



AMERICAN
PSYCHOLOGICAL
ASSOCIATION
PRACTICE ORGANIZATION

April 30, 2014

Edith Ramirez, JD
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chairman Ramirez,

The American Psychological Association Practice Organization (APAPO) appreciates the opportunity to submit comments to the Federal Trade Commission (FTC) regarding the FTC's recent workshop "Health Care Workshop, Project No. P131207." APAPO applauds the FTC's commitment to promote competition, patient access and patient choice in the health care market. We encourage the FTC to continue its advocacy efforts to prevent anticompetitive conduct in the health care marketplace to ensure patients have full access to health care services and providers.

The APAPO is an affiliate of the American Psychological Association (APA), the professional organization representing more than 130,000 members and affiliates engaged in the practice, research and teaching of psychology. APAPO promotes the professional interests of psychologists in a wide variety of practice settings. APAPO has advocated for increased access to mental and behavioral health care, inclusion of psychologists in new practice models, fairness in public and private insurance reimbursement and appropriate quality measurement for psychologists.

Licensure Regulations And Reimbursement Policies May Adversely Affect Innovations In The Delivery Of Telehealth Services

With regard to issues of telehealth and innovations in health care delivery, psychology is very much interested in how to incorporate technology in an appropriate way that not only ensures the safe delivery of behavioral health services but enhances patient access to much needed services. Increasing calls from psychologists for guidance on how to use technology in providing psychological services prompted the APA to establish a joint task force with the Association of State and Provincial Psychology Boards (ASPPB) and The Trust to develop the [Guidelines for the Practice of Telepsychology](#). This document is meant to assist psychologists as they apply current standards of professional practice when utilizing telecommunication technologies as a means of delivering their professional services. These guidelines identify the potential privacy and security risks that psychologists and their patients may encounter when services are not provided in an in-person setting. For any health care services provided remotely, good practice would warrant a thoughtful informed consent discussion between the provider and the patient. Many health care disciplines seem to be considering these issues and providing similar guidance to their members.

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In addition to good clinical and ethical practice, there are also issues of licensure/regulation, interjurisdictional practice and reimbursement/payer policies that impact the ability of telehealth practice to evolve in a meaningful way. Currently, the ability for health care professionals to provide services is defined by state law. Under the current regulatory scheme, if a provider wants to treat a patient in another jurisdiction, either the patient must travel to see the provider or the provider must be licensed in the patient's jurisdiction (although there are some limited exceptions). It is very costly and burdensome for providers to seek and maintain licensure in multiple jurisdictions. So we are aware of efforts by ASPPB, the Federation of State Medical Boards and the Nursing Licensure Compact to develop various mechanisms that would enable interjurisdictional practice and/or licensure mobility for their licensees without sacrificing the responsibility of licensing boards to protect the public.

The decision by the Centers for Medicare & Medicaid (CMS) to allow for originating site hospitals or facilities (where the patient is located) to accept and rely upon the credentialing decisions of the distant hospitals or facilities (where the provider is located) has been very helpful in increasing patient access to specialists and providers who may not practice in rural or underserved areas. It is hopeful that CMS and other payers would consider fewer restrictions on those sites where patients may receive services to allow them to receive services via telehealth in their homes if clinically appropriate. Currently, originating sites are often limited to providers' offices, hospitals, clinics, skilled nursing facilities, etc. For many patients with behavioral health needs, being able to see their psychologist virtually from their home would greatly improve their ability to access services especially if they are ill, lack transportation or have a specific diagnosis (e.g., agoraphobia) that would make it difficult for them to make their appointments.

In addition, more consistent reimbursement/coverage policies for services provided via telehealth would facilitate greater patient access. As mentioned above, some payer policies (including Medicare) limit the locations where patients may receive health care services remotely. Loosening those restrictions would greatly benefit the ability of patients to see their providers remotely. Also, many payer policies, including state laws mandating coverage of services provided via telehealth, only allow for services using real-time audio-video conferencing. Store-and-forward technology is often not included and therefore, insurance often does not cover asynchronous telehealth services.

Approximately 22 states have enacted laws prohibiting insurance companies from refusing to cover services because they were provided via telehealth if those services would otherwise be covered if provided in-person. While this definitely indicates an increasing awareness among state policymakers about the utility of telehealth, there continues to be a lack of consistency among those state laws as to whether telehealth reimbursement must be on par with reimbursement for in-person services, whether originating sites may claim a facility fee (assuming the patient is at a site other than his/her home) to cover basic overhead expenses, whether there are geographic restrictions on telehealth coverage, and whether coverage is limited to only those providers in an approved telehealth network. Greater uniformity on reimbursement and coverage issues would provide greater transparency to providers and patients alike and therefore, improve access to services.

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Antitrust Uncertainty and Corporate Practice Laws May Pose Barriers to Innovations in Delivery Models for Psychological Services

The vast majority of our practicing psychologist members are in solo or small group psychology practices (recent surveys indicate that over half of our practicing members are solo practitioners). Many of them are concerned about their ability to survive in the evolving health care system that gives a competitive advantage to larger provider entities. Those advantages include the ability to afford sophisticated IT systems essential to integration and outcomes and other data collection,¹ the ability to provide “one stop shopping” for ACOs, hospitals and other entities seeking behavioral health services, and the greater ability to integrate with physical health care. (There is ample evidence that integration of behavioral health and physical health improves care and reduces overall health costs.²) If a combination of these forces drives many small psychology practices out of business, this will decrease competition for psychological services. More importantly, it would drastically reduce consumer/patient access to crucial mental health services.

To counter this pressure, APAPO has worked to develop innovative practice models, such as independent practice associations and management services organizations, which we hope will be viable models for typical psychology practices. These models will allow small psychology practices to collaborate and integrate clinically, while still maintaining their small businesses, instead of having to merge into larger practices. We believe that these models will allow these collaborations to provide better, more integrated care, while reducing overall health costs and maintaining health competition in the marketplace for mental health services.

Antitrust uncertainty

Antitrust concerns are a regulatory barrier to the development of innovative practice models. We have reviewed the relevant guidance from the FTC and the Department of Justice and obtained an outside legal opinion on this issue. As the FTC/DOJ guidance appears to recognize, to be viable some of these innovative collaborations will need the ability to jointly negotiate reimbursement with payers. We are providing general guidance to our members interested in innovative practice models on the necessary clinical or financial integration to avoid antitrust concerns.

But a practice considering new models (particularly a very innovative one that departs from prior models that have been reviewed by the antitrust agencies) will not have much certainty whether its integration is sufficient to avoid antitrust scrutiny until it has vetted the details of the proposed model via an advisory opinion from the

¹ Psychologists have never been eligible for incentive payments under the HITECH Act that support physicians’ acquisition of electronic health records systems. The APA Practice Organization continues to press for legislation to remove that discriminatory exclusion of psychologists.

² American Hospital Association (2012) Bringing Behavioral Health into the Care Continuum: Opportunities to Improve Quality, Costs and Outcome, *TrendWatch* Policy Research Report, available at <http://www.aha.org/research/reports/tw/12jan-tw-behavhealth.pdf>.

FTC or an opinion from an lawyer with appropriate antitrust expertise Legal advice from attorneys with real expertise in this specialized area of antitrust can be prohibitively expensive for most of our members, and it may take several months and considerable effort to obtain an FTC advisory opinion. This uncertainty regarding the antitrust implications of a particular model -- and the cost and delay of reducing that uncertainty -- creates a disincentive to innovation.

We would like to discuss with the FTC ways to make it easier for our members interested in innovation to achieve clarity on this issue. An opportune forum for that discussion will be in connection with a symposium on this and other antitrust issues at APA's annual convention in early August. Our in-house attorney on these issues will be on a panel with Markus H. Meier of FTC's Health Care Division and Ryan Kantor of DOJ's Litigation I Section, Antitrust Division. In connection with that presentation, we hope to discuss possible solutions with Mr. Meier and Mr. Kantor, such as having FTC/DOJ comment on the antitrust guidance we are providing to our members and options for expedited review for advisory opinion requests.

State laws barring multi-disciplinary professional corporations and LLCs

Another barrier to innovative practice models that foster the integration of behavioral health and physical health, are archaic state laws that prohibit the formation of multi-disciplinary professional corporations and limited liability companies (LLCs). Our recent 50-state review of professional corporations' laws indicates that about 20 states appear to prohibit psychologists from forming professional corporations with any other type of health care professional, while 5 states only allow psychologists to incorporate with certain other mental health professionals. State LLC laws appear to pose similar barriers to integration.

These laws serve no legitimate purpose and, in fact, create unnecessary barriers to integration and healthy competition in health care. We have worked with some of our state associations on legislation to bring these laws into the 21st century, with mixed success so far. Would the FTC be willing to write a letter in support of our state psychological associations seeking legislation to eliminate these outdated barriers to integration and reasonable health care competition?

Thank you for the opportunity to provide this information to the FTC. We look forward to working with the FTC staff on efforts to improve transparency and access in the health care marketplace.

Sincerely,

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cc: Association of State and Provincial Psychology Boards (ASPPB)
The Trust

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