

August 12, 2016

Via email to rulesc@oic.wa.gov



Bianca Stoner
Policy and Legislative Affairs Division
Office of the Insurance Commissioner
P.O. Box 40258
Olympia, WA 98504-0258

Re: July 6, 2016 draft rule on Issuer disclosures, notices and processes to protect privacy of health care information (R 2013-11)

Dear Ms. Stoner and Rules Committee members:

We appreciate the opportunity to submit comments on the most recent draft of the proposed rule relating to the issue of health care information privacy. Legal Voice is a nonprofit advocacy organization that seeks to advance the law for women and girls in the Pacific Northwest. We are regional experts on law and policy relating to gender-based violence, including domestic violence, and reproductive health care.

We are pleased that the Office of the Insurance Commissioner (OIC) has recognized that currently, despite laws and regulations to protect the privacy of health care information for sensitive services, there is still both widespread lack of understanding about the requirements as well as lack of implementation to ensure confidentiality. However, we are concerned that even though several years have passed since OIC began considering rulemaking in 2013, the most current proposal remains inadequate, and, indeed, is a step backward. Thus, Legal Voice has signed on to a joint letter submitted on behalf of a group of organizations, and also submits these comments to provide additional information and elaborate on specific concerns.

Concerns and impetus for the proposed rule

Although advocates have raised these before, it is worth repeating the concerns that motivated the rulemaking request. The concern is not that insurance companies are intentionally failing to respond to requests by patients to maintain confidential services. And the purpose of the requested rulemaking is not merely to ensure that persons seeking confidential services have the right to request that their records, including explanations of benefits, remain confidential. Rather, the purpose is to ensure that this right to privacy and confidential access to services is a meaningful right that promotes health and ensures safety.

Washington State already require suppression of health information to policyholders when a minor consents to certain services.¹ Yet despite these existing rules, the present status quo includes these problems:

¹ WAC 284-04-510.

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- Without an understanding of their rights, or the ability to obtain assurance that a service will remain confidential, young adults and minors may be deterred from seeking sensitive services.
- For survivors of interpersonal violence, including adults and minors, disclosure to an abusive partner or family member can worsen violence or abuse.
- Individuals already covered by private insurance seek public insurance coverage for certain services, and/or obtain services at publicly-funded community clinics, thus shifting costs to publicly funded programs.
- When people delay or forego treatment, the result can be more health problems and higher costs in the future.

Thus, as detailed in the advocates' separate letter, we support a range of different ways that together, will not only ensure more robust exercise of existing confidentiality protections, but also will eventually eliminate these other barriers to confidentiality. Legal Voice elaborates on some of these suggestions and provides additional suggestions below.

Create a standard form and minimum requirements for a process for requesting confidentiality

The current proposal to require website changes will address only one concern: helping patients exercise their rights to invoke confidentiality. While this is a laudable goal, we suggest the following additional changes would help to effectuate that intent. Without reiterating them here, we support the specific suggestions stated in the advocates' separate letter on what information should be included in a common form.

Further, we underscore the point that the requirements should be simple and not onerous. Indeed, when asked specifically at a stakeholder meeting, carriers could not identify any basis on which they would deny a request. Thus, the information necessary to determine whether to grant a privacy request by a patient should be straightforward and easy for patients to provide, and straightforward and easy for a carrier to obtain and assess.

Several other jurisdictions have already established standardized forms to gather the necessary information. For example, in addition to Oregon, Maryland has such a form that includes blanks for a limited set of information necessary to process the request, including the name of the patient, the insurance company, and the policyholder.² California has promoted a Confidential Communications Request (CCR) form³ and has created a single website that includes this standard form, as well as a drop-down menu of different insurance companies to assist a patient in identifying where to send the form for each carrier.⁴ Similarly, rather than focusing on trying to establish standards that still allow each carrier to decide what information to request, and where on its own webpage to put this information, it would be far easier and more effective for OIC to create a standard form.

Engage in stronger public education and promote transparency

While public education alone would not solve all the problems identified above, there is certainly room for the OIC to do more to affirmatively protect patients from inadvertent breaches by insurers. For example, in addition to creating a standard form, the OIC could require carriers to submit information to

² See <http://insurance.maryland.gov/Consumer/Documents/publicnew/confidential-communication-form.pdf>

³ Available at <http://www.myhealthmyinfo.org/sites/default/files/Confidential-Communications-Request.pdf>

⁴ See <http://www.myhealthmyinfo.org/>

OIC about where to submit the forms, and any individual requirements for their own insureds, and then collect and publish all the information in one place.

There is recent precedent for this approach in Washington State. In 2013, the Department of Health (DOH) promulgated regulations requiring hospitals to submit policies on certain topics, including non-discrimination, reproductive health, and end-of-life care, to the DOH. The DOH requires updates when policies are updated and posts all the information on its website.⁵ Thus, patients and other members of the public can easily find out information about a particular hospital. Similarly, OIC could collect information from insurance companies about their processes for requesting confidentiality – ideally, promoting a single form that would suffice for every insurer – and create a “one-stop shop” for consumers seeking to exercise their rights to have insurers maintain confidentiality.

Require automatic suppression for certain services and/or zero balance preventive services

The proposed rule should require the automatic suppression of explanation of benefits (EOBs) for certain categories of services and for services for which there is no balance to be billed. Though this provision would not protect all services that a patient may wish to keep confidential, it would enable providers to advise at least certain patients that at least a certain range of services would remain confidential. This approach cannot be used alone, however, as many sensitive services that minor patients have a right to keep confidential, such as STI testing or contraceptive care, may require further treatment that is not deemed “preventive” and thus could result in a bill and an EOB.

Although OIC indicated some concern that automatic suppression could result in increased provider billing fraud, carriers participating in the August 2016 stakeholder meeting indicated that they had internal mechanisms for identifying such fraud and that they therefore did not share the concern. Other states have already required this type of automatic suppression in specific contexts. Colorado, Delaware, and Florida require automatic suppression of STI testing and treatment information for minors, including billing, to any person other than the minor consenting to treatment.⁶ New York and Wisconsin created exemptions from the required dissemination of EOBs when the services did not carry a balance.⁷

Moreover, there is no ERISA barrier to automatic suppression, as carriers have suggested. The Employee Retirement Income Security Act (ERISA) requires that a plan administrator notify a claimant if a claim is wholly or partially denied.⁸ This provision applies only to adverse benefit determinations and would not be triggered by EOBs with no balance. During stakeholder discussions, carriers agreed that suppression of zero-balance EOBs would alleviate their ERISA concerns.

In addition, even when there is a balance, notice to the patient is sufficient to satisfy ERISA requirements. ERISA does not limit “claimants” to “policyholders”; rather, it defines “claimants” as

⁵ See WAC 246-320-141(6) and the DOH website:

<http://www.doh.wa.gov/DataandStatisticalReports/HealthcareinWashington/HospitalandPatientData/HospitalPolicies>

⁶ Del. Code Ann. Tit. 16 § 710; Conn. Gen. Stat. § 19a-216; Fla. Stat. § 384.30.

⁷ N.Y. Ins. Laws § 3234(c); Wisc. Stat. Ann. § 632.857; see also

<https://cgw.cgwnetservices.com/~cgwnet/ins%20brochures%20fags%20etc/Fact%20Sheet%20on%20Standard%20Health%20Insurance%20Forms.pdf>

⁸ 29 C.F.R. § 2560.503-1(f)(1).

“participants and beneficiaries.”⁹ ERISA explicitly provides a civil action as a remedy to either a participant or a beneficiary.¹⁰ Therefore, a “claimant” can be either a participant or a beneficiary, and notification to the individual making the claim, whether a participant or beneficiary, would therefore satisfy ERISA.

Require automatic member-level communications

Finally, while Washington State regulations already allow enrollees to submit a request prohibiting disclosure of certain services, it is not clear how such requests are implemented. Further, these protections do not extend beyond certain types of services, such as reproductive health, STI testing, and substance abuse or mental health treatment. Thus, adult dependents, including adult children or spouses of policyholders, are not protected.

One approach that could help all of these patient categories maintain confidentiality of all services – regardless of whether they are zero-balance or billed as treatment – would be to automatically issue all EOBs to the enrollee, rather than to the policyholder. Indeed, some Washington State carriers have indicated that they already by default send EOB communications to the minor enrollee’s name; however, also by default, the contact address for minors is usually the same as that of the policyholder.

Colorado adopted this approach of requiring direct communication with the enrollee for adult dependents through a rule by the Colorado Division of Insurance.¹¹ Of course, for this approach to be effective, the enrollee would have to provide alternative contact information. But in conjunction with enhanced public education and a standardized form as discussed above, this approach could be more successful at making existing rights real for more minor patients, as well as adult dependents.

Conclusion

We appreciate the OIC’s continued efforts to enhance protections for patients seeking to access confidential services and maintain their confidentiality. We recognize that there is no single easy solution. However, we also know that there are affirmative steps that the enforcing agency can take to ensure that the status quo does not remain the same. The impact of failing to take action on this issue will fall most heavily on vulnerable populations, including minors and survivors of abuse, as well as on the public fisc. Thus, we encourage the OIC to adopt a broader rule than the limited proposal issued in July 2016, and we look forward to continuing to work with other stakeholders to develop an effective rule. Thank you for your consideration of these comments.

Sincerely,

Janet Chung
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⁹ 29 C.F.R. § 2560.503-1(a).

¹⁰ 29 U.S.C. § 1132(a)(1)(B). Indeed, in a case in the Ninth Circuit Court of Appeals (which covers Washington State), the court noted, “[b]oth ERISA plan participants and beneficiaries must have recourse to civil enforcement of ERISA plan provisions in order to further the statute’s purpose of promoting ERISA plan integrity.” *Harper v. American Chambers Life Ins. Co.*, 898 F.2d 1432, 1434-35 (9th Cir. 1990) (internal quotation marks omitted).

¹¹ 3 Code Colo. Regs. § 702-4(6).