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THE JFNA STRATEGIC HEALTH RESOURCE CENTER

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1720 I Street, NW
Washington, DC
20006-3736

Phone 202.785.5900
Fax 202.785.4937

jfederations
@jfederations

JewishFederations.org/washington

April 11, 2016

Kana Enomoto, Acting Administrator
The Substance Abuse and Mental Health Services Administration
United States Department of Health and Human Services
Attn: SAMHSA-4162-20
5600 Fishers Lane, Room 13N02B
Rockville, MD 20857

Re: SAMHSA 4162-20: Confidentiality of Substance Use Disorder Patient Records (81 Fed. Reg. 6988)

Dear Ms. Enomoto:

The Jewish Federations of North America (JFNA) commends SAMHSA on its efforts to ensure that patients with behavioral health conditions are not left out of the transformative changes occurring in the healthcare industry today. One of these major shifts is the move toward integration and coordination of healthcare services for patients. Health information technology (HIT) is a fundamental part of this sea change and, therefore, SAMHSA's attempt to modernize 42 C.F.R. Part 2 to accommodate electronic health recordkeeping and data exchange is critically important. JFNA, however, urges SAMHSA to ensure that the final rule promotes ease of use and interoperability, is workable with both existing and imminently available technologies, and respects patient choice for privacy in the treatment of sensitive information like substance abuse treatment records.

JFNA is one of largest philanthropic networks in the United States, serving as the umbrella organization for 151 Jewish federations and over 400 partner agencies. Our network includes hospitals, long-term care facilities and 125 Jewish Family & Children's Agencies that provide extensive mental health and substance abuse treatment services. Our Jewish Family & Children's Agencies treat patients of all ages and demographics, including many patients covered by Medicare and Medicaid. Our agencies need access to HIT for behavioral health services, as well as to sensible, easy to implement privacy rules for maintaining and handling electronic health records and data sharing. Our agencies' patients need the ability to make their own determinations about their healthcare information, and need to have their privacy ensured.

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Since 2009, as a result of Congress' investment of nearly $30 billion under the Health Information Technology for Economic and Clinical Health (HITECH) Act, a majority of physicians and hospitals have adopted electronic health records (EHRs) under the Act's Medicare and Medicaid Meaningful Use Program. But, as one of the healthcare sectors excluded from this program, behavioral health providers have not made equivalent progress. Both the United States Department of Health and Human Services (HHS) in 2013[i] and the Bipartisan Policy Center (BPC) in 2015[ii] have recognized that behavioral health providers are lagging behind their medical counterparts in their adoption of HIT.

JFNA believes that the slower progress being made in the behavioral healthcare sector towards HIT adoption is impeding much needed care coordination and integration between primary health care and behavioral health care. The federal government's efforts to spur care coordination and integration through the Accountable Care Organization models and demonstration programs are quite promising, but a recent study in *Health Affairs* documented that these efforts to date have not been successful in integrating the mainstream general medical sector with the behavioral healthcare sector.[iii] Behavioral health providers face two major barriers to their adoption of HIT: cost and outdated privacy rules for patients with substance abuse disorders. First, with respect to cost, the BPC has noted that it is a major barrier to the healthcare industry's adoption of HIT. It is thus not surprising that Congress' exclusion of behavioral health providers from the benefits of the HITECH Act has now led to the inevitable result of further dividing behavioral health care from the rest of the healthcare industry. As a nation, we can and should be doing better for our behavioral health patients, and therefore JFNA consistently has advocated for expansion of the Meaningful Use Program to cover behavioral health providers.

Second, with respect to the privacy rules governing substance abuse treatment records, SAMHSA has acknowledged and JFNA agrees, that modifying the now outdated rules governing substance abuse treatment records under 42 C.F.R. Part 2 will be a key part of modernizing the behavioral healthcare sector, and to moving the field toward better care coordination and integration with the general medical sector. The outdated privacy rules governing substance abuse treatment records make sharing a patient's full healthcare record more difficult than it is for other patients, and JFNA, therefore, applauds SAMHSA for re-examining these privacy rules. However, we urge SAMHSA to make these changes with caution to ensure that the final rule facilitates the simple and efficient exchange of behavioral healthcare records in a way that is workable with today's technology, and in a manner that is as private and secure as the patient chooses.

Overall, JFNA recommends that the final rule modifying 42 C.F.R. Part 2 facilitate the secure and efficient electronic exchange of patients' health data. Ideally, we would like to see a rule that allows the exchange of health data that can work with existing technology and, so that the rule is not out of date upon immediate publication, changes in that technology that are on the near horizon. For example, JFNA believes that electronic consent and electronic signature should be permitted. We understand that concerns exist

about the ability of current technology to handle some of the proposed requirements for data sharing, while we also understand that technology can be designed to accommodate specific requirements.

JFNA also would like to see a rule that continues to ensure the security of the information being exchanged. Substance abuse treatment records are more sensitive than many other types of healthcare records, and warrant more stringent protection. We share the concerns of many other providers and patient advocates that exposure of substance abuse treatment records in particular can have serious criminal and civil consequences for patients. We believe that the Health Insurance Portability and Accountability Act (HIPAA) by itself does not provide sufficient protection for substance abuse treatment records because it allows disclosure for treatment, payment, and health care operations *without* requiring patient consent (45 C.F.R. 164.506). HIPAA also allows disclosure of treatment records not just under a court order, but upon a simple discovery request (45 C.F.R. 164.512(e)). By contrast, 42 C.F.R. Part 2 requires disclosure to law enforcement only under court order.

Enhanced patient privacy for substance abuse treatment records can be achieved in multiple ways. For example, JFNA supports retaining the additional protection of barring disclosure of substance abuse treatment records for non-healthcare related purposes without specific patient consent or a court order (e.g., in the context of law enforcement, employment decisions, insurance coverage decisions, divorce litigation, etc.). Requests for access to substance abuse treatment records also could flow through a patient's healthcare providers, not through Health Information Exchange organizations or other intermediaries, and could be limited to the minimum necessary health information.

Finally, JFNA would like to see a rule that permits patient choice, but in an efficient electronic manner. If patients choose to share their substance abuse treatment records with some or all of their providers, payers, health information exchanges, there should be -- as SAMHSA has proposed -- a simple and efficient opportunity for the patient to request that, while allowing for patients to change their preferences (or settings) at some future time. For example, JFNA supports giving patients the option of consenting to disclosure to their past, current and future treating providers without having to consent in writing each and every time. Similarly, if the patient prefers to keep his or her substance abuse treatment records private from other healthcare providers and others, there should be a simple mechanism to elect that as well. The request for consent to disclosure must, of course, be written in a manner that is easy for consumers to understand. JFNA supports the development and distribution of a sample consent form. Also, as required by the HITECH Act, patients should have the right to restrict disclosure of their health information when they pay out-of-pocket for services. JFNA is concerned that the proposed rule does not adequately identify precisely how the electronic consent process will work.

In sum, the healthcare system is undergoing transformative change; it is vital for behavioral health to be included in this process. A critical part of the system's transformation rests upon the use of electronic health records systems and information

exchange. At the same time, heightened privacy for substance abuse treatment records remains critical due to the potential criminal and civil consequences of disclosure.

Thank you for the opportunity to comment on the proposed rule.

Sincerely,

William C. Daroff, Senior Vice President for Public Policy &
Director of the Washington Office

[i] U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation. (2013). *EHR Payment Incentives for Providers Ineligible for Payment Incentives and Other Funding Study.* Retrieved from https://aspe.hhs.gov/sites/default/files/pdf/76706/EHRPI.pdf.
[ii] Bipartisan Policy Center. (2015). *Improving Health Through Interoperability and Information Sharing*. Retrieved from http://bipartisanpolicy.org/library/improving-health-through-interoperability.
[iii] Lewis, V., Colla, C., Tierney, K., Van Citters, A., Elliott S., Few ACOs Pursue Innovative Models That Integrate Care for Mental Illness and Substance Abuse with Primary Care, *Health Affairs*, 33, no.10 (2014):1808-1816.