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TELEMENTAL HEALTH TAKES CENTER STAGE: HOW PANDEMIC-ERA WAIVERS OPENED THE DOOR TO BETTER MENTAL HEALTH CARE

❖ Note ❖

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I. INTRODUCTION

Millions of Americans were stuck in their houses during the COVID-19 pandemic.¹ The rising death tolls, financial insecurity, and growing uncertainty increased anxiety, depression, and a surge in emergency department visits for mental health conditions.² Federal and state-level licensing alongside permit waivers allowed many Americans needing mental health care, access to telemental health services.³ As a result, Americans had more options in and out-of-state that were unavailable before the pandemic.⁴ During the pandemic, federal agencies waived previous telehealth restrictions.⁵ Moreover, in most states, through executive orders, out-of-state mental health providers in good standing were permitted to provide telemental services to patients.⁶

Telehealth gives patients and providers better access, options, and overall healthcare treatment and management without needing to be physically present.⁷ In addition, it gives providers more continuity of care, and better overall healthcare management of their patients.⁸

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¹ See Joseph Guzman, *90 Percent of Americans Now Staying Home to Prevent Coronavirus Spread*, HILL (Mar. 27, 2020), <https://thehill.com/changing-america/well-being/prevention-cures/489813-majority-of-americans-staying-home-as-much-as/>.

² See *infra* Part III.

³ See Rachel B. Goodman & Thomas B. Ferrente, *COVID-19: States Waive In-State Licensing Requirements for Health Care Providers*, FOLEY & LARDNER LLP (Mar. 17, 2020), <https://www.foley.com/en/insights/publications/2020/03/covid-19-states-waive-licensing-requirements>.

⁴ See *id.*

⁵ See *id.*

⁶ See U.S. *States and Territories Modifying Requirements for Telehealth in Response to COVID-19*, FSMB, <https://www.fsmb.org/siteassets/advocacy/pdf/states-waiving-licensure-requirements-for-telehealth-in-response-to-covid-19.pdf> (last visited Mar. 23, 2023) (state orders generally used “good standing” to refer to a practitioner not facing any “disciplinary or adverse action”).

⁷ See Josh Sherman, *Notes: Double Secret Protection: Bridging Federal and State Law to Protect Privacy Rights for Telemental and Mobile Health Users*, 67 DUKE L.J. 1115, 1116 (2018).

⁸ See Sherman, *supra* note 6; see also David Pratt, *Telehealth and Telemedicine in 2015*, 25 ALB. L.J. SCI. & TECH. 495, 508 (2015).

Telemental health shares these goals.⁹ After the pandemic, some states and federal agencies made permanent telehealth changes.¹⁰ Currently, Medicare has no geographic restrictions for behavioral and mental health telehealth services.¹¹ Additionally, in 2022, Delaware signed legislation enabling out-of-state practitioners to provide service to Delaware residents so long as they are in good standing in all practicing jurisdictions.¹² However, many states suspended or let pandemic-era waivers expire without implementing new legislation, particularly for telemental health care.¹³ As a result, the current state of telehealth, particularly telemental health, is a regression to pre-pandemic policies. Pre-pandemic telemental health policies operate in contrast to the goals of telehealth and ignore the ongoing demand for telemental health care. Furthermore, such policies restrict patients' options in choosing the optimum mental health care.¹⁴

To this end, Part II of this Note will explain telehealth, telemental health, and federal and state waivers. Part III will discuss the federal and state waivers that affected telemental health during the pandemic and its impact. This article then argues in Part IV that states should (1) temporarily extend or re-issue waivers until state legislatures have permanent solutions regarding telemental health and (2) adopt cross-state telemental licensure reform, allowing patients to have the optimum options, access, and care for their needs. Part V will conclude.

II. BACKGROUND

A. *What Does "Telehealth" Mean Today?*

Frequently, telehealth interchanges with "telemedicine," "mobile health" (mHealth), "electronic health" (eHealth), and "virtual care."¹⁵ For clarity, telehealth is an umbrella term for using telecommunications and technologies for healthcare services in clinical and non-clinical settings.¹⁶ Telehealth then has subsets that narrow certain aspects of the service. MHealth and

⁹ See Sherman, *supra* note 6.

¹⁰ See Brian Joseph, *States Making Pandemic Telehealth Policy Changes Permanent*, LEXISNEXIS (Mar. 4, 2022), <https://www.lexisnexis.com/community/insights/legal/capitol-journal/b/state-net/posts/states-making-pandemic-telehealth-policy-changes-permanent>

¹¹ *Telehealth Policy Changes After the COVID-19 Public Health Emergency*, HRSA (Mar. 22, 2023, 2:40 PM), <https://telehealth.hhs.gov/providers/policy-changes-during-the-covid-19-public-health-emergency/policy-changes-after-the-covid-19-public-health-emergency#:~:text=Permanent%20Medicare%20changes,-Federally%20Qualified%20Health&text=There%20are%20no%20geographic%20restrictions,accepted%20as%20an%20originating%20site>.

¹² See DEL. LAWS, c. 484 (2022).

¹³ See Joseph, *supra* note 9; see also Rebecca Pifer, *As Cross-State Telemedicine Waivers Expire, Virtual Care Advocates Focus on Long-Term Policy Changes*, HEALTHCARE DIVE (June 21, 2022), <https://www.healthcaredive.com/news/cross-state-telemedicine-waivers-expire-virtual-care-advocates-focus/625389/>.

¹⁴ Justin Lo et al., *Telehealth Has Played an Outsized Role Meeting Mental Health Needs During the COVID-19 Pandemic*, KAISER FAM. FOUND. (Mar. 15, 2022), <https://www.kff.org/coronavirus-covid-19/issue-brief/telehealth-has-played-an-outsized-role-meeting-mental-health-needs-during-the-covid-19-pandemic/> (telemental health has given more access for patients in seeking care).

¹⁵ See *What Is the Difference Between Mhealth, Ehealth, Telehealth, and Telemedicine*, SBMA, <https://www.sbmabenefits.com/what-is-the-difference-between-mhealth-ehealth-telehealth-and-telemedicine/> (last visited Mar. 20, 2023).

¹⁶ See *Telehealth*, NIH, <https://www.nibib.nih.gov/science-education/science-topics/telehealth> (last visited Mar. 20, 2023); see also *Frequently Asked Questions*, HEALTHIT.GOV, <https://www.healthit.gov/faq/what-telehealth-how-telehealth->

eHealth are examples of telehealth services used in clinical and non-clinical capacities. Mhealth is the use of mobile devices in providing health services.¹⁷ EHealth refers to using “web-enabled systems and processes” for healthcare services such as electronic medical records.¹⁸

Clinical telehealth services and telemedicine are the same. Telemedicine refers to using telecommunications for health care solely in a clinical capacity.¹⁹ Virtual care is a sub-subcategory of telemedicine that involves the clinical use of technology for patients and healthcare provider interactions.²⁰ Non-clinical telehealth services include “provider training, administrative meetings, and continuing medical education.”²¹ Non-clinical positions, like many jobs during the pandemic, also worked remotely, taking on a telehealth role.²²

B. *What Is “Telemental Health”?*

Telemental health is a subcategory of telehealth that narrows its focus to mental health services. For clarity, telemental health is the umbrella term of using telecommunications and technologies for mental health services in clinical and non-clinical capacity.²³ Most notably, “telepsychiatry” and “teletherapy” are examples of telemental clinical services.²⁴ The American Psychiatric Association defines “telepsychiatry” as “providing a range of services including psychiatric evaluations, therapy . . . patient education, and medication management.”²⁵ Teletherapy can be categorized as virtual care or a subset under telemental health services.²⁶ The practice

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telemedicine#:~:text=While%20telemedicine%20refers%20specifically%20to,in%20addition%20to%20clinical%20services (last visited Mar. 20, 2023).

¹⁷ See Robert S. H Istepanian, *Mobile Health (m-Health) in Retrospect: The Known Unknowns*, 19 INT. J. ENVIRON. RES. PUB. HEALTH (2022).

¹⁸ Maria Helena da Fonseca et al., *E-Health Practices and Technologies: A Systematic Review from 2014 to 2019*, 9 HEALTHCARE (BASEL) (2021).

¹⁹ See *Frequently Asked Questions*, supra note 15; see also Sayed E. Wahezi et al., *Telemedicine and Current Clinical Practice Trends in the COVID-19 Pandemic*, 35 BEST PRACT. & RES. CLIN. ANAESTHESIOLOG. (2021).

²⁰ See Cindy (Zhirui) Li et al., *Connecting the World of Healthcare Virtually: A Scoping Review on Virtual Care Delivery*, 9 HEALTHCARE (BASEL) (2021).

²¹ See *Frequently Asked Questions*, supra note 15.

²² Heather Gilmartin et al., *Assessing the Impact of Remote Work During COVID-19 on Clinical and Translational Scientists and Staff in Colorado*, 5 J. CLIN. TRANSL. SCI (2021).

²³ See *What Is Telemental Health?*, NIH, <https://www.nimh.nih.gov/health/publications/what-is-telemental-health> (last visited Mar. 20, 2023); see also Donald M. Hilty et al., *The Effectiveness of Telemental Health: A 2013 Review*, 19 TELEMED. J. E. HEALTH (2013).

²⁴ See *What Is Telepsychiatry?*, APA, <https://www.psychiatry.org/patients-families/telepsychiatry> (last visited Mar. 20, 2023); see also Victoria Clayton, *Telepsychiatry vs. Teletherapy: What's The Difference?*, FORBES (Dec. 6, 2022), <https://www.forbes.com/health/mind/telepsychiatry-vs-teletherapy/> (“Teletherapy and telepsychiatry are mental telehealth services that . . . facilitate communication between mental health professionals and their patients.”)

²⁵ *What Is Telepsychiatry?*, supra note 23.

²⁶ Claire Imber, *How the Pandemic Changed HR's Views on Virtual Care*, HEALTH JOY (Apr. 29, 2023, 10:00 PM), <https://www.healthjoy.com/blog/benefits/telehealth/pandemic-changed-virtual-care> (using teletherapy as a subset of virtual care); Rebecca Appleton et al., *Telemental Health: A Public Mental Health Perspective*, BMC HEALTH SERV RES (Jan. 25, 2023) (using teletherapy under the umbrella branch telemental health).

involves counseling through “video, phone calls, or online apps.”²⁷ Finally, like telehealth, telemental health has non-clinical capacities: administrative work, distant learning, and research.²⁸

C. *What are Federal and State Waivers?*

Governmental waivers refer to a governing body agreeing to temporarily relinquish a right or declaring that people do not have to follow a particular rule or law.²⁹ Commonly, the executive branch, composed of administrative agencies, can issue waivers.³⁰ Waivers then typically temporarily “modify” or “waive” existing law.³¹ Concerning, telemental service, executive orders, and administrative waivers are the most applicable. During the pandemic, state and federal executive orders and administrative agencies issued waivers on different statutes and regulations throughout state and federal law.³²

Congress allows agencies the authority to issue waivers for statutes and regulations independent of the President.³³ Additionally, the President, as the head of the executive branch, can direct federal agencies to issue waivers. For example, The Stafford Act provides legal authority for the federal government to aid in emergencies.³⁴ During the pandemic, the President announced an emergency declaration under the Stafford Act.³⁵ As a result, federal agencies were directed and had the authority by the executive order to issue waivers aiding in the emergency.³⁶ Federal agencies

²⁷ *Telehealth for Behavioral Health Care*, HEALTH RESOURCES & SERV ADMIN, <https://telehealth.hhs.gov/providers/best-practice-guides/telehealth-for-behavioral-health/individual-teletherapy> (last visited Mar. 20, 2023).

²⁸ Dines Bhugra et al., *Telemental Health: A Public Mental Health Perspective*, OXFORD TEXTBOOK (Sept. 1, 2018) <https://doi.org/10.1093/med/9780198792994.003.0056>.

²⁹ *See Waiver*, COLLINS, <https://www.collinsdictionary.com/us/dictionary/english/waiver#:~:text=Word%20forms%3A%20waivers&text=A%20waiver%20is%20when%20a> (last visited Mar. 20, 2023).

³⁰ *See* Joel Aberbach & Mark Peterson, *The Executive Branch (Institutions of American Democracy)* 508 (2005).

³¹ *See Coronavirus waivers & flexibilities*, CMS, <https://www.cms.gov/coronavirus-waivers> (last visited Mar. 20, 2023).

³² *See id.*

³³ *See* Peter L. Strauss et al., *Gellhorn and Byse's Administrative Law Cases and Comments*, 11th ed. 12 (2011)

³⁴ *See* Lance Gable, *Evading Emergency: Strengthening Emergency Responses Through Integrated Pluralistic Governance*, 91 OR. L. REV. 375, 396 (2012) (“[T]he Stafford Act authorizes the President to declare an ‘emergency’ or ‘major disaster’. . . . [o]nce one of these declarations has been made, the federal government may provide resources.”).

³⁵ *The Stafford Act Emergency Declaration for COVID-19*, CRS, <https://crsreports.congress.gov/product/pdf/IN/IN11251> (2020).

³⁶ *See COVID-19 Emergency Declaration Blanket Waivers for Health Care Providers*, CMS (Oct. 23, 2022); Press Release, U.S. DEP’T OF HEALTH & HUMAN SERV, *OCR Announces Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency* (Mar. 17, 2020), <https://public3.pagefreezer.com/content/HHS.gov/31-12-2020T08:51/https://www.hhs.gov/about/news/2020/03/17/ocr-announces-notification-of-enforcement-discretion-for-telehealth-remote-communications-during-the-covid-19.html>; *COVID-19 FAQ*, DEA, https://www.deadiversion.usdoj.gov/faq/coronavirus_faq.htm (last visited Mar. 20, 2023).

began waiving sections of laws concerning eligible practitioners, prescribed controlled substances, and telehealth requirements.³⁷ Resulting in temporarily expanded telehealth access.³⁸

Generally, state administrative agencies are delegated authority by their respective legislatures.³⁹ Most states have a general law that allows the state agency to waive or modify regulations.⁴⁰ After a declaration or executive order by the state's governor, state administrative agencies can generally "waive" or "modify" state law regulated by their respective agency.⁴¹ For example, in 2020, the "COVID-19 Executive Order No.7," issued by the governor of Illinois expanded telehealth services for residents and protected healthcare providers in response to COVID-19.⁴² Illinois's administrative agency, the Illinois Department of Financial and Professional Regulation, then modified regulations to allow out-of-state providers not licensed in Illinois to provide care healthcare to Illinois residents.⁴³

III. ANALYSIS

A. *Waivers Affecting Telemental Health During the Pandemic*

The increase and availability of telemental services during the pandemic were largely due to the combination of stay-at-home orders that confined residents to their homes alongside multiple modifications and waivers of laws and regulations on the federal and state level.⁴⁴ On January 30, 2020, the CDC's Health and Human Services Secretary, Alex Azar, declared "the novel coronavirus (2019-nCoV) a public health emergency."⁴⁵ At that time, the virus was confirmed to have spread to only two people in the United States.⁴⁶ However, by March, the United States had "surpassed all other nations to rank first in numbers of cases."⁴⁷ This also coincided with most states issuing

³⁷ *Id.*

³⁸ CMS News and Media Group, *CMS Waivers, Flexibilities, and the Transition Forward from the COVID-19 Public Health Emergency*, CMS.GOV (Feb. 27, 2023), <https://www.cms.gov/newsroom/fact-sheets/cms-waivers-flexibilities-and-transition-forward-covid-19-public-health-emergency>.

³⁹ States typically have some form of an Administrative Procedure Act that gives state administrative agencies power to waive or modify rules and regulations. *See, e.g.*, 5 ILL. COMP. STAT. ANN. 100; CAL. GOV'T CODE § 11340; N.Y. A.P.A. LAW § 301.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² ILL. EXEC. ORDER NO. 2020-09 (Mar. 19, 2020), <https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-09.pdf>.

⁴³ *See U.S. States and Territories Modifying Requirements for Telehealth in Response to COVID-19*, *supra* note 5.

⁴⁴ Julia Shaver, *The State of Telehealth Before and After the COVID-19 Pandemic*, 49 PRIM CARE (2022), <https://doi.org/10.1016%2Fj.pop.2022.04.002>.

⁴⁵ *U.S. Declares Coronavirus a Public Health Emergency, CDC Updates Guidance*, AM. HEALTH ASS'N (Jan. 31, 2020), <https://www.aha.org/news/headline/2020-01-31-us-declares-coronavirus-public-health-emergency-cdc-updates-guidance#:~:text=Health%20and%20Human%20Services%20Secretary,be%20quarantined%20for%20two%20weeks>.

⁴⁶ Press Release, CDC, *CDC Confirms Person-to-Person Spread of New Coronavirus in the United States* (Jan. 30, 2020), <https://www.cdc.gov/media/releases/2020/p0130-coronavirus-spread.html#:~:text=The%20Centers%20for%20Disease%20Control,with%20this%20new%20virus%20here>.

⁴⁷ James M. Schultz, *Pandemic March: 2019 Coronavirus Disease's First Wave Circumnavigates the Globe*, 14 DISASTER MED PUBLIC HEALTH PREP (2020).

mandatory stay-at-home orders.⁴⁸ Federal agencies regulate federal laws concerning telemental service such as HIPAA, The Ryan Haight Act of 2008, and HITECH.⁴⁹ On the state level, generally, states waived comparable state-level regulations and laws to relieve practitioners of state licensure and permit requirements.⁵⁰

1. Federal Waivers

The federal waivers that had the most impact on telemental service on the federal level were by the U.S. Department of Health and Human Services (“HHS”), the Drug Enforcement Agency (“DEA”), and the Centers for Medicare and Medicaid Services (“CMS”).⁵¹

First, the DEA has powers under The Ryan Haight Act of 2008 to regulate prescribed controlled substances via telemedicine.⁵² In response to the pandemic, the DEA issued a temporary order waiving the requirement that telemedicine practitioners must be registered in the state the patient resides.⁵³ As a result, telepsychiatry psychiatrists could now prescribe appropriate medications for patients who were not in the state the psychiatrist resided.⁵⁴

Second, the HHS, specifically The Office for Civil Rights, enforces and regulates The Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), and Health Information Technology for Economic and Clinical Health (“HITECH”).⁵⁵ The Office waived penalties for healthcare providers utilizing “everyday communication technologies that serve patients.”⁵⁶ As a result, telemental providers could now conduct virtual care or teletherapy through commonly used platforms such as “Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, Zoom, or Skype.”⁵⁷

Finally, the CMS is a federal agency tasked with providing healthcare coverage to over 100 million Americans through Medicare, Medicaid, the Children's Health Insurance Program, and the Health Insurance Marketplace.⁵⁸ The agency brought about several waivers pertinent to the telemental health services. First, the agency under the authority of the Coronavirus Aid, Relief, and

⁴⁸ See Amanda Moreland et al., *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement — United States, March 1–May 31, 2020*, 69 MMWR (2020).

⁴⁹ See Deborah R. Farringer, *A Telehealth Explosion: Using Lessons from the Pandemic to Shape the Future of Telehealth Regulation*, 9 TEX. A&M L. REV. 1, 23 (2021).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See Kierin Bernard, *Telemedicine, and The Ryan Haight Act: An Analysis of the Ryan Haight Act's Statutory Purpose, its Inadvertently Negative Impact on the Telemedicine Industry, and the Future of Telemedicine*, 10 WAKE FOREST J.L. & POL'Y S.S. 59, 59; see also *COVID-19 FAQ*, *supra* note 35 (The “DEA is permitted to waive practitioners’ general registration requirements by regulation when consistent with the public health and safety.”).

⁵³ See *COVID-19 FAQ*, *supra* note 35.

⁵⁴ See Nancy Rowe & Sara F. Gibson, *Another Pandemic Silver Lining: Rural Patients Benefit from Relaxed Remote Prescribing Rules*, ARIZONA TELEMEDICINE PROGRAM (Dec. 17, 2020) <https://telemedicine.arizona.edu/blog/another-pandemic-silver-lining-rural-patients-benefit-relaxed-remote-prescribing-rules>.

⁵⁵ See U.S. DEP'T OF HEALTH & HUMAN SERV, *supra* note 35.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See Centers for Medicare and Medicaid Services, USA.GOV, <https://www.usa.gov/federal-agencies/centers-for-medicare-and-medicaid-services#:~:text=The%20Centers%20for%20Medicare%20and, and%20the%20Health%20Insurance%20Marketplace> (last visited Mar. 20, 2023).

Economic Security Act (CARES Act) waived the requirement under law for certain telehealth services requiring video technology.⁵⁹ Therefore, under telemental health services, psychologists could “provide many of their typical services by audio-only telephones” to Medicare and Medicaid users.⁶⁰ Second, CMS waived the requirement that when an out-of-state practitioner is practicing in another state, they must also be licensed within that state.⁶¹ Instead, the practitioner had to be (1) an enrolled practitioner in a Medicare program, (2) licensed to practice within the state of their enrollment, (3) conducting services in a state where there is an emergency, (4) and “not affirmatively excluded from practice in the state or any other state that is part of the 1135 emergency area.”⁶² Notably, the CMS licensing waiver does not affect state and local licensure requirements.⁶³ However, most states then waived their state and local licensure requirements.⁶⁴

1. State Waivers During the Pandemic

Federal waivers by administrative agencies do not affect each state’s regulations and licensing restrictions for practitioners. Therefore, states would also have to waive telemental health restrictions for practitioners to be able to practice. Before the pandemic, telemental health services were partially prevented due to each state’s licensing regulations.⁶⁵ However, state-level licensure waivers across America occurred during the pandemic. As a result, states began temporarily waiving licensure requirements for out-of-state practitioners conducting telemental health services on in-state residents.⁶⁶ By the middle of the pandemic, most states during the pandemic adopted a similar waiver.⁶⁷ Generally, the waiver provided that out-of-state practitioners could provide services, such as telemental health services, within the state so long as they have (1) an active license/certification/or registration in another state, (2) and are in good standing in the state they are registered to practice.⁶⁸ States then made alterations to these requirements. For example, states such as Maine, Virginia, and Utah placed time requirements on the status of the license.⁶⁹

⁵⁹ See *COVID-19 Emergency Declaration Blanket Waivers for Health Care Providers*, *supra* note 35 (The CMS also waived the requirements “which specify the types of practitioners that may bill for their services when furnished as Medicare telehealth services from the distant site.”).

⁶⁰ Office of Health Care Financing, *Phone Only Telehealth Services for Medicare During COVID-19*, APA (Jun. 4, 2020), <https://www.apaservices.org/practice/clinic/covid-19-telehealth-phone-only>.

⁶¹ See *COVID-19 Emergency Declaration Blanket Waivers for Health Care Providers*, *supra* note 35.

⁶² *Id.*

⁶³ *Id.*; Taylor Lodise, “Let’s talk about it”: New Jersey Needs to Codify Its Temporarily Relaxed Licensure Requirements For Telemental Health Providers, 74 RUTGERS U.L. REV. Comments 219, 222.

⁶⁴ David Goguen, *States Allow Doctors to Practice Across State Lines During COVID-19 crisis*, THE HOSPITALIST (Apr. 1, 2020), <https://www.the-hospitalist.org/hospitalist/article/219995/coronavirus-updates/states-allow-doctors-practice-across-state-lines>.

⁶⁵ Lisa V. Parciak, *The Future Cannot Come Soon Enough: How Federal Regulation Of Telepsychiatry Is Necessary To Create Greater Access To Mental Health Services During A Time When Psychiatrists Are In Short Supply*, 122 W. VA. L. REV. 477, 488 (2019) (additional barriers to telemental services pre-pandemic were privacy concerns for telepsychiatry and reimbursement policies under private and public health insurers).

⁶⁶ See Goodman, *supra* note 3; see also Lodise, *supra* note 62.

⁶⁷ See Lodise, *supra* note 62.

⁶⁸ See *Id.*; U.S. *States and Territories Modifying Requirements for Telehealth in Response to COVID-19*, *supra* note 5.

⁶⁹ See U.S. *States and Territories Modifying Requirements for Telehealth in Response to COVID-19*, *supra* note 5 (Maine and Virginia required a license in good standing for the five and ten years; Utah required a minimum of ten years of professional experience).

B. Telemental Services Impact During the Pandemic

The need for telemental services existed before the pandemic but was exacerbated when the pandemic ensued.⁷⁰ Before the pandemic, rural areas lacked overall access to healthcare, including mental health services.⁷¹ However, during the pandemic, the relaxed licensing, and regulations of telemental services allowed rural residents to utilize the services the most. A study showed that 55% of rural patients utilized telemental services compared to 35% in urban areas.⁷²

Moreover, studies showed depressive symptoms tripled largely due to pandemic-induced factors such as “lower social resources, lower economic resources, and greater exposure to stressors” such as job loss.⁷³ Studies also showed telemental services “for common mental health problems surged 16 to 20-fold during the first year of the COVID-19 pandemic.”⁷⁴ Simultaneously, telemental service use rapidly increased during the pandemic. For example, a Kaiser Family Foundation study found that before the pandemic telemental health “represented less than 1% of outpatient care.”⁷⁵ However, during the peak of the pandemic telemental health “represented 40% of mental health and substance use outpatient visits.”⁷⁶

Among patients covered by private insurers, a study “found that the COVID-19 pandemic was associated with a rapid increase in telehealth services for mental health conditions.”⁷⁷ Telemental services also led to a “slight increase in total utilization for anxiety disorders and stability overall.”⁷⁸ Regarding Medicare users, the HHS found a massive increase in telemental use of behavioral health providers during the pandemic, with it having the “highest telehealth utilization relative to other providers.”⁷⁹ The agency found that in 2020, “telehealth visits comprised a third of total visits to behavioral health specialists.”⁸⁰ Similar increases in the use of telemental services were also found for Medicaid users.⁸¹

⁷⁰ See Parciak, *supra* note 64; Sherman, *supra* note 6; Allison N. Winnike & Bobby Joe Dale III, *Rewiring Mental Health: Legal and Regulatory Solutions for the Effective Implementation of Telepsychiatry and Telemental Health Care*, 17 HOUS. J. HEALTH L. & POL’Y 21, 38 (2017).

⁷¹ See Sherman, *supra* note 6

⁷² Lo, *supra* note 13.

⁷³ Catherine K. Ettman et al., *Prevalence of Depression Symptoms in US Adults Before and During the COVID-19 Pandemic*, 3 JAMA (2020).

⁷⁴ Press Release, RAND, *Mental Health Telehealth Services Increased During Pandemic; Treatment Rates Increased for Some Disorders* (Jan. 6, 2023), <https://www.rand.org/news/press/2023/01/06.html>.

⁷⁵ Lo, *supra* note 13.

⁷⁶ *Id.*

⁷⁷ Ryan K. McBain, *Mental Health Service Utilization Rates Among Commercially Insured Adults in the US During the First Year of the COVID-19 Pandemic*, 4 JAMA (2023).

⁷⁸ *Id.*

⁷⁹ Press Release, CENTERS for MEDICARE & MEDICAID SERV., *New HHS Study Shows 63-Fold Increase in Medicare Telehealth Utilization During the Pandemic* (Dec. 3, 2021), <https://www.cms.gov/newsroom/press-releases/new-hhs-study-shows-63-fold-increase-medicare-telehealth-utilization-during-pandemic>.

⁸⁰ *Id.*

⁸¹ See Madeline Guth, *Telehealth Delivery of Behavioral Health Care in Medicaid: Findings from a Survey of State Medicaid Programs*, KAISER FAM. FOUND. (Jan. 10, 2023), <https://www.kff.org/8edicaid/issue-brief/telehealth-delivery-of-behavioral-health-care-in-medicicaid-findings-from-a-survey-of-state-medicicaid-programs/> (“[B]ehavioral health, especially mental health, remained a top service category with high telehealth utilization among Medicaid enrollees.”).

IV. RECOMMENDATION

A. Temporary Waiver Until Permanent Telemental Reform

First, states should temporarily reinstate waivers affecting telemental health services until permanent legislation is formed addressing the continuous need for increased mental health services. Some states have recognized the continuous need for mental health services post-pandemic and temporarily passed legislation bringing back telemental health waivers. For example, in 2023, Vermont signed legislation temporarily allowing out-of-state healthcare practitioners to provide service until a permanent solution is formed.⁸² However, after the pandemic, most states let waivers that temporarily allowed out-of-state practitioners to utilize telemental services expire without subsequent legislation.⁸³ A recent survey by a mental health company, found that “70% of therapists reported that they had to stop seeing a client who moved to a different state.”⁸⁴

More states should recognize that the need for mental health services has increased. As the CEO of the APA stated in 2022, “[t]he national mental health crisis continues.”⁸⁵ A 2022 COVID-19 practitioner impact survey of psychologists found there was still a high demand for treatment for “trauma- and stressor-related disorders and substance use disorders.”⁸⁶ Moreover, the survey reported increased in treatment for depression, trauma, and substance use.⁸⁷ Not only has the demand for treatments increased, but the demand has also increased in certain populations. Psychologists surveyed reported an increased in mental health services for teenagers, young adults, and healthcare workers.⁸⁸ The demand for telehealth services has not decreased post-pandemic but increased.⁸⁹ Therefore, letting telemental waivers expire removes a large subset of mental health services that were previously available when the need was not as big as the present day. Reducing services for Americans who need mental health services even more than during the pandemic contrasts with the initial state and federal executive orders’ goals allowing telemental services to accommodate the increased demand.

B. Telemental Health Cross-State Licensing Reform

Second, a permanent solution to the increased need for mental health services, unequal access, and giving patients the ability to have more options to choose their optimum care is telemental health cross-state licensing reform. Cross-state licensure can occur through a state-by-state licensure adoption of a general standard of requirements for licensing regarding telemental health practitioners. This concept is not new to the mental health field, considering the Psychology Interjurisdictional Compact (“PSYPACT”), which is an interstate agreement that allows “psychologists in participating jurisdictions to practice across state lines without having to get

⁸² An act relating to extending COVID-19 health care regulatory flexibility (Acts of 2023, No. 4) (Vt. 2023).

⁸³ See *U.S. States and Territories Modifying Requirements for Telehealth in Response to COVID-19*, *supra* note 5 (states such as Illinois, Arkansas, California, Connecticut, Hawaii and many more waivers expired from 2021-2023); Pifer, *supra* note 12.

⁸⁴ Harry Ritter, *How Cross-state Licensure Reform Can Ease America’s Mental Health Crisis*, STAT (Mar. 8, 2023), <https://www.statnews.com/2023/03/08/cross-state-licensure-reform-telehealth-ease-mental-health-crisis/>.

⁸⁵ See Press Release, AMERICAN PSYCHOLOGICAL ASS’N, *Increased Need for Mental Health Care Strains Capacity* (Nov. 15, 2022), <https://www.apa.org/news/press/releases/2022/11/mental-health-care-strains>.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

licensed.”⁹⁰ Cross-state licensure would aid in addressing the continuous need for mental health services after the pandemic and maximize patients’ options, care, and access.

The general model most states adopted during the pandemic works as a starting point for cross-state licensure reform.⁹¹ The practitioners must have (1) an active license, certification, or registration in another state (2) and be in good standing in the state they are registered to practice.⁹² Since most states have already temporarily adopted this model during the pandemic, it presents an easier transition into states making the model permanent legislation. Several states have acknowledged this. Notably, in 2022, Delaware signed legislation generally adopting this standard. Moreover, in 2023, Idaho passed legislation that adopted similar requirements to the standard above for telemental health providers.⁹³ Other states have yet to adopt the standard but are addressing a telemental health service need by not requiring practitioners to be in-state to provide service.⁹⁴ For example, in 2023, Virginia and Tennessee passed legislation that exempted practitioners who provided telehealth care exclusively from the requirement of having to be physically present or have a physical address within the state.⁹⁵

V. CONCLUSION

The COVID-19 pandemic exposed a gaping need for mental health care in America.⁹⁶ The pandemic allowed states and federal governments to reflect on how best address the growing need for mental health services. Telemental health services provide a solution to the need of millions of Americans who struggle with depression, substance abuse, and the spectrum of mental health conditions that many deal with alone. This article recommends that legislatures must now face the reality of mental health in America and proactively bring solutions that are not merely temporary but permanent.⁹⁷ Stagnant legislation and temporary waivers only prolong a permanent need for mental health services. For millions of Americans, their mental health is neither stagnant nor temporary but permanent and changing. The proliferation of telemental health access is a solution to an ever-fluid, constantly changing mental health landscape in America.

⁹⁰ Ritter, *supra* note 83; *see also* Joseph, *supra* note 9.

⁹¹ *See* AMERICAN PSYCHOLOGICAL ASS’N, *supra* note 84.

⁹² *See* Lodise, *supra* note 62.

⁹³ *See* 2022 IDAHO SESS. LAWS, CH. 142.

⁹⁴ *See* *Trending in Telehealth: March 20 – 27, 2023*, NAT’L L. REV. (Apr. 1, 2023), <https://www.natlawreview.com/article/trending-telehealth-march-20-27-2023>.

⁹⁵ *Id.*

⁹⁶ *See supra* Part III.

⁹⁷ *See supra* Part IV.