CHAPTER 6
USES AND DISCLOSURES OF PROTECTED HEALTH INFORMATION

I. INTRODUCTION[1]

The purpose of this Chapter is to describe when and how PHI can be used and disclosed internally within DMH and when PHI can be disclosed by DMH to others outside of DMH. It also clarifies how PHI can be de-identified so that it is not PHI for purposes of HIPAA.

There are many federal and state laws, regulations, and orders governing the use and disclosure of PHI that impact DMH and its Workforce Members. (*See* Introduction.) In many situations, state laws and regulations that apply to DMH are more restrictive than HIPAA regarding disclosure of PHI. Under HIPAA, the more restrictive state law will govern if it provides more protection to the PHI or greater rights to the individual who is the subject of the PHI. In other situations, HIPAA permits disclosure where state law and regulations require disclosure, such as in cases of abuse, neglect, or other situations that require disclosure by law. Care needs to be taken when a Workforce Member is responding to a request for PHI from a person or entity that only cites HIPAA as the authority for releasing the PHI without an Authorization. The requestor may not be aware of all the laws and regulations applicable to DMH. Workforce Members may only use and disclose PHI as permitted in this Handbook.

NOTE: This Chapter only addresses when PHI may be used or disclosed and does not address when informed consent for treatment needs to be obtained.

II. GENERAL RULES FOR REQUESTING, CREATING, USING OR DISCLOSING PHI

When requesting, creating, using or disclosing PHI, Workforce Members must observe the rules set forth in this Section II.

A. Protecting the Confidentiality of Individuals. Workforce Members must respect and protect information about, and the records of, applicants and recipients of DMH services and/or case management.[2]

B. Use and Disclosure of PHI Only as Permitted. DMH and its Workforce Members may use or disclose PHI only as permitted by this Handbook.

C. **Requesting, Creating, Using and Disclosing Only that Amount of PHI that is Necessary**. When requesting, creating, using or disclosing PHI, Workforce Members must make reasonable efforts to limit the amount of PHI requested, created, used or disclosed, to the minimum necessary to accomplish the purpose for which the PHI is being requested, created,

[1] See Glossary to this Handbook for definitions of all capitalized terms.
[2] Applicants and recipients of DMH services and/or case management are referred to as "individuals" inthis Handbook.

used or disclosed. PHI must not be requested, created, used or disclosed if it is not needed. (*See* Chapter 9, Minimum Necessary Rule.)

D. **Administrative, Technical and Physical Safeguards**. Workforce Members must follow the administrative, technical and physical safeguards that DMH develops to reasonably protect PHI from unauthorized use or disclosure. (*See* Chapter 1, Administrative Requirements, Chapter 2, Workforce Members' Responsibilities, Chapter 3, Physical and Technical Safeguards, Chapter 9, Minimum Necessary Rule and Chapter 10, Verification of the Identity and Authority of the Requester.)

E. **Data Integrity**. Workforce Members must ensure, to the greatest extent reasonably possible, the quality, accuracy, and reliability of the PHI under their control, whether contained in written, electronic, or other format. Workforce Members must protect PHI from unauthorized modification or destruction. DMH has established, where appropriate, mechanisms allowing individuals, and/or their PRs, to review and amend their PHI, as required by state and federal law. (*See* Chapter 11, Right of Individuals or Personal Representatives to Access Protected Health Information Maintained by DMH and Chapter 13, Right to Amend Protected Health Information.)

F. **Research Studies**. Workforce Members and others who want to conduct research that requires access to PHI held by DMH must consult with the DMH Research Office of the Division of Clinical and Professional Services and the DMH Institutional Review Board ("**DMH IRB**") to determine if the research is permissible and if so, the protocols that must be followed to access the PHI.

G. **Uses and Disclosure of Decedents' Records**. Generally, the PHI of a decedent is to be treated the same as when the individual was alive. After the death of an individual, the court appointed administrator, executor, or other person authorized by law to act on behalf of the decedent may exercise the rights of the decedent with regard to the decedent's PHI (i.e., the right to authorize its use or disclosure, the right to access the PHI and/or to request an audit trail of disclosures made by DMH, the right to request a confidential communication and/or to restrict the use or disclosure of PHI).

Absent authorization by the court appointed administrator or executor of a decedent's estate or a court order, family members of a decent and the general public are not entitled to access the decedent's DMH record.

NOTE: A PR who had authority to authorize release of PHI during the decedent's life does not automatically become the administrator or executor of a decedent's estate. A specific court appointment is required.

H. **Verification.** Prior to disclosing PHI, the identity of the person or entity to which the PHI is to be disclosed and the authority of that person or entity to receive the PHI must be verified in accordance with Chapter 10, Verification of the Identity and Authority of the Requester.

I. **Restrictions.** Prior to making a disclosure, a Workforce Member must determine if DMH has granted a request to restrict PHI that would preclude such a disclosure. *See* Chapter 15, Right to Request Restrictions on the Use and/or Disclosure of Protected Health Information.

III. PROHIBITED USES AND DISCLOSURES OF PHI

A. **Marketing**. Neither DMH nor its Workforce Members shall use or disclose PHI for any Marketing purposes, as that term is defined below. Selling lists of clients'/patients'/applicants' and/or service recipients' names or disclosing PHI to a third party for that party's Marketing activities are strictly prohibited.

B. **Fund Raising**. Neither DMH nor Workforce Members shall use or disclose PHI for the purpose of raising funds for DMH's or any other person's or entity's benefit.

C. **Directories**. DMH operated inpatient facilities or outpatient or community-based programs shall not maintain directories for the purpose of providinginformation to non-Workforce Members.

IV. INTERNAL USE OF PHI BY WORKFORCE MEMBERS

A. **Internal Uses Generally** (Treatment, Payment, and Health Care Operations. *See* Section VI below.) Without obtaining an Authorization from the individual who is the subject of the PHI, or the individual's PR, Workforce Members generally may use[3] PHI internally within DMH as long as it is necessary to do their job. This is because almost all work is related to treatment, payment, and health care operations. This Section IV does not address disclosures of PHI to non-Workforce Members. Such disclosures are discussed in Section V.

B. **Other Permitted Internal Uses:**

1. **Research.** If a Workforce Member's job includes research, use of PHI for such purpose requires an individual's informed consent in most situations. Informed consent for research includes consent to use and/or disclose an individual's PHI, as set forth in the consent form. The DMH IRB may waive the informed consent requirement for use/disclosure of PHI as part of its approval of a research protocol.[4]

[3] See Definition of "use".

[4] The DMH IRB approval letter must document that it determined that the alteration or waiver of informed consent satisfies certain criteria as set forth at 45 CFR 164.512, 104 CMR 31, and DMH IRB Operating Procedures.

2. **To Avert a Serious Threat to Health and Safety**. DMH, consistent with applicable law, may use PHI if DMH believes in good faith that the use is necessary to prevent or lessen a serious and imminent threat to the health or safety of an individual or the public and the use is made by/to a person or persons reasonably able to prevent or lessen the threat.

3. **Health Oversight Activities**. *See* Section IX, below.

4. **Clergy**. If an individual or their PR agrees verbally or in writing, a limited amount of PHI (i.e., name, address and religious affiliation) may be shared with clergy who are Workforce Members. NOTE: an Authorization is not required.

5. **Incidental Uses**. Incidental uses are uses of PHI that are secondary, cannot reasonably be prevented, are limited in nature, and occur as an unavoidable result of an otherwise permitted use. (For example, confidential discussions between clinical team members may be overheard by a DMH Workforce Member who is not part of that team.)

V. DISCLOSING PHI OUTSIDE OF DMH TO NON-WORKFORCE MEMBERS

A. Without Authorization. The general rule is that Workforce Members may not **disclose**[5] PHI to third parties (outside of DMH to non-Workforce Members) without obtaining an Authorization, unless one of the following exceptions applies:

1. **Disclosure to the Individual who is the Subject of the PHI or their Personal Representative, if any.** PHI may be disclosed to the individual who is the subject of the PHI or, if they have a PR, totheir PR, or, if the individual is deceased, to the court appointed administrator or executor of the individual's estate. In some cases, a Minor has the right to control access to their PHI, even if they have a PR. These would include cases where the PHI is related to treatment to which the Minor has the legal authority to consent and did so consent (e.g., emergency treatment of a Minor.) (*See* M.G.L. c. 112, §12F.) Additionally, both a Minor and their PR have the right to inspect records relating to the admission to a Facility when the Minor voluntarily admitted themself to a Facility pursuant to M.G.L. c.123, §§10 and 11 and 104 CMR 27.06. (*See* 104 CMR 27.16(8)(e).)

   Chapter 10, Verification of the Identity and Authority of the Requester, outlines when a parent, guardian, Rogers monitor, Health Care Agent, DYS or DCF is considered a PR.

[5] See Definition of "disclose".

DMH, under certain circumstances, may limit the right of individuals and/or PRs to access PHI. *See* Chapter 11, Right of Individuals or Personal Representatives to Access Protected Health Information Maintained by DMH.

2. **Disclosure to the Attorney of an Individual who is the Subject of PHI.** *See* Chapter 10, Verification of the Identity and Authority of the Requester, for a discussion on determining whether an attorney is permitted to access an individual's PHI.

   NOTE: The Exceptions to Use and Disclosure for Treatment, Payment, and Health Care Operations set forth in Section VI. E. below regarding Psychotherapy Notes, Part 2 substance abuse treatment information, and HIV/AIDs and/or genetic test results apply to disclosures to attorneys and therefore require the individual's Authorization.

3. **Disclosures Made Pursuant to a Judicial Order**. PHI may be disclosed pursuant to a proper judicial order. "A proper judicial order" means an order signed by a justice or special justice of a court of competent jurisdiction, or a clerk or assistant clerk of such court acting upon instruction of such a justice. A subpoena is not a "proper judicial order." Whenever possible, an individual or the individual's PR, if any, shall be informed of a court order commanding production of the individual's records prior to the production of the records, unless it is clear from the judicial order that the individual or PR was given notice of the judicial proceedings which issued the order and an opportunity to object to the issuance of the order. The PHI released must be limited to that specified in the order. A judicial order for release of WRAP records must contain specific findings required under federal law. (*See* Chapter 17, Women's Recovery from Addictions Program Restrictions on Disclosures and Use of Individual Identifying Information.)

   NOTE: A subpoena is often mistaken for a court order. Unlike a court order, a subpoena requiring the production of records is not sufficient authority to release PHI. A subpoena is a formal request to compel DMH to produce an individual to testify or produce documents in relation to a proceeding in which DMH may or may not be a party to the action. A subpoena may be issued by an attorney or, in some instances, by the court. It is often accompanied by a witness fee. Failure to respond to a subpoena may result in legal sanctions, thus, it should not be ignored even if subpoenas do not provide grounds for disclosing the records.

   If a subpoena, motion for a subpoena or court order, or court order is directed to one area, facility, or program of DMH, such subpoena, motion or order shall be sent to that Area's Legal Office. In addition to

notifying the Area Legal Office, judicial orders should be sent to the responsible Designated Record Set Contact Person for processing and response. (*See* Appendix D, Designated Record Set Contacts.)

If a subpoena, motion or order is directed to DMH, generally, to the WRAP, or to more than one area, facility, or program of DMH, such subpoena, motion or order shall be sent to the Central Office Legal Department. The Central Office Legal Department will send court orders to the responsible Designated Record Set Coordinator for processing and response. (*See* Appendix D, Designated Record Set Contacts.)

4. Disclosure Made Pursuant to a Best Interest Determination.

The Commissioner or designee, in their discretion, may permit the release of PHI, where the Commissioner or designee has madea determination that such disclosure would be in the best interest of the individual who is the subject of the PHI. The disclosure, however, must be of the type that is permissible under HIPAA without an Authorization.

a. **Categorical Determinations**. The Commissioner by regulation (104 CMR 17.17 and 28.09) has determined that disclosures for one of the following purposes is permissible without Authorization as being in the best interest of the individual and consistent with HIPAA:

i. For purposes of Treatment, Payment and Health Care Operations as permitted by the privacy regulations promulgated under HIPAA at 45 CFR parts 160 and 164 (*See* Section VI, including exceptions, below);
ii. To obtain authority for a legally authorized representative to act on the individual's behalf, or to obtain a judicial determination of substituted judgment, when a clinical determination has been made that the individual lacks capacity to render informed consent to treatment;
iii. To persons conducting an investigation involving the individual pursuant to 104 CMR 32.00 *Investigation and Reporting Process;*
iv. To persons engaged in research if such access is approved by the DMH IRB pursuant to 104 CMR 31.00: *Human Subject Research Authorization and Monitoring*;
v. To make reports of communicable and other infectious disease to the Department of Public Health and/or local board of health consistent with 105 CMR 300.000 *et. seq*: *Reportable Diseases, Surveillance and Isolation and Quarantine Requirements*; and
vi. In the case of death, to the coroners, medical examiners, or funeral directors.

The Administrator-in-Charge of the applicable DMH location shall establish for their location how and who may decide that the conditions of a categorical best interest determination are met with regard to a particular disclosure.

If the disclosure is made for other than Treatment, Payment, or Health Care Operation purposes, it may need to be logged for audit trail purposes. (*See* Chapter 12, Right to an Audit Trail of Certain Disclosures of Protected Health Information.)

b. **DMH Determination**. The Commissioner, by written determination applicable to DMH, has determined that the disclosure of PHI to law enforcement officials in the circumstances specified below is permissible without Authorization as it is in the best interest of the individual and consistent with HIPAA.

Investigations of Alleged Workforce Member Criminal Conduct:

Disclosures of DMH's initial investigatory records, as set forth below, can be made to law enforcement officials conducting initial investigations of allegations that a Workforce Member has committed a crime against an individual and DMH has a good faith belief that such initial investigatory records contain evidence of the crime occurring on DMH premises.

The disclosure is limited to providing law enforcement access and/or copies of DMH's initial investigatory records, such as incident reports, campus police activity reports/logs; and permitting law enforcement to view (but not copy) video surveillance tapes.[6]

This determination does not extend to disclosure beyond DMH's initial investigatory records or law enforcement's initial investigation. Once a criminal investigation proceeds beyond the initial stage, more formal processes, such as Court ordered Grand Jury subpoenas or other Court orders, should be utilized.

The Administrator-in-Charge of the applicable DMH location shall establish for their location how and who may decide that the conditions of this best interest determination are met regarding a particular disclosure.

The disclosure may need to be logged for audit trail purposes. (See Chapter 12, Right to an Audit Trail of Certain Disclosures of Protected Health Information.)

[6] This determination typically does not apply to peer review protected documents. Questions about release of any particular document should be referred to the Central Office Legal Department.

Note: This Best Interest Determination does not apply to the RAP. The Central Office Legal Department should be consulted in cases involving the RAP.

c. **Individual Determinations.** The Commissioner or designee, in their discretion, may make individual best interest determinations(s) to permit the release of PHI, where the Commissioner or designee has made a determination that such disclosure would be in the best interest of a single individual who is the subject of the PHI. The disclosure, however, must be of the type that is permissible under HIPAA without an Authorization. The applicable federal regulations (Title 45) are:

- Disclosures in an emergency situation to persons involved in the individual's care; when the opportunity to agree or object to the disclosure cannot be practically provided to the individual. 45 CFR 164.510(b). (*See also* Disclosures to Persons Involved in the Care of the Individual at Section V.A. 10 below.)
- Disclosure for Public Health Activities. 45 CFR 164.512(b). Disclosure about victims of abuse, neglect or domesticviolence. 45 CFR 164.512(c). (*See also* Disclosures Required by Law at Section V. A. 5, below.)
- Disclosure for Health Oversight Activities. 45 CFR 164.512(d).
- Disclosures for judicial and administrative proceedings. 45 CFR 164.512(e).
- Disclosure for certain law enforcement purposes. 45 CFR 164.512(f).
- Disclosure to avert a serious threat to health or safety. 45 CFR 164.512(j).
- Disclosure for certain specialized government functions. 45 CFR 164.512(k).
- Disclosures for workers' compensation. 45 CFR 164.512(l).

The disclosure may need to be logged for audit trail purposes. (*See* Chapter 12, Right to an Audit Trail of Certain Disclosures of Protected Health Information.)

The Administrator-in-Charge of the applicable DMH location shall establish for their location how and who may decide that the conditions of an individual best interest determination are met with regard to a particular disclosure; *provided, however*, a decision that the conditions of the individual best interest determinations have been met can be made only by the Administrator-in-Charge or a licensed health care professional(s) that they designate.

5. **Disclosures Required By Law**. "Required by Law," means a mandate contained in law that compels an entity to make a disclosure of PHI that is enforceable in a court of law. Required by Law includes, but is not limited to, court orders, Medicare Conditions of Participation with regard to Health Care Providers participating in the Medicare program, and statutes or regulations that require the production of information, including statutes or regulations that require such information if payment is sought under a government program proving public benefits. Disclosures that DMH or its Workforce Members are required to make include, but are not limited to, the following:

   a. Crimes Committed Upon Persons in care of Mental Health Facilities. M.G.L. c.19, §10
   b. Transfer Notices. M.G.L. c.123, §3
   c. Periodic Review Notices. M.G.L. c.123, §4
   d. Commitment Petitions/Appeals. M.G.L. c.123, §§7, 8, 9, 15 and 16
   e. Petition for Medical Treatment Orders. M.G.L. c.123, §8B
   f. Emergency Hospitalizations. M.G.L. c.123, §12
   g. Forensic Reports. M.G.L. c123, §§15, 16, 17, 18
   h. Guardian or Conservator Appointments. M.G.L c.123, §25 and M.G.L. c.201, §§6, 6A, 6B, 7, 14, 16B, 17, 21
   i. Unclaimed Funds Notice. M.G.L c.123, §26
   j. Administration of estate of deceased inpatient or resident by DMH. M.G.L. c.123, §27
   k. Violent or Unnatural Death of DMH Clients. M.G.L c.123, §28
   l. Unauthorized Absence of DMH Clients. M.G.L. c.123, §30
   m. Disclosure for Billing Purposes. M.G.L. c.6A, §16
   n. Medication Communications. 104 CMR 28.06
   o. Gun Licensing Authority Access to Mental Health Records. M.G.L. c.140, §§129B and 131
   p. Mental Health Legal Advisor's Committee access to records. M.G.L c.221, §34E
   q. Abuse of Elderly Person. M.G.L. c.19A, §15, 104 CMR 32
   r. The Disabled Person Protection Commission. M.G.L. c.19C, §15, 104 CMR 32
   s. DCF-Persons required to report Cases of Injured, Abused or Neglect Children. M.G.L c.119, §§ 51A and 51B
   t. Persons Having Knowledge of Death to Notify Medical Examiner. M.G.L. c.38, §13, 104 CMR 32
   u. Sex Offender Registry Law. M.G.L. c.6, §§178C through 178Q
   v. Disclosures to the U.S. Secretary of Health and Human Services, if required by the Secretary in investigating DMH's compliance with HIPAA. 45 CFR 164.505(a)(2)
   w. Protection and Advocacy. 42 USC 10806
   x. Executive Office of Health and Human Services. 101 CMR 16.00 (Contact the Central Office Legal Department.)

NOTES:

- A subpoena requiring the production of records is not sufficient authority to release PHI. If a subpoena for PHI is received, the Legal Office should be notified. (*See* NOTE regarding subpoenas at Section V A. 3, above.)

- *See also* Section VII, Special Rules Regarding the Reporting of Adult Abuse or Neglect.

- Disclosures required by law may be made only if the conditions as set out in the applicable law are met and only the amount of information required to comply with the law may be disclosed (i.e., minimum necessary).

6. **Cadaveric Organ, Eye or Tissue Donation**. Pursuant to Commissioner Directive #10, PHI may be used or disclosed to organ procurement organizations or other entities engaged in procurement, banking, or transplantation of cadaveric organs, eyes, or tissue for the purpose of facilitating organ, eye or tissue donation or transplantation**.**

7. **Disclosures for Research**. Research means a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge. (*See also* 104 CMR 31.02). Research requires an individual's informed consent in most situations. Informed consent includes consent to use and/or disclose an individual's PHI, as set forth in the consent form. The DMH IRB may waive the informed consent requirement as part of its approval of a research protocol.[7]

8. **Limited Data Set.** DMH may create, use or disclose a limited data set containing PHI if the requirements as set forth in Section VIII, below are met**.**

9. **Disclosures for Health Oversight Activities.** *See* Subsections V.A. 5. v. and x., above and Section IX, below.

10. **Disclosures to Persons Involved in the Care of the Individual.** If the individual or their PR provides the individual's agreement, whether verbally or in writing, or an appropriate Workforce Member provides the individual with the opportunity to object to the disclosure, and the individual does not express an objection, PHI may be disclosed to a family member, other relative, or any other person identified by the individual, if the PHI directly is relevant to the person'sinvolvement with the individual's care or payment related to the individual's care. It is important for the circumstances agreeing the disclosure be

[7] The DMH IRB approval letter must document that it determined that the alteration or waiver of informed consent satisfies certain criteria as set forth at 45 CFR 164.512, 104 CMR 31, and DMH IRB Operating Procedures

documented by the Workforce Member in the individual'srecord. Important information to capture includes: how the person is involved in the care of the individual; if consent was given in writing, oral or by the opportunity to object; date agreement given or otherwise obtained. An individual may withdraw their agreement at any time. If withdrawn this also must be documented in the individual's record.

NOTE: The WRAP cannot disclose 42 CFR Part 2 information to persons involved with care or payment without an authorization signed by the individual who is the subject of the information.

11. **Disclosures Pursuant to M.G.L. c. 123, §36B Duty to Protect and/orWarn.** Disclosures pursuant to this statue may be made only by licensed health care professionals and only if the conditions as set outin the statute are met. The conditions allowing the disclosure and the disclosure must be noted in the individual's record.

12. **Disclosure by Whistleblowers and Workforce Members Who are Crime Victims.** A Workforce Member will not be considered to have violated the disclosure restrictions as set forth in this Section if the Workforce Member discloses PHI for whistleblowing or reporting a crime if (1) the disclosure of PHI is necessary to accomplish the intended purpose (e.g., the report could not be accomplished with the use of de-identified information or the use of a code); (2) the amount of PHI that is used is limited only to the amount that is necessary for the intended purpose; and (3) the requirements below are met.

    a. **Whistleblowers.** The Workforce Member must believe in good faith that DMH has engaged in conduct that is unlawful or otherwise violates professional or clinical standards or that the care, services or conditions provided by DMH potentially endangers one or more individuals and the disclosure is made to: (i) a Public Health Authority, Health Oversight Agency, or healthcare accreditation organization authorized to investigate or oversee the conduct at issue: or (ii) an attorney retained by the Workforce Member for the purpose of determining legal options of the Workforce Member with regard to said conduct.

    b. **Workforce Members Who Are Crime Victims**. A Workforce Member, who is an alleged victim of a criminal act committed by an applicant or recipient of DMH services and/or case management, may disclose PHI about the alleged perpetrator to law enforcement. The PHI disclosed must be limited to the following information for the purpose or identifying or locating a suspect or material witness.

        i. name and address;
        ii. date and place of birth;
        iii. Social security number;
        iv. blood type (A/B/O) and Rh factor;

v. type of injury;
vi. date and time of treatment;
vii. date and time of death, if applicable; and
viii. a description of distinguishing physical characteristics, including, but not limited to, height, weight, gender, race, hair, eye color, and the presence or absence of facial hair (beard or moustache) scars, and tattoos.

Additionally, a description of the incident may be provided; *however*, the description may only include the facts and circumstances of the incident itself. The description may not include any information that may appear in the individual's medical records, such as diagnosis, history, or treatment.

Commissioner's Directive 14 addresses circumstances in which a Workforce Member wishes to file a criminal complaint against a patient in a DMH inpatient facility.

13. **Incidental Disclosures.** Incidental disclosures are disclosures of PHI that are secondary, cannot reasonably be prevented, are limited in nature, and occur as an unavoidable result of an otherwise permitted disclosure. (For example, use of a waiting room sign-in sheet that lists only names results in a disclosure of PHI –patient names – to other users of the sign-in sheet.)

Questions as to whether a category of Section V. A. is applicable to a particular disclosure should be addressed to the Area Privacy Coordinator or Privacy Officer.

B. **DMH Routine Disclosures - Appendix C of the Handbook**. Appendix C of the Handbook lists the routine disclosures of PHI made by DMH and its Workforce Members, with the exception of disclosures made to an individual who is the subject of the PHI and/or their PR. For each disclosure listed, the following information is provided: (a) the person or entity to whom the disclosure can be made; (b) the purpose of the disclosure; (c) whether an Authorization, or a best interest determination, is required for the disclosure; (d) the maximum amount of PHI that should be released; and (e) any special requirements regarding the disclosure. In making any of the disclosures listed in Appendix C, Workforce Members are responsible for ensuring that, if required for the disclosure, an Authorization is obtained or a best interest determination has been made, and that only the authorized amount of PHI is disclosed.

C. **Disclosures Requiring an Authorization**. A disclosure of PHI not specified as permitted without Authorization in this Chapter 6 or Appendix C, requires an Authorization. The Authorization must comply with all of the requirements set forth in Chapter 8, Authorization for Use and Disclosure of Protected Health Information. The disclosure made must be consistent with the terms of the Authorization.

VI. TREATMENT, PAYMENT, AND HEALTH CARE OPERATIONS

A. **Treatment**. Workforce Members may use PHI and may disclose PHI to a Health Care Provider (including Providers not covered by the Privacy Rule) for the purpose of providing, coordinating or managing the treatmentof the individual who is the subject of the PHI, including the coordination or management of health care by a Health Care Provider with a third party; consultation between Health Care Providers relating to an individual; or the referral of an individual for health care from one Health Care Provider to another. **Disclosures for Treatment can only be made between Health Care Providers**.

Examples of Treatment activities include, but are not limited to:

- Disclosure from a sending to a receiving facility for purposes of transferring the individual (such as, pursuant to M.G.L. c.123, §3);
- Disclosure to a physician or other health care provider who requires such records for the treatment of a medical or psychiatric condition;
- Disclosure to a medical or psychiatric facility currently caring for the individual;
- Disclosure between DMH and a contracted vendor regarding individuals referred to or served by the vendor for purposes related to services provided under the contract.

NOTE: Disclosure for Treatment does not apply to applicants for DMH services who, for any reason, are not approved to receive services.

B. **Payment**. Workforce Members may use PHI and may disclose PHI to a Health Care Provider (including Providers not covered by the Privacy Rule) to obtain payment or be reimbursed for their services and to a health plan to obtain premiums, to fulfill their coverage responsibilities and provide benefits under the plan, and to obtain or provide reimbursement for the provision of health care. **Disclosures for Payment can only be made between Covered Entities**.

Examples of Payment activities include, but are not limited to:

- Determining eligibility or coverage under a plan (including coordination of benefits or the determination of cost sharing amounts);
- Creating and sending claim to individual and/or insurer;
- Interactions with insurer for the purpose of obtaining payment;
- Collection activities;
- Reviewing health care services for medical necessity, coverage, justification of charges, and the like;
- Utilization review activities (including precertification and preauthorization of services, concurrent and retrospective review of services).

C. **Health Care Operations**. Workforce Members may use PHI for any of DMH's Health Care Operations. (*See* Definition for a complete list of

Health Care Operations.) Workforce Members may disclose PHI to another Covered Entity **for certain** Health Care Operation activities of the Covered Entity that receives the information **if**:

1. DMH and the Covered Entity has or had a relationship with the individual who is the subject of the PHI; and
2. The PHI pertains to the relationship. **Disclosures for Health Care Operations can only be made between Covered Entities, only if these 2 conditions are met, and only for the below identified activities.**

Disclosures for Health Care Operations activities **are limited to**:[8]

- Conducting quality assessment and improvement activities;
- Developing clinical guidelines;
- Conducting patient safety activities;
- Conducting population-based activities relating to improving health or reducing health care cost;
- Developing protocols;
- Conducting case management and care coordination (including care planning);
- Contacting health care providers and patients with information about treatment alternatives;
- Reviewing qualifications of health care professionals;
- Evaluating performance of providers and/or health plans;
- Conducting training programs or credentialing activities;
- Supporting fraud and abuse detection and compliance programs;
- Accreditation;
- Certification;
- Licensing; and
- Credentialing.

D. Business Associates. Workforce Members may disclose PHI to a DMH Business Associate to the same extent that PHI can be used by Workforce Members, as set forth in this Chapter as long as it is necessary for the Business Associate to perform services under its contract with DMH. (*See* Chapter 7, Business Associates.) Workforce Members may disclose PHI to another Covered Entity's business associate to the same extent that such PHI can be disclosed directly to the Covered Entity, as set forth in this Chapter.

E. **Exceptions to Use and Disclosure for Treatment, Payment, and Health Care Operations.**

1. Psychotherapy Notes. Psychotherapy Notes are recorded by a mental health professional documenting or analyzing the contents of a conversation during a counseling session that are kept separate from

[8] Disclosures to Covered Entities for Health Care Operations are limited to the quality-related health care operations activities listed in paragraphs (1) and (2) of the Definition of Health Care Operations and for the purpose of health care fraud and abuse detection or compliance.

the rest of the individual's medical record. Psychotherapy Notes are primarily for personal use by the treating professional who created the notes and generally are not used or disclosed for other purposes. Except when Psychotherapy Notes are used by the originator to carry out Treatment, or by DMH for certain limited Health Care Operations related to training, uses and disclosures of Psychotherapy Notes for Treatment, Payment, and Health Care Operations require the individual's Authorization.

2. Part 2 Substance Use Disorder Information. Substance use disorder information created by or received from a Part 2 program is regulated under 42 CFR Part 2. Generally, a Part 2 program is any federally assisted program that holds itself out as providing, or whose primary function is identified as, substance use disorder diagnosis, treatment, or referral for treatment. The DMH Women's Recovery from Addiction Program is a Part 2 program. Internal use of Part 2 information should be limited to those Workforce Members with a need to know the information. Except for Treatment in a medical emergency, disclosures of Part 2 information for Treatment, Payment, and Health Care Operations require the individual's Authorization. (*See* Chapter 17, Women's Recovery from Addiction Program for additional information.)

NOTE: Part 2 information received by DMH with the individual's consent should be received with a statement notifying DMH that redisclosure of Part 2 information is prohibited, unless further disclosure is expressly permitted by the written consent of the individual to whom it pertains or as otherwise permitted by Part 2. It is important to maintain the notice with that portion of the individual's record that is subject to 42 CFR Part 2.

3. HIV/AIDs and/or Genetic Test Results. Internal use of HIV/AIDs and genetic information should be limited to those Workforce Members with a need to know the information. With limited exception, risk of exposure to HIV/AIDs is not a need to know. Disclosures of HIV/AIDs and/or genetic test results for Treatment, Payment, and Health Care Operations require the individual's Authorization.

VII. SPECIAL RULES REGARDING THE REPORTING OF ADULT ABUSE OR NEGLECT

If a Workforce Member makes a report of abuse or neglect regarding an adult, the adult who is the victim of the abuse or neglect, or their PR, if applicable, must be notified promptly that the report has been made unless one of the following determinations is made:

A. That informing the individual would place the individual at risk of serious harm; or
B. That the individual's PR is responsible for the abuse, neglect, or other

injury, and that informing such person would not be in the best interest of the individual.

These determinations may be made only by a Workforce Member who is a licensed health care professional exercising their professional judgement. Therefore, if the reporter is not a licensed health care professional, they must notify the Administrator-in-Charge, or their designee, who will assign a licensed health care professional to review the matter and to make a determination with regard to giving notice to the adult who is the victim of the abuse or neglect, or their PR, if applicable. The decision shall be documentedin the appropriate DMH record.

VIII. DEFINITIONS AND RELATED PROCEDURES FOR DE-IDENTIFIED, AGGREGATE, AND LIMITED DATA SET INFORMATION.

A. De-Identified Health Information

1 **Definition.** De-identified Health Information is health information that does not identify an individual and where there is no reasonable basis to believe that the information can be used to identify an individual. Once PHI is de-identified, it no longer is considered PHI and is not subject to DMH policies and procedures regarding PHI.

2. **How PHI can be De-identified.** PHI is considered de-identified only if one of the following two standards is met:

a. **Elimination of 18 Specific Identifiers**. The first standard is the deletion from the PHI of eighteen (18) specific identifiers relating to the individual or relatives, employers, or household members of the individual. They are:

i. Names;
ii. All geographic subdivisions smaller than a state, including street address, city, county, precinct, zip code, and their equivalent geocodes, except for the initial three digits of a zip code, if according to the current publicly available data from the Bureau of the Census:
- the geographic unit formed by combining all zip codes with the same three initial digits contain more than 20,000 people and;
- the initial three digits of a zip code for all such geographic units containing fewer than 20,000 people is changed to 000 (for Massachusetts zip code information, see Appendix F);

iii. All elements of dates (except year) for dates directly related to an individual, including date of birth, admission date, discharge date, date of death; and all ages over 89 (unless aggregated into a single category of age 90 and older);
iv. Telephone numbers;

v. Fax numbers;
vi. Electronic mail addresses;
vii. Social Security numbers;
viii. Medical record numbers;
ix. Health Plan beneficiary numbers;
x. Account numbers;
xi. Certificate or license numbers;
xii. Vehicle identifiers and serial numbers, including license plate numbers;
xiii. Device identifiers and serial numbers;
xiv. Web Universal Resource Locators (URLs);
xv. Internet Protocol (IP) address numbers;
xvi. Biometric identifiers, including finger and voice prints;
xvii. Full face photographic images and comparable images; and
xviii. Any other unique identifying number, characteristic, or code (except a code to allow re-identification under certain requirements).

For PHI to be considered de-identified under this method, DMH cannot have actual knowledge that the de-identified information could be used alone or in combination with other information to identify an individual.

A code or other mechanism may be created for the purpose of being able to re-identify the de-identified PHI. However, the code cannot be derived from, or related to, information about the individual and it otherwise must not be translatable so as to identify the individual. Additionally, the code cannot be provided to anyone outside of DMH. If de-identified PHI is re-identified, such information then is PHI and must be treated as such.

b. **Use of a Statistician.** Under the second standard, a statistician (a person with appropriate knowledge of and experience with, generally acceptable statistical and scientific principles and methods for rendering information not individually identifiable) applies principles and methods to the PHI, so that it is unlikely that anyone could use the information, alone or with other reasonably available information, to identify the individual who is the subject of the information.

B. Aggregate Data

1. **Definition.** Aggregate data is data collected from specific individuals' records containing PHI that have been combined for statistical or analytical purposes and that are maintained in a form that does not permit the identification of individuals.

2. **De-identifying Aggregate Data.** In determining if the de-identification standards are met with regard to aggregate data, the Aggregate Data

Release Standards developed by the Department of Public Health ("**DPH**") as set forth in Appendix F should be followed. The DPH standards are based on cell size suppression. This is a statistical method used to report aggregate data by restricting or suppressing disclosures of subsets of aggregate data based on size, so as to avoid the risk of identifying individuals in small populations.

C. Limited Data Set

1. **Definition**. A limited data set is information from which "facial" identifiers have been removed. Specifically, because they relate to the individual or their relatives, employers, or household members, all of the following identifiers must be removed in order for PHI to be a limited data set:

   a. Names;
   b. Street addresses (other than town, city, state and zip code);
   c. Telephone numbers;
   d. Fax numbers;
   e. E-mail addresses;
   f. Social Security numbers;
   g. Medical records numbers;
   h. Health plan beneficiary numbers;
   i. Account numbers;
   j. Certificate license numbers;
   k. Vehicle identifiers and serial numbers, including license plates;
   l. Device identifiers and serial numbers;
   m. Web Universal Resource Locators (URLs);
   n. Internet Protocol (IP) address numbers;
   o. Biometric identifiers (including finger and voice prints); and
   p. Full face photos (or comparable images).

   In comparison with de-identified PHI, the following information may be included in a limited data set:

   i. Dates such as admission, discharge, date(s) of service, date of birth, date of death;
   ii. City, state, five digit or more zip code; and
   iii. Ages in years, months, days or hours.

   A limited data set is PHI because it has not been fully de-identified. However, a limited data set may be used without obtaining an Authorization if the conditions as set forth in this Section VIII.C. are met.

2. **Uses and Disclosures.** DMH may use or disclose a limited data set only for the purposes of Research, public health or Health Care Operations. (*See* the 45 CFR 164 generally regarding disclosures for public health purposes.)

3. **Data Use Agreement**. DMH must enter into a Data Use Agreement with the party who is to receive a limited data set. Any Workforce Member who desires to enter a limited data set Data Use Agreement must contact the Central Office Legal Department for assistance with the agreement, which may include obtaining a best interest determination from the Commissioner. The Data Use Agreement must:

    a. establish the permitted uses and disclosures of the limited data set;
    b. identify who may use or receive the information;
    c. prohibit the recipient from using or further disclosing the information, except as permitted by the agreement or as required by law;
    d. require the recipient to use appropriate safeguards to prevent a use or disclosure that is not permitted by the agreement;
    e. require the recipient to report to DMH any unauthorized use or disclosure of which it becomes aware;
    f. require the recipient to report to DMH any unauthorized use or disclosure of which it becomes aware;
    g. require the recipient to ensure that any agents (including a subcontractor) to whom it provides the information will agree to the same restrictions as provided in the agreement;
    h. prohibit the recipient from identifying the information or contacting the individuals; and
    i. require that reasonable steps are taken to cure any breach by a recipient of the Data Use Agreement.

4. **Creating the Limited Data Set.** A Workforce Member shall be responsible for creating a limited data set from PHI maintained by DMH. If, however, the project involving the limited data set is Research, the Deputy Commissioner for Clinical and Professional Services, or designee, and the DMH IRB, in certain circumstances, may permit a non-Workforce Member to create the limited data set (e.g., situations when an Authorization may be waived by the DMH IRB).

IX. HEALTH OVERSIGHT ACTIVITIES

DMH is a Health Oversight Agency with regard to those psychiatric facilities and residential programs that it licenses. It is authorized by statute and regulation to review the performance of licensees in the conduct of its health oversight activities. In its role as a Health Oversight Agency, DMH is not required to obtain an individual's Authorization to lawfully receive, use or disclose, or exchange PHI and/or to require others to disclose or exchange PHI with it. Such access, disclosures and exchanges are required by law. (104 CMR 27 and 28.) DMH must safeguard PHI that it obtains during health oversight activities in a manner consistent with federal and state laws and regulations, and DMH policies and procedures relating to PHI.

X. LEGAL REFERENCE

45 CFR 160.103 (Definition of Disclosure, Use)
45 CFR 164.103 (Definition of Required By Law)
45 CFR 164.501 (Definition of Designated Record Set, Health Care Operations, Health Oversight Agency, Marketing, Payment, Psychotherapy Notes, Treatment)
45 CFR 164.502(a) (Permitted Uses and Disclosures)
45 CFR 164.502(d) (De-identified PHI)
45 CFR 164.502(e) (Disclosures to Business Associates)
45 CFR 164.502(f) (Standard: deceased individuals)
45 CFR 164.502(g) (Standard: PR)
45 CFR 164.502(j) (Whistleblowers and Victims of a Crime)
45 CFR 164.506 (Uses and Disclosures to Carry Out Treatment, Payment, or Health Care Operations)
45 CFR 164.508 (Uses and Disclosures for Which an Authorization is Required)
45 CFR 164.510 (Uses and Disclosures Requiring an Opportunity for the Individual to Agree or to Object)
45 CFR 164.512 (Uses and Disclosures for Which an Authorization or Opportunity to Agree or Object is Not required.)
45 CFR 164.514 (a), (b) and (c) (De-identification Standard; Implementation; and Re-identification)
45 CFR 164.514(e) (Standard: Limited Data Set)
45 CFR 164.514(f) (Fundraising)

M.G.L. c.12, §§5A – 5O False Claims
M.G.L. c.12, §5J Employers preventing employees from acting to further false claim actions; liability
M.G.L. c.12A, §14 Complaints by public employees; investigation (No retaliation for reports to Inspector General of activity constituting fraud, waste and abuse)
M.G.L. c.111, §70 HIV test; informed consent; disclosure of results or identity of subject of test
M.G.L. c.111, §70G Genetic information and reports protected as private information; prior written consent for genetic testing
M.G.L. c.112, §12F Emergency treatment of minors
M.G.L. c.123, §36 Patient records; inspection; maintenance and retention
M.G.L. c.123, §36A Court records of examination or commitment; privacy
M.G.L. c.149, §185 Retaliation against employees reporting violations of law or risks to public health, safety or environment; remedies (Protects disclosures by state employees) regarding violations of law, and risk to public health and safety.)
M.G.L. c.149, §187 Health care providers; protection from retaliatory action by health care facilities (a health care facility cannot retaliate against a health care provider for disclosing a practice which the health care provider reasonably believes poses a risk to public health, etc.)

101 CMR 16.00
104 CMR 27.03

104 CMR 27.16
104 CMR 28.09
104 CMR 28.13
104 CMR 31.05

Commissioner Directive # 10 (Organ and Tissue Donation Protocol)
Commissioner Directive # 14 (Employee Filing of Criminal Complaints in DMH Inpatient Facilities)

See also (regarding Treatment but not necessarily confidentiality of records):
M.G.L. c.112, §12E Drug dependent minors; consent to medical care; liability for payment; records
DMH Policy # 14-01 (Medication Education, Capacity Assessment, and Informed Consent For Psychiatric Medications)