

Behavioral Health Law Ledger | September 2021



Welcome to the Ledger

Welcome to the first issue of Greenberg Traurig’s quarterly Behavioral Health Law Ledger, keeping behavioral health and integrated health providers current on behavioral health legal and regulatory developments. We highlight recent legal developments, including but not limited to audit risks, significant litigation, enforcement actions, and changes to behavioral health-related laws or regulations such as health privacy, confidentiality, and/or security issues, consent issues, data-sharing allowances, and other cutting-edge arrangements and issues facing behavioral and integrated health care providers.

OIG & DOJ Telehealth Audits: Risks & Action Items

In February 2021, the U.S. Department of Health and Human Services, Office of the Inspector General (OIG) published a [statement](#) announcing its intention to conduct seven audits of telehealth services provided under the Medicare and Medicaid programs during the COVID-19 pandemic. Earlier, the Department of Justice (DOJ) identified fraudulent and abusive telehealth practices as an enforcement priority. Because several waivers loosened telehealth regulatory requirements, OIG wants to: identify weaknesses in the system; ensure these programs were not compromised by fraud, abuse, or misuse; determine which flexibilities should be made permanent; and evaluate general utilization information. Based on provider feedback, behavioral health providers pivoted to use telehealth in ways rarely employed before, making these audits of particular interest to OIG in evaluating a provider’s risk profile. The results of these audits are expected to be published in late 2021 or early 2022. The following identified risks and considerations could potentially apply to the OIG audits and the DOJ investigations:

- **Waivers & Timelines:** Identify when the various waivers and private payor policies became effective, when they changed, as well as their scope; Ensure dates of services are in-line with coverage policies, including distant and originating sites, virtual check-in services, and technology use. Because

private payors often follow OIG audits with their own audits, ensure private payor coverage policies are compliant as well.

- **Licensing & Credentialing:** If care has been provided to patients in other localities or states or from a different locality or state, ensure all provider licensures were effective and up-to-date at the time the service was provided (given the evolving legal and regulatory environment during COVID-19, waivers, etc.).
- **Enrollment:** If a patient's care was billed to Medicare or Medicaid, ensure the patient was enrolled and eligible for such benefits at the time of services.
- **Billing & Coding:** OIG said it will report overpayments to CMS; thus, all billing and coding documentation needs to be accurate, especially if the number of claims to Medicare or Medicaid increased during the pandemic. OIG indicated its concern about fraud, notably sham remote visits and improper billing for items or services other than telehealth visits (durable medical equipment, genetic tests, etc.). Some examples of accuracy reviews include:
 - (1) Reviewing claims and ensuring the correct codes, including the new pandemic mental health codes, were billed correctly, and providing sufficient supporting documentation for the codes billed;
 - (2) Addressing if the records meet specific telehealth billing requirements;
 - (3) Ensuring all telehealth providers receive robust education on proper billing procedures for telehealth services and documenting that communication;
 - (4) Documenting the means of communication between provider and patients as required;
 - (5) Documenting requisite level of decision-making;
 - (6) Documenting and coding provider type and time-based services as required;
 - (7) If documentation is missing or errors are discovered, take corrective action, update the patient record to capture the required elements, pay back overpayments as soon as possible, and document that action.
- **Compliance Policies and Procedures:** Review compliance policies and procedures to ensure that programs adequately address specific telehealth requirements, that those policies and procedures were clearly communicated to providers and staff, and that those policies were and are being followed. For instance, ensure that technology use was and is compliant with HIPAA as amended by COVID-19 waivers and that contracts are in compliance with fraud and abuse laws.

Colorado Law Transforms Behavioral Health Service Regulation

A Colorado bill introduced February 2021 establishes a new state agency that will transform how Colorado will deliver mental health and substance use services. On April 22, Gov. Polis signed [Colorado House Bill 21-1097](#), which directs the Colorado Department of Human Services (DHS) to establish a behavioral agency, the Behavioral Health Administration (BHA), by July 2022.

- **What Is the BHA?** The BHA is a new state agency that will be housed in the Colorado Department of Human Services (CDHS) until 2024, after which time the state will determine where to permanently house the agency. The structure of the BHA is not yet known, but such decisions will be made by the Behavioral Health Reform Executive Committee and the Governor's Office by Nov. 1, 2021, at which time it will be submitted to the General Assembly. The BHA is expected to be operational in July 2022.
- **What Will the BHA Do?** The BHA will align, coordinate, and integrate state mental health and substance use programs and funding under a single government agency, thereby streamlining access to services for Coloradans and reducing bureaucracy for providers. The BHA is tasked with the following:
 - (1) Coordinating and integrating the delivery of behavioral health services in Colorado;
 - (2) Setting standards for the behavioral health system to improve the quality and equity of care;
 - (3) Ensuring that behavioral health services respond to the changing needs of communities, monitor state and local outcomes, support tribal needs, and evaluate state efforts;
 - (4) Improving equitable access to, quality of, and affordability of behavioral health services for Coloradans;
 - (5) Preserving and building upon the integration of behavioral and physical care that treats the whole person;
 - (6) Leading and promoting Colorado's priority of addressing the increasing need for behavioral health services;
 - (7) Eliminating unnecessary fragmentation of services and streamlining access;
 - (8) Addressing social determinants of health;
 - (9) Promoting transparency and accountability of behavioral health reform outcomes and spending of taxpayer dollars;
 - (10) Reducing administrative burden on behavioral health care providers.

The ultimate framework of the BHA and details of its implementation remain to be seen; however, big changes to Colorado's behavioral health system, including consolidation of behavioral health programs, are expected in the final plan. Those interested in following or participating in developments of the BHA, the Behavioral Health Task Force and Subcommittee Members' next quarterly meeting will take place Sept. 8, 2021 from 3-5 p.m MST. Those interested in attending can [register here](#). Updates on Colorado's behavioral health reform can be followed at the [CDHS Behavioral Health Reform webpage](#).

Let's Stay in Touch

We want to stay in touch with you. Through this newsletter, we will be sharing tips and updates we have learned in the course of our services to clients, and we will do our best to facilitate an interactive dialogue with behavioral and integrated health providers and the issues they are facing in their businesses. If you know someone who would appreciate receiving the Ledger, forward this email to them, or they can subscribe [here](#).

Contributors

Julie A. Sullivan
Shareholder
+1 303.685.7412
sullivanjul@gtlaw.com

Nancy E. Taylor
Shareholder
+1 202.331.3133
taylorn@gtlaw.com

Tess Dillon Meyer
Associate
+1 202.533.2319
meyert@gtlaw.com

Dara N. Keller
Associate
+1 303.572.6594
kellerda@gtlaw.com

Jennifer M. Little
Associate
+1 303.572.6564
littleje@gtlaw.com

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