

CONFIDENTIALITY OF MENTAL HEALTH AND DRUG & ALCOHOL RECORDS

PROVIDER GUIDANCE

I. This guidance is designed to help PerformCare, CABHC, County SCAs and providers understand the changes in their responsibilities with respect to confidentiality of mental health and substance use disorder records in light of the most recent changes in Pennsylvania law. This guidance is a reference document which should be read together the regulations promulgated under the amended law, as may be revised from time to time, and guidance(s) issued by the government agencies.

II. Act 32 and Act 33 of 2022

Effective July 7, 2022, Pennsylvania Act 32 of 2022 amended the confidentiality provisions of the state Mental Health Procedures Act (the “MHPA”), and Act 33 amended the corresponding provisions of the Drug and Alcohol Abuse and Control Act (the “DAACA”). The amendments update the Pennsylvania law to allow sharing of patient information by and among health care providers, health care facilities and insurers in alignment with the federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and its regulations, and, the Confidentiality of Alcohol and Drug Abuse Patient Records regulations at 42 CFR Part 2 (“Part 2”).

Summary of applicable confidentiality statutes and regulations

	Protected Health Information (PHI) including Mental Health Records	Drug and Alcohol Records and Substance Use Disorder information
Federal	The Health Insurance Portability and Accountability Act (HIPAA)	The Health Insurance Portability and Accountability Act (HIPAA) and 42 C.F.R. Part 2 Confidentiality of Substance Use Disorder Regulations (Part 2)
State	The Mental Health Procedures Act (MHPA) as amended by Act 32 55 Pa. Code §5100.37* 28 Pa. Code § 711.43(d)*	The Drug and Alcohol Abuse Control Act (DAACA) as amended by Act 33 71 P.S. § 1690.108* 4 Pa. Code § 255.5* 28 Pa. Code § 709.28*

*As currently written, the regulation is inconsistent with Act 32/33

II. Pennsylvania Confidentiality Regulations

Before Act 32 and Act 33, Pennsylvania law had requirements stricter than the applicable federal law and established certain limitations on exchange and disclosure of patient health information even with a patient consent. Although the state regulations have not been updated yet, the set of statues and regulations that

control the management of mental health records and drug and alcohol/substance use disorder information in Pennsylvania, will not be enforced¹:

- **71 P.S. § 1690.108** governs confidentiality of client records prepared or obtained under the DAACA and records of SUD treatment prepared or obtained by any SUD or medical provider. Under this regulation, allowable disclosure without a patient’s consent can only be made in cases of life-threatening emergencies and for providers with good clause court order. Even with a patient’s consent, SUD information can only be released:
 - 1) To medical personnel exclusively for diagnosis and treatment;
 - 2) To government official for the purposes of obtaining benefits; or
 - 3) To the parent or legal guardian of a minor patient.

- **4 Pa. Code § 255.5** is the regulation that limits the information and recipients of disclosure of client information by SUD providers and coordinating bodies. Compliance with Section 255.5 is written into the regulations of mental health and psychiatric treatment providers *See* 55 Pa. Code §5100.37 and 28 Pa. Code § 711.43(d). The regulation restricts the purposes and content of the information to be released with a patient's written consent. Under 255.5, the information can only be released to *a judge, probation or parole officer, insurance company, health plan or government official* to determine the advisability of continuing the client with the assigned treatment and must be restricted to the following:
 - (1) Whether the client is or is not in treatment,
 - (2) The prognosis of the client,
 - (3) The nature of the project/treatment,
 - (4) A brief description of the progress of the client, and
 - (5) A short statement as to whether the client has relapsed into drug, or alcohol abuse and the frequency of such relapse.

- **28 Pa. Code § 709.28** regulations establish standards for licensing freestanding treatment facilities to include adherence to confidentiality requirements of 4 Pa. Code § 255.5.

III. Current Confidentiality Requirements

The use and disclosure of mental health and SUD records are now aligned with HIPAA and Part 2 and are subject to certain limitation and exceptions described below.

A. HIPAA

HIPAA protects individual’s information held by Covered Entities (such as healthcare providers, health plans, and healthcare clearinghouses) and their business associates. Act 32 aligns MHPA with HIPAA, thus the exchange of mental health records² must be in accordance with HIPAA rules.

The Privacy Rule, promulgated under HIPAA, establishes the standards protecting individual’s identifiable health information. Such protected health information (the “PHI”) must be kept confidential and generally requires a patient’s consent for sharing. 164.502(a)(1)(iii).

¹ DDAP issued a bulletin confirming that it **will not enforce** stricter state regulations that govern exchange of SUD records. *See* DDAP Bulletin 02-2022, Aug. 24, 2022

² For the purposes of this guidance, the term “mental health records” does not include psychotherapy notes, which receive special protections as particularly sensitive information and require specific authorization for disclosure.

Exceptions to patient consent requirement:

Treatment, Payment and Health Care Operations

A covered entity is permitted to use and disclose PHI for the purposes of *treatment, payment and healthcare operations* without the patient's written permission. 45 CFR § 165.506(c). A covered entity also may disclose protected health information for the treatment activities of any health care provider, the payment activities of another covered entity and of any health care provider, or the health care operations of another covered entity involving either quality or competency assurance activities or fraud and abuse detection and compliance activities, if both covered entities have or had a relationship with the individual and the protected health information pertains to the relationship³.

Other Exceptions

Other instances when HIPAA permits disclosure of PHI by a covered entity without individual's authorization are:

- Public health activities by the public health authorities to carry out public health mission
- Victims of abuse, neglect or domestic violence
- Health oversight purposes (to agencies that oversee administrative functions such as audits, investigations, inspections, licensure or discipline, civil, criminal or administrative proceedings)
- Judicial and administrative proceedings in response to an order of a court or administrative tribunal
- Law enforcement purposes
- Decedents (coroners and medical examiners, funeral directors)
- Cadaveric organ, eye, or tissue donation purposes
- Research purposes provided that the covered entity obtains a written documentation of an authorization waiver
- Averting a serious and imminent threat to health and safety to individual or public safety
- Specialized government functions, including to government programs for purposes of enrollment and benefits management, and for the administrative functions of the program
- Worker's compensation
- As otherwise required by law; 45 CFR §164.512

B. Part 2 regulations

Part 2 regulations apply to federally-assisted SUD programs (other than a general medical facility), defined as an individual or entity that holds itself out as providing and provides SUD diagnosis, treatment, or referral for treatment. All SUD providers reimbursed through the HealthChoices Program are federally-assisted under the definition of 42 CFR 2.12(b) by virtue of being funded through Medical Assistance (Medicaid) program and must comply with Part 2.

Part 2 regulations provide the framework for confidentiality protections of SUD records and prohibit law enforcement's use of SUD patient records in criminal prosecutions against patients, absent a court order. Unlike HIPAA, Part 2 regulations, with limited exceptions discussed below, require a patient's consent

³ Additional guidance on Uses and Disclosure for Treatment, Payment and Health Care Operation is available at <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/disclosures-treatment-payment-health-care-operations/index.html>

even when disclosures are for the purposes of treatment, payment and health care operations.⁴ The information that is being protected by Part 2 is any that identifies individual directly or indirectly as having a current or past drug or alcohol problem, or is being treated by an SUD provider.

Exceptions to patient consent requirement:

Qualified Services Organizations

A provider does not need to secure a patient’s authorization to share SUD information with an entity that has administrative control over the records. Such entity is a qualified services organization (a “QSO”) that provides data processing, bill collecting, laboratory analyses, or legal, medical, accounting or other professional services to a provider. A QSO must enter into an agreement with the program/provider to (i) acknowledge that in receiving, storing, processing, or otherwise dealing with any patient records from the program/provider, it is fully bound by Part 2; and (ii) if necessary, it will resist in judicial proceedings any efforts to obtain access to patient-identifying information related to SUD diagnosis, treatment, or referral for treatment except as permitted by Part 2.

Immediate threat to the health and safety of an individual

Disclosures to medical personnel in a medical emergency

A patient’s consent to disclose the patient’s identifying information is not required where a provider “is treating a condition which poses an immediate threat to the health of any individual and which requires immediate medical attention.” § 2.51(a). If there is a medical emergency, a provider may release SUD information to another treating provider who indicates he/she needs access to that information to treat a condition that poses immediate threat to the health of any individual and requires immediate medical intervention.

Notification to law enforcement

Law enforcement agencies can be notified for the purposes of their assistance if an immediate threat to the health and safety of an individual exists due to a crime on the premises or against program personnel. § 2.12 (c)(5).

Reports of child abuse and neglect

The restrictions on disclosure and use in the regulations do not apply to the reporting under state law of incidents of suspected child abuse and neglect to the appropriate state or local authorities. However, the restrictions continue to apply to the original substance use disorder patient records maintained by the program/provider including their disclosure and use for civil or criminal proceedings which may arise out of the report of suspected child abuse and neglect.

Scientific Research

Part 2 addresses the circumstances where disclosures may be made without patient consent for research activities. §2.52, and the researcher documents that it satisfies requirements for data protection.

Audits and Evaluations

⁴ A full description of the requirements of a Part 2 consent form is available at <https://www.govinfo.gov/content/pkg/FR-2017-01-18/pdf/2017-00719.pdf>

Section 2.53 allows a Part 2 program to disclose patient records without patient consent in response to audits and evaluation activities performed by *federal, state and local governmental agencies* and third-party payors (including their contractors, subcontractors, and legal representatives) to identify needed actions at the agency or payer level to improve care. The auditors may also be quality assurance and quality improvement organizations.

Permitted Disclosures With Patient Authorization

HIPAA	Part 2
<p>No limitations on the purposes for which disclosure may occur with patient consent.</p> <p>No requirement to specify the purpose of disclosure</p>	<p>No limitations on the purposes for which disclosure may occur with patient consent. However, <i>the person/name/entity to which the disclosure is made and the purpose for disclosure must be listed in the consent.</i> § 2.31.⁵</p> <p>A general consent for purposes of “payment and healthcare operations” is acceptable and should be requested from SUD patients for the purposes of sharing their healthcare information. Examples of permissible payment and healthcare operations include:</p> <ul style="list-style-type: none"> • Billing, claims management, collections • Clinical professional support services • Patient safety activities • Activities pertaining to (i) training of healthcare professionals; (ii) the assessment of practitioner competencies; (ii) assessment of health plan performance; and (iv) training of non-healthcare professionals • Accreditation, licensing or credentialing • Underwriting, enrollment, premium rating, and other activities related to the creation, renewal, or replacement of contract if health insurance/benefit • Third-party liability coverage • Fraud, waste and abuse activities • Medical review, legal services or auditing • Business planning and development • Business management and administrative activities • Customer services, including the provision of data analyses for policy holders, plan sponsors, or other customers • Resolution of internal grievances • Determination of eligibility for health benefit claims • Risk adjusting based on enrollee health status and demographic characteristics

⁵ Additional information regarding a Part 2 compliant written consent and its content is provided in DDAP Licensing Alert 03-22, Nov. 29, 2022, available at <https://www.ddap.pa.gov/Licensing/Documents/Licensing%20Alerts/Alert%202022-03.pdf>

	<ul style="list-style-type: none">• Review of healthcare services regarding medical necessity, coverage and appropriateness of treatment• Care coordination or case management• Other payment/healthcare operations activities not expressly prohibited
--	---

Permitted Disclosures Without Patient Authorization

HIPAA	Part 2
<ul style="list-style-type: none"> • Treatment • Payment • Healthcare Operations • Public Health Activities • Health Oversight purposes • Judicial and Administrative Proceedings • Law Enforcement Purposes • Decedents • Organ donation purposes • Research • Threat to health and safety • Government functions • Worker’s compensation • As required by law <p>IMPORTANT</p> <p>Limit any permitted use or disclosure of PHI to the minimum necessary</p> <p>Exceptions: Disclosure to patient Disclosure to another provider for treatment purposes</p>	<ul style="list-style-type: none"> • Communications with Part 2 Program for those who have need to know • Medical emergency • Report crime or threat on Part 2 premises or against Part 2 personnel to law enforcement; limit info • Report child abuse or neglect • Research • Audit or Evaluation of Part 2 program/provider by government, payer, or other lawful holder • Court order <p>IMPORTANT</p> <p>Limit disclosure to the information necessary for permitted purposes of disclosure</p>
<p>Disclosure to Business Associates (“BA”) if a BA Agreement in place</p>	<p>Disclosure to Qualified Services Organizations (“QSO”) if a QSO Agreement is in place</p>