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Janice Staloski, Director
Bureau of Community Program Licensure and Certification
Pennsylvania Department of Health
132 Kline Plaza, Suite A
Harrisburg, PA 17104-3188

Re: Comments on Amendments to Confidentiality of Drug and Alcohol Treatment
Patient Records and Information (4 Pa. Code § 255.5)

Dear Ms. Staloski:

This is to comment on the legality under the Americans with Disabilities Act ("ADA") and the Pennsylvania Constitution of the Department of Health's proposed rule that would effectively prohibit substance abuse treatment programs from meaningfully discussing a patient's treatment with impaired professionals organizations, professional licensure entities and employee assistance plans. In the alternative, The Caron Foundation requests a reasonable modification of the regulatory language under the ADA allowing it to discuss a patient's treatment with impaired professionals organizations, professional licensure entities and employee assistance plans.

The Richard J. Caron Foundation ("Caron"), is a private nonprofit corporation, which provides specialized care for chemically dependent individuals who have completed a primary program but would benefit from a transitional therapeutic environment. Part of its therapeutic program is to provide discharge planning for its patients, who are in active recovery from addiction and alcoholism.

I. INTRODUCTION

The Pennsylvania Department of Health has proposed a rule that would effectively prohibit programs such as Caron from meaningfully discussing a patient's treatment with impaired professional organizations, professional licensure entities and employee assistance plans.¹ This rule applies only to substance abuse providers and not to medical providers for people with other physical and mental health disabilities.

The proposed rule, 4 Pa. Code § 255.5, provides in pertinent part:

¹ No such limitations appear to apply to providers of medical treatment to people with physical and psychiatric disabilities. See *Christy v. Wordsworth-At-Shawnee, et al.*, 749 A.2d 557, 559-60 (Pa. Commw. Ct. 2000) (mental health patient over age fourteen retained sole control over his mental health records).

(c) *Consensual release of information for patient records.*

(1) With patient's written consent, a program may release information from a patient's records to medical personnel for the purpose of diagnosis, treatment, or referral of treatment.

....

(6) With the patient's written consent, a program may disclose information from a patient's records to a patient's employers [sic] to further the rehabilitation of the patient; or, to a prospective employer who affirmatively expresses that the information is sought to enable the employer to engage the patient as an employee. The information released under this paragraph shall be limited to whether the patient has or is receiving treatment with the program.

As will be demonstrated below, the confidentiality provisions of 4 Pa. Code § 255.5 in both its current and proposed forms are not only inconsistent with the framework established by professional practice and title acts, which envision communication between treatment facilities and impaired professional organizations, their designees, and professional licensure boards, but they also impermissibly infringe upon patients' rights to control release of their own information under Pennsylvania's common law and its state constitution, and facially violate the ADA. Alternatively, the ADA requires that the Department of Health grant Caron a reasonable modification.

These problems can be avoided by rewording the proposed rule as set forth in Section III.H of this comment.

II. STATUTORY AND REGULATORY BACKGROUND

A. Summary of Confidentiality Provisions Relating to Drug and Alcohol Abuse and Dependence

A plain reading of both the provisions of the Pennsylvania Drug and Alcohol Abuse Control Act and its regulations severely limits the information about substance abuse treatment that may be released, even with patient consent.

Section 8(c) of the Pennsylvania Drug and Alcohol Abuse Control Act provides:

All patient records and all information contained therein relating to drug or alcohol abuse or drug or alcohol dependence prepared or obtained by a private practitioner, hospital, clinic, drug rehabilitation or drug treatment center shall remain confidential and may be disclosed only with

the patient's consent and only (i) to medical personnel exclusively for purposes of diagnosis and treatment of the patient or (ii) to government or other officials exclusively for the purpose of obtaining benefits due the patient as a result of his drug or alcohol abuse or drug or alcohol dependence except that in emergency medical situations where the patient's life is in immediate jeopardy, patient records may be released without the patient's consent to proper medical authorities solely for the purpose of providing medical treatment to the patient.

71 Pa. Stat. Ann. § 1690.108(c).

4 Pa. Code § 255.5 in both its current and proposed amended form similarly limits the extent to which substance abuse treatment information may be released, even with patient consent. Under the proposed regulatory scheme treatment information may be released with patient consent to the following individuals and entities, provided particular conditions are satisfied: (1) medical personnel for the purpose of diagnosis, treatment or referral for treatment; (2) to government officials and third-party payers to obtain benefits and services as a result of drug abuse or dependence; (3) any lawyers representing the patient; (4) the patient's probation or parole officer; (5) judges who have imposed a sentence conditioned upon treatment or entering a pre-sentence conditional release program; and (6) to an employer or prospective employer (limited information only).

Disclosure without consent is allowed: (1) to medical authorities when the patient's life is in immediate jeopardy; (2) under a court order issued after an application showing good cause; (3) to law enforcement personnel when the patient committed a crime on the program premises or against program personnel or threatened to commit a crime (limited information only); (4) to appropriate authorities when reporting suspected child abuse; (5) for scientific research in accordance with 42 C.F.R. § 2.52; and (6) for audits or evaluations by governmental or third-party payers or quality control reviewers.

No provision is made for communications with impaired professional programs or professional licensure boards, either with or without patient consent.

B. Summary of the Impaired Professional Provisions of the Professional Practice and Title Acts

Several professional practice and title acts include provisions for addressing the issues related to impaired professionals. For example, consider § 18 of the Professional Psychologists Practice Act (the "Act"). Section 18 of the Act contemplates the disclosure of treatment information in two instances, both of which do not appear to require patient consent.

First, approved treatment providers for impaired professionals are required to release information regarding a participant's progress in treatment to the consultant who acts as a liaison between the provider and the State Board of Psychology (the "Board").

The Act allows the Board to appoint a consultant to act as a liaison between the Board and approved treatment programs for impaired professionals. Pursuant to the Act, approved program providers must disclose to the consultant the "information in [their] possession regarding any impaired professional in treatment which the program provider is not prohibited from disclosing by an act of this Commonwealth, another state or the United States." 63 Pa. Stat. Ann. § 1218. If the professional has not progressed satisfactorily, the consultant must then "disclose to the Board all information in his possession relevant to the issue of impairment regarding said professional" which the Board will use to determine the appropriate course of action with regard to such professional's license. An approved program provider who makes a disclosure pursuant to this arrangement is immune from civil liability for the disclosure or its consequences. Id.

Second, all other individuals and providers, including any hospital or health care facility that does not act in a treatment capacity to an impaired professional *in an approved treatment program*, must report to the Board information regarding a professional's lack of treatment or mental or physical incompetence to carry out his or her duties. 63 Pa. Stat. Ann. § 1218(f). A health care facility that makes such a report to the Board in good faith and without malice is immune from any civil or criminal liability that may arise from such report. Id. Approved treatment programs acting in a treatment capacity toward the impaired professional are exempt from this mandatory reporting requirement. Id.

In addition to the Professional Psychologists Practice Act, the following professional practice and title acts contain similar provisions: the Chiropractic Practice Act (63 Pa. Stat. Ann. § 625.509); the Dental Law (63 Pa. Stat. Ann. § 130g); the Medical Practice Act of 1985 (63 Pa. Stat. Ann. § 422.4); the Professional Nursing Law (63 Pa. Stat. Ann. § 224.1); the Practical Nurse Law (63 Pa. Stat. Ann. § 666.2); the Optometry Practice Act (63 Pa. Stat. Ann. § 244.7a); the Osteopathic Medical Practice Act (63 Pa. Stat. Ann. § 271.16c); the Pharmacy Act (63 Pa. Stat. Ann. § 390-7); the Podiatry Practice Act (63 Pa. Stat. Ann. § 42.21b); the Social Workers, Marriage and Family Therapists and Professional Counselors Act (63 Pa. Stat. Ann. § 1915); the Speech, Language and Hearing Licensure Act (63 Pa. Stat. Ann. § 1717.1); and the Veterinary Medicine Practice Act (63 Pa. Stat. Ann. § 485.26a).

Pursuant to these acts, the Pennsylvania Department of State has established the Division of Professional Health Monitoring Programs ("PHMP") of the Bureau of Professional & Occupational Affairs (BPOA) in order to allow professionals who suffer from a physical or mental impairment, such as chemical dependency, to be connected with an appropriate approved treatment provider and receive monitoring and treatment designed to ensure that such professionals can safely practice their licensed profession. PHMP is comprised of two programs: the Voluntary Recovery Program (VRP) and the Disciplinary Monitoring Unit (DMU). Both programs require treatment providers to share the following patient information with the PHMP:

- (i) participation in treatment, including the estimated length of treatment, type of treatment services provided, attendance, and date and type of treatment termination;
- (ii) diagnosis/prognosis, including a diagnostic summary by the treatment provider with treatment recommendations;
- (iii) the nature of the project, including clinical issues to be addressed; treatment methodology and model to be utilized by the provider; and any referrals to support groups and/or another provider for supportive services not available from this treatment provider;
- (iv) a brief description of the progress in treatment; and
- (v) a short statement documenting the type and frequency of any relapse into the use of any mood altering substance, including alcohol, for which the client does not have a valid prescription.

The above information is the information that may be released under the current but not proposed version of 4 Pa. Code § 255.5, although the current version of 4 Pa. Code § 255.5 does not provide for the release of this information to PHMP projects.

III. LEGAL CHALLENGES TO THE PROPOSED RULE AND HOW TO FIX THE RULE

A. The confidentiality provisions of 4 Pa. Code § 255.5 are inconsistent with the framework established by professional practice and title acts, which envision communication between treatment facilities and impaired professional organizations, their designees, and professional licensure boards

Section § 255.5 of the Pennsylvania Code does not specifically permit disclosure of treatment records to professional licensing boards or the consultants who work as liaisons between treatment providers and such licensing boards. However, section 255.5 cannot be reviewed in isolation but rather must be read in conjunction with the impaired professional provisions noted above. The impaired professional provisions clearly contemplate the sharing of information between the approved providers and the licensing board consultants. To interpret section 225.5 as prohibiting the disclosure of treatment records to professional licensing boards or the consultants who work as liaisons between treatment providers and such licensing boards would interfere with the impaired professional provisions and have the practical effect of eliminating them. Section 255.5 should not be interpreted in this way. Indeed, a state regulation cannot be drafted or interpreted in such a way as to be inconsistent with the overall statutory scheme.

The impaired professional provisions appear to allow the sharing of patient information without the consent of the patient. More specifically, they discuss the sharing of information without any reference to the need for the patient's consent. While the need for patient consent can be debated, what cannot be debated is that they

unquestionably allow the sharing of information with the patient's consent; otherwise, the disclosures contemplated by the provisions could not take place.

B. The confidentiality provisions of 4 Pa. Code § 255.5 are inconsistent with the well-established practice of PHMP and its interpretation of § 255.5 as allowing communication between PHMP programs and treatment facilities

PHMP has acted as a liaison between the approved treatment providers and various licensing boards for over twenty (20) years. During that period, it is our understanding from conversations with PHMP that PHMP has received treatment information regarding licensees from various approved treatment providers throughout the Commonwealth of Pennsylvania. It is our understanding that PHMP does not view this collaborative sharing of treatment information as a violation of § 255.5. In fact, the information sought from treatment providers mirrors the information that may be released to approved individuals and entities pursuant to § 255.5(b) as currently enacted.

C. The confidentiality provisions of 4 Pa. Code § 255.5 stifle impaired professionals' ability to consent to communications between treatment facilities and impaired professional organizations, their designees, and professional licensure boards, thus limiting treatment options in Pennsylvania and increasing the likelihood that impaired professionals will not seek the treatment they need to rehabilitate and practice their professions safely

Prohibiting individuals from consenting to the release of their records to impaired professional organizations, professional licensure entities, and employee assistance plans interferes with and may prevent successful treatment of substance abuse addiction and rehabilitation on a variety of fronts. Employees that need to communicate with impaired professional organizations and licensure entities in order to maintain their professional licenses may be forced to seek treatment outside of Pennsylvania in states that allow such consensual disclosure to take place. Individuals seeking treatment need immediate care; Pennsylvania professionals forced to leave Pennsylvania to enter treatment programs that allow them to release information as necessary with their informed consent will delay and possibly forego treatment. In addition, a lack of communication between treatment facilities, impaired professional organizations and licensure entities may result in impaired professionals continuing to practice while battling substance abuse addictions. This presents not only a danger to the impaired professional, but also to the public at large.

Because the confidentiality provisions of 4 Pa. Code § 255.5 impose additional restrictions on the manner in which substance abuse records may be shared with any interested parties beyond those which apply to individuals with other mental health or medical problems, even with the patient's consent, such regulations discriminate against individuals who suffer from substance abuse as opposed to other mental health or medical problems. Further, as a practical matter, the different treatment with regard to mental health records and substance abuse records makes no sense in the real world in

which dual diagnosis is very common. By way of example, pursuant to 50 Pa. Stat. Ann. § 7111, records related to an individual's participation in mental health treatment may be freely disclosed with the patient's consent. However, pursuant to 55 Pa. Code § 5100.37, "whenever information in a patient's records relates to drug or alcohol abuse or dependency . . . those specific portions of the patient's records are subject to the confidentiality provisions of section 8(c) of the Pennsylvania Drug and Alcohol Abuse Control Act (71 P. S. § 1690.108(c)), and the regulations promulgated thereunder, 4 Pa. Code § 255.5."

Because these proposed provisions severely restrict the information about substance abuse treatment that may be released, even with the patient's consent, they discriminate against individuals who have drug or alcohol problems as opposed to other mental health or medical problems. This proposed rule will be particularly burdensome for patients who are dually diagnosed and suffer from both mental health and substance abuse issues as those patients can no longer freely communicate and share their treatment records with any treatment providers, impaired professionals organizations or licensing boards.

D. Proposed regulation 4 Pa. Code § 255.5(c)(1) violates patients' common law right to control access to her protected health information

Pennsylvania case law recognizes that substance abuse patients have a personal right to their treatment records:

While we understand that sometimes disclosure of a patient's treatment records to the patient may not be therapeutic, it is unreasonable to deny a patient access to her own information. The purpose of the privilege is to encourage diagnosis and treatment. We believe the right to claim a privilege is a personal one belonging to the individual protected by the statute. A patient should not have to engage in legal proceedings in her quest for copies of her own treatment records.

Sullivan v. Cornerstone Counseling, 49 Pa. D. & C.4th 499, 504-5 (2000) (emphasis added); *Christy v. Wordsworth-At-Shawnee, et al.*, 749 A.2d 557, 559-60 (Pa. Commw. Ct. 2000).

Because the privilege is personal to the patient, *Sullivan* strongly suggests that an impaired professional should be able to exercise informed consent and allow her provider to discuss those records and her treatment with impaired professionals organizations, professional licensure entities and employee assistance plans.

E. Proposed regulation 4 Pa. Code § 255.5(c)(1) violates the Pennsylvania Constitution's Right to Privacy

In *In re "B"*, 394 A.2d 419 (Pa. 1978), the Pennsylvania Supreme Court struck down a subpoena for a mother's psychiatric records to be used by a juvenile court psychologist in determining placement of her son on the ground that the subpoena violated the mother's right under the Commonwealth's Constitution:

We conclude that in Pennsylvania, an individual's interest in preventing the disclosure of information revealed in the context of a psychotherapist-patient relationship has deeper roots than the Pennsylvania doctor-patient privilege statute, and that the patient's right to prevent disclosure of such information is constitutionally based. This constitutional foundation emanates from the penumbras of the various guarantees of the Bill of Rights, *Griswold v. Connecticut*, [381 U.S. 479, 85 S.Ct. 1678 (1965)], as well as from the guarantees of the Constitution of this Commonwealth . . . In some respects these state constitutional rights parallel those of the Federal Constitution, see especially, Amendments 1, 3, 4, 5, and 9. In other respects our Constitution provides more rigorous and explicit protection for a person's right of privacy e.g., Article I, Sections 1, 3, 4, 7 and 11.

394 A.2d at 425. Thus, the Pennsylvania Supreme Court recognizes that Pennsylvania's state constitutional right to privacy is at least as rigorous as the Federal one.

While Pennsylvania state courts have not addressed the precise contours of the right to privacy, the United States Supreme Court has recognized two privacy rights: an autonomy-based right to privacy and a right to control the dissemination of sensitive information about one's self. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980) (interpreting *Whalen* as creating a broad constitutional right to informational privacy).

The Pennsylvania statute and proposed rule implicate the latter privacy right. While most information dissemination cases address the right to prevent sensitive information from becoming public, nothing in those cases undermines the right of the individual to control the dissemination of his or her his or her personal health information.²

² Notably, federal law generally allows patients to control the dissemination of their personal health information through informed consent. *See Confidentiality of Alcohol and Drug Abuse Patient Records Act*, 42 U.S.C.A. § 290dd-2, the *Health Insurance Portability and Accountability Act ("HIPAA") Regulations* at 45 C.F.R. § § 164.508, 164.512.

F. Proposed regulation 4 Pa. Code § 255.5(c)(1) violates the ADA on its face because it discriminates against people with substance abuse disabilities

1. Overview of the ADA

The ADA is intended "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b). Title II of the ADA prohibits discrimination by public entities, including states, on the basis of disabilities:

No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. In enacting the ADA, Congress found that "discrimination against individuals persists in such critical areas as . . . health services" 42 U.S.C. § 12101(3). The ADA's reference to "programs, services, or activities" of a public entity has been construed broadly, to invalidate countless laws and rules, and clearly applies to rulemaking such as that challenged here. *New Directions Treatment Services v. City of Reading*, 490 F.3d 293 (3d Cir. 2007) (invalidating state statute); *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 730 (9th Cir. 1999) (invalidating ordinance); *Jones v. Gale*, 405 F. Supp. 2d 1066 (D. Neb. 2005) (invalidating state constitutional provision), *aff'd on other grounds*, 470 F.3d 1261 (8th Cir. 2006); *Ellen S. v. Florida Board of Bar Examiners*, 859 F. Supp. 1489 (S.D. Fla. 1994) (invalidating questions on bar application and follow-up inquiries regarding treatment for mental illness).

2. The ADA protects recovering alcoholics and addicts

The legislative history of the ADA indicates that it was intended to apply to recovering alcoholics and addicts. The committee reports state that the term "physical or mental impairment" includes, *inter alia*, "drug addiction [] and alcoholism." H.R.Rep. No. 101-485(II), at 51 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 333; accord H.R.Rep. No. 101-485(III), at 28 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 451; S.Rep. No. 101-116, at 22 (1989), available in WESTLAW, ADA-LH database. *See, e.g., Thompson v. Davis*, 295 F.3d 890, 896 (9th Cir. 2002) ("Drug addiction that substantially limits one or more major life activities is a recognized disability under the ADA.") *Miners v. Cargill Communications, Inc.*, 113 F.3d 820, 823 n. 5 (8th Cir. 1997) (recognizing that alcoholism is a disability for purposes of the ADA); *Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102, 1105 (Fed.Cir. 1996) (stating that "it is well-established that alcoholism meets the definition of a disability" under the ADA).

3. Pennsylvania's statutory and regulatory scheme facially discriminates on the basis of disability

Under Pennsylvania law, people with physical and psychiatric disabilities have a general right to control access to their treatment records. *Christy v. Wordsworth-At-Shawnee, et al.*, 749 A.2d 557, 559-60 (Pa. Commw. Ct. 2000) (mental health patient over age 14 retained sole control over his mental health records). However, proposed 4 Pa. Code § 255.5(c)(1) and related statutes severely limit the control by people with substance abuse disabilities over access to their treatment records and information, and therefore constitute discrimination under the ADA. *Doe v. Stincer*, 990 F. Supp. 1427 (S.D.Fla. 1997), *vacated and remanded by* 175 F.3d 879 (11th Cir. 1999). Summary judgment was reinstated on remand.

In *Doe*, Florida law created a general right of access to medical records, but restricted such access for records of treatment for any mental or emotional condition. The Court first addressed whether medical records access was implicated by the ADA:

Whether the statutory access to medical records is a "service, program, or activity" under Title II of the ADA is unclear. The ADA does not define these terms, the Court has uncovered no Eleventh Circuit authority which sheds light on this issue, and decisions from other Circuits are similarly sparse. However, this issue is academic because Title II's anti-discrimination provision contains "catch-all" language that "prohibits all discrimination by a public entity, regardless of the context." *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 44 (2d Cir. 1997).

Id. at 1431.

The Court then held that the Florida statute discriminated against people with psychiatric disabilities:

[T]he Florida statute does more than distinguish between the mentally and physically disabled, the statute excludes everyone who has received treatment for a "mental or emotional condition" from the universe of all patients, including the non-disabled. Furthermore, although it is not necessarily the case that an individual who received treatment for a "mental or emotional condition" is disabled as that term is defined in the ADA, the statute has the practical effect of excluding individuals with mental disabilities from all other individuals who enjoy this statutory right. This directly contradicts the relevant Department of Justice regulations, which state:

A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be **necessary** for the provision of the service, program, or activity being offered. A public entity may impose neutral rules and criteria that screen out, or tend to screen out, individuals with disabilities if the criteria are necessary for the safe operation of the program in question.

28 C.F.R. § 35.130(b)(8) (emphasis added). Since regulations promulgated by the Department of Justice interpreting the ADA are entitled to considerable weight, *see Kornblau v. Dade County*, 86 F.3d 193, 194 (11th Cir. 1996), the statutory exception is preempted by the ADA unless the Defendant can establish its necessity.

Id. at 1431-2.

G. Caron is entitled to a blanket reasonable modification from the existing or proposed statutes and rules

Title II of the Americans with Disabilities Act provides a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Specifically, Title II prohibits state and local governments from discriminating against individuals with disabilities. 42 U.S.C. § 12132.

In addition to proscribing facial discrimination on the basis of disability, the ADA also requires that public entities such as the Department of Health make reasonable modifications to avoid discrimination on the basis of disability. The reasonable modification provision of the regulations implementing the ADA requires:

A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the services, program, or activity.

28 C.F.R. § 35.130(b)(7).

Confidentiality statutes and regulations encourage people to seek treatment, and can help enhance quality of treatment. Blanket confidentiality provisions that cannot be waived for impaired professionals who risk losing their licenses will discourage professionals from seeking treatment for fear of losing their licenses unless treatment

information is shared with their EAP or regulatory or licensing entity. Encouraging professionals to seek and obtain treatment is of paramount importance, and active monitoring such treatment by a licensing entity is every bit as important as judicial oversight of probationers and others in the criminal justice system, already plainly allowed by the statutes and proposed rule.

H. How to fix the proposed rule

Caron's concerns can be remedied by deleting certain wording from 4 Pa. Code § 255.5 (c)(6) and adding other wording as follows:

(6) With the patient's written consent, a program may disclose information from a patient's records to a patient's employers, **impaired professionals organization, professional licensure entity or employee assistance plan** to further the rehabilitation of the patient; or, to a prospective employer who affirmatively expresses that the information is sought to enable the employer to engage the patient as an employee. ~~The information released under this paragraph shall be limited to whether the patient has or is receiving treatment with the program.~~

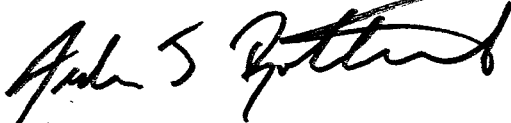
(Additions in bold; deletions stricken through.)

While consent may not be required per the impaired professional statutory scheme, it cannot be doubted that patients may consent to the sharing of their own health information.

Please call us with any questions.

Sincerely,

RICHARD J. CARON FOUNDATION



Andrew J. Rothermel
EVP/Chief Financial and Administrative Officer