MHDO Board Meeting

December 7, 2017

**Issue:** Current Hold Harmless provision in the MHDO Data Use Agreement (DUA), Section 5 as currently written violates state statues specific to indemnification and hold harmless.

Comment 15: Section 4(2)(H) requires that Data Recipients must indemnify the MHDO from any damages resulting from a data recipient's breach. The Data Use Agreement used by the MHDO should also require Data Recipients to indemnify Data Providers-it is very likely that someone whose information was compromised might well take action against the Data Provider as well as the MHDO.

MHDO Response: We will include a provision in the MHDO Data Use Agreements regarding indemnification as described above.

Language in MHDO DUA that addresses the comment above is the following:

**5. HOLD HARMLESS**

Data Applicant and Data Recipient shall be jointly and severally liable and shall indemnify and hold harmless MHDO and its Directors and employees for any damages, liabilities, and costs, including individual notification, resulting from a Data Applicant's or Data Recipient's breach or other violation of law or of this Agreement. Furthermore, if MHDO determines that notification to affected individual persons of the breach and/or other remedies are required, the Data Applicant and Data Recipient agree to carry out these remedies without cost to MHDO. To the extent legal action based on a Data Applicant and or Data Recipient's breach or other violation of law is taken against an entity that submits data to MHDO, Data Applicant and/or Data Recipient shall indemnify and hold harmless that data provider.

**Proposal:** Revised language below for state entities only. There are two options based on the laws in the state. We will lead with the first option and if the state (like NH) cannot comply with the language in option 1 b/c of state laws we will offer the language in option 2 (which NH can comply with).

Option 1: replace the language in section 5. with the following:

**5. HOLD HARMLESS**

Data Applicant and Data Recipient shall be individually and respectively liable and shall individually and respectively indemnify and hold harmless MHDO and its Directors and employees and MHDO Data Providers for any damages, liabilities, and costs, including individual notification, resulting from the performance of this Agreement, but only in proportion to and to the extent such damage, liability or costs are caused by or result from the negligent or intentional acts or omissions of the individual Data Applicant or Data Recipient, its respective officers, agents or employees. Furthermore, if MHDO determines that notification to affected individual persons of the breach and/or other remedies are required, the Data Applicant and Data Recipient agree to carry out these remedies without cost to MHDO.

Note the definition of a An "MHDO Data Provider" as defined in MHDO Rule Chapter 120 is an entity or person that provides data to the MHDO pursuant to 22 M.R.S.A. Sections 8708, 8708-A, 8709, 8710 or 8711 and is a health care facility, health care practitioner, health care claims processor or carrier.

Option 2: replace the language in section 5. with the following:

**5. BREACH**

Data Applicant and Data Recipient acknowledge their legal responsibility resulting from a Data Applicant's or Data Recipient's breach or other violation of law or of this Agreement. Furthermore, if MHDO determines that notification to affected individual persons of the breach and/or other remedies are required, the Data Applicant and Data Recipient agree to carry out these remedies without cost to MHDO.