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May 5, 2021

Office of Civil Rights  
U.S. Department of Health and Human Services  
200 Independence Avenue, SW  
Washington, DC 20201

### **Proposed Modifications to the HIPAA Privacy Rule to Support, and Remove Barriers to, Coordinated Care and Individual Engagement (RIN 0945-AA00 b)**

The Maryland Psychiatric Society, a state medical specialty society representing more than 700 psychiatric physicians, appreciates the opportunity to submit comments on the Department of Health and Human Services' (the Department or HHS) Office of Civil Rights' proposed modifications to the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule to Support, and Remove Barriers to, Coordinated Care and Individual Engagement. We support many of the flexibilities and clarifications included in the proposed rule to give patients more control over their health information and to help clinicians feel more comfortable sharing information to improve care. **On the other hand, we are concerned about some of the proposed changes. In particular, clinicians must have the flexibility to use their professional judgment on the best time to share information as to not adversely impact treatment.**

Below is our specific feedback and recommendations on these proposed changes.

- **III.A.2 Strengthening the Access Right to Inspect and Obtain Copies of PHI (45 CFR 164.524(a)(1))**

While we support patients having improved access to their health information, **we are concerned about proposals that require the sharing of protected health information (PHI and electronic protected health information or ePHI) at the point of care.**

The proposal states "When protected health information is readily available at the point of care in conjunction with a health care appointment, a covered health care provider is not permitted to delay the right to inspect." The proposal also seeks comment on whether to require covered health providers to allow individuals to record PHI, contained in a designated record set, via photographs or recording during such visits. **These provisions of the rule would be burdensome to implement in almost any healthcare setting or specialty, because immediate inspection could require considerable amounts of staff time supervising access, disrupt workflows, and delay essential care to other individuals.** Permitting photography or other recordings could result in privacy loss for other patients being seen in the office or hospital setting. **In addition, we contend that this timeframe is particularly challenging in terms of sharing highly sensitive information with patients, which requires an adequate opportunity for thoughtful**



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**conversation and compassionate delivery of information.** In inpatient and emergency psychiatric settings, when individuals are already in a state of high emotional distress, immediate point-of-care access to records may further increase symptoms and distress and disrupt therapeutic relationships, even when a physical harm threshold does not appear to be reached. Increased emotional distress and disruptions in treatment planning may also occur if a patient has immediate access to clinically important information that has been provided in confidence by a patient's family or caregiver.

- **III.F Encouraging Disclosures of PHI when Need to Help Individuals Experiencing Substance Use Disorder (including Opioid Use Disorder), Serious Mental Illness, and in Emergency Circumstances (45 CFR 164.502 and 164.510-514)**

The proposal would amend the Privacy Rule to replace the "serious and imminent threat" standard with a "serious and reasonably foreseeable threat" standard. This is defined to mean "that an ordinary person could conclude that a threat to health or safety exists and that harm to health or safety is reasonably likely to occur if a use or disclosure is not made, based on facts and circumstances known at the time of the disclosure." It also modifies the standard for certain permitted disclosures from one based on a covered entity's "professional judgment," to one based on its "good faith" belief that a disclosure would be in the best interest of the individual.

**We support the change to "good faith belief" in place of "professional judgment" and replacing the standard "serious and imminent threat" with "imminent and foreseeable threat" to permit covered entities to share protected health information, when appropriate, with family members, caregivers, and others who are in a position to avert threats of harm and other potential detriments to patients' health and safety.** Family members, friends, and other individuals involved in the patient's support network can be important sources of collateral information about the reason for an evaluation, the patient's past history, and current symptoms and behavior. They may also be an important component of a patient's care team. For example, in Coordinated Specialty Care (CSC), an evidence-based model used to treat people with first episode psychosis, family education and support are key components of the model. Patients who received treatment under CSC achieved significant improvements in education and employment and experienced a decrease in hospitalization rates. Thus, active and collaborative involvement of family members in treatment can help to identify a patient's treatment goals with an overall goal of improved patient outcomes.

The proposal notes, some covered health care providers, such as licensed mental and behavioral health professionals, have specialized training, expertise, or experience in assessing an individual's risk to health or safety (e.g., through a violence or suicide risk assessment) and, therefore, the standard includes an express presumption that such a health care provider has met the reasonably foreseeable standard when it makes a disclosure related to facts and circumstances about which the health care provider (or a member of the team) has specialized training, expertise, or experience. We



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are concerned, however, that this approach would adversely impact non-mental health clinicians' willingness to report a threat without consultation with a mental health clinician. Already the shortage of mental health clinicians causes challenges to access treatment and this would further exacerbate the challenges. This could create a barrier to helping patients, especially in communities with limited and or no mental health clinicians. **We urge the Department to delete the reference to licensed mental and behavioral health professionals in the definition of "serious and reasonably foreseeable". Moreover, it may still be a challenge for clinicians including mental health professionals to know the threshold for meeting the standards for "foreseeable" threat. Thus, the Department should continue to identify scenarios and examples of when disclosure may be appropriate.**

In addition to the comments above, we offer specific feedback on implementation of the rule.

- **I.C. Effective and Compliance Dates**

**The Maryland Psychiatric Society requests that HHS extend the effective and compliance deadlines for implementing this rule.** Healthcare providers, ancillary staff, IT professionals, and others, are still reeling from all of the issues related to the pandemic, which have included multiple IT changes and overwhelmed front-line workers who have been redeployed for critical care needs and to provide the COVID-19 vaccine as rapidly as possible. Moreover, larger organizations are facing challenges of implementing the Information Blocking provisions of the Final Rule, and EHR vendors are still working on the new Interoperability standards within the rule.

Thus, staff still need to be educated about these proposed changes to HIPAA and how they will affect clinical workflows through organizations, large and small. Concerns around these changes will be especially acute if immediate, point-of-care access remains a part of this HIPAA proposed rule. If the changes in HIPAA focused solely on better information sharing with family, as well as the changes to the imminent harm definition, 180 days might be sufficient time for implementation; however, when coupled with the point-of-care access provisions, more time will be needed to make these changes. We recommend at least a year before the law is in effect.

Thank you again for your work on this important issue.

Sincerely,

*Virginia L. Ashley, M.D.*

Virginia L. Ashley, M.D.  
President