Testimony
Tribal and State Relations Committee
Representative Boucher, Chairman
April 16, 2010

Chairman Boucher and Members of the Tribal and State Relations Committee:

I am Doug Boknecht, Assistant Regional Director of the Lake Region Human Service Center. I am here today to present information on behalf of the North Dakota Department of Human Services regarding the disclosure of state psychological evaluations to tribal entities.

Current protocols within the Department of Human Services offer no distinction that would differentiate exchange of psychological evaluations to tribal entities compared to exchanging psychological evaluations with non-tribal entities.

Confidentiality guidelines can be complicated. In particular, the Department of Human Services must take into consideration mandates required by the Health Insurance Portability & Accountability Act (HIPAA), and give consideration to various state laws and rules, for example, North Dakota Century Code Chapter 25-03 Involuntary Commitment Statutes, & North Dakota Supreme Court Rules, such as rule 7.2 which describes the Recognition of Tribal Court Orders and Judgments. Specifically, Rule 7.2 states: "The judicial orders and judgments of tribal courts within the state of North Dakota, unless objected to, are recognized and have the same effect and are subject to the same procedures, defenses, and proceedings as judgments of any court of record in this state."

It is also more common than not, that clinical records held by the human service centers or institutions fall under the federal guidelines of 42 CFR part 2, which offer more stringent protections for consumers who have received substance abuse diagnoses or services.

There are a number of avenues that allow for exchange of information, including sharing psychological evaluations. The most commonly used solution is to obtain a signed AUTHORIZATION TO DISCLOSE INFORMATION FORM, by which the

consumer or guardian grants permission for an agency to exchange or disclose specific, identified information, as deemed necessary to achieve the purpose for which that information is being exchanged. There are clear guidelines in both HIPAA and 42 CFR Part 2 about what elements a Release of Information must contain to be valid. A release of information is definitely the simplest and preferred option, and DHS psychologists always have conversations with consumers about INFORMED CONSENT prior to the start of an evaluation. This discussion includes providing information about how the evaluation may be disclosed.

A second avenue that can require the exchange or disclosure of information is through court order. Depending on the circumstances of a specific consumer, a psychological evaluation may be considered to be a mental health record, the disclosure of which is governed by HIPAA. However, often consumers have co-occurring substance abuse disorders, in which case both HIPAA and 42 CFR Part 2 apply. It is relatively much easier for a court to order disclosure of a mental health record. It is also possible for a court to order disclosure of a substance abuse record, but the protections are greater, so the process to successfully accomplish that order is more complicated. Federal rules require an "in camera" review, which essentially is a separate disclosure decision hearing, prior to the hearing on the original matter before the court.

A third option for exchanging or disclosing mental health information, such as a psychological evaluation, is pursuant to the Treatment, Payment, or Health Care Operations (TPO) component of HIPAA. This is a less frequently used solution but just last week, I did disclose 3 psychological evaluations to an IHS Mental Health Psychologist based on the treatment component of TPO rules.

There are other guidelines that can come into play in making decisions about whether to disclose, and how much to disclose in given circumstances. These include situations having to do with emergency services and screenings for admission into the North Dakota State Hospital, duty to warn, child abuse and neglect mandated reporting, and when crimes are committed on the premises.

These latter examples less often involve the sharing of psychological evaluations so I won't discuss them further in this testimony unless there are questions from the Committee.

In closing, the rules governing the exchange or disclosure of information do not substantially differ based on whether the recipient of that information is a tribal or non-tribal entity. The confidentiality rules can be complicated, so what can become a barrier to disclosing information is more often related to complying with any of the above-described requirements. Challenges can include the part of Supreme Court Rule 7.2 that indicates Tribal Courts... are subject to the same procedures, defenses, and proceedings as judgments of any court of record in this state; or the HIPAA mandate requiring specific elements of what a release of information must contain, or the 42 CFR Part 2 requirement of additional hearing and review prior to allowing disclosure. Often overcoming these barriers is a collaborative effort that educates and problem solves in a manner to reduce or overcome those barriers.

Here are a couple of examples. A few years ago, a tribal judge from the Turtle Mountain Band of Chippewa reservation preferred to use their own authorization to disclose form, so I emailed her a DHS HIPAA compliant disclosure form with the DHS logo removed. She tweaked the form and added the Tribal Court logo and we were good to go. A more recent example involved working with a new tribal judge from Spirit Lake Nation. The judge was involved in her first involuntary commitment to the North Dakota State Hospital. The respondent was unlikely to willingly sign a release of information and unlikely to be willing to take prescribed psychotropic medication. In consultation with the DHS legal department and an IHS psychologist, we were able to offer the court consultation on what elements it would be helpful for that court order to contain that would allow subsequent disclosure, and would address the medication concern.

This concludes my testimony.