



December 29, 2014

Maine Health Data Organization
Attn: Linda Adams
State House Station 102
Augusta, Maine 04333-0102

via e-mail to
linda.adams@maine.gov

Re: Proposed Rule Chapter 120, "Release of Data to the Public"

Dear Ms. Adams:

On behalf of Anthem Blue Cross and Blue Shield, I would like to submit the following comments with respect to proposed Rule Chapter 120, "Release of Data to the Public," pursuant to the Notice of State Rule-making published by the Secretary of State on November 26, 2014.

Section 2. Definitions

- The proposed definition of the term "disclosure" applies only to protected health information or "PHI"; however, the potential for unauthorized disclosure is not limited to PHI and the restrictions on unauthorized disclosure should not be limited to PHI. In addition, it may the definition should probably pertain to "Unauthorized Disclosure" rather than disclosure.
- The definition of "limited data set" indicates it is "similar" to that specified in HIPAA. We believe it should be the same as set forth in HIPAA and would suggest revising the definition as follows:
 24. Limited Data Set. A "Limited Data Set" includes limited identifiable patient information as similar to that specified in HIPAA regulations. A Limited Data Set may be disclosed to a data recipient without a patient's authorization in certain conditions: (1) the purpose of the disclosure must be limited to research, public health, health care operations; (2) the purpose of the disclosure must be consistent with and the purposes of the MHDO; and (3) the Data Recipient must sign a MHDO DUA.
- We have several concerns with the definition of "proprietary data."

First, the current version of Rule chapter 120 contains a definition of "confidential data," which was not carried forward in the proposed rule. While the proposed rule does contain a definition of "proprietary data" not found in the current rule, it is much narrower than the existing definition. The definition also specifically affords confidential treatment to hospital charge information but not the reimbursement rates negotiated between providers and payors. Affording confidential treatment to hospital charge information is contrary to the disclosure requirements of 22 M.R.S.A. sections 1718 and 1718-A.

In addition, the definition of proprietary data states that the MHDO will determine if the disclosure of the information will result in the Data Provider being placed at a competitive economic disadvantage—this fails to provide data providers with any form of due process. If the MHDO decides that disclosure would not result in a competitive economic disadvantage, a Data Provider has no opportunity to be heard on the issue, or to demonstrate why the release of information would result in a competitive disadvantage. This has real consequences not only for third-party payors, but also the individuals that they insure—premiums are a reflection of claims paid and if payors are not able to negotiate the most favorable terms, the insured individuals will pay higher premiums for their health care coverage.

- Finally, the current rule allows the MHDO to “create public reports or tables arrayed in this manner when all applicable health care facility and practitioner claims for a specific service have been aggregated to produce the total price paid.” However, the proposed rule permits the disclosure of actual negotiated reimbursement rates by allowing disclosure of the individual elements of the total price paid—the paid amount, co-pay, deductible, etc., are all Level I data. If it is the intent to allow such disclosure, we are strongly opposed to this provision; if it is not the intent to permit such disclosure, then the proposed rule should be amended accordingly.

Section 3. General Provisions Applicable to all MHDO Data

- In section 3(1)(C) and in several other places in the proposed rule, it states that decisions of the MHDO with respect the release of data are not reviewable. It is not clear to what review this is intended to apply. Such a prohibition on review is in violation of the Maine Administrative Procedure Act, which provides that “[e]xcept where a statute provides for direct review or review of a pro forma judicial decree by the Supreme Judicial Court or where judicial review is specifically precluded or the issues therein limited by statute, any person who is aggrieved by final agency action shall be entitled to judicial review thereof in the Superior Court in the manner provided by this subchapter.” 5 M.R.S.A. § 11001(1). The MHDO cannot, through rulemaking, supersede or eliminate the right to review under the Maine Administrative Procedure Act.

Section 3(J) provides that the “MHDO shall maintain ownership of all data elements and sets it releases including any MHDO generated numbers or identifiers therein.” However, the MHDO does not really “own” the data. The data is submitted by data providers and the MHDO is the state repository for that information; however, that does not confer ownership rights upon the MHDO. Therefore, we would suggest amending section 3(J) to provide that “As between MHDO and the data recipient, MHDO shall maintain ...” A similar change should be made to section 4(2)(C) as well.

Section 4. MHDO Data Use Agreement

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.

Section 13. Individual Choice, Process to File Complaints

- We would suggest revising this section to clarify that it is the MHDO that is providing the choice/ Section 13(1)(A) could be amended as follows:
 - A. Choice regarding disclosure of information: The MHDO shall provide the opportunity for ~~a~~Any person to ~~may~~ choose to opt out and have their direct patient identifiers excluded from all subsequent Level III Data releases ~~by opting out~~.

We would further suggest that paragraph B be last and paragraphs C and D be re-lettered accordingly, the provisions governing the “opt out”, are followed by the process for doing so, with the ability to “opt in” at the end.

Finally, the classification of group number as Level II data potentially allows the cherry picking of small groups. This potential is recognized under the Maine Insurance Code, which does not require that small group experience information be released. Furthermore, it potentially allows an employer or other individual to identify an individual's claims or diagnosis. For example, if a group of 10 obtains there is only one 50 year old on the plan or only one individual with a high cost condition, it would be very easy for someone to determine the claims associated with that individual. We believe it would be advisable to limit the disclosure of this information to large groups, consistent with the provisions of the Insurance Code, and to use an MHDO Assigned Replacement Number or Code, rather than the actual group number.

Thank you and if you have any questions or need anything further, please do not hesitate to contact me at (207) 822-7260.

Sincerely,



Kristine M. Ossenfort, Esq.
Director, Government Relations