Mental Health Liaison Group

December 17, 2001

The Honorable Tommy G. Thompson
Secretary
U.S. Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

Dear Secretary Thompson:

The Mental Health Liaison Group (MHLG), a coalition of organizations representing consumers, families, advocates, professionals and providers dedicated to mental health care in our nation, commends you for putting into effect the final rule regarding standards for the privacy of individually identifiable health information (as published in 65 Federal Register 82462 et seq.). We believe that the rule provides for many strong patient records' protections, including those which require: patient authorization for the release of psychotherapy notes, patient consent for release of records for treatment and administrative purposes, patient access to their records, the "minimum necessary" disclosure of records, and the non-preemption of stronger state records privacy laws. We understand that the Department of Health and Human Services (DHHS) is currently in the process of drafting changes to the rule. We take the opportunity to reiterate the importance of these patient protections for individuals with mental health records and to suggest improvements to the rule.

Preservation of Stronger State Mental Health Records Privacy Laws.

We note initially our understanding that DHHS appropriately does not view itself as having the regulatory authority to alter the state preemption provisions of the rule. We mention, however, that the preservation of stronger state records privacy laws is vitally important to patients with mental health records. Many states have enacted laws that more stringently protect the privacy of mental health records than do the provisions of this new federal rule. States have long provided heightened protection for mental health records, recognizing that these records typically contain highly sensitive information, the inappropriate disclosure of which could leave patients vulnerable to embarrassment or stigmatization. These laws must continue to remain intact, if we are to ensure that the federal privacy rule truly protects the privacy of mental health records, acting as a new "floor" of protection upon which states may provide additional protection for patient records.

Suggested Improvements to Key Mental Health Provisions in the Privacy Rule.

~~The psychotherapy notes patient authorization requirement is vitally important to patients with mental health records and should be preserved. In addition, the rule should be amended to require patient authorization of other mental health records, such as psychological testing and assessment records, which contain information that is equally as sensitive as that contained in psychotherapy notes~~. As provided by the rule, 45 C.F.R. § 164.508(a)(2) requires a covered entity to obtain a patient's authorization for disclosure of psychotherapy notes for use beyond the treating therapist. As commentary accompanying the rule indicates, the rationale for this authorization, which is in addition to patient consent for disclosure of records, is based in part on the United States Supreme Court decision of *Jaffee v. Redmond*,

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581 U.S. 1 (1996). In *Jaffee* the Supreme Court emphasized the importance of protecting the privacy that is integral to the relationship between the patient and his or her treating therapist. As the Court determined, effective psychotherapy:

> . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. (518 U.S. at 10.)

The psychotherapy notes patient authorization requirement goes far to protect the privacy of the psychotherapist-patient relationship. However, psychotherapists typically maintain or create records in addition and directly related to psychotherapy treatment, which contain similar and highly sensitive information. In the spirit of the *Jaffee* decision, the rule should also require patient authorization for release of these records to eliminate “the mere possibility of disclosure” that would otherwise impede successful treatment. A patient cannot feel secure in the privacy of his or her mental health treatment, if a realistic perception exists that some records require authorization for release, while other similar and highly sensitive records do not.

Specifically, psychological testing and assessment records are often used for purposes of psychotherapy and contain information that is as sensitive to disclosure as information contained in psychotherapy notes. Therefore--

- ✓ The rule should be amended to provide for patient authorization for the release of testing and assessment records. Preferably, this would be a new and separate patient authorization in addition to the authorization provided for psychotherapy notes.

In addition, the psychotherapy notes and new psychological testing and assessment authorization requirements should be strengthened by—

- ✓ Providing guidance that a therapist’s participation in a health plan may not be predicated on seeking patient authorization for psychotherapy notes or for testing and assessment records, and other related guidance to ensure that the psychotherapy notes authorization requirement cannot be circumvented by covered entities.

For many of the reasons stated above, we are concerned with a recently made National Committee on Vital and Health Statistics recommendation that protected health information be made available “without individual written authorization” when needed for health care quality purposes. This recommendation would seem to eliminate the special protections for psychotherapy notes under the rule’s authorization requirement for purposes of quality assurance and should not be adopted for purposes of future changes to or interpretation of the rule.

The patient consent requirement should be retained in the final rule. In addition, the rule should be amended to ensure that patient consent applies to health plans and other covered entities when they are

using patient records for treatment, payment, and health care operations purposes. Members of the MHLG are pleased that the final rule requires patient consent for the release of their records for "treatment, payment, and health care operations," at 45 C.F.R. § 164.506. The MHLG notes, however, that only health care providers, not health plans and other covered entities, are required to seek patient consent for these mainly payment and administrative uses of records. This lack of patient consent is particularly troubling considering the expansion of the terms "treatment," "payment," and "health care operations" in the final rule to provide for a myriad of records' uses for which patients are unlikely to foresee on providing initial consent.

Patients generally are not concerned with the use of their records by their treating providers. Rather, they are worried, and legitimately so, with the use of their records by entities, such as insurance companies, with which they have little or no contact. In addition, the rule will do little to quell excessive demands made by some health plans for access to patient records, which often amount to requests for entire records.

✓ *The rule should be amended to require health plans and other covered entities to seek patient consent for "treatment, payment, and health care operations" purposes. In conjunction or alternatively, the "treatment," "payment," and "health care operations" purposes could be more narrowly defined.*

The "minimum necessary" requirement should be preserved and interpreted most favorably to the patient to ensure protection of the record for purposes of release to insurers and other third parties beyond the patient and his or her direct treating providers. The rule recognizes a myriad of "treatment, payment, health care operations" and other disclosures and uses of patient records beyond the patient and his or her treating provider. In essence, the rule has legitimized this multitude of uses and disclosures by specifically recognizing and providing for them. For patients, then, the rule must provide for protection of the patient record each time it is disclosed or used by third parties. Without ensuring that the minimum necessary requirement is interpreted most favorably to the patient, the rule would simply eradicate any semblance of records' protection that the rule is designed to afford.

✓ *The "minimum necessary" requirement should be interpreted most favorably to the patient to ensure protection of the record.*

Other Privacy Rule Provisions of Concern to the MHLG.

Disclosures related to law enforcement and pursuant to judicial and administrative proceedings. The rule permits a covered entity to disclose patient records without patient consent, authorization, or opportunity to object in judicial and administrative proceedings (45 C.F.R. § 164.512(e)) and pursuant to law enforcement activities (45 C.F.R. § 164.512(f)). These provisions weaken the rights of patients, because they do not require the obtaining of full legal process. The rule should be amended to require that law enforcement officers and those requesting patient records pursuant to judicial and administrative proceedings comply with constitutionally-based procedures prior to obtaining access to patient records. Written statements from the requestors of information, for example, should not satisfy or substitute for judicial review and the opportunity on the part of the patient to object to disclosure.

Disclosures related to marketing and fundraising. The rule gives covered entities the ability to share patient records without patient consent or authorization for a number of marketing and fundraising purposes (45 C.F.R. § 164.514(e) and (f)). It makes little sense to require treating providers to obtain consent before treatment while permitting marketers and fundraisers access to records without patient permission. Such disclosures represent an invasion of privacy that will substantially weaken patients' belief that their records are safe from intrusion by unknown persons and entities. Certainly and at a *Secretary Thompson*

minimum, the "opt-out" requirements are inadequate, and the rule should be amended to provide for an "opt-in" by the patient before use of his or her records for these purposes.

Compliance burden. Many mental health professionals provide services to patients in solo or small group practices. While these professionals would not want to see the records protections afforded by the rule weakened, the MHLG requests that HHS undergo an on-going assessment of the compliance burden associated with this new rule. The complex and technical nature of the rule can be daunting for providers to understand and implement. There are many administrative requirements that may warrant changes in current practice and operations, such as revising consent and authorization forms, developing a privacy notice and compliance practices, devising record-keeping policies and procedures, training staff (if applicable), and addressing "business associate" relationships. Implementation guidance and technical assistance should be tailored to help mental health providers appropriately comply with the rules, particularly those in solo or small practices, with model forms, policies and contracts.

We look forward to working with you and your staff in the Department of Health and Human Services during this implementation period. We would welcome the opportunity of meeting with you to further discuss these issues and concerns. Please call Doug Walter, Legislative and Regulatory Counsel, American Psychological Association Practice Organization, if you have any questions or comments regarding the suggestions and concerns raised in this letter at 202-336-5889.

Sincerely,

Alliance for Children and Families
American Academy of Child and Adolescent Psychiatry
American Association for Geriatric Psychiatry
American Association for Marriage and Family Therapy
American Association for Psychosocial Rehabilitation
American Association of Pastoral Counselors
American Board of Examiners in Clinical Social Work
American Counseling Association
American Family Foundation
American Group Psychotherapy Association
American Mental Health Counselors Association
American Orthopsychiatric Association
American Psychiatric Association
American Psychoanalytic Association
American Psychological Association
American Society of Clinical Psychopharmacology
Anxiety Disorders Association of America
Association for Ambulatory Behavioral Healthcare
Association for the Advancement of Psychology
Bazelon Center for Mental Health Law
Children and Adults with Attention-Deficit/Hyperactivity Disorder
Clinical Social Work Federation
Corporation for the Advancement of Psychiatry
Employee Assistance Professionals Association
Greater Washington Coalition of Mental Health Professionals and Consumers
MentalHealthAMERICA, Inc.
NAADAC, The Association for Addiction Professionals
National Alliance for the Mentally Ill

National Association for Rural Mental Health
National Association of Anorexia Nervosa and Associated Disorders
National Association of County Behavioral Health Directors
National Association of Psychiatric Treatment Centers for Children
National Association of School Psychologists
National Association of Social Workers
National Coalition for the Homeless
National Depressive and Manic-Depressive Association
National Foundation for Depressive Illness
National Mental Health Association
Tourette Syndrome Association