



**OFFICE OF MENTAL HEALTH
AND SUBSTANCE ABUSE
SERVICES BULLETIN**

ISSUE DATE:

May 12, 2023

EFFECTIVE DATE:

May 12, 2023

NUMBER:

OMHSAS-23-05

SUBJECT:

Confidentiality of Records Changes Due to
ACT 32 of 2022 and Aligning with Health
Insurance Portability and Accountability Act of
1996

BY:

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Office of Mental Health and Substance Abuse Services**

SCOPE:

County Administrators
Primary Contractors
Behavioral Health (BH) Managed Care Organizations
BH Providers who render services in the fee-for-service or managed care delivery system
BH Providers enrolled in the BH managed care plan

PURPOSE:

The purpose of this bulletin is to:

- inform stakeholders of Act 32 of 2022 changes to the list of permissible disclosures in 50 P.S. § 7111(a), and new definitions in 50 P.S. § 7103.1: and
- announce that the Department of Human Services (Department) will amend 55 Pa. Code Chapter 5100 to align with Act 32 and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) requirements.

BACKGROUND:

On July 7, 2022, Act 32 of 2022 (P.L. 428, No. 32) was signed into law, amending the Mental Health Procedures Act by updating definitions and confidentiality requirements. Act 32 of 2022 also requires the Department to promulgate regulations.

COMMENTS AND QUESTIONS REGARDING THIS BULLETIN SHOULD BE DIRECTED TO:
Office of Mental Health and Substance Abuse Services, Bureau of Policy, Planning and Program
Development, P.O. Box 2675, Harrisburg, PA 17105. General Office Number 717-772-7900

DISCUSSION:

Act 32 of 2022 includes new definitions and confidentiality requirements for mental health records. Act 32 defines “business associate,” “covered entity,” “disclosure,” “health care operations,” “payment,” “treatment,” and “use” to be as defined in 45 C.F.R. §§ 160.103 and 164.501. Further, the Act adds covered entities and business associates to the list of entities to which the Department may disclose confidential information without the person’s written consent. Specifically, Act 32 amended 50 P.S. § 7111 by adding (a)(5) as follows (bolded):

Section 7111(a). All documents concerning persons in treatment shall be kept confidential and, without the person’s written consent, may not be released or their contents disclosed to anyone except:

- (1) those engaged in providing treatment for the person;
- (2) the county administrator, pursuant to section 110;
- (3) a court in the course of legal proceedings authorized by this act; [and]
- (4) pursuant to Federal rules, statutes and regulations governing disclosure of patient information where treatment is undertaken in a federal agency[.]; and
- (5) a covered entity or a covered entity’s business associate that makes the use, disclosure or request for disclosure in accordance with 45 C.F.R. Pt. 164 Subpt. E (relating to privacy of individually identifiable health information).**

Although the Department will amend 55 Pa. Code Chapter 5100 to align with Act 32 changes, the Act’s new definitions and addition to the list of permissible disclosures without written consent are effective immediately. In addition to these changes, the Department will amend Chapter 5100 to align with HIPAA requirements that preempt conflicting state law.T

The following provisions of Chapter 5100 are superseded, effective immediately:

- Section 5100.31(f) – the limitation stated in the second sentence is superseded as contrary to HIPAA, which affords individuals greater right to access their own information. This limitation will be deleted under the Department’s regulatory amendments.
- Section 5100.31(g) is superseded as potentially contrary to HIPAA. This subsection will be deleted under the Department’s regulatory amendments.
- Section 5100.31(h) is superseded as contrary to HIPAA. HIPAA nonetheless applies to public records/information about the individual contained in their record. This subsection will be deleted under the Department’s regulatory amendments.
- Section 5100.32(a)(1) and (2) is superseded because neither Act 32 nor 50 P.S. § 7111 include the limitations as stated therein. Instead, Act 32 and applicable HIPAA requirements apply to disclosures to health care providers for treatment

purposes and disclosures to third party payors. These paragraphs will be deleted under the Department's regulatory amendments.

- Section 5100.33(a) through (e) is superseded as contrary to HIPAA requirements concerning an individual's right to access their own record/information. These subsections will be deleted under the Department's regulatory amendments
- The first sentence of Section 5100.33(j) is superseded as contrary to HIPAA because of its reference to the exception in (c). This sentence will be deleted under the Department's regulatory amendments
- Section 5100.34(b) is superseded because this section differs from Act 32 and HIPAA. This subsection will be deleted under the Department's regulatory amendments.
- Section 5100.34(c) is superseded because the required HIPAA notices of privacy practices are controlled by HIPAA. This subsection will be deleted under the Department's regulatory amendments.

As provided above, the Department is pursuing amendments to Chapter 5100 to align with federal HIPAA requirements. While these amendments are being pursued, federal law controls. Title 45 C.F.R. Part 164, Subsection E or other federal law requiring or precluding disclosure of an individual's personally identifying information supersedes any conflicting requirement in Chapter 5100. Further, the following applies:

- An individual's access to and control of their record and information contained therein shall be in accordance with 45 C.F.R. Part 164, Subpart E.
- An individual may authorize release of all or part of their record/information in accordance with 45 C.F.R. Part 164, Subpart E.
- For disclosures that require written authorization, each facility shall use a department approved authorization form that complies with applicable federal and state requirements, including those set forth in 45 C.F.R. Part 164, Subpart E.

In addition to these changes, the cross references in Section 5100.37 to the regulations promulgated under the Pennsylvania Drug and Alcohol and Abuse Control Act and 4 Pa. Code § 255.5 are also superseded by Act No. 33 of 2022. These cross references will be deleted under the Department's regulatory amendments.

OBSOLETE:

This bulletin will be obsoleted upon promulgation of the Department's Chapter 5100 amendments.