

BOARDS AND COMMISSIONS
Board of Optometric Examiners
(Amendment)

201 KAR 5:055. Telehealth.

RELATES TO: KRS 320.300, 320.390

STATUTORY AUTHORITY: KRS 320.390(2)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 320.390(2) requires the Board of Optometric Examiners to promulgate administrative regulations to prevent abuse and fraud through the use of telehealth services, prevent fee-splitting through the use of telehealth services, and utilize telehealth in the provision of optometric services and in the provision of continuing education. This administrative regulation establishes requirements for the use of telehealth services.

Section 1. Definitions.

- (1) ~~["Contact lens prescription" is defined by KRS 367.680(3).]~~
{(2)} ~~["Eye examination" means an examination that meets the requirements for a complete eye examination established in 201 KAR 5:040, Section 7(1).]~~
{(3)} ~~["Face to face" means in person and not via telehealth.]~~
{(4)} ~~["Licensed health care professional" means an optometrist licensed pursuant to KRS Chapter 320, or a physician or osteopath licensed under KRS 311.550(12).]~~
{(5)} ~~"Doctor of Optometry[Optometrist]" means an individual licensed by the Kentucky Board of Optometric Examiners to engage in the practice of optometry.~~
(2) {(6)} "Patient" means the person receiving services or items from a doctor of optometry[an optometrist or a physician].
{(7)} ~~["Physician" is defined by KRS 311.550(12).]~~
(3) {(8)} "Practice of optometry" is defined by KRS 320.210(2).
{(9)} ~~["Prescription" means an order for a pharmaceutical agent, or any other therapy within the scope of practice of an optometrist or a physician.]~~
{(10)} ~~["Prescription for eyewear" means a written prescription for visual aid glasses or a contact lens prescription after a complete eye examination is performed by an optometrist or physician.]~~
(4) {(11)} "Telehealth" is defined by KRS 320.390(3) and KRS 211.332.
{(12)} ~~["Telehealth provider" means an optometrist licensed pursuant to KRS Chapter 320 who performs a telehealth consultation.]~~
{(13)} ~~["Telepractice" means the practice of optometry that is provided by using communication technology that is two (2) way, interactive, simultaneous audio and video.]~~
{(14)} ~~["Visual aid glasses" is defined by KRS 320.210(4).]~~

Section 2. ~~[Patient Identity,]~~ Communication and Informed Consent Requirements.

- (1) All telehealth services by a doctor of optometry shall be conducted:
(a) By a doctor of optometry to a patient or to another health care provider at a different location; and,
(b) Over secure telecommunication technologies, including but not limited to synchronous and asynchronous technology, remote patient monitoring technology, and audio-only encounters.
(2) Prior to the delivery of telehealth services, a doctor of optometry must obtain the informed consent of the patient or obtain the consent by another appropriate person with authority to make the health care treatment decision for the patient.
(a) For purposes of this section, informed consent by a patient can be provided in writing, verbally acknowledged, or electronically submitted.

(b) The informed consent must include an acknowledgment of the risks and limitations of telehealth services. ~~{An optometrist-patient relationship shall not commence via telehealth.}~~

~~{(2)} [An initial, in-person meeting for the optometrist and patient who will prospectively utilize telehealth shall occur in order to evaluate whether the potential or current patient is a candidate to receive services via telehealth.]}~~

~~{(3)} [An optometrist who uses telehealth to deliver vision or eye care services shall at the initial, face-to-face meeting with the patient:]}~~

~~{(a)} [Verify the identity of the patient;]}~~

~~{(b)} [Establish a medical history and permanent record for the patient;]}~~

~~{(c)} [Obtain alternative means of contacting the patient other than electronically such as by the use of a telephone number or mailing address;]}~~

~~{(d)} [Provide to the patient alternative means of contacting the optometrist other than electronically such as by the use of a telephone number or mailing address;]}~~

~~{(e)} [Provide contact methods of alternative communication the optometrist shall use for emergency purposes such as an emergency on call telephone number;]}~~

~~{(f)} [Document if the patient has the necessary knowledge and skills to benefit from the type of telepractice provided by the optometrist; and]}~~

~~{(g)} [Inform the patient in writing and document acknowledgement of the risk and limitations of:]}~~

~~{1.} [The use of technology in the use of telepractice;]}~~

~~{2.} [The potential breach of confidentiality of information or inadvertent access of protected health information due to technology in telepractice;]}~~

~~{3.} [The potential disruption of technology in the use of telepractice;]}~~

~~{4.} [When and how the optometrist will respond to routine electronic messages;]}~~

~~{5.} [The circumstances in which the optometrist will use alternative communications for emergency purposes;]}~~

~~{6.} [Others who may have access to patient communications with the optometrist;]}~~

~~{7.} [How communications shall be directed to a specific optometrist;]}~~

~~{8.} [How the optometrist stores electronic communications from the patient; and]}~~

~~{9.} [Whether the optometrist may elect to discontinue the provision of services through telehealth.]}~~

Section 3. Jurisdictional Considerations.

(1) A doctor of optometry licensed by the Kentucky Board of Optometric Examiners may provide telehealth services in the practice of optometry:

(a) To a person who is a permanent resident of Kentucky while the person is located in Kentucky;

(b) To a person who is a permanent resident of Kentucky while the person is temporarily located outside of Kentucky; or

(c) To a person who is not a permanent resident of Kentucky while the person is temporarily located in Kentucky.

(2) A doctor of optometry licensed by the Kentucky Board of Optometric Examiners may provide telehealth services when the doctor of optometry is not physically located in Kentucky to a permanent resident of Kentucky.

(3) A doctor of optometry licensed by the Kentucky Board of Optometric Examiners may establish a doctor-patient relationship using telehealth and digital technologies. ~~{A licensed health care professional providing eye and vision services via telehealth shall be licensed by the Kentucky Board of Optometric Examiners or the Kentucky Board of Medical Licensure if services are provided:}~~

~~{(1)} [To a person physically located in Kentucky; or]}~~

~~{(2)} [By a person who is physically located in Kentucky.]}~~

Section 4. Representation of Services and Code of Conduct.

(1) A doctor of optometry. ~~[A telehealth provider]~~ shall not engage in false, misleading, or deceptive advertising.

(2) An advertisement for telehealth services must comply with 201 KAR 5:002, Section 2. ~~[A person shall not advertise an eye examination unless the requirements of 201 KAR 5:040, Section 7(1) are met. A person shall not purport to write a prescription for eyewear solely by using an autorefractor or other automated testing device.]~~

(3) ~~[(2)]~~ Evaluation, treatment, and consultation recommendations by a doctor of optometry via telehealth shall be held to the same standards of appropriate practice as those in traditional in-person clinical settings and established in 201 KAR 5:002, Section 3. ~~[Treatment and consultation recommendations made in an online setting, including a prescription or a prescription for eyewear via electronic means, shall be held to the same standards of appropriate practice as those in traditional practice, face-to-face settings. Treatment, including issuing a prescription for eyewear based solely on an online autorefraction, shall not constitute an acceptable practice or standard of care.]~~

(4) A doctor of optometry providing optometry services via telehealth shall: ~~[A telehealth provider shall:]~~

(a) Verify the identity of the patient before telehealth services are performed ~~[Not split fees in accordance with KRS 320.300(3)];~~

(b) Collect and review a patient's medical history. ~~[Shall maintain a medical record of a service or item provided to a patient via telepractice];~~

(c) Provide any applicable accommodations required by the Federal Americans with Disabilities Act, 42 U.S.C. secs. 12101 et seq., as amended;

(d) Maintain patient privacy and security in accordance with applicable state and federal law;

(e) Gather and transmit protected health information in compliance with the federal Health Insurance Portability and Accountability Act of 1996, as amended;

(f) ~~[(e)]~~ Document and maintain a record of the patient's presenting problem or ~~[,]~~ purpose for the telehealth service, including the ~~[, or]~~ diagnosis or treatment and include which services were provided by telehealth ~~[telepractice];~~

(g) Perform telehealth services with a recognized Current Procedural Terminology Code maintained by the American Medical Association, if applicable;

(h) Secure all required credentialing for reimbursement of telehealth services; and

(i) Obtain privileges if required by hospitals or facilities to admit and treat patients.

(5) An optometrist providing telehealth services shall not split fees in accordance with KRS 320.300(3);

(6) Prescriptions for controlled substances shall not be made via telehealth by a doctor of optometry.

(7) A contact lens or visual aid glasses prescription issued through telehealth must include the requirements established in the Kentucky Consumer Protection Eye Care Act, KRS 367.680-690 et seq.

~~[(d)] [Use secure communications with each patient including encrypted text messages, via email or secure Web site and not use personal identifying information in non-secure communications; and]~~

~~[(e)] [Dispense visual aids only in accordance with KRS 320.300(1).]~~

Section 5. Utilization of Telehealth in Provision of Continuing Education. Credit for telehealth educational presentations shall be granted in accordance with 201 KAR 5:030. ~~[,]~~ ~~Section 2. Educational hours obtained through telehealth shall be considered as part of the credit hours granted in accordance with 201 KAR 5:030, Section 6(1).]~~

~~[Section 6.] [This administrative regulation shall not be construed as giving jurisdiction over physicians licensed under KRS Chapter 311 to the Kentucky Board of Optometric~~

~~Examiners.}}~~

WILLIAM REYNOLDS, President

APPROVED BY AGENCY: March 15, 2023

FILED WITH LRC: March 15, 2023 at 11:30 a.m.

PUBLIC HEARING AND COMMENT PERIOD: A public hearing on this administrative regulation shall be held on May 23, 2023 at 3:00 p.m. at the Kentucky board of Optometric Examiners, 2365 Harrodsburg Road, Suite A240, Lexington, Kentucky 40504. Individuals interested in attending this hearing shall notify this agency in writing by 4:30 p.m. on May 18, 2023, five workdays prior to this hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to attend the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted until 11:59 p.m. on May 31, 2023. Send written notification of intent to attend the public hearing or written comments on the proposed administrative regulation to:

CONTACT PERSON: Christi LeMay, Executive Director, Kentucky Board of Optometric Examiners, 2365 Harrodsburg Road, Suite A240, Lexington, Kentucky 40504; phone (859) 246-2744; fax (859) 246-2746; email christi.LeMay@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact Person:Carson Kerr

(1) Provide a brief summary of:

(a) What this administrative regulation does:

This administrative regulation amends the existing telehealth regulation to bring about some needed revisions. Among those revisions this amendment is designed to prevent abuse and fraud through the use of telehealth services, prevent fee-splitting through the use of telehealth services, and utilize telehealth in the provision of optometric services and in the provision of continuing education. This administrative regulation establishes requirements for the use of telehealth services.

(b) The necessity of this administrative regulation:

This regulation is necessary to comply with the mandates of KRS 320.390(2), which requires the Kentucky Board of Optometric Examiners to promulgate administrative regulations related to the practice of optometry via telehealth.

(c) How this administrative regulation conforms to the content of the authorizing statutes:

This regulation establishes criteria for mandates in KRS 320.390, specifically drafted to prevent fraud and abuse, prevent fee-splitting, and promote the utilization of telehealth in the provision of optometric services.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes:

This amendment to the current administrative regulations continues to carry-out the functions mandated in KRS 320.390 while also promoting utilization of telehealth.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation:

The amendment eliminates and cleans up existing definitions which are no longer necessary to define, it eliminates the barriers to doctors of optometry establishing the doctor-patient relationship via telehealth, incorporates model telehealth regulation language related to jurisdictional concerns, and sets out the manner in which doctors of optometry may utilize telehealth in the practice of optometry.

(b) The necessity of the amendment to this administrative regulation:

The amendment brings the regulation in conformity with the authorizing statutes, and refreshes the regulation to bring it in line with similar telehealth rules in Kentucky. (c) How this amendment conforms to the content of the authorizing statutes: The amendment eliminates the requirement that the doctor-patient relationship may not be established via telehealth except in unique circumstances, as the authorizing statutes do not address this issue.

(c) How the amendment conforms to the content of the authorizing statutes:

No answer provided.

(d) How the amendment will assist in the effective administration of the statutes:

There will be conformity between the statutes and regulation, and more consistency with newer telehealth rules.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation:

Approximately 900 optometrists are required to follow the dictates of these provisions for the practice of optometry by Kentucky Licensed Doctors of Optometry;

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment:

Doctors of optometry will find it easier to establish a doctor-patient relationship via telehealth while also being required to maintain certain records, and comply with the provisions of this regulation in order to practice in this manner.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3):

There is no additional monetary cost to the entities identified in question (3).

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3):

The amendment eliminates a requirement rather than add one, so there is no benefit of compliance. (5) Provide an estimate of how much it will cost to implement this administrative regulation:

(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially:

No new costs will be incurred by the board.

(b) On a continuing basis:

No new costs will be incurred by the Board.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation:

No funding is required for this amendment.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment:

Implementation of this regulation is not dependent on an increase in fees or funding.

(8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees:

This administrative regulation does not establish any fees.

(9) TIERING: Is tiering applied?

Tiering was not applied as the regulation is applicable to all licensees.

FISCAL NOTE

(1) What units, parts, or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation?

This administrative regulation will impact licensees of the Kentucky Board of Optometric Examiners.

(2) Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation.

KRS 320.390 requires the action taken by this administrative regulation.

(3) Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year?

There will be no change in revenue for the agency.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years?

There will be no change in revenue for the agency.

(c) How much will it cost to administer this program for the first year?

There will be no change in cost for the agency. This will not require any new measures for enforcement unless a complaint comes in regarding these updated practices, in which case the agency will investigate as it always has done.

(d) How much will it cost to administer this program for subsequent years?

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-):

Expenditures (+/-):

Other Explanation:

This regulation simply brings optometry practice in the context of telehealth in line with the terminology and means by which other agencies in the Commonwealth discuss telehealth.

(4) Estimate the effect of this administrative regulation on the expenditures and cost savings of regulated entities for the first full year the administrative regulation is to be in effect.

(a) How much cost savings will this administrative regulation generate for the regulated entities for the first year?

There will be no costs savings, or additional costs for that matter.

(b) How much cost savings will this administrative regulation generate for the regulated entities for subsequent years?

There will be no costs savings, or additional costs for that matter.

(c) How much will it cost the regulated entities for the first year?

There will be no costs savings, or additional costs for that matter.

(d) How much will it cost the regulated entities for subsequent years?

There will be no costs savings, or additional costs for that matter.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Cost Savings (+/-):

Expenditures (+/-):

Other Explanation:

There will be no costs savings, or additional costs for that matter.

(5) Explain whether this administrative regulation will have a major economic impact, as defined below.

"Major economic impact" means an overall negative or adverse economic impact from an administrative regulation of five hundred thousand dollars (\$500,000) or more on state or local government or regulated entities, in aggregate, as determined by the promulgating administrative bodies. [KRS 13A.010(13)] This will not have a major economic impact.