

October 21, 2008

Pamela L. Brand
Associate Vice Chancellor for System Resources
PA State System of Higher Education
2986 North Second Street
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Pam,

Thank you for sharing the remarks from Deven McGraw regarding the Healthy U program and the relationship between Highmark and HealthMedia. There are a number of erroneous assumptions and conclusions included in those remarks that could well spark undue concern among PASSHE members regarding the Healthy U program. We find it unfortunate that these remarks were solicited and disseminated to Highmark members without benefit of our input. This analysis clearly indicates that Ms. McGraw was not informed about the limits under which both Highmark and HealthMedia, Inc. may use or disclose member health information under HIPAA privacy standards and our business associate agreement.

Our responses to the remarks from Ms. McGraw are included below in **bold blue** type. We trust that our responses will remove the confusion and false impressions generated about this program, and provide a comfort level for PASSHE members that the Healthy U program is simply aimed at improving their general health and well-being, and member confidentiality will be stringently protected. Please review the responses and let us know if you need any clarifications or have additional questions. If not, please feel free to distribute this information as needed. Thanks!

Dave Yinger
Highmark Blue Shield

Remarks by Deven McGraw, a HEALTH PRIVACY EXPERT regarding the Blue Shield Health Insurance / HealthyU / Succeed survey by HealthMedia, Inc.

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Date: October 15, 2008
Re: HealthMedia, Inc.

1. HealthMedia is an independent company that is not covered by the federal health information privacy rules promulgated under the Health Insurance Portability and Accountability Act (HIPAA). As a result, they don't have any legal restrictions on

how they use the personal information that people will provide to them through this survey and/or through their participation in any HealthMedia programs. As a result, the personal information provided by program participants could be used without authorization to market products and services, as well as for research or other commercial purposes. HealthMedia could also disclose this information directly to an employer for use by that employer for any purpose (because they are not subject to the law that would otherwise prohibit the disclosure of personal health information for this purpose).

HealthMedia is a “business associate” of Highmark that has agreed in writing to fully comply with HIPAA’s stringent privacy standards. As such, HealthMedia is prohibited by contract from:

- A. Using or disclosing member health information (which includes information provided by Healthy U participants in their health risk assessments) for their own purposes;**
- B. Using or disclosing member health information for marketing or research purposes without first obtaining the express written consent of Highmark and Healthy U participants; and**
- C. Disclosing member health information supplied by Healthy U participants to your employer. HealthMedia can only disclose member health information to representatives of your health plan who perform plan administrative functions – which, in the case of insured benefits, is limited to Highmark.**

On the back of the survey, it says that HealthMedia "may disclose your personal information to your health plan without your specific authorization or as required by law."

HealthMedia will disclose member health information to Highmark (the “health plan” referenced in the health risk assessment (survey)) in full compliance with HIPAA privacy standards. Highmark receives the information for Healthy U program administration and “Blues on Call” health coaches. Blues on Call is a valuable member benefit that Highmark has expressly agreed to provide under the terms of its insurance contract with the Pennsylvania State System of Higher Education (PASSHE).

It also says that HMI may create aggregate data results "for dissemination to sponsoring organizations and for research purposes. Aggregate data is combined from many individuals. THIS AGGREGATE DATA WILL NOT CONTAIN ANY INFORMATION WHICH DISCLOSES YOUR IDENTITY...." It also says that this aggregate data may be disclosed to an employer - but because it's aggregate data, it won't contain any identifying information. What's missing is an express commitment not to use or disclose the information for any other purpose. For example, it does not expressly say that the information will be used ONLY for the purposes of

program participation and not for any other purpose.

The statements contained on the back of the paper health risk assessment (survey) are not intended to be exhaustive. Except as required by law, HealthMedia is prohibited by contract from disseminating member health information in any form for any purpose other than for the Healthy U program.

It does not say that the information won't be used for marketing.

As noted above, HealthMedia is prohibited by contract from using member health information for marketing purposes without the express written consent of Highmark and Healthy U participants.

As noted above, it says that the data can be aggregated and used for research - but it doesn't say that non-aggregated, identifiable information will not be used for research.

As noted above, HealthMedia is prohibited by contract from using member health information (aggregated or non-aggregated) for research purposes without the express written consent of Highmark and Healthy U participants.

It never expressly says that identifiable data will not be disclosed to an employer (the language just says that aggregate data will be disclosed).

As noted above, HealthMedia is prohibited by contract from disclosing individually identifiable health information to your employer. HealthMedia can only disclose identifiable health information to representatives of your health plan who perform plan administrative functions – which, in the case of insured benefits, is limited to Highmark.

So HealthMedia is getting a lot of highly personal information and not making express commitments to keep it confidential and to only use it in identifiable form for purposes of providing treatment or services.

HealthMedia has a written business associate agreement with Highmark that requires full compliance with HIPAA's stringent privacy standards. Among other things, this means that member health information can only be used or disclosed by HealthMedia in connection with its performance of wellness program services. All Highmark members can immediately access Highmark Blue Shield's Privacy Policy from the home page of our website, www.highmarkblueshield.com.

Another question is how long they keep and use this data - even in aggregate form - for their own purposes (or to meet the needs of their other clients).

HealthMedia will not keep member information for its own purposes or to meet

the needs of its other clients, as such uses are prohibited under its business associate agreement with Highmark. In accordance with HIPAA, HealthMedia must return or destroy member health information upon termination of its business associate agreement with Highmark. As required by HIPAA, HealthMedia must continue to comply with all relevant privacy standards and obligations of its business associate agreement with respect to any member information that it cannot feasibly return or destroy.

2. It is possible that HealthMedia is bound to abide by the HIPAA privacy rules under a contract with Blue Cross. You should ask whether Blue Cross has executed a business associate contract with HealthMedia. If this is the case, then HealthMedia is required by contract to follow HIPAA privacy rules - but that contract should also ideally prohibit them from using information they receive by virtue of that Blue Cross contract (which includes any information provided by program participants) for their own purposes.

This is, in fact, the case. HealthMedia has a business associate agreement with Highmark that requires full compliance with HIPAA privacy standards. Furthermore, and as noted above, the contract prohibits HealthMedia from using member health information it receives for its own purposes.

If such a contract exists, it would be great if you could see the language to make sure that HealthMedia is only using this information to perform its obligations to Blue Cross (not for its own purposes...).

The terms of HealthMedia's business associate agreement are confidential; however, the agreement complies in all respects with the requirements for business associate agreements under HIPAA's privacy standards.

3. Of note, under HIPAA, health plans like Blue Cross are required to get your authorization before using your personal health information for marketing or research purposes, subject to some exceptions. They are not permitted to condition your coverage on whether or not you sign this authorization.

Highmark fully complies with HIPAA's privacy standards, which prohibit the use of protected health information for marketing purposes, with the exception of offering certain value added services. Highmark is prohibited by HIPAA from using your protected health information for research purposes without your express written authorization. Highmark would never require execution of an authorization as a requirement of coverage as such a requirement is prohibited by HIPAA.

In this case, you arguably don't have a real option not to participate in the program because there is a financial consequence to nonparticipation.

The author's conclusion is made without fact or foundation. Participation in

the Healthy U program is entirely voluntary. The program provides incentives for completion. PASSHE determines the amount and/or type of reward a member may receive for completing the program. Members who elect not to participate are not penalized; rather, they have simply chosen not to pursue a financial reward.

The consequence is not complete loss of coverage - but the financial penalty for nonparticipation is significant this year, and could be more significant in later years.

There is no loss of coverage (partial or complete) for non-participation in the Healthy U program. Furthermore, the author mischaracterizes this voluntary incentive-based program as one that would impose a penalty. The author's statements regarding program incentive in future years is pure speculation.

If the data submitted to HealthMedia is being used for marketing and research purposes, the authorization for use of the data for these purposes is not being freely given - first, because it's not completely clear in the language of the survey that the data could be used for these purposes, and second, because participation is arguably a condition of coverage because of the financial consequence associated with nonparticipation.

This use of member health information for marketing and research is pure conjecture on the author's part. HealthMedia is prohibited from using member health information for marketing or research purposes unless expressly consented to by both Highmark and Healthy U participants. It cannot be overstressed that the Healthy U program is entirely voluntary. PASSHE member health coverage is in no way conditioned on participation in the Healthy U program. In fact, Highmark is prohibited from doing so under the HIPAA privacy standards.

4. Finally, some of the data that is requested in the survey could have significant consequences for participants if it is used for law enforcement purposes or in divorce or custody proceedings. Questions about how often people drink alcohol, whether they ever drive under the influence, how often they use a seat belt will result in a database of information that is highly sensitive - and is not the type of information that is typically found in a health record. If subpoenaed by law enforcement or in a court proceeding it could have significant adverse consequences. Even if HealthMedia has agreed contractually to abide by HIPAA, this information could be released under subpoena (and again, it's not the type of information that would typically be in a health record).

HIPAA does allow for the disclosure of certain member health information in response to a court order. In addition, member health information may be subject to a subpoena/discovery request made during the course of a court or administrative proceeding, but only if certain notice and/or protective measures are first undertaken. HIPAA does not take away any right members

have to object to a court order or subpoena/discovery request under applicable rules of procedure.

HIPAA does allow for the disclosure of member health information for law enforcement purposes if the reporting of certain wounds is required by law or if made in compliance with the requirements of a court-order, subpoena or administrative proceeding (in a more limited way). Significantly, HIPAA does not enhance the ability of law enforcement agencies to obtain member health information; rather, HIPAA recognizes the existing obligation of law enforcement agencies to investigate criminal activity.

It is important to note that members are not required to participate in the Healthy U program. In other words, members can always decide that, on balance, it is not in their best interest to participate in a program that involves the disclosure of health information that could be subject to judicial or law enforcement review.

5. The intrusiveness of the questions, and the fact that participation is not truly voluntarily, add to the concerns. Requiring people to disclose very sensitive information as a condition of health plan coverage is unfair - and as I noted above, could have significant adverse consequences for the individuals who participate. There should be other options, particularly for those who are healthy and don't have health conditions that justify answering such intrusive questions.

Questions posed in the survey have been developed by widely-recognized experts in the area of health risk management. The questions are clearly designed to elicit responses that will identify areas in which members can improve their health habits and their general well-being. In this regard, you should note that HealthMedia surveys are utilized by leading health insurers, such as Highmark, as well as numerous nationally recognized plan sponsors.

Once again, the author wrongly concludes that members are required to disclose sensitive health information when, in fact, the Healthy U program is entirely voluntary. Members who elect not to participate in the program suffer no adverse consequences; thus, fairness is simply not an issue. Electing members do, however, have the opportunity to receive incentive-based rewards determined by PASSHE. As a consequence, members learn to engage in healthy behaviors that can lead to a healthier future.

Lastly, the author assumes that members are the best judge of their health and, therefore, should not be required to answer questions posed in the health risk assessment. The author's conclusions reveal a fundamental misunderstanding of surveys of this kind. The health risk assessment is the first step in a process that seeks to identify unhealthy habits and conditions and further engage members in healthy behaviors. Highmark believes that all members can benefit from pursuing these wellness goals.