

CHAPTER 4

NOTICE OF PRIVACY PRACTICES

I. GENERAL RULE

HIPAA requires that DMH provide a Notice of Privacy Practices to each patient in a DMH facility, DMH Client, and applicant for continuing care services. This notice also must be provided to each person who is not a DMH Client who receives DMH-operated emergency treatment services (emergency services recipient). If an individual has a Personal Representative (PR) who can make health care decisions on his/her behalf, then the notice shall be provided to the PR rather than to the individual, unless an exception in Section III.A.3 applies. An individual with a PR also may be provided with a copy of the notice; however, the individual must be provided with a copy upon his or her request.

The DMH Notice of Privacy Practices must explain how DMH may use and/or disclose Protected Health Information (PHI); the rights of an individual (or his/her PR) regarding his or her PHI held by DMH; and DMH's legal duties with respect to PHI. The notice must be provided to each applicable individual receiving services as of April 14, 2003 by April 14, 2003. If an individual's first DMH service delivery is after April 14, 2003, the notice must be provided on the date of the first service delivery, except in emergency situations, when the notice must be given as soon as it is clinically reasonable to do so.

DMH is required to abide by the terms of its current Notice of Privacy Practices. All uses and disclosures of PHI made by DMH must be consistent with its current notice. DMH may change its notice at any time; however, a change to its privacy practices cannot occur until the effective date of the new Notice of Privacy Practices reflecting the change, unless said change is required by law. The new notice must be posted and distributed in accordance with the requirements below.

DMH also is required to obtain a written acknowledgment of receipt from each individual to whom it is required to provide a Notice of Privacy Practices. If it cannot obtain such an acknowledgment, it must document the good faith efforts that were made to obtain the acknowledgment. The acknowledgment or documentation of good faith efforts is to be retained by DMH in accordance with these procedures.

II. SPECIFIC REQUIREMENTS

A. Standardized Notice of Privacy Practices and Acknowledgment Form

DMH will develop a standardized DMH Notice of Privacy Practices and Acknowledgment Form. The Commissioner or designee will approve all forms. Copies of the DMH Notice of Privacy Practices and Notice of Privacy Practices Acknowledgement Form are included at the end of this Chapter.

B. Notice of Privacy Practices

- 1. Required Contents of the Notice of Privacy Practices.** The DMH Notice of Privacy Practices, developed in accordance with the procedures set forth below, must be written in plain language and contain the following elements:
 - a. This statement must appear in a header or otherwise prominently be displayed: "THIS NOTICE DESCRIBES HOW MEDICAL INFORMATION ABOUT YOU MAY BE USED AND DISCLOSED AND HOW YOU CAN GET ACCESS TO THIS INFORMATION. PLEASE REVIEW IT CAREFULLY."
 - b. A description, including at least one example, of the types of uses and disclosures that DMH is permitted to make for purposes of treatment, payment and health care operations, with sufficient detail to place an individual on notice of the uses and disclosures permitted or required.
 - c. A description of each of the other purposes for which DMH is permitted or required to use or disclose PHI without an individual's consent or authorization, with sufficient detail to place an individual on notice of the uses and disclosures permitted or required.
 - d. A statement that other uses or disclosures will be made only with the individual's written authorization and that the authorization may be revoked in writing to stop future uses/disclosures except to the extent that DMH already has undertaken an action in reliance of the authorization.
 - e. A separate statement describing that DMH may contact the individual for appointment reminders, treatment alternatives or other health-related benefits.

- f. A statement of the individual's rights with respect to his/her PHI, and a brief description of how the individual may exercise those rights, including: the right to request restrictions on certain uses/disclosures of PHI, and the fact that DMH does not have to agree to such restrictions; the right to receive confidential communications of PHI; the right to inspect and to copy PHI; the right to amend PHI; the right to receive an accounting of disclosures of PHI; and the right to receive a paper copy of the Notice of Privacy Practices.
- g. A statement of DMH's duties with respect to PHI, including statements that DMH: is required by law to maintain the privacy of PHI and to provide individuals with notice of its legal duties and privacy policies; is required to abide by the terms of the currently effective Notice of Privacy Practices; reserves the right to change its privacy practices and terms of the notice; and reserves the right to make the changes apply to all existing and future PHI, with a description of how DMH will provide individuals with the revised notice.
- h. A statement that individuals may complain to DMH and to the Secretary of the U.S. Department of Health and Human Services about privacy rights violations, including a brief statement about how a complaint may be filed and an assurance that the individual will not be retaliated against for filing a complaint.
- i. The name, or title, and telephone number of the person or office to contact for further information.
- j. The effective date of the notice, which may not be earlier than the date printed or published.

2. Revisions to the Notice of Privacy Practices.

- a. **When Required.** DMH must revise its Notice of Privacy Practices whenever it wants to make a material change
 - i. to the way it uses or discloses PHI;
 - ii. in the rights of patients, clients, applicants and emergency services recipients regarding PHI; or
 - iii. in DMH's legal duties or other privacy practices stated in its Notice of Privacy Practices.
- b. **Process.** To make a change to its privacy practices, DMH must:
 - i. revise the notice;
 - ii. establish an effective date for the new notice;
 - iii. post the new notice as required;

- iv. distribute the new notice to new applicants and new recipients of DMH services;
 - v. post the new notice on its Internet web site;
 - vi. post the new notice in DMH Facilities, Area and Site offices and DMH-operated programs;
 - vii. make the new notice available upon request; and
 - viii. remove the old, obsolete notices from DMH Facilities, Area and Site offices and DMH-operated programs and its Internet web site.
- c. **Retroactive Application.** A change to DMH's privacy practices may be applied retroactively to PHI it already has in its possession if the prior applicable Notice(s) of Privacy Practices (i) contained a statement expressly reserving DMH's right to change the terms of its notice and to make the new notice provisions effective for all PHI that it maintains; and (ii) described how DMH will provide individuals with the revised notice.

3. Time of Provision of the Notice of Privacy Practices. DMH must provide a Notice of Privacy Practices to each patient in a DMH facility, DMH Client, applicant for continuing care services and emergency services recipient by April 14, 2003, or on the first date of service after April 14, 2003.

4. Posting of the Current Notice of Privacy Practices and the Availability of Copies upon Request. Each DMH Facility, Area and Site office, and DMH-operated program must post copies of DMH's current Notice of Privacy Practices in clear and prominent locations where it is reasonable to expect individuals receiving or seeking services from DMH will be able to read the notice. Additionally, all such locations must have copies of DMH's current Notice of Privacy Practices available for any individual who requests it.

The Notice of Privacy Practices is a public document.

5. Posting the Current DMH Notice of Privacy Practices on the DMH Web Site. DMH must post prominently a copy of its current Notice of Privacy Practices on its Internet web site.

6. Providing a Copy of the DMH Notice of Privacy Practices by E-Mail. If an individual is required to be given a Notice of Privacy Practices, the notice may be given by e-mail only if the individual agrees to this method. Additionally, a notice can be given by e-mail only if it can be documented that the e-mail was received (this documentation may be used in lieu of the Department's standardized

acknowledgment form). If it is known that the e-mail transmission failed, a paper copy of the notice must be provided to the individual.

7. **Retention of the Notice of Privacy Practices Issued by DMH.** The DMH Privacy Officer will retain copies of all Notices of Privacy Practices issued by DMH. Each copy will be retained in accordance with DMH record retention schedules, but in all events for a period of at least six (6) years from the date that the notice expires.
8. **Provision of the Notice of Privacy Practices to Personal Representatives.** If an individual has a Personal Representative (PR), and the PR status is known to DMH at the time that the Notice of Privacy Practices is to be given to the individual, the notice must be given to the PR rather than to the individual, and an acknowledgment of receipt must be obtained from the PR rather than the individual, unless an exception in Section III.A.3 applies. An individual with a PR also may be provided with a copy of the notice and shall be provided with a notice on request.

There will be situations where a Notice of Privacy Practices is given to an individual and it is determined, after the notice is provided, that the individual has a PR. Also, there will be situations where a PR is established for the individual after the individual receives the notice. In these situations, a Notice of Privacy Practices must be given to the PR and acknowledgment of receipt obtained from the PR in accordance with the requirements of this Chapter. This must be done immediately upon a determination that the individual has a PR. An individual's Health Care Agent does not become a PR until the individual has been determined to be incompetent to make health care decisions, in accordance with applicable legal standards. If questions arise, the applicable legal office should be consulted.

C. Acknowledgment of Receipt of Notice of Privacy Practices

1. **Acknowledgment of Receipt or Documentation of Good Faith Efforts to Obtain Acknowledgment.** Except in emergency treatment situations, as defined in these procedures, DMH must make a good faith effort to obtain written acknowledgment of receipt of the DMH Notice of Privacy Practices from each individual to whom it is required to give a copy. If acknowledgment of receipt cannot be obtained, DMH must document its good faith efforts to obtain such acknowledgment and the reasons why the acknowledgment was not obtained (e.g., the client refused.)
2. **Documentation.** DMH must retain documentation of the individual or PR's acknowledgment of receipt of the DMH Notice of Privacy

Practices, or the good faith efforts to obtain such acknowledgment, in accordance with applicable DMH record retention schedules.

III. DISTRIBUTION AND ACKNOWLEDGMENT PROCEDURES

A. Distribution of the Notice of Privacy Practices, Obtaining Acknowledgment of Receipt, and Documentation

1. Required Distributions Prior to April 14, 2003.

- a. **Patients in a DMH Facility.** Between April 7, 2003 and April 14, 2003, every DMH-operated or contracted Facility (including IRTPs, BIRTS and DMH units in DPH Hospitals and in Parkview Hospital) shall provide each patient or his/her PR, if applicable, with a DMH Notice of Privacy Practices together with a Notice of Privacy Practices Acknowledgment Form (both included at the end of this Chapter). By April 14, 2003, the Facility must obtain a signed Acknowledgment Form from each patient or PR or document its good faith efforts to obtain it in accordance with Section III.B. The Acknowledgment Form or good faith documentation shall be retained in the legal section of the patient's medical record and entered into the Mental Health Information System (MHIS), if such system is available to the Facility.
- b. **DMH Client -- Case Managed.** Between March 15, 2003 and April 14, 2003, each DMH case manager shall give every Client on his or her caseload or PR, if applicable, a copy of the DMH Notice of Privacy Practices together with a Notice of Privacy Practices Acknowledgment Form. Contact must be made in person, if possible, or, if not possible, by mail. The case manager must obtain acknowledgment of receipt from the DMH Client or PR. If the case manager is unable to obtain a signed Acknowledgment Form for any reason, he/she must follow the instructions in Section III.B. The signed Acknowledgment Form, or the documentation required by Section III.A., shall be retained in the legal section of the case management record and entered into the MHIS, if available to such case manager.
- c. **DMH Client -- Non-Case Managed but receiving a DMH Service.** Between March 15, 2003 and April 14, 2003, each Area Office shall ensure that every DMH Client (or PR, if any) who does not have a DMH case manager but who is receiving a DMH service as of that date, is given a DMH Notice of Privacy Practices and DMH Notice of Privacy Practices Acknowledgment Form.

The Area must obtain from each such DMH Client or PR an acknowledgment of receipt.

The Notice shall be given in person, if possible, or otherwise by mail. The Area shall do telephone follow-up to get verbal or written acknowledgment if the Acknowledgment Form is not returned. If the Area is unable to obtain acknowledgment of receipt of the Notice of Privacy Practices for any reason, the Area must document its good faith efforts and the reasons why it was unable to obtain it in accordance with Section III.B. The acknowledgment or the good faith documentation shall be retained in the DMH Client's DMH file in accordance with the applicable DMH record retention schedule.

- d. **DMH Client -- Non-Case Managed and Not Receiving a DMH Service.** If an individual has been determined eligible for DMH services as of April 14, 2003, but is not then receiving a DMH service, the individual shall be given a Notice of Privacy Practices in accordance with Section III.A.2.d.
- e. **Non DMH Client – Receiving Clubhouse Services Only.** An individual who only receives clubhouse services from a DMH vendor and who has not applied for and/or who has not been determined eligible for DMH Continuing Care Services is not required to receive a DMH Notice of Privacy Practices. DMH does not create or maintain PHI about such individuals.

2. Required Distributions on or after April 14, 2003.

- a. **Patients Admitted to a DMH Facility on or after April 14, 2003.** Each patient (or his/her PR, if any) admitted on or after April 14, 2003 shall be given a Notice of Privacy Practices together with a DMH Notice of Privacy Practices Acknowledgment Form that documents receipt of the notice at the time of admission. In emergency situations or where it is not clinically recommended that a patient then be given a Notice of Privacy Practices, the patient shall be given the notice and Acknowledgment Form as soon as it is clinically reasonable to do so, but no later than at the time of the initial master treatment planning meeting or discharge, whichever occurs sooner. The Facility must obtain acknowledgment of receipt from the patient or PR, if any, or document receipt in accordance with Section III.B. This documentation shall be retained in the legal section of the patient's medical record and entered into the MHIS, if available to the Facility.

b. Applicants for Continuing Care Services on or after April 14, 2003.

As of April 14, 2003, the application for adult, child and adolescent continuing care services shall include, as a separate attachment, a Notice of Privacy Practices. Included in the applicant or PR's signature section of the application is an acknowledgment of the receipt of the Notice of Privacy Practices. A current application can be found on either the DMH Internet or Intranet Web pages by clicking on "Forms."

- i. When an application is made directly by an individual, or his/her PR, if any, the individual or PR shall retain the Notice of Privacy Practices.
- ii. When a Facility or Program submits an application on behalf of an individual, it is the responsibility of the Eligibility Determination Specialist (EDS) to give a copy of the Notice of Privacy Practices to the individual, or PR, if any, on whose behalf the application has been made. The EDS must obtain acknowledgment that the applicant, or PR, received the Notice of Privacy Practices. If the EDS is unable to obtain the acknowledgment of receipt of the Notice, the EDS must document his/her good faith efforts to obtain it and the reasons why he/she was unable to obtain it in accordance with Section III.B.

If the application for DMH eligibility is approved, the application and, if separate, the acknowledgment of receipt, shall be filed in the applicant's DMH file and entered into MHIS. If the application for DMH eligibility is denied, the application and, if separate, the acknowledgment of receipt, shall be retained in the applicant's eligibility file for at least six years.

c. Individuals Who Receive Services from a DMH-Operated Emergency Services Program on or after April 14, 2003.

As of April 14, 2003, any individual receiving emergency services shall be given a copy of the Notice of Privacy Practices and asked to acknowledge receipt of the Notice of Privacy Practices at the point of service. In situations where it is not feasible or clinically appropriate to give the individual a copy of the Notice of Privacy Practices, the Emergency Services Program (ESP) shall make a reasonable effort to follow up with the individual in person or by mail to give him/her the Notice of Privacy Practices and to obtain acknowledgment of receipt of the Notice of Privacy Practices. If

the ESP is unable to obtain acknowledgment of receipt, then the ESP must document its good faith efforts to obtain it and the reasons why it was unable to obtain it in accordance with Section III.B. The acknowledgment of receipt or the good faith documentation shall be retained in the individual's file at the ESP for at least six years.

- d. **DMH Clients Who Were Determined Eligible Before April 14, 2003 and Receive Their First DMH Service after April 14, 2003.** When such a DMH Client is assigned to a DMH service, the Site Office shall ensure that the DMH Client or PR, if any, is given a Notice of Privacy Practices. The Site Office also must obtain from the DMH Client or PR an acknowledgment of receipt. If the Site Office is unable to obtain acknowledgment of receipt, then the instructions in Section III.B. must be followed. The acknowledgment or the documentation required by Section III.B. must be retained in the individual's DMH file in accordance with the applicable record retention rule.
- e. **Non DMH Client – Receiving Clubhouse Services Only.** An individual who only receives clubhouse services from a DMH vendor and who has not applied for and/or who has not been determined eligible for DMH Continuing Care Services is not required to receive a DMH Notice of Privacy Practices. DMH does not create or maintain PHI about such individuals.

3. Exceptions to Giving the Notice of Privacy Practices to PRs.

- a. **16 and 17 Year Olds Who Voluntarily Admit Themselves to a Facility Pursuant to 104 CMR 27.06.** A 16 or 17 year old who voluntarily admits himself or herself to a Facility pursuant to 104 CMR 27.06 shall be provided with a copy of the Notice of Privacy Practices and his/her acknowledgment shall be obtained. However, the PR of the 16 or 17 year old also shall be provided with a copy of the Notice of Privacy Practices and the PR acknowledgment shall be obtained when the PR consents to treatment on behalf of the 16 or 17 year old. If acknowledgment cannot be obtained in either instance, the Facility must document its good faith efforts to obtain it in accordance with Section III.B. The applicable acknowledgments or documentation must be retained by the Facility in the legal section of the patient's record and entered into the Mental Health Information System (MHIS), if such system is available to the Facility.
- b. **Minors Who Consent to Treatment.** If a Facility or Program, after consultation with legal counsel if necessary, determines that a

minor is able to provide consent to treatment because he/she is an emancipated minor or the treatment meets a certain legal exception, the Facility or Program shall give the minor a Notice of Privacy Practices when he/she actually consents to the treatment. The Facility or Program must obtain acknowledgment of receipt of said Notice from the minor, or document receipt in accordance with Section III.B. The acknowledgment or documentation of receipt shall be retained in the legal section of the minor's medical record if a Facility and in the minor's program file if a Program and entered into the MHIS, if such system is available.

A minor who consents to treatment has the rights set forth in the Notice of Privacy Practices regarding PHI, but only to the extent the PHI is applicable to such treatment.

- 4. Minors in the Care and Custody of DSS and DYS.** DSS or DYS must be provided with a copy of the DMH Notice of Privacy Practices and their acknowledgment of receipt must be obtained for any minor in their custody for which they may make health care decisions. DSS or DYS should be consulted to determine if the agency can make health care decisions on behalf of the minor and, if not, who is the minor's PR for this purpose.

B. Documentation Requirements When Unable to Obtain Acknowledgment

Each Facility, case manager, EDS, ESP, and Area and Site Office must make a good faith effort to obtain written acknowledgment of receipt of the Notice of Privacy Practices (e.g., by telephone, mail or face to face meeting). If the Facility, case manager, EDS, ESP, or Area or Site Office is unable to obtain a completed Acknowledgment Form, or any other type of written acknowledgment for any reason, the good faith effort must be documented on the Acknowledgment Form, including the reasons why the acknowledgment was not obtained (e.g., individual refused, did not respond, could not be located). This documentation must be signed and dated and retained in the applicable file as directed above.

IV. LEGAL REFERENCE AND ATTACHMENTS

HIPAA 45 CFR 164.520
DMH Notice of Privacy Practices
DMH Notice of Privacy Practices Acknowledgement Form