

# **YOUR RIGHTS REGARDING ACCESS TO MENTAL HEALTH RECORDS IN MASSACHUSETTS**

**Prepared by the Mental Health Legal Advisors Committee  
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An individual has a right to confidentiality with respect to their own personal health information, including mental health information. This right provides that, in most cases, only the individual, the individual's personal representative and the individual's treatment providers may access this information. An individual has the right, in most cases, to inspect and copy their personal health information.

## **Health Care Providers covered by HIPAA's Privacy Rule**

Federal standards, known as the "Privacy Rule," establishes national rules for the protection and dissemination of personal health information.<sup>1</sup> Because the Privacy Rule implements the requirement of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"),<sup>2</sup> the standards are often called HIPAA standards.

The Privacy Rule applies to health plans, healthcare clearinghouses, and to any healthcare provider who transmits health information in electronic form in connection with transactions for which the Secretary of Health and Human Services (HHS) has adopted standards under HIPAA.<sup>3</sup>

The Privacy Rule protects all "**individually identifiable health information**" held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper, or oral.<sup>4</sup>

Personal health information (PHI) protected by the Privacy Rule includes: medical and billing records about the individual maintained by or for a covered provider; insurance info; and records used, in whole or part, by or for, the provider/insurer to make decisions about the individual.

Regular PHI does not include psychotherapy notes, which are notes that a mental health professional takes during a conversation with a patient. Psychotherapy records are kept separate from the patient's medical and billing records and requires a separate valid authorization.

Under the Privacy Rule, a covered entity may not disclose an individual's records except as provided by the rule or with the written authorization of the individual or the individual's personal representative. In addition, under the rule, an individual or the

individual's personal representative has a right to access their records in most cases, including for the purposes of both inspection and copying.<sup>5</sup>

However, in certain cases, a covered entity can decline to provide such access to the record:

- A licensed health care professional has determined, in the exercise of professional judgment, that the access requested is **reasonably likely to endanger the life or physical safety of the individual or another person**;
- The record makes reference to another person (who is not a health care provider) and a licensed health care professional has determined, in the exercise of professional judgment, that the access requested is **reasonably likely to cause substantial harm to such person**; or
- The request is made by the individual's personal representative and a licensed health care professional has determined, in the exercise of professional judgment, that providing access to the representative is **reasonably likely to cause substantial harm to the individual or another person**.<sup>6</sup>

#### **Inpatient facilities operated by the Department of Mental Health (DMH), contracted for by DMH, or licensed by DMH and Intensive Residential Treatment Programs (IRTPs)**

At mental health inpatient facilities operated by DMH, contracted for by DMH, or licensed by DMH, as well as at intensive residential treatment programs (IRTPs) for adolescents, access to records is addressed by state law<sup>7</sup> and DMH regulations.<sup>8</sup> In certain cases, DMH policy and guidelines also apply.

An individual or guardian has a right to **inspect** the individual's mental health record, unless the DMH Commissioner or designee has determined that inspection will result in "serious harm" to the individual. An individual has a right to a **copy** of the record when it is in the individual's "best interest."<sup>9</sup> The DMH regulations list certain circumstances in which the best interest standard is automatically met. They include the following:

- When the record will enable the individual, or someone acting on the individual's behalf, to pursue a claim, suit or other legal remedy; to enforce a right; or to defend him or herself against such action;
- To ensure that the individual's civil rights are protected; or
- To enable the individual or someone acting on the individual's behalf to obtain benefits or third-party payment for services rendered.<sup>10</sup>

The expectation of DMH is that: "In most instances, individuals should be permitted to review their records and/or obtain a copy."<sup>11</sup>

For DMH-operated inpatient facilities, private inpatient units located within a DMH-operated facility, and any private inpatient facility which has contracted with DMH to follow a recent DMH policy regarding patient rights, DMH provides further direction regarding the "best interest" analysis. For these facilities, DMH defines disclosure as being in the individual's "best interest" unless:

- There would likely be **serious harm** to the individual, defined as physical or psychological harm which is tangible or concrete, and not hypothetical or insignificant,<sup>12</sup> as a result of disclosure, as determined by a clinician who has reviewed the record and is knowledgeable of the individual;
- The likelihood of harm as a result of disclosure may not be satisfactorily addressed through a staff person reviewing the records with the individual;
- The denial and reasons for it are reviewed with the individual; and
- The denial and reasons for it are noted in the individual's record.<sup>13</sup>

The facility's chief executive officer or designee must review all decisions to deny disclosure.<sup>14</sup>

### **Community programs operated by DMH, contracted for by DMH, or licensed by DMH**

At community programs operated by, contracted for or licensed by DMH, access to records is addressed in DMH regulation. This regulation grants an individual the absolute right to inspect and copy the record upon request.<sup>15</sup>

### **Residential programs licensed by the Department of Early Education and Care (EEC)**

At residential programs licensed by EEC, access to records is addressed in EEC regulations. Such programs must have written procedures regarding access to the record by the resident (taking into account the resident's capacity to understand), parent(s), persons other than the parent who have custody, and persons not directly related to the service plan.<sup>16</sup> The procedures must identify the person or persons, if any, whose consent is required before information in the resident's record may be released.<sup>17</sup>

### **Facilities operated or licensed by the Department of Public Health (DPH)**

At hospitals or clinics operated or licensed by the DPH (and not operated or licensed by DMH), access to inpatient and outpatient records is addressed by state law.<sup>18</sup> These facilities must allow the individual to inspect and copy their records; there is no "best interest" standard.

## Other health care providers

An individual receiving services from a health care provider other than those who fall into any of the above categories, has a right to access his or her entire record.<sup>19</sup> The individual's "authorized representative" is also entitled to the record.<sup>20</sup>

State law passed before the implementation of HIPAA's privacy rule includes one exception to this general rule: a psychotherapist may prohibit access to that portion of the mental health record generated by the psychotherapist, if the psychotherapist believes that access to those specific records would "adversely affect the patient's well-being." If a psychotherapist limits access, he or she must provide the individual with a summary of the psychotherapy records. However, the psychotherapist must provide the entire record to the individual's attorney or to another psychotherapist if the individual consents to its release.<sup>21</sup> This exception is only available to those providers who are not covered by the HIPAA Privacy Rule, as the Privacy Rule does not contain this exception and provides controlling legal authority.

## ENDNOTES

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<sup>1</sup> 45 CFR Part 160 and Part 164, Subparts A and E. (final publication Aug. 14, 2002).

<sup>2</sup> Public Law 104-191 (enacted August 21, 1996).

<sup>3</sup> Every health care provider, regardless of size, who electronically transmits health information in connection with certain transactions, is a covered entity. These transactions include claims, benefit eligibility inquiries, referral authorization requests, or other transactions for which HHS has established standards under the HIPAA Transactions Rule. The Privacy Rule covers a health care provider whether it electronically transmits these transactions directly or uses a billing service or other third party to do so on its behalf. Health care providers include all "providers of services" (e.g., institutional providers such as hospitals) and "providers of medical or health services" (e.g., non-institutional providers such as physicians, dentists and other practitioners) as defined by Medicare, and any other person or organization that furnishes, bills, or is paid for health care.

<sup>4</sup> 45 CFR 160.103.

<sup>5</sup> 45 CFR 164.502(a)(2)(i); 45 CMR 164.524(c)(1).

<sup>6</sup> 45 CFR 164.524(a)(3).

<sup>7</sup> Mass. Gen. L. ch. 123, § 36.

<sup>8</sup> 104 CMR 27.17.

<sup>9</sup> Mass. Gen. L. ch. 123, § 36: 104 CMR 27.17(6)(f); DMH, Guidelines for Release of DMH Inpatient Medical Records V. (May 3, 1994) (hereinafter, DMH Guidelines).

<sup>10</sup> 104 CMR 27.17(6)(f) 3,4,5.

<sup>11</sup> DMH Guidelines, I.A.3.

<sup>12</sup> DMH Policy 95-5R, Patient Rights and Responsibilities, III.F. (Sept. 6, 1996) (hereinafter, DMH Policy 95-5R).

<sup>13</sup> DMH Policy 95-5R, at III.E.8.

<sup>14</sup> DMH Policy 95-5R, at III.E.8.

<sup>15</sup> 104 CMR 28.09(1)(a).

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<sup>16</sup> 102 CMR 3.10(5)(a).

<sup>17</sup> 102 CMR 3.10(5)(b).

<sup>18</sup> Mass. Gen. L. ch. 111, § 70, fourth sentence; § 70E, fifth paragraph, subparagraph (g).

<sup>19</sup> Mass. Gen. L. ch. 112, § 12CC.

<sup>20</sup> Mass. Gen. L. ch. 112, § 12CC.

<sup>21</sup> Mass. Gen. L. ch. 112, § 12CC.