

Mental Health Liaison Group

May 18, 1999

The Honorable James Jeffords
Chair, Health, Education, Labor and Pensions Committee
United States Senate
SH-835 Hart Senate Office Bldg.
Washington, D.C. 20510

Dear Mr. Chairman:

As consumer, advocacy, family, professional and provider organizations dedicated to mental health we write to express our concern about the critically important issue of medical records privacy. We greatly appreciate the commitment of Chairman Jeffords and Ranking Member Kennedy to enacting meaningful medical records privacy legislation into law. We also believe that insuring strong privacy protections, as we outline below, is essential to protecting the quality of care and the effectiveness of treatment for mental illness.

As the Supreme Court noted in its 1996 *Jaffee v. Redmond* decision, effective psychotherapy cannot be provided unless a patient can rely on a relationship of "trust and confidence" with the therapist in which the patient "is willing to make a frank and complete disclosure of facts, emotions, memories, and fears". The Court found that in order to protect the "mental health of our nation's citizenry" greater mental health confidentiality protections are necessary than for any other type of medical condition. Confidential communications between the patient and the therapist were so sensitive the Court concluded, "the mere possibility of disclosure...may impede the development of the confidential relationship necessary for successful treatment."

In fact, the Court found that the confidentiality of psychotherapy communications was so essential that it could not be subjected to a "balancing test" with other competing demands. Based on these findings, the Court recognized a "psychotherapist-patient privilege" which, like the attorney-client privilege, is virtually immune from compelled disclosure during legal proceedings.

We believe to provide for a voluntary, informed consent process and to protect both the spirit and letter of the law established under *Jaffee v. Redmond*, the following provisions should be included in the bill

Recommendations

We strongly urge that federal privacy legislation not pre-empt state laws which are more protective of patient's rights and that it also not prohibit states from enacting more privacy protective laws in the future. Our banking, credit, and communications industries all operate extensively across state lines, but federal legislation in these areas allows states to enact more privacy-protective laws. Given that the information in medical records is much more sensitive and that privacy is an essential component of quality care, we believe the non pre-emption approach in the Leahy-Kennedy bill is necessary to insure patient privacy.

Equally essential are provisions that incorporate the holding and logic of the *Jaffee v. Redmond* decision, i.e. the effective treatment of mental illness requires that confidential communications between psychotherapist and patient not be disclosed. In the framework of Senator Jeffords' legislation, S. 578, the logic of the *Jaffee* decision as well as the clinical experience of mental health experts compels that additional protections for mental health records are included in the legislation.

Among the needed protections that we urge you to include is a provision that requires a separate authorization for use and disclosure of psychotherapy notes. Of course, authorization for disclosure of information about diagnosis, treatment planning, medication and other services as well as evidence of improvement, or lack thereof, would still be provided as part of the consolidated consent. We would be happy to provide you with legislative language on this issue.

We also strongly urge inclusion of provisions that ensure that patient-identifiable information is used only when necessary, particularly for health care operation purposes. By encouraging the use of aggregate or deidentified data, patient privacy can be fully protected while the free use of health data for administrative, quality improvement or other purposes can be advanced. Thus, the existing provisions on the use of deidentified data in the safeguard sections of both the Jeffords and Bennett bills need to be strengthened.

Informed, voluntary consent is critical to insuring privacy and high quality health care. Particularly important in any legislation is a definition of health care operations narrower than the broad definition contained in Senator Jeffords' legislation and the expansive definition contained in the Bennett bill.

Likewise, any legislation that is truly pro-confidentiality must include provisions which insure that patients who self pay can revoke consent for disclosures for payment and health care operations purposes. A fundamental principle of individual liberty and privacy requires that patients who pay for services themselves must be free to decline providing the highly sensitive personal information in their medical records to insurers, health plans and others without facing the penalty of termination from their health plan.

Law enforcement agents must be required to obtain judicial approval based on a probable cause standard before they are granted access to individually identifiable medical records. Among the protections that MHLG believes critical to insure appropriate patient privacy is a requirement that law enforcement agencies and officials should be subject to the same requirements for protecting individually identifiable health information obtained pursuant to a court order as apply to other recipients of protected health information.

We also believe specific and strong protections are needed to insure that employer access to employees' medical records is strictly limited.

Thank you for considering our views on these important issues.

Sincerely,

Chris Koyanagi
Co-Chair Health Policy Committee

William Bruno
Chair, Workgroup on Privacy

ON BEHALF OF:

Alliance for Children and Families
American Counseling Association
American Federation of State, County and Municipal Employees
American Psychiatric Nurses Association
American Group Psychotherapy Association
American Psychiatric Association
American Association for Marriage and Family Therapy
American Academy of Child and Adolescent Psychiatry
American Association for Psychosocial Rehabilitation
American Orthopsychiatric Association
Association for Ambulatory Behavioral Healthcare
Association for the Advancement of Psychology
Bazelon Center for Mental Health Law
Clinical Social Work Federation
Corporation for the Advancement of Psychiatry
Federation of Behavioral Psychological and Cognitive Sciences
National Alliance for the Mentally Ill
National Association of Protection and Advocacy Systems
National Association of School Psychologists
National Association of Social Workers
National Council for Community Behavioral Healthcare
National Mental Health Association