



September 5, 2014

By Email and First Class Mail

Darin W. Dalton
Vice President, Commercial Risk Adjustment
Anthem, Inc.
120 Monument Circle
Indianapolis, Indiana 46204

Dear Mr. Dalton,

We write on behalf of the American Psychological Association Practice Organization (APAPO) and the California Psychological Association (CPA). The APAPO is an affiliate of the American Psychological Association, the largest scientific and professional organization representing psychology in the US. APA's membership includes nearly 130,000 clinicians, researchers, educators, consultants and students. CPA is a non-profit professional organization of over 4,000 members practicing in the state of California. California's psychologists currently work in private practice, hospitals, government agencies, university and research settings, schools, community clinics, and businesses.

Our organizations have fielded complaints and inquiries from our respective members in California and other states (including Connecticut and Georgia) about Anthem, and its contractor Inovalon, sending psychologists requests for patient charts. These audit requests state that Anthem needs this information to satisfy Affordable Care Act (ACA) data requirements. We are writing to clarify and address privacy and confidentiality concerns under the HIPAA Privacy Rule, California confidentiality law and the confidentiality laws of other states where Anthem BCBS companies are conducting this audit.

Our main concern is that we need to better understand what information Anthem legitimately needs under the ACA so that psychologists can properly comply with the minimum necessary rule under the HIPAA Privacy Rule. Based on this and state confidentiality law concerns, we have suggested that members hold off on responding to the audit requests until we obtain clarification and further information from you -- so that they can be sure that they are providing information to you in conformity with these laws.

HIPAA

Minimum Necessary. 45 CFR Section 164.502(b)

The Final HIPAA Rule mandates that the party releasing PHI determine what is the minimum information in order to accomplish the purpose of the release. Our members cannot make that determination based on the vague information provided by Anthem and Inovalon (collectively, the "Companies."). Inovalon's requests for "charts" create a particular concern for many psychologists who keep a combined mental health record that includes not only basic clinical information such as diagnosis, symptoms and treatment plan, but also the sensitive details revealed during therapy. Obviously, an entire mental health record of this type is far more than the minimum necessary that Anthem would need to comply with whatever its ACA data obligations are.

Anthem's form letter states vaguely that the request is to meet data requirements for Qualified Health Plans. The accompanying form letter from Inovalon indicates that the documentation is necessary to "clarify specific member medical conditions."

The Companies have provided additional information about the purpose of the audit to individual psychologists asking questions. However, this information is inconsistent and has not been provided to the vast majority of psychologists receiving audit requests. For example, members report being told orally that the audits are focused on "diagnosis and chronicity" and that the purpose of the audits is to compare plans in and outside of the exchanges to make sure that exchange subscribers are getting comparable care to subscribers in regular commercial plans. We also understand that Anthem has advised the California Medical Association (CMA) that "the audit is designed to determine health status and demographic characteristics" and to identify "conditions/illnesses that demonstrate patients who are at risk for being sicker or who are predicted to be healthier."

We ask that Anthem clarify:

What specific data provisions of the ACA regulations drive Anthem's requests for mental health records?

What specific minimum information Anthem believes it needs to comply with those provisions?

Once we have this information, we should be able suggest to Anthem and to our members some specific information that would allow Anthem to satisfy its ACA requirements while allowing psychologists to comply with HIPAA and state confidentiality laws.

A more focused review would protect patient's mental health privacy and allow psychologists to comply with the minimum necessary rule. It would also save the Companies' time and money by letting Inovalon focus its review on key information instead of combing through thousands of pages of mostly irrelevant mental health records.

Psychotherapy notes. 45 CFR Section 164.508(a)(2)

We appreciate that (in our email exchange in advance of this letter) you clarified that Anthem is not seeking psychotherapy notes in this audit, and will clarify that in future communications regarding this audit.

Confidentiality Laws of California and other States

Inovalon's form letter correctly states that the Privacy Rule allows disclosure of PHI for quality control purposes (under the "health care operations" prong of the "treatment, payment, health care operations" exception). But it ignores the fact that for mental health records, more stringent mental health confidentiality laws must be followed because they are not preempted by the Privacy Rule.

Notice under California Civil Code 56.104

In California, it is our understanding that the Companies are required to provide psychologists and patients with the specific notice of the request for outpatient psychotherapy records required by California Civil Code 56.104. That section requires that the insurer seeking records must provide a written request to both the patient and the psychologist who has the records. The written request must include:

1. What specific information is being requested and *its specific intended use*.
2. The length of time the information will be kept and when the information will be destroyed or returned.

The Companies' form letters are too vague to meet the first requirement and we see no indication that they address the second. If Anthem has reason to believe that Section 56.104 does not apply in this situation, please explain why. If you believe that the Companies have complied with the Section 56.104 requirements, please explain.

Patient Consent (states other than California)

In the other states where the Companies are conducting this audit, state laws protecting the confidentiality of mental health information uniformly require patient consent for disclosures for quality control purposes. Does the consent that Anthem obtains when subscribers enroll allow Anthem and its contractor Inovalon to conduct audits for these purposes? We ask for the consent language that Anthem relies upon.

We look forward to your clarification of these important mental health confidentiality issues. Please let us know if this issue would be more efficiently resolved by a conference call.

Sincerely,

A handwritten signature in black ink that reads "Katherine C. Nordal". The script is cursive and fluid.

Katherine C. Nordal, PhD
Executive Director for Professional Practice
American Psychological Association Practice Organization

A handwritten signature in black ink that reads "Jo Linder-Crow, PhD". The script is cursive and fluid.

Jo Linder Crow
Chief Executive Officer
California Psychological Association