis/liberating-telemedicine-options-eliminate-state-licensing-roadblock
[7] https://www.azleg.gov/legtext/55leg/1r/bills/hb2454p.htm
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