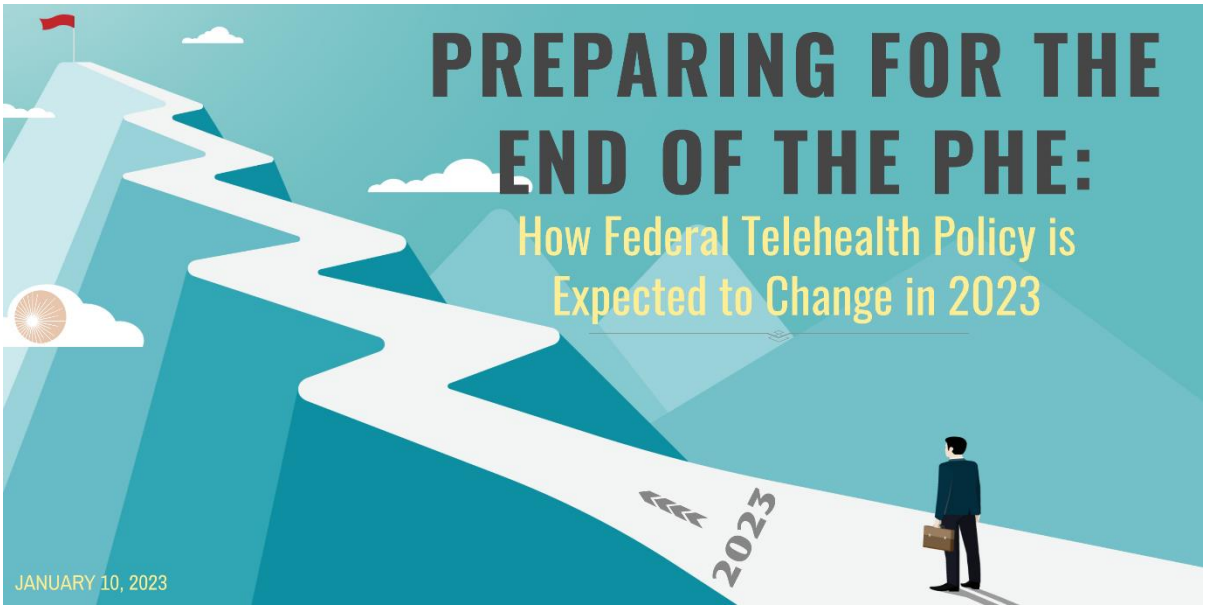
Center for Connected Health Policy



With the COVID-19 Public Health Emergency (PHE) likely ending in 2023 it has become increasingly urgent for providers to start preparing themselves for its imminent termination. The PHE was initially declared by the Department of Health and Human Services (HHS) on January 31, 2020, and has been renewed every 90 days since. The most recent renewal occurred October 13, 2022, ensuring the PHE would remain until at least January 11, 2023, however it is expected that the PHE will be renewed one more time until April 11, 2023. Additionally, many of the telehealth flexibilities were initially extended by the 2022 Consolidated Appropriations Act for an additional 151 days after the PHE expires, and subsequently extended until December 31, 2024 by the Omnibus Government Spending Package which passed late last month. While the Final 2023 Physician Fee Schedule (PFS) clarified many remaining concerns about how telehealth flexibilities will be treated at the end of the PHE with the assumption at the time of adoption of the PFS that there was only a 151-day extension to the telehealth flexibilities, the extension of the telehealth PHE flexibilities for another two years will likely necessitate modifications to some of the policies laid out in the fee schedule. CCHP's Factsheet on

the 2023 Final PFS, which breaks down all of the telehealth elements based on the 151-day extension period, is available for further details.

Given the two-year extension for the PHE telehealth flexibilities, the biggest change for most providers is that once the PHE ends, there will no longer be enforcement discretion on the requirement to use a HIPAA-secure and BAA-covered video platform and patient communications tool. Another major change is that providers will also no longer be able to prescribe controlled substances to patients via telemedicine except in specific circumstances, most commonly when a patient is in a DEA registered medical facility or in the physical presence of a DEA registered provider. There is a proposed rule by the Substance Abuse and Mental Health Services Administration that would permanently allow providers to prescribe buprenorphine specifically for opioid use disorder treatment without an in-person visit in an opioid treatment program, but this is still in the proposal phase with comments due on Feb. 14, 2023.

Below CCHP has also provided a detailed breakdown of what stays and what goes when the PHE ends as it stands now:

What stays permanently:

- Medicare reimbursement for eligible telehealth services when the patient is located in a geographically rural area AND in an eligible originating site (i.e. in most cases not the home).
- Medicare reimbursement for mental health telehealth services (including audio-only services in some cases), provided that there is an in-person visit within the first six months of an initial telehealth visit and every 12 months thereafter (with certain exceptions). Implementation of this in-person requirement is delayed until

Jan. 1, 2025. There is also an exception from the in-person requirement for substance use disorder treatment or a co-occurring mental health disorder and treatment for end stage renal disease.

- Medicare reimbursement to federally qualified health centers and rural health clinics, although it will no longer be billed the same or for 'telehealth' specifically, for mental health services delivered via audio-only or live video. CMS has redefined a 'mental health visit' to now include encounters furnished through interactive, real-time telecommunications technology (which will include audio-only delivery in some cases) for a mental health disorder.

What stays on a temporary basis until Dec. 31, 2024, but will go away afterward:

- Medicare reimbursement for telehealth services provided to patients at home, aside from certain exceptions.
- Medicare reimbursement for an expanded list of eligible providers, such as occupational therapists, physical therapists, speech language pathologists and audiologists.
- Medicare coverage of audio-only telehealth for non-mental health visits.
- Reimbursement of FQHCs and RHCs as distant site telehealth providers for non-mental health services. As noted above, FQHCs and RHCs will continue to be reimbursed for 'interactive, real-time telecommunications technology' for a mental health disorder but these are not regarded as "telehealth" services for these entities.
- Reimbursement of Medicare telehealth services not included in Medicare's Categories 1, 2 or 3, will be allowed for a 151-day extension period (unless altered by CMS given the two-year extension of the other telehealth flexibilities) but will expire afterward. Includes codes such phone E/M codes 99441-99443.

Available through the calendar year in which the PHE ends:

- Codes on Medicare's Category 3 telehealth list [see page 3-4 of CCHP's 2023 PFS factsheet for list], will remain reimbursable through the end of the year in which the PHE ends, likely extending it to Dec. 31, 2023. Some of these codes may eventually be incorporated into Categories 1 (services similar to services already on permanent telehealth list) or 2 (there is sufficient evidence to show service can be provided safely and effectively via telehealth) allowing for permanent Medicare reimbursement.
- Virtual presence for direct supervision is available through the end of the calendar year the PHE ends, though CMS continues to consider comments regarding this issue for potential future PFS rulemaking.

What goes right away:

- During the COVID public health emergency, HHS Office for Civil Rights (OCR) applied enforcement discretion to telehealth providers, allowing them to utilize any non-public facing remote communication product, even if they don't fully comply with the requirements of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). OCR has recently clarified in a FAQ document that the enforcement discretion will remain in effect until the Secretary of HHS declares that the public health emergency no longer exists, or upon expiration date of the declared PHE. OCR will issue a notice to the public when it is no longer exercising its enforcement discretion.
- During the emergency, providers were able to prescribe controlled substances without an in-person examination. This flexibility will expire with the end of the PHE, requiring providers to adhere to strict rules. In most cases this will require a patient to be located in a doctor office or hospital registered with the DEA to be

prescribed a controlled substance via telehealth. As mentioned previously, a proposed rule would create an additional permanent exception for prescribing buprenorphine in an Opioid Treatment Program (OTP), but has not yet been finalized.

Many state-based policies will vary depending on the end of a given state's public health emergency and/or state of emergency, and may or may not be tied to the end of the federal public health emergency. Almost all of the state waivers related to licensure and private payers have expired, though some Medicaid telehealth flexibilities still remain. Visit CCHP's COVID policy tracker for more information on state-based policies.

For more information on the telehealth extensions included in the Omnibus Government Spending Package, see CCHP's summary and full text of the bill, and for policies under the 2023 Physician Fee Schedule, see CCHP's factsheet.