Office of Policy Planning
Bureau of Competition
Bureau of Economics

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Delaware Board of Speech/Language Pathologists, Audiologists and Hearing Aid Dispensers
Cannon Building
861 Silver Lake Blvd.
Dover, DE 19904

The staffs of the Federal Trade Commission's ("FTC") Office of Policy Planning, Bureau of Economics, and Bureau of Competition[1] (collectively, "FTC staff") appreciate the opportunity to respond to the Board of Speech/Language Pathologists, Audiologists and Hearing Aid Dispensers' ("Board") notice requesting comments on its proposed revisions to its telecommunication and telehealth regulations. The Board proposes to eliminate an existing restriction on evaluation and treatment by correspondence, including telecommunication at 24 Del. Admin. Code § 3700-9.2.1.4, and replace it with a new § 3700-10, on "Telepractice."[2] The new regulation would promote the use of telepractice by allowing licensed Speech/Language Pathologists, Audiologists and Hearing Aid Dispensers (collectively, "licensees")[3] to determine whether telepractice is an appropriate level of care for a patient. However, before licensees could

> "Licensees who deliver telepractice services must possess specialized knowledge and skills in selecting interventions that are appropriate to the technology and that take into consideration client and disorder variables."[21]

These provisions provide safeguards to ensure that telepractice meets an in-person standard of care. The proposed regulation, however, also would create a requirement that all "[i]nitial evaluations shall be performed face to face and not through telepractice."[22] The proposed regulation would allow a licensee to "be responsible for determining and documenting that telepractice is an appropriate level of care for the client only after an initial face to face evaluation."[23] Accordingly, while the proposed regulation would rely on the judgment of licensees to determine whether to provide telepractice interventions and consultations, it prohibits initial evaluations by telepractice, potentially prohibiting some telepractice diagnostic services and discouraging practitioners and consumers from using telepractice for post-evaluation treatment or intervention.

III. Likely Competitive Impact of Delaware's Proposed Telepractice Regulation

A. Telepractice Has the Potential to Increase Competition and Access to Speech and Hearing Care Services

Generally, competition in health care markets benefits consumers by containing health care prices, expanding access and choice, and promoting innovation. Telehealth can potentially increase the supply of practitioners and thereby enhance price and non-price competition, reduce transportation expenditures, and improve access to quality care.[24] Many health care professionals and expert bodies support the use of telehealth to address access to health care challenges arising from an aging population, health care workforce shortages, and geographic and other maldistributions of providers that can lead to shortages in urban as well as rural areas.[25]

Telepractice as a delivery model for audiology and speech/language pathology services offers the same potential to enhance competition among providers and improve access to quality care. Practitioners and expert bodies such as the National Academies of Sciences, Engineering, and Medicine have recognized the potential for telepractice to address geographic and economic barriers to hearing and speech care, especially in underserved communities.[26]

The Delaware Division of Public Health has acknowledged the potential for telehealth to mitigate the state's healthcare access challenges caused by shortages in critical healthcare specialties and underserved geographic locations.[27] While Delaware is a small state, many of its health resources are unevenly distributed. For example, there are few audiologists in Sussex and Kent counties relative to New Castle, suggesting that telehealth would allow New Castle practitioners to serve Sussex and Kent patients.[28] Experts have found that many audiology and speech/language pathology rehabilitation services can be effectively provided through telepractice, potentially improving access to care arising from shortages, economic disparities, and/or poor mobility.[29] As the Delaware *State Plan* points out, the elderly and individuals with disabilities could especially benefit from telehealth because it would allow them to "receive some medical care at home, or in other more convenient settings."[30]

The potential for improved health outcomes and access to cost-effective medical care motivated the Delaware Medicaid Program's 2012 decision to reimburse services delivered by telemedicine.

found to be an effective way to address barriers to obtaining diagnostic hearing evaluation and to reduce or eliminate the number of infants not receiving an audiological evaluation.[43]

Such a program could enable Delaware-licensed audiologists located in New Castle County or out-of-state to provide diagnostic evaluations to infants in Sussex and Kent counties, addressing the shortages in those counties and potentially reducing the number of infants who did not receive an audiological evaluation.[44] Importantly, improved follow-up may enable children found to have a hearing loss to receive treatment without delay, likely allowing them to acquire language skills comparable to hearing children.

Requiring initial in-person examination or evaluation requirements in the health professions may restrict entry of qualified telehealth practitioners, potentially decreasing competition, innovation, and health care quality, while increasing price.[55] Thus, several state legislatures and health care regulatory boards, including Delaware's Board of Occupational Therapy Practice, have recently eliminated or declined to adopt provisions requiring an initial in-person evaluation.[56]

Similarly, of the 19 states and the District of Columbia with laws, regulations, or policies on speech/language pathology or audiology telepractice, only three—Kentucky,[57] Montana,[58] and Texas[59]—require an in-person initial evaluation or contact.[60] Moreover, neither Kentucky nor Montana requires the distant telepractice provider to make an in-person evaluation if a qualified, in-person practitioner evaluates the client prior to the provision of telepractice services.[61]

The Board could avoid a blanket restriction in the proposed regulation by allowing licensed practitioners to determine whether telepractice is appropriate for an initial evaluation, just as they are permitted to do for subsequent visits, consistent with the in-person standard of care and related health and safety concerns. Allowing the licensed practitioner to determine whether to use telepractice for an initial evaluation would put the decision in the hands of the practitioner in the best position to weigh access, health, and safety considerations on a case-by-case basis. In addition, because the nature of many speech/language pathology and audiology services requires a facilitator to assist with the patient and/or specialized equipment,[62] licensees often will have a proxy for an in-person encounter. In any event, the Board's proposed rules already would require telepractice providers to ensure that their services are appropriate for the client's condition, and would hold providers to an in-person standard of care.[63]

For these reasons, we encourage the Board to consider whether the proposed regulation could provide potentially greater access, quality of care, and other benefits to patients by broadening the proposed definition of telepractice to include evaluations and eliminating the apparent prohibition of initial evaluations conducted by telepractice.[64]

IV. Conclusion

Well-intentioned laws and regulations may impose unnecessary, unintended, or overbroad restrictions on competition, thereby depriving health care consumers of the benefits of vigorous competition.[65] Thus, we suggest that regulators consider whether a restriction that could limit entry or access is narrowly tailored to the legitimate goals of the restriction, such as health and safety, and whether other provisions in the law or regulations already achieve, or could achieve, such goals through less competitively restrictive means.

The proposed Delaware regulation could promote the use of telepractice and enhance competition in the provision of hearing and speech care services, likely increasing access, improving quality of care, and bringing other benefits, by allowing licensees to determine whether telepractice is an appropriate level of care.

We commend the Board and support the proposed regulation's flexibility in generally allowing licensees to determine whether to use telepractice. At the same time, we urge the Board to consider whether allowing licensees to decide whether and when to use telepractice delivery, including on initial evaluations, would better promote competition and access to safe and affordable care.

We appreciate your consideration.

Respectfully submitted,

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extent that hearing aid dispensers provide services remotely, we see no reason why an analysis of the likely

Oct. 18, 2016). Populations and areas for the counties: Sussex (197,145; 950 sq mi); Kent (162,310; 594 sq mi); New Castle (538,479; 438 sq mi). *Se* 2010 Census Data for Delaware,

[38] *See, e.g.*, Robert H. Eikelboom & De Wet Swanepoel, *Remote Hearing Assessment*, in TELEPRACTICE IN AUDIOLOGY 123 (Emma Rushbrooke & K. Todd Houston, eds. 2016); Madan Dharmar et al., *Results of a Follow-Up Tele-audiology Diagnostic Evaluation*, 22 TELEMED. & EHEALTH 1 (2016) (study of California newborn tele-audiology evaluation program); Colleen Psarros & Emma Van Wanrooy, *Remote Fitting of Cochlear Implants*, in TELEPRACTICE IN AUDIOLOGY 91 (Emma Rushbrooke & K. Todd Houston, eds. 2016); Chad Gladden et al., *Tele-audiology Evaluation and Hearing Aid Fitting*, 26 J. AM. ACAD. AUDIOLOGY 792, 795-96 (2015) (describing hearing aid fitting and programming by the Dep't of Veterans Affairs). *See also* NATIONAL ACADEMIES, *supra* note 26, at 124 (listing current teleaudiology capabilities for adults). ASHA's list of audiology services that can be provided by telepractice includes aural rehabilitation, cochlear implant fitting, hearing aid fitting, infant and pediatric hearing screenings, pure tone audiometry, speech in noise testing, and videootoscopy. *See* ASHA, TELEPRACTICE, *supra* note 2, Practice Areas in Audiology.

[39] *See* Gladden et al., *supra* note 38, at 793, 795. *See also* NATIONAL ACADEMIES, *supra* note 26, at 125 ("One of the leading users of tele-audiology services is the VA, which serves a large number of patients who live outside

[50] *See supra* notes 18, 22 and accompanying text.

[51] *See supra* notes 33-36, 40-43 and accompanying text.

[52] ASHA defines "*Telepractice*" as "the application of telecommunications technology to the delivery of speech language pathology and audiology professional services at a distance by linking clinician to client/patient or clinician to clinician for assessment, intervention, and/or consultation." *See* ASHA, TELEPRACTICE, *supra* note 2, Overview. *See also* ASHA, MODEL TELEPRACTICE SERVICE DELIVERY REGULATIONS § .01, http://www.asha.org/uploadedFiles/ModRegTelepractice.pdf ("'Telepractice Service' means the application of telecommunication technology to deliver speech-language pathology and/or audiology services at a distance for assessment, intervention and/or consultation.").

[53] *See, e.g.*, ASHA, MODEL TELEPRACTICE PRACTICE SERVICE

behavioral, physical, and cognitive abilities to participate in telepractice services. Telepractice services may be provided by the patient's evaluator or another qualified speech-language pathologist or audiologist by the board.").

[59] *Se* 16 TEX. ADMIN. CODE § 111.212(h) (2016) ("The initial contact between a licensed speech-language pathologist and client shall be at the same physical location to assess the client's candidacy for telehealth, including behavioral, physical, and cognitive abilities to participate in services provided via telecommunications prior to the client receiving telehealth services."). Texas has a Board for speech-language pathologists and audiologists, and another Board for hearing aid fitters and dispensers. Each Board adopted "Joint Rules for Fitting and Dispensing of Hearing Instruments for Telepractice,"