

Health Information Compliance Alert

Litigation: JUDGE NIXES HIPAA CHALLENGE

A federal district court judge June 17 dismissed a challenge to the Health Insurance Portability Act privacy rule mounted by a physician group and other plaintiffs, ruling that many of the claims aren't yet "ripe" for judicial review.

Filed last year by the Tucson, AZ-based **Association of American Physicians and Surgeons**, the suit took the **Department of Health and Human Services** to task on both statutory and constitutional grounds. Among other contentions, the plaintiffs including Rep. **Ron Paul** (R) of Texas claim the privacy rule:

1. violates the Fourth Amendment by requiring physicians to allow government access to protected health information without a warrant;
2. runs afoul of the First Amendment by stifling communications between physicians and their patients;
3. is unconstitutional under the Tenth Amendment in that it intrudes into local, private activities between doctors and patients that have no connection to interstate commerce;
4. oversteps the bounds of HIPAA itself by regulating non-electronic information; and
5. violates the Paperwork Reduction Act and Regulatory Flexibility Act.

The Fourth Amendment issues seemed to rile AAPS the most. "The most heavy-handed aspect of the new federal rules is the unprecedented government access to everyone's private medical records," AAPS' **Kathryn Serkes** said in announcing the suit last year. "When it comes to government prying, these rules obliterate any remote notion of patients' rights."

Serkes also argued that, under the privacy rule, doctors can be fined for withholding records from the government, and patients who do not consent to government disclosure of their records can be refused medical treatment.

U.S. District Judge **Sim Lake**, however, didn't buy most of those contentions. On the First and Tenth Amendment claims, he ruled that the plaintiffs don't have standing to sue because they didn't demonstrate any actual harm arising from alleged First Amendment violations on the one hand, and, on the other hand, because only states, not private individuals, can pursue claims under the Tenth Amendment. Lake also rejected the plaintiffs' statutory claims.

As to the Fourth Amendment claims, Judge Lake ruled that the plaintiffs can't sue before the rule is enforced, since their suit would not be "ripe" if no one has yet suffered any actual harm. Pre-enforcement, "HHS may promulgate new rules related to the privacy rule that would render plaintiffs' complaint moot," he notes.

For its part, AAPS promises both to appeal the current decision and to reassert its Fourth Amendment claims when they are "ripe."