

Pennsylvania Law and Policy Governing the Confidentiality of Substance Use Treatment Information: Challenges and Opportunities

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Introduction

This brief provides an analysis of the legal and policy challenges surrounding the disclosure of substance use treatment information in Pennsylvania. It was prepared by the Health Information & the Law Project at the George Washington University Milken Institute School of Public Health for the Overdose Prevention Program at Vital Strategies in support of its ongoing work in Pennsylvania. This analysis consists of a review of Pennsylvania statutes and regulations governing the disclosure of substance use treatment information, including comparisons with federal law and a discussion of policy gaps, conflicts, and areas of confusion under Pennsylvania law. The analysis concludes with a review of available legal and policy options to address these challenges.

Attached are three appendices that provide more detail of the gaps, conflicts, and challenges identified in this analysis. Appendix A is a table showing the application of core Pennsylvania laws by type of disclosure, who is regulated, what is covered, and limits that apply to the disclosure. Appendix B is a table of examples of policy gaps in Pennsylvania's legal framework for SUD treatment confidentiality. Appendix C is a table comparing Pennsylvania's state laws with the major federal laws governing SUD treatment information confidentiality. Together, these appendices provide the reader with an opportunity to understand more detail about how the laws apply in Pennsylvania and identify areas of the law that may need to change.

Overview of Pennsylvania Law

Background

Pennsylvania has restrictive legal provisions governing the disclosure of information about individuals in substance use disorder (SUD) treatment programs or information about substance use contained in medical records. The state does not have a centralized statutory or regulatory scheme governing the confidentiality of substance use treatment information or disclosure of such information across all providers and settings. Rather, requirements that were designed for a centralized system of drug and alcohol treatment projects are incorporated into licensure and

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certification requirements for other types of providers, which extends requirements to a broader set of providers and circumstances than the scope of the original provision. This structure can be confusing because statutory language may not seem, on its face, to apply to the provider or circumstance to which it is applied in practice through licensure and certification requirements. Restrictions on the disclosure of substance use treatment information and confidentiality requirements are found in both statutes and regulations.[†]

The state and federal legal landscape governing substance use treatment information in Pennsylvania is a patchwork of requirements that may vary based on provider type, patient characteristics, the purpose of the disclosure, and source(s) of funding. In practice, a single treatment record may be subject to many layers of state and federal law that protect the confidentiality of medical records generally and substance use treatment information in particular. For example, a hospital's medical record containing information about a patient's drug use would be governed by state medical records confidentiality requirements that apply to all information in the medical record,¹ state laws governing the confidentiality of information about drug or alcohol use,² federal laws governing health information confidentiality, including the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule,³ 42 C.F.R. Part 2 (hereafter "Part 2"),⁴ and the Medicare Conditions of Participation.⁵ Additional requirements may apply if the patient is a minor.

This analysis addresses Pennsylvania laws that govern the disclosure of substance use treatment information. (It does not focus on laws that regulate other types of records that may incidentally contain substance use information, such as criminal records, school records, or judicial proceedings. It also does not address laws that govern medical records generally.) Key provisions are described below.

Pennsylvania's Regulatory Structure

The Pennsylvania Drug and Alcohol Abuse Control Act was enacted in April 1972 ("the Act").⁶ The Act created the Pennsylvania Advisory Council on Drug and Alcohol Abuse and required the Department of Health "to develop and coordinate the implementation of a comprehensive health, education and rehabilitation program for the prevention and treatment of drug and alcohol abuse and drug and alcohol dependence."⁷ Part XI of Title 4 of the Pennsylvania Administrative Code includes regulations implementing the policies of the Governor's Council on Drug and Alcohol Abuse.⁸ The Council is charged with establishing community-based drug and alcohol prevention, intervention, and treatment services (as part of a plan to phase out institutional services). In 1981, the Council was transferred from the Governor's Office to the Department of Health.⁹

Planning, delivery, and evaluation of community-based services is the responsibility of Single County Authorities (SCAs), defined as "[t]he agenc[ies] designated by the local authorities in a county or joinder to plan, fund and administer drug and alcohol activities in that county or

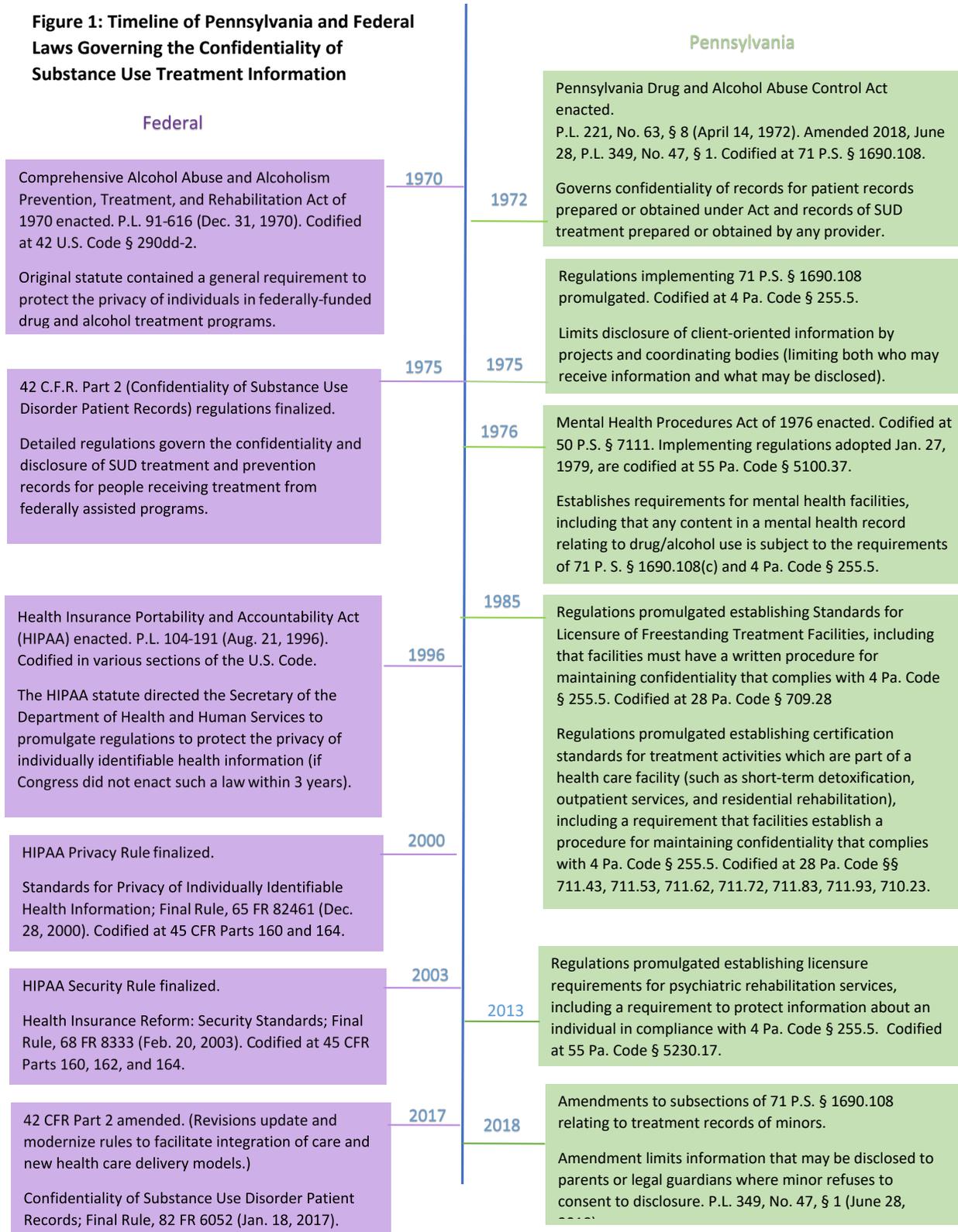
[†]Statutes are codified laws enacted by a legislature, while regulations are rules issued by an administrative agency, which may be implementing a specific statute or exercising the agency's authority as a regulator. Regulations must stay within the scope of the authorizing statute. In other words, regulations and enforcement activities of administrative agencies must be authorized by the legislature and designed to carry out the intention of the legislature.

joinder.”¹⁰ Chapter 255 of Title 4 of the Administrative Code governs information management and, in addition to authorizing a Uniform Data Collection System, includes a statement of policy that the “Council will require all projects, SCAs and governmental agencies to insure that all persons treated or rehabilitated or both, including all persons formerly treated or rehabilitated or both, for drug and alcohol abuse and dependence, be secure in their right to privacy except as disclosure is permitted by law.”¹¹

In 2010, the Pennsylvania legislature created the Department of Drug and Alcohol Programs (DDAP) as a standalone agency tasked with oversight and management of the state’s drug and alcohol response.¹² Functions of the Department of Health regarding substance use disorder prevention and treatment were transferred to DDAP, which did not receive funding enabling it to become operational until 2012. Currently, the Pennsylvania Advisory Council on Drug and Alcohol Abuse serves as the advisory council to DDAP.¹³ The Advisory Council is composed of the Secretary of the Department of Drug and Alcohol Programs and eight other members with relevant experience who are appointed by the Governor.¹⁴

Pennsylvania’s laws governing disclosure of substance use treatment information date to the 1970s. (See the timeline in Figure 1 below.) The structure of the laws, centered around state drug and alcohol programs, reflects the health care system of the time. In contrast, the HIPAA Privacy and Security Rules went into effect in 2000 and 2003, respectively. The confidentiality regulations at 42 C.F.R. Part 2 are also from the 1970s but were revised in 2017 to better align with the HIPAA Privacy Rule and to facilitate integrated care and new delivery models. Further revisions to Part 2 are being considered.¹⁵

Figure 1: Timeline of Pennsylvania and Federal Laws Governing the Confidentiality of Substance Use Treatment Information



Summary of Pennsylvania Laws Confidentiality of Substance Use Treatment Information

Key Provisions

71 P.S. § 1690.108

This section of the Pennsylvania Drug and Alcohol Abuse Control Act relates to confidentiality of records. The Act also contains provisions governing admissions procedures, SUD services in correctional institutions, and treatment of minors. (More detailed and restrictive than the equivalent federal statute, this Pennsylvania statute predates the Part 2 regulations by three years.)

Subsection (b) of 71 P.S. § 1690.108 states that patient records prepared or obtained under the Pennsylvania Drug and Alcohol Abuse Control Act¹⁶ may be disclosed only with the patient's consent and only for the following two purposes: 1) to medical personnel exclusively for diagnosis and treatment; or 2) to government or other officials for the purpose of obtaining benefits due the patient as a result of their drug or alcohol abuse or dependence. Subsection (b) provides exceptions for life-threatening medical emergencies and court orders issued upon a showing of good cause.¹⁷ This subsection also specifies that "[n]o such records or information may be used to initiate or substantiate criminal charges against a patient under any circumstances."¹⁸

Subsection (c) of 71 P.S. § 1690.108 reaches beyond programs under the Act to restrict the disclosure of any information relating to substance abuse or dependence prepared or obtained by any private healthcare provider or facility.¹⁹ With patient consent, this information may only be disclosed for three purposes: 1) to medical personnel for diagnosis and treatment; 2) to government or other officials exclusively for the purpose of obtaining benefits; or 3) to the parent or legal guardian of a minor patient, with consent. There is an exception for a life-threatening medical emergency, but not for a good-cause court order, as the Pennsylvania Superior Court²⁰ and a Federal District Court²¹ have found in interpreting 71 P.S. § 1690.108(c).²² Subsection (c) also includes provisions relating to consent by minors that were added in 2018.²³

This statute prevents many other disclosures that health care providers typically make, such as to insurance companies for the purpose of obtaining payment. Neither HIPAA nor Part 2 limit the purpose for which disclosure may occur with patient consent. In contrast, the Pennsylvania statute does not allow a patient to consent to the disclosure of their information for purposes such as research, quality improvement, and public health.

There is also tension between the intended scope of this statute and the way that it is applied today in Pennsylvania. The summary of the Drug and Alcohol Abuse Control Act, as it was enacted in 1972, does not include any expression of intent to regulate providers beyond the scope of the state programs. Likewise, the statement of scope for regulations implementing the Act (4 Pa. Code § 255, discussed below) indicates that they apply to "projects, [Single County Authorities], and government agencies."²⁴ However, the language of 71 P.S. § 1690.108(c) reaches any provider that holds substance use treatment information. State courts have applied an expansive reading of the statute's scope and application.²⁵

4 Pa. Code § 255.5

Section 255.5 governs the disclosure of client-oriented information by projects and coordinating bodies. Elsewhere in the Administrative Code, regulations governing the Department of Drug and Alcohol Programs give the following definitions: “Client--An individual who is or has been the recipient of the services of a project. A client may be receiving drug services, alcohol services, or both.” “Project--The public or private organization responsible for the administration and delivery of drug or alcohol services, or both, through one or more facilities. A project is a component of an SCA drug and alcohol program.”²⁶ The terms “coordinating body” and “client-oriented information” are not defined. At first glance, § 255.5 is restricted to projects administered by SCAs under state authority. However, as discussed below, § 255.5 has been incorporated by reference into various facility licensure provisions, extending its application.

Subsection (a) of § 255.5 limits the purpose and/or recipients of permissible disclosures and subsection (b) limits the content of permitted disclosures. Subsection (a) prohibits projects and project staff from disclosing client-oriented data except for nine specific purposes, including to government officials and, with consent, to insurance companies, health plans, or government programs for the purpose of obtaining government benefits due the patient as a result of their drug or alcohol abuse or dependence.²⁷

Subsection (b) limits the information disclosed under some of the Subsection (a) conditions, including disclosures for the purpose of obtaining benefits, to five pieces of information: “(1) Whether the client is or is not in treatment. (2) The prognosis of the client. (3) The nature of the project. (4) A brief description of the progress of the client. (5) A short statement as to whether the client has relapsed into drug, or alcohol abuse and the frequency of such relapse.”²⁸ DDAP explained these categories of information in a 2000 Interpretive Guideline, describing the types of information that could be disclosed under each of the categories.²⁹ For example, “whether the client is or is not in treatment” may include an estimate of the length of time the client may need to complete treatment, with the client’s consent. Specific details of the treatment or the patient may not be disclosed, such as drugs used, medications prescribed, recent overdose events, pregnancy status, symptoms, or vital signs. In guidance, the Department of Public Welfare (DPW) explained that “the restrictions set forth in 4 Pa. Code §255.5(b) only apply to the disclosure of information from licensed treatment providers to MCOs and other third-party payers, government officials, judges and probation and parole officers. The disclosure of information between licensed treatment providers and other entities is governed by less restrictive federal law.”³⁰ See below for a discussion of the interaction between federal and state law.

Subsection (c) limits the information that may be disclosed if a patient wants to transfer his or her records to another treatment provider. “Client Admission Forms, the Treatment/Discharge Forms,

LIMITS ON PERMITTED DISCLOSURES

Subsection (a) of Section 255.5 limits the purpose and/or recipients of permissible disclosures subsection (b) limits the content of permitted disclosures. For example, even with a client’s consent, a provider may not disclose a full treatment record to a health insurance company for the purpose of approving benefits, such as an extended inpatient stay.

and Discharge Summary Records are the only client records which may be transferred for treatment purposes.”³¹ Other details, such as provider notes and diagnostic test results, may not be shared.

Laws that Apply 4 Pa. Code §255.5 to Other Providers as a Condition of Certification or Licensure

As written, Section 255.5 governs disclosure of information by public or private organizations responsible for the administration and delivery of SUD services as a component of an SCA (i.e., “projects”). However, many other sections of the Administrative Code incorporate Section 255.5 by reference, extending its application to other types of organizations, including mental health providers, freestanding drug and alcohol treatment facilities, and healthcare facilities that provide drug and alcohol treatment services in inpatient or outpatient settings (such as a hospital that provides detoxification services). These other providers and facilities are required to comply with the terms of Section 255.5 as a condition of licensure or certification.

28 Pa. Code § 709.28

Part 5 of Title 28 of the Administrative Code contains regulations for Department of Drug and Alcohol Programs. Chapter 709 contains the standards for licensure of freestanding drug and alcohol treatment facilities.³² Freestanding treatment facilities are those that are not part of a health care facility.³³ As a condition of licensure, a facility’s project director must develop a written procedure that complies with 4 Pa. Code 255.5, including procedures for maintaining confidentiality of client identity and records, as well as identification of project staff with access to records.³⁴ Violations are enforced by DDAP as part of its licensure and complaint processes.³⁵ Approximately 13% of DDAP’s citations in recent years involved confidentiality violations.³⁶

Records must be maintained for four years³⁷ and clients have a right to inspect their records.³⁸ However, clients do not appear to have the right to a copy of their records or to direct that those records be given to a third party. In 2008, FAQs published by the Department of Health stated that under Pennsylvania law, “The current regulations allow a patient to read his or her medical record but the current regulations prohibit a treatment provider from giving a patient a copy of his or her medical records. Under the current regulations, patients cannot get copies of their own medical records that they want and need to win a claim for insurance benefits or coverage or for any other purpose important to the patient.”³⁹ If this characterization is true, that aspect of Pennsylvania law is preempted by HIPAA, as discussed below.

55 Pa. Code § 5100.31 et seq.

The Mental Health Procedures Act (MHPA)⁴⁰ includes a confidentiality provision for mental health records that is not intended to conflict with the laws regarding substance use records.⁴¹ Regulations implementing the MHPA are codified under Title 55, Part 7 of the Pennsylvania Administrative

EXTENSION OF 4
PA.CODE § 255.5

As written, Section 255.5 governs disclosure of information by public or private organizations responsible for the administration and delivery of SUD services as a component of an SCA. Subsequent legislation and regulation extended its application to other types of organizations, including mental health providers, freestanding drug and alcohol treatment facilities, and healthcare facilities that provide drug and alcohol treatment services in inpatient or outpatient settings.

Code. Chapter 5100 governs the confidentiality of records of persons seeking, receiving or having received mental health services from mental health facilities covered by the MHPA,⁴² which “establishes rights and procedures for all involuntary treatment of mentally ill persons, whether inpatient or outpatient, and for all voluntary inpatient treatment of mentally ill persons.”⁴³ Section 5100.37, entitled “Records relating to drug and alcohol abuse or dependence,” provides that any content in a mental health record (at a covered facility) that “relates to drug or alcohol abuse or dependency” is subject to the requirements of 71 P. S. § 1690.108(c) and 4 Pa. Code § 255.5.⁴⁴ Therefore, the records of a mental health provider providing inpatient treatment or any kind of involuntary treatment that contain drug abuse or dependency information in addition to mental health information would be subject to both sets of statutes and regulations.⁴⁵

28 Pa. Code § 715.11

Standards for the approval of narcotic treatment programs require those programs to maintain secure, confidential patient records in compliance with Section 709.28,⁴⁶ which requires compliance with Section 255.5.

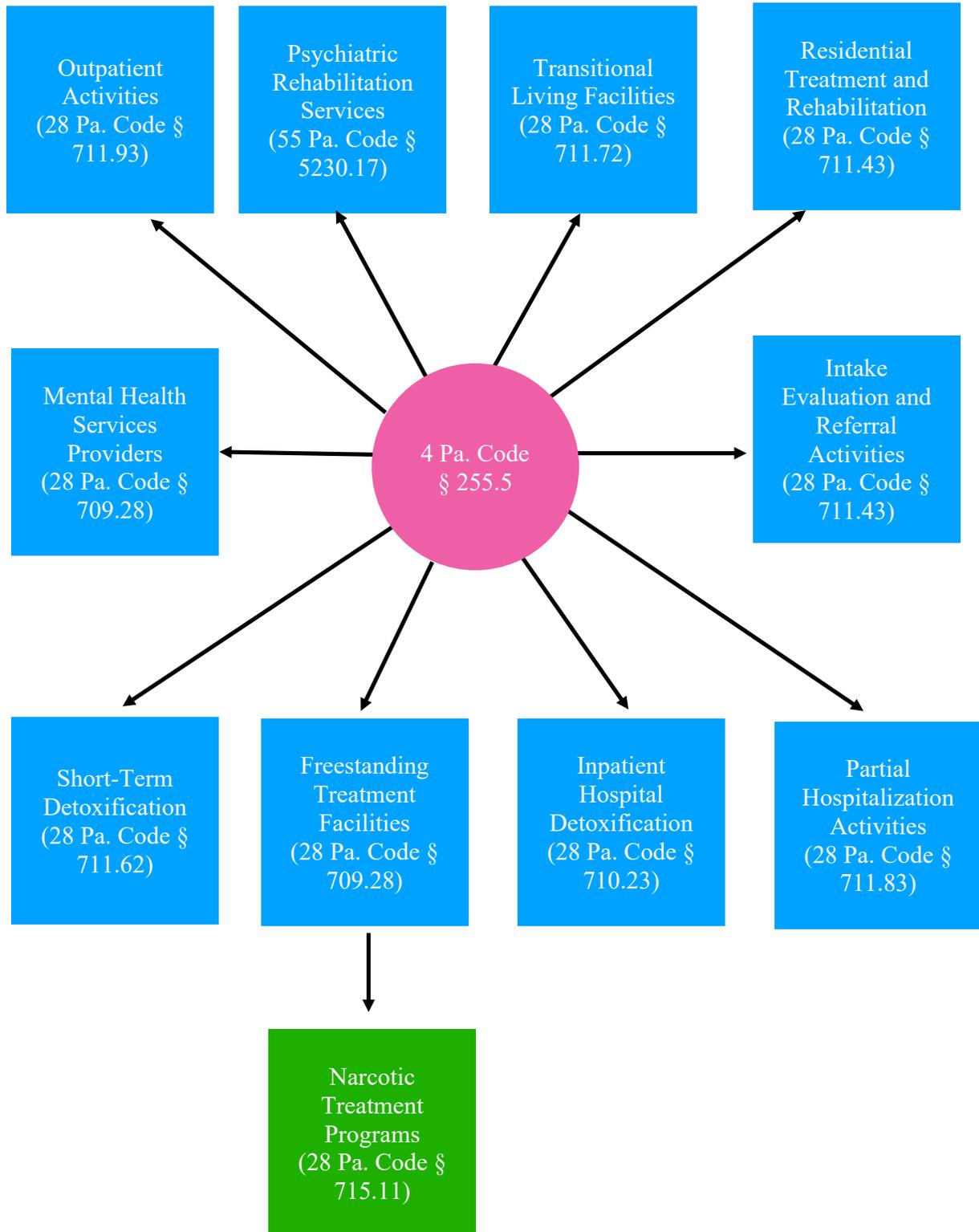
28 Pa. Code § 711.43, 711.53, 711.62, 711.72; 711.83, 711.93, 710.23

Certification requirements for drug and alcohol treatment activities that are part of health care facilities require facilities to establish a procedure to maintain confidentiality in compliance with Section 255.5. This requirement is duplicated across several sub-sections governing intake evaluation and referral activities,⁴⁷ nonhospital residential treatment and rehabilitation,⁴⁸ nonhospital short-term detoxification,⁴⁹ transitional living facilities,⁵⁰ partial hospitalization activities,⁵¹ outpatient activities,⁵² and inpatient hospital detoxing services.⁵³

55 Pa. Code § 5230.17

Licensure standards for psychiatric rehabilitation service providers require those providers to protect information in compliance with Section 255.5 and to comply with the MHPA.⁵⁴

Figure 2: Provisions that Require Compliance with Section 255.5



Exceptions for State Agents

Disclosures to state entities, such as public health or law enforcement agencies, may be required by state law regardless of confidentiality requirements under federal or state law. In some cases, the regulations governing substance use treatment facilities or providers may direct the facilities or providers to communicate with state entities, such as law enforcement. For example, DDAP regulations for client management by an intake project⁵⁵ direct the project to “have written policies and procedures for communication with law-enforcement authorities, local or State health or welfare authorities, as appropriate, regarding clients whose condition or its cause is reportable.”

Alternatively, the requirement to disclose to a state entity may be in a separate provision of law that pertains only to that entity, which may supersede other confidentiality requirements. State entities that receive such information may also have their own confidentiality requirements. For example, the Methadone Death and Incident Review Act requires providers to disclose information (including substance use information) for review by the Methadone Death and Incident Review Team,⁵⁶ which must then keep the information confidential.⁵⁷ Pharmacies and other dispensers of controlled substances must report information about prescriptions dispensed to the electronic prescription monitoring system required by the Achieving Better Care by Monitoring All Prescriptions Program (Abc-Map) Act, which must be queried by providers before prescribing controlled substances.⁵⁸ The Juvenile Act allows a county agency, court or juvenile probation officer to receive drug and alcohol treatment records with parental consent or upon an order of the court, consistent with U.S. Department of Health and Human Services regulations relating to the confidentiality of drug and alcohol treatment records.⁵⁹ In a recent case, the Pennsylvania Superior Court considered whether the confidentiality provisions of the Drug and Alcohol Abuse Control Act (DAA) protected information required to be disclosed under the Controlled Substances Act (CSA).⁶⁰ The court concluded that each law imposed separate requirements on the regulated providers, so the confidentiality provisions of the DAA did not shield information about methadone distribution from disclosure to state regulators as required by the CSA.⁶¹

Disclosures required by state law are an exemption to HIPAA’s privacy protections.⁶² Part 2 allows certain disclosures to law enforcement and state agencies, such as where child abuse or neglect is suspected.⁶³

Interaction with Federal Law

Information pertaining to substance use treatment is governed at the federal level by the HIPAA Privacy Rule,⁶⁴ which governs the confidentiality of individually-identifiable information held by Covered Entities (healthcare providers, health plans, and healthcare clearinghouses) and their business associates, and 42 C.F.R. Part 2, which governs the confidentiality of substance use disorder patient records obtained by federally assisted programs.

The HIPAA Privacy Rule was designed to provide a federal “floor” of privacy requirements across all healthcare providers and plans. Therefore, it preempts contrary state laws, with an exception for state laws that are more protective of patient privacy.⁶⁵ In contrast, Part 2 applies only to SUD treatment providers that receive federal funding, operating alongside state laws rather than replacing them. However, no state law may authorize or compel a disclosure prohibited by Part 2.⁶⁶ A provider that is subject to both HIPAA and Part 2 would follow both laws, with Part 2 generally being more protective than HIPAA’s “floor.”⁶⁷

Patient Access to their Own Records

Under Pennsylvania law, drug and alcohol treatment project clients have the right to inspect their own records, though a project director may remove portions of a client's record after determining that the information contained in those portions would be detrimental to the client.⁶⁸ Clients also have the right to appeal a director's decision limiting their access to those records. This provision of Pennsylvania law is silent on whether clients may obtain copies of their records or have them sent to a third party, which conflicts with HIPAA.

The Pennsylvania standard that allows information to be removed if "detrimental to the client" also may be preempted by HIPAA. Under HIPAA, a provider may deny a patient access to information only when access "is reasonably likely to endanger the life or physical safety of the individual or another person."⁶⁹ HHS has specified in guidance that this "ground for denial does not extend to concerns about psychological or emotional harm (e.g., concerns that the individual will not be able to understand the information or may be upset by it)."⁷⁰

42 C.F.R. Part 2, which governs most substance use disorder treatment providers operating within Pennsylvania, expressly does not prohibit Part 2 program patients from copying their own records.⁷¹ HIPAA requires that all covered entities (a categorization applicable to most substance use disorder treatment providers) grant individuals the right to obtain copies of their protected health information (PHI) upon request⁷² and/or have them sent directly to a third party designated by the individual in writing.⁷³ HIPAA preempts all state confidentiality laws that are less protective of patient's rights; therefore, it is likely that drug and alcohol treatment project clients and substance use disorder provider patients in Pennsylvania are entitled to avail themselves of HIPAA's right to obtain copies of their own records and to direct the project or provider to transmit a copy of those records directly to a third party, such as an insurer or healthcare provider. Even if there were a Pennsylvania law prohibiting patients from obtaining copies of their own records, this would likely be considered less protective of patient rights than HIPAA, and thus would be preempted by HIPAA's access provisions.

2008 Proposed Regulatory Change

In 2008, the Department of Health (DOH) proposed changes to 4 Pa. Code 255.5 in draft final rulemaking.⁷⁴ The DOH had concluded that its "regulations relating to disclosure of client-oriented information have become outdated and an impediment to service delivery and the coordination of care for individuals with substance abuse problems."⁷⁵ DOH expressed concern that third party payers have declined to authorize services because they cannot obtain sufficient information, which can prevent individuals with substance use disorder from receiving necessary treatment.

The proposed revisions would have made state law more consistent with federal law by expanding the substance use treatment information that may be disclosed for treatment or payment purposes and giving patients the ability to control the release of their own information to insurers and third party payers.⁷⁶ In particular, the revisions "would provide that a program may release a patient record to medical personnel for the purpose of diagnosis, treatment or referral for treatment, and to government officials and third-party payers to obtain benefits due the patient as the result of the patient's drug or alcohol abuse or dependence."⁷⁷ The proposed rule also included a provision to allow a patient to have access to their own substance use treatment records. The revisions were not finalized, however, and Section 255.5 remained unchanged.

The stakeholder concerns that prompted the 2008 proposed changes continue today, as discussed in the following section. Pennsylvania's restrictive laws create barriers that may discourage providers from offering SUD treatment services and may prevent individuals from receiving treatment services by inhibiting payment and care coordination. The need for SUD treatment is even greater today. In 2008, the rate of fatal drug overdose in Pennsylvania was 14.9 per 100,000 people, but by 2017, that rate had nearly tripled to 44.3 overdose deaths per 100,000 people, the third highest in the nation.⁷⁸

Gaps, Challenges, and Conflicts

Pennsylvania's legal framework governing substance use treatment information presents numerous challenges for stakeholders, including providers, payers, and patients. Stakeholders seek to disclose information about substance use treatment not to violate privacy but as necessary to coordinate patient care, obtain payment and authorization for services from payers, and/or satisfy various reporting requirements under the law.

The many, sometimes conflicting, state and federal confidentiality rules contribute to confusion among providers and patients in Pennsylvania. Confusion also may stem from a lack of definitions of key terms and vague legal language in Pennsylvania's statutes and regulations. SUD treatment providers have expressed confusion and conflicting opinions about what information they can disclose and how it may be done in compliance with the law. Because the restrictions on information-sharing may inhibit care coordination or full use of health insurance or public program benefits, some providers perceive the restrictions on information sharing as harmful to patients. Providers have said they may not be able to disclose sufficient information to a patient's insurance plan to authorize coverage for needed services and might not be able to disclose enough information to get clients into more restrictive care for their own protection. Providers also said they could not disclose information needed to qualify a patient for social services, such as disability benefits, that would support his or her treatment.⁷⁹

In some cases, organizational policies may prohibit sharing unnecessarily, whether because of a misunderstanding of the law or a particularly risk-averse organizational culture. In those cases, additional guidance may help bring practice in line with requirements. In other cases, challenges referenced by stakeholders represent actual and actionable barriers grounded in the legal framework governing SUD information sharing. These "gaps" in the legal framework are areas where the scope and content of relevant statutes and regulations are unclear, inconsistent, contradictory, or incomplete. In this analysis, the gaps fall into three types:

1. Lack of definition and vague or unclear statutory or regulatory language;
2. Unclear Implementation, Scope, or Application; and
3. Conflict with Federal or other State Law

A table illustrating these gaps is attached as Appendix B. This is not an exhaustive list of all gaps that may exist in the law, it identifies particularly significant ones under the three types.

Lack of Definition and Vague or Unclear Statutory or Regulatory Language

Statutes and/or their implementing regulations typically define key terms used in the law's provisions. These key words and phrases may clarify terms of art, name relevant governmental authorities, describe types of stakeholders, and/or identify technical specifications as they are to be understood within a particular provision. These definitions are critical to ensure that it is clear to anyone reading the law what is meant by a term that may otherwise have multiple meanings or be familiar only to those with particular expertise or knowledge. The absence of a definition for a specific term does not invalidate a law, but it does create uncertainty for stakeholders in applying the words of a statute or regulation to a real-life situation.

Sometimes the lack of a definition requires stakeholders to guess as to the meaning of a specific term; this is the case in Section 255.5, which grants an "Executive Director" authority to allow an insurance company to receive more SUD information (with the patient's consent) than the regulation otherwise permits providers to disclose. "Executive Director" is defined in other sections of Title 4 as the head of DDAP as well as the head of each SCA. Without defining which Executive Director is referenced in 255.5, it is unclear to whom a stakeholder should submit requests or which entity has the authority to make such an allowance.

There are numerous cases where statutory or regulatory language exists but is vague or confusing. For example, several types of providers and treatment activities must comply with Section 255.5, but the terms of that section are written for projects as created by the original Drug and Alcohol Abuse Control Act (i.e., SUD services provided as a component of an SCA). It is unclear how providers that are not "projects," such as hospitals that provide detoxification services or outpatient providers who would not otherwise be subject to Part 2, should interpret and apply the restrictions in 4 Pa Code 255.5 that reference projects, such as the requirement to disclose the "nature of the project."

Vague regulatory or statutory language requires stakeholders to make assumptions about meaning and intent without a guarantee that these assumptions equate to compliance with legal requirements. For example, 28 Pa. Code 709.34 requires that providers develop and implement policies and procedures to respond to various crimes committed by staff or patients. The text specifies certain crimes that require a response but is otherwise unclear about whether this is limited to crimes committed on premises or whether it also encompasses crimes that occurred off-site but are discovered or identified on premises.

Even the definitions given in Pennsylvania laws may not offer sufficient clarity. For example, the Definitions that apply to DDAP indicate that the "words and terms, when used in this part, have the following meanings, ***unless the context clearly indicates otherwise***" (emphasis added).⁸⁰ The caveat at the end of that sentence has the effect of adding ambiguity to the definitions provided.

Unclear Implementation, Scope, or Application

Statutes should remain relevant even if unanticipated events occur that alter the landscape in which the law applies. Typically, statutory language is broad and then delegates authority for implementing the statute via regulations to a designated executive department or authority. Regulations are more easily revised, repealed, and rewritten than statutes; it is thus typically more efficient to provide operational specifics within regulatory text and then modify it as needed in the future. Sometimes, however, implementing regulations are not written or do not provide sufficient

parameters or guidelines to effectively operationalize a statute's. It may also be the case that a regulation exists but lacks sufficient instruction, so that the intended function or outcome of the regulation is not realized. For example, 28 Pa. Code 701.11(a) permits providers to request an exception to any provision governing SUD providers from DDAP. This would presumably include the provisions that extend 255.5 to various other SUD treatment providers and activities. There is no further detail provided about the form or format of such a request, the content of such request, the process or timing for such a determination, or the parameters for making the determination. This lack of detail leaves stakeholders without a clear understanding of the exception process or a straightforward list of requirements to meet in seeking an exception. As a result, stakeholders may not use a process that policymakers intended to exist.

Regulations may also be needed to provide guidance for stakeholders where guidance is expected. For example, there is no regulatory or statutory provision in Pennsylvania law that addresses how SUD information may be used or shared within a program or facility and with or by whom. In federal privacy law (Part 2 and HIPAA), there is explicit language limiting the types of individuals within an organization who may access patient information and the purposes for which they may do so. Given the more restrictive nature of Pennsylvania's privacy laws, it is reasonable to expect that similar restrictions would be placed on intra-provider access; however, the law is silent on this issue. This creates confusion for stakeholders in designating who may carry out which functions within their organization and what information can or should be available to those individuals.

Conflict with Federal or other State Law

As discussed above, some of Pennsylvania's laws appear to conflict with HIPAA to the extent that they may limit an individual's access to their own medical record or ability to direct that their record be disclosed. To the extent that Pennsylvania's laws do not allow an individual receiving substance use treatment to receive their records from treatment facilities or direct that those records be disclosed to others (such as an insurance company for a coverage determination), these provisions are likely preempted by HIPAA. In that case, the federal requirements relating to patient access would apply to providers that are covered by HIPAA.⁸¹ With a written designation by a patient, projects and providers in Pennsylvania can be authorized to transmit patient information directly to third parties, such as payers, county and state health agencies, attorneys, employers, and family members, in addition to giving patients their own records. However, Pennsylvania's laws either are silent on patient access or seem to prevent providers from sharing information even with patient authorization. This is another source of confusion for providers that leads them to deny a request for information even from the patient or where the patient asks them to disclose the information, such as for an insurance authorization or non-emergency health care.

Within Pennsylvania law, some provisions may seem to conflict with others. For example, child welfare regulations authorize disclosure of SUD treatment information to a court that 255.5 would otherwise prohibit.⁸² Similarly, the various provisions of state law that require disclosures to state agencies seem to conflict with 255.5, which does not contain an exception for disclosures required by state law (unlike HIPAA). The confidentiality regulations do not shield providers from compliance with other laws that require disclosure, such as the Controlled Substances Act,⁸³ but it may be unclear how to comply both with a law that requires confidentiality and a law that requires disclosure.

Legal, Regulatory, and/or Policy Options to Address Challenges

There are several routes to address the challenges discussed above, including processes that could be implemented under current law to facilitate information sharing. There are also actions that could be taken by DDAP or another agency, within the scope of existing authority, to clarify regulations and educate stakeholders. Other changes may require legislative action. Pennsylvania also may consider harmonizing its requirements with federal law to simplify compliance for providers and improve understanding of patient records confidentiality for all stakeholders.

Methods to Disclose More Information under Current Law

Additional disclosures to insurance plans.

Providers subject to the restrictions of Section 255.5 who want to disclose substance use treatment information beyond the limits of that section have a few options depending on the circumstances. In the case of disclosures to an insurance company for purposes of authorizing benefits, there is a mechanism in Section 255(a)(7) for an insurance company to obtain information beyond the scope of the limitations by appealing to the Executive Director⁸⁴ with the client's written consent and obtaining the Director's approval. There are no provisions governing whether or how that additional information must be given. (It is not clear whether or how that appeal process is used.)

Patient as intermediary.

Most significantly, a provider can give a patient their entire treatment record. (Although PA law is unclear on this point, HIPAA's patient access rights would preempt any conflicting state law.) Then the patient can choose to give it to another provider, an insurance company, or anyone else. In that case, the burden of obtaining and sharing the record, as well as keeping it secure and confidential while in their possession, is on the patient.

Regulatory Options

DDAP authority to grant exceptions.

At the beginning of the DDAP regulations in Part 5 of Title 28 of Administrative Code (28 Pa. Code § 701.1 et seq.), there is a section entitled "Exceptions to this part," which gives the Secretary of DDAP (or a designee) broad authority to grant an exception to the regulations governing confidentiality, either at the request of an SCA or on his or her own initiative.⁸⁵ The provision specifies that an exception may be granted only after "it has been determined that, under the circumstances, the granting of the exception will be: (1) In furtherance of sound project or program implementation. [and] (2) Consistent with the policy objectives of this part."⁸⁶ This broad authority may be used to grant exceptions to facilitate information disclosures that support patient care and access to substance use treatment.

There are no details in the regulation with respect to the process for seeking an exception but the Secretary of DDAP may take action without a specific request and the scope of the authority includes the licensure and certification requirements for the many SUD treatment providers and activities that subjected to 255.5 through these requirements. These providers include freestanding drug and alcohol treatment, narcotic treatment programs, and health care facilities that provide inpatient and outpatient drug and alcohol treatment activities (such as detox).

Informal guidance

DDAP could issue guidance to clarify the application of regulations that stakeholders have indicated present barriers. Stakeholders have expressed confusion about how much information can be shared with patients or other treating providers and concern that they cannot share enough information to help clients get coverage for treatment services, qualify for a disability determination, or demonstrate compliance with parole or other criminal justice system requirements. These unmet needs may present barriers to care for individuals with SUD.

The gaps identified in Appendix B and the variations between federal and state law in Appendix C illustrate specific provisions and areas of confusion or conflict where guidance may be helpful.

Regulatory changes

DDAP could propose revisions to its regulations. While it must remain within the scope of its authority under the authorizing statute, DDAP could make a number of changes to clarify its regulations. For example, DDAP could add additional definitions to clarify key terms in 255.5, such as coordinating bodies, other officials, benefits, and immediate jeopardy, and also update outdated terms and references, such as to the Governor's Council. DDAP also could add language to clarify the application of provisions, such as how the term "project" in 255.5 is applied to providers that are not projects and the process for an insurance company to seek additional information in order to support an authorization for coverage.

It may be that new regulations need to be drafted to reflect current health care practices and the needs of stakeholders in the current substance use treatment landscape. The legal framework of Pennsylvania's SUD treatment confidentiality laws was created in the 1970s and reflects how drug and alcohol services were delivered at the time. Revised regulations could consider the way SUD services are delivered today, with increasing emphasis on the integration of physical and behavioral health, care coordination, medical homes, etc. Revisions could also consider the parallel federal regulations of HIPAA and Part 2 with which SUD treatment providers in Pennsylvania must comply in addition to state law, perhaps clarifying obligations and reducing the burden on providers by creating more consistent rules.

Areas where Legislative Action May Be Required

The records confidentiality provision of the Pennsylvania Drug and Alcohol Abuse Control Act prescribes requirements not just for drug and alcohol treatment projects that operate under the SCA structure created by the Act,⁸⁷ but also for any private healthcare provider that prepares or obtains any "information relating to drug or alcohol abuse or drug or alcohol dependence."⁸⁸ Under this statute, SUD information may only be disclosed with consent and only for two purposes: 1) to medical personnel exclusively for diagnosis and treatment; or 2) to government or other officials exclusively for the purpose of obtaining benefits due the patient as a result of his drug or alcohol abuse or dependence. Any changes to these requirements or conditions would require legislative action to change the statute.

As with regulatory change, lawmakers could consider harmonizing state requirements with federal requirements under HIPAA and Part 2, depending on the needs of Pennsylvania stakeholders. See the comparative table of federal and state law in Appendix C for a guide to the differences between the laws in key areas, such as treatment, payment, and public welfare.

Conclusion

The gaps, challenges, and conflicts in Pennsylvania’s statutes and regulations governing the disclosure of substance use treatment information contribute to stakeholder confusion about their rights and responsibilities. The restrictive laws may have a chilling effect on SUD treatment providers, reducing access to SUD treatment when it is needed more than ever. They may also present a barrier to access to SUD treatment to the extent that they limit coordination between physical health care providers and SUD treatment providers, limit access to payment for SUD treatment by preventing disclosures to insurance plans, and limit communication with social services and the criminal justice system.

Lawmakers and regulators, including DDAP, have a range of options to address these gaps, from informal guidance to new laws. Actions to clarify the meaning, scope, and application of state laws and to harmonize state law requirements with federal requirements will clarify obligations for providers and other stakeholders, as well as remove barriers to more providers offering SUD treatment services. Finally, guidance on the matter of patient access would help to inform both patients and providers of patient rights and provide a mechanism for patients to overcome barriers to accessing SUD treatment services.

¹ E.g., 28 Pa. Code § 115.27 (confidentiality of patient records in hospitals).

² E.g., 71 P.S. § 1690.108(c).

³ 45 C.F.R. Part 164, Subpart E.

⁴ 42 C.F.R. Part 2 is a federal regulation that governs the confidentiality of substance use disorder patient records obtained by federally-assisted programs that provide alcohol or drug abuse diagnosis, treatment, or referral for treatment.

⁵ 42 C.F.R. § 482.24(b)(3) (hospital must have a procedure for ensuring the confidentiality of patient records).

⁶ 71 P.S. § 1690.101 et seq.

⁷ P.L. 221, No. 63, § 1.

⁸ 4 Pa. Code § 252.1.

⁹ 71 P.S. § 751-31.

¹⁰ 28 Pa. Code § 701.1.

¹¹ 4 Pa. Code § 255.1 (d).

¹² 2010 Pa. Legis. Serv. Act 2010-50.

¹³ The history of DDAP is complex. The Governor’s Council was established by Section 3 of Act 63 of 1972, former 71 P.S. § 1690.103. Various agencies’ powers and duties were transferred to the Governor’s Council by Reorganization Plan No. 4 of 1973, 71 P.S. § 751-16. The licensure function for substance use disorder treatment facilities was transferred from the former Department of Public Welfare to the Governor’s Council by Reorganization Plan No. 2 of 1977, 71 P.S. § 751-25. After the Governor’s Council and its functions were transferred to DOH in 1981, the Pennsylvania Drug and Alcohol Abuse Control Act was amended to change the name to the Pennsylvania Advisory Council on Drug and Alcohol Abuse and its functions were amended to that of an advisory council. See, e.g., 71 P.S. §§ 1690.102 (defining “Council”), 1690.103. The functions of the Department of Health regarding substance use disorder prevention and treatment were transferred to DDAP by Act 50 of 2010, § 10, 71 P.S. § 613.1; and §§ 11-13, uncodified.

¹⁴ https://www.ddap.pa.gov/Pages/Advisory_Council.aspx.

¹⁵ Substance Abuse and Mental Health Services Administration (SAMHSA), U.S. Department of Health and Human Services (HHS). Confidentiality of Substance Use Disorder Patient Records, 84 FR 44568 (Aug. 26, 2019)(proposed rule). Available at <https://www.govinfo.gov/content/pkg/FR-2019-08-26/pdf/2019-17817.pdf>.

¹⁶ In discussing the scope of the Controlled Substances Act (CSA) and the Drug and Alcohol Abuse Control Act (DAA), the PA Superior Court noted that the DAA “protects the records of patients undergoing treatment for drug or alcohol abuse.” *Matter of Commonwealth for Order Approving Release of Patient Records from Drug and Alcohol Treatment Facility*, 208 A.3d 1090, 2019 PA Super 129 (2019).

¹⁷ “All patient records (including all records relating to any commitment proceeding) prepared or obtained pursuant to this act, and all information contained therein, shall remain confidential, and may be disclosed only with the patient’s consent and only (i) to medical personnel exclusively for purposes of diagnosis and treatment of the patient or (ii) to government or other officials exclusively for the purpose of obtaining benefits due the patient as a result of his drug or alcohol abuse or drug or alcohol dependence except that in emergency medical situations where the patient’s life is in immediate jeopardy, patient records may be released without the patient’s consent to proper medical authorities solely for the purpose of providing medical treatment to the patient. Disclosure may be made for purposes unrelated to such treatment or benefits only upon an order of a court of common pleas after application showing good cause therefor. In determining whether there is good cause for disclosure, the court shall weigh the need for the information sought to be disclosed against the possible harm of disclosure to the person to whom such information pertains, the physician-patient relationship, and to the treatment services, and may condition disclosure of the information upon any appropriate safeguards. No such records or information may be used to initiate or substantiate criminal charges against a patient under any circumstances.” 71 P.S. § 1690.108(b).

¹⁸ 71 P.S. § 1690.108(b).

¹⁹ “(1) Except as provided under section 12(b), patient records and all information contained therein relating to drug or alcohol abuse or drug or alcohol dependence prepared or obtained by a private practitioner, hospital, clinic, drug rehabilitation or drug treatment center shall remain confidential and may be disclosed only: (i) when the patient is of the age of majority and consents to the disclosure; or (ii) if the patient is a minor, the patient consents to treatment under section 12(a) and consents to the disclosure. A minor patient who does not consent to medical treatment or counseling under section 12(a) may consent to the disclosure of records and information. (2) Records and information subject to disclosure in accordance with paragraph (1) shall only be disclosed: (i) to medical personnel exclusively for purposes of diagnosis and treatment of the patient; (ii) to the parent or legal guardian of a minor or any other designee for which the patient has provided consent; or (iii) to government or other officials exclusively for the purpose of obtaining benefits due the patient as a result of his drug or alcohol abuse or drug or alcohol dependence.” (3) Notwithstanding any other provisions of this section, in emergency medical situations where the patient’s life is in immediate jeopardy, patient records may be released without the patient’s consent to proper medical authorities solely for the purpose of providing medical treatment to the patient. (4) When a parent or legal guardian signs the consent for furnishing medical care and counseling on behalf of the minor and the minor refuses to sign a consent to release the treatment information to the minor’s parent or legal guardian, the practitioner, hospital, clinic or drug and alcohol treatment facility providing treatment may only inform the parent or legal guardian of the facts relevant to reducing a threat to the minor or other individual in accordance with Federal or State law or any other information that is authorized under Federal or State law.” 71 P.S. § 1690.108(c).

²⁰ *Gallo v. Conemaugh Health Sys.*, 114 A.3d 855, 863 (Pa. Super. 2015).

²¹ *O’Boyle v. Jensen*, 150 F.R.D. 519, 522 (M.D.Pa.1993) (“However, unlike the federal statute, the Pennsylvania statute provides that if the records sought are in the possession of a “private practitioner, hospital, clinic, drug rehabilitation or drug treatment center” as they are in this case, such records [shall remain confidential]. 71 P.S. § 1690.108(c). There is no provision in this section comparable to that found in the federal statute and in Pennsylvania section 1690.108(b) providing for the release of the treatment records by court order upon a showing of good cause.”)

²² In *Gallo v. Conemaugh Health System*, the Pennsylvania Superior Court held that the trial court had erred in compelling information about the alcoholism of a doctor accused of malpractice to be disclosed during a wrongful death trial, even though the accused had been found to waive privilege during trial proceedings in a manner that would satisfy the good cause exception of 71 P.S. § 1690.108(b), because the subsection that applied to private facilities (71 P.S. § 1690.108(c)) did not contain a good cause exception. 114 A.3d 855, 864-865 (Pa. Super. 2015)(“Accordingly, as in *O’Boyle*, subsection (c), related to disclosure of documents held by private facilities, controls. As noted above, the plain language of subsection (c) does not include a good cause provision. Accordingly, we hold that the trial court erred in determining that the good cause exception of subsection (b) applies to subsection (c). Thus, we conclude that the records sought by *Gallo* are protected by the Act, without exception, subject to disclosure by Dr. Padhiar.”).

²³ P.L. 349, No. 47, § 1 (June 28, 2018). The statute makes clear that a parent or guardian may consent to treatment even where the minor does not but that where “the minor refuses to sign a consent to release the treatment information to the minor’s parent or legal guardian, the practitioner, hospital, clinic or drug and alcohol treatment facility providing treatment may only inform the parent or legal guardian of the facts relevant to reducing a threat to the minor or other individual in accordance with Federal or State law or any other information that is authorized under Federal or State law. 71 P.S. § 1690.108(c)(4).

²⁴ “As mandated by section 8 of Act 63 (71 P. S. § 1690.108), the Council will require all projects, SCAs and governmental agencies to insure that all persons treated or rehabilitated or both, including all persons formerly treated or rehabilitated or both, for drug and alcohol abuse and dependence, be secure in their right to privacy except as disclosure is permitted by law.” 4 Pa. Code § 255.1(c).

²⁵ E.g., *Matter of Commonwealth for Order Approving Release of Patient Records from Drug and Alcohol Treatment Facility*, 208 A.3d 1090, 2019 PA Super 129 (2019); *Gallo v. Conemaugh Health Sys.*, 114 A.3d 855, 863 (Pa. Super. 2015).

²⁶ 28 Pa. Code § 701.1.

²⁷ “(a) Disclosure. Information systems and reporting systems shall not disclose or be used to disclose client oriented data which reasonably may be utilized to identify the client to any person, agency, institution, governmental unit, or law enforcement personnel. Project staff may disclose client oriented data only under the following situations: (1) With or without the consent of the client information may be released to those judges who have imposed sentence on a particular client where such sentence is conditioned upon the client entering a project. Information released shall be limited to that provided for in subsection (b). (2) With or without the consent of the client, information may be released to those duly authorized probation or parole officers or both who have assigned responsibility to clients in treatment if the probation or parole of the client is conditioned upon his being in treatment. Information released shall be limited to that provided for in subsection (b). (3) With or without the consent of the client, to judges who have assigned a client to a project under a pre-sentence, conditional release program. Presentence conditional release programs include preindictment or preconviction conditional release such as Accelerated Rehabilitative Disposition, probation without verdict or disposition in lieu of trial under sections 17 and 18 of Act 64 (35 P. S. §§ 780-117 and 780-118). (4) With the consent of the client, in writing, to a judge in order to assist that judge in deciding whether to initiate conditional release programs including those specified in paragraph (3). (5) Projects may disclose any information to the attorney of a client provided as follows: (i) The client consents, in writing to the disclosure of information. (ii) The attorney is representing the client in a criminal, civil or administrative proceeding. (6) Projects may disclose with the consent of a client, in writing, the information to employers of a client to further the rehabilitation of a client; or, to a prospective employer who affirmatively expresses that information is sought to enable the employer to engage the client as an employee. Such information shall be limited to whether the client has or is receiving treatment with the project. (7) Projects may disclose information as set forth in subsection (b) with the consent of a client, in writing, to an insurance company, health, or hospital plan or facsimile thereof, which has contracted with the client to provide or will provide medical, hospital, disability or similar benefits. In the event that an insurance company, health, or hospital plan remains dissatisfied with the content of the information released with regard to a client in accordance with this paragraph, such insurance company, health or hospital plan may apply to the Executive Director for additional information with the written consent of the client and, upon approval by the Executive Director, such information may be released. (8) Projects may disclose information as set forth in subsection (b) with the consent of a client, in writing, to governmental officials for the purpose of obtaining governmental benefits due the client as a result of his drug or alcohol abuse or dependence. (9) In emergency medical situations where the life of the client is in immediate jeopardy, projects may release client records without the consent of the client to proper medical authorities solely for the purpose of providing medical treatment to the client. (10) Projects shall keep and maintain a written record of all information and data which are disclosed under this section.” 4 Pa. Code § 255.5(a).

²⁸ “(b) Restrictions. Information released to judges, probation or parole officers, insurance company health or hospital plan or governmental officials, under subsection (a)(1), (2), (4), (7) and (8), is for the purpose of determining the advisability of continuing the client with the assigned project and shall 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. (4) A brief description of the progress of the client. (5) A short statement as to whether the client has relapsed into drug, or alcohol abuse and the frequency of such relapse.” 4 Pa. Code § 255.5(b).

²⁹ Division of Drug and Alcohol Program Licensing. "Chapter 709, Subchapter C. General Standards for Free-Standing Treatment Activities. Interpretive Guideline." Available at:

http://www.paproviders.org/archives/Pages/DA_Archive/Chapter_709_Interpretive_Guideline.pdf.

³⁰ Department of Public Welfare. Guidance on Health Care Information Sharing. Available at:

http://www.chcs.org/media/DPW_Confidentiality_Guidance.pdf. Note: This guidance document appears to have been produced by DPW around 2008 in collaboration with the Center for Health Care Strategies as part of the Rethinking Care Program: <https://www.chcs.org/project/rethinking-care-program-integrated-care-collaboratives/>.

³¹ "(c) Record transfer. The Client Admission Forms, the Treatment/Discharge Forms, and Discharge Summary Records are the only client records which may be transferred for treatment purposes. The transfer may be initiated upon the request of a client or by the present project of a client. In any case, the client shall fully understand the nature of the information, the purpose of the record transfer, and the identity of the recipient of the information. Only after these conditions are met, may the client authorize the transfer by signing a Release Form provided by the UDCS." 4 Pa. Code § 255.5(c).

³² "This chapter establishes the procedures for the issuance of a license by activity to freestanding drug and alcohol treatment facilities. The term, facility, applies to the physical location from which drug and alcohol services are provided. A facility may provide more than one service." 28 Pa. Code § 709.1.

³³ The term "freestanding treatment facility" is defined as: "The setting in which drug and alcohol treatment services take place that is not located in a health care facility." 28 Pa. Code § 701.1.

³⁴ "(a) A written procedure shall be developed by the project director which shall comply with 4 Pa. Code § 255.5 (relating to projects and coordinating bodies: disclosure of client-oriented information). The procedure must include, but not be limited to: (1) Confidentiality of client identity and records. Procedures must include a description of how the project plans to address security and release of electronic and paper records and identification of the person responsible for maintenance of client records. (2) Identification of project staff having access to records, and the methods by which staff gain access." 28 Pa. Code § 709.28.

³⁵ E.g., Pennsylvania Department of Health, Inspection Results for Ce'Ja Counseling and Consulting (August 10, 2012). Available at

http://sais.health.pa.gov/commonpoc/Content/PublicWeb/DASurveyDetails.aspx?facid=FITZ6601&exit_date=08/10/2012&eventid=CNOS11.

³⁶ From FY 2016-2019 there were 10,247 total DDAP citations with 1,339 confidentiality citations. (Communication with DDAP, July 2019.)

³⁷ 28 Pa. Code § 709.29.

³⁸ "... (3) Clients have the right to inspect their own records. The project, facility or clinical director may temporarily remove portions of the records prior to the inspection by the client if the director determines that the information may be detrimental if presented to the client. Reasons for removing sections shall be documented in the record. (4) Clients have the right to appeal a decision limiting access to their records to the director. (5) Clients have the right to request the correction of inaccurate, irrelevant, outdated or incomplete information in their records. (6) Clients have the right to submit rebuttal data or memoranda to their own records." 28 Pa. Code § 709.30.

³⁹ Bureau of Drug and Alcohol Programs. FAQ – BDAP (April 25, 2008). Available at

http://www.paproviders.org/archives/Pages/DA_Archive/DOH_Confidentiality_FAQ_050108.pdf. These FAQs appear to be those referenced in the notice soliciting comments on the proposed rulemaking at 38 Pa.B. 2268 (<https://www.pabulletin.com/secure/data/vol38/38-20/923.html>). See also http://www.paproviders.org/archives/Pages/DA_Archive/Confidentiality_Comments_Needed_050108.shtml. Referenced in the document heading, the Bureau of Drug and Alcohol Programs

(BDAP) is the precursor to Department of Drug and Alcohol Programs (DDAP). DDAP, formerly under the Department of Health, became a separate agency in 2012. <https://www.ddap.pa.gov/Pages/About.aspx>.

⁴⁰ 50 P.S. § 7101 et seq.

⁴¹ "(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. In no event, however, shall privileged communications, whether written or oral, be disclosed to anyone without such written consent. This shall not restrict the collection and analysis of clinical or statistical data by the

department, the county administrator or the facility so long as the use and dissemination of such data does not identify individual patients. Nothing herein shall be construed to conflict with section 8 of the act of April 14, 1972 (P.L. 221, No. 63),² known as the “Pennsylvania Drug and Alcohol Abuse Control Act.” 50 P.S. § 7111(a).

⁴² 55 Pa. Code § 5100.31 et seq.

⁴³ 50 P.S. § 7103; *See also* 55 Pa. Code § 5100.4.

⁴⁴ “Whenever information in a patient’s records relates to drug or alcohol abuse or dependency, as defined in 71 P. S. § 1690.102, those specific portions of the patient’s records are subject to the confidentiality provisions of section 8(c) of the Pennsylvania Drug and Alcohol Abuse Control Act (71 P. S. § 1690.108(c)), and the regulations promulgated thereunder, 4 Pa. Code § 255.5 (relating to projects and coordinating bodies: disclosure of client-oriented information).” 55 Pa. Code § 5100.37.

⁴⁵ I.e., 50 P.S. § 7111; 55 Pa. Code § 5100.37; 71 P. S. § 1690.108(c); and 4 Pa. Code § 255.5.

⁴⁶ 28 Pa. Code § 715.11

⁴⁷ 28 Pa. Code § 711.43.

⁴⁸ 28 Pa. Code § 711.53.

⁴⁹ 28 Pa. Code § 711.62.

⁵⁰ 28 Pa. Code § 711.72.

⁵¹ 28 Pa. Code § 711.83.

⁵² 28 Pa. Code § 711.93.

⁵³ 28 Pa. Code § 710.23.

⁵⁴ 55 Pa. Code § 5230.17.

⁵⁵ 28 Pa. Code § 709.43. While “intake project” is not defined, Section 709.43 appears under “Subchapter D. Standards for Intake, Evaluation and Referral Activities.” The term “intake, evaluation and referral activity” is defined as “The provision of intake and referral by a facility designated by the SCA to perform those services centrally for two or more facilities within that SCA.” 28 Pa. Code § 701.1.

⁵⁶ “Medical records.--Notwithstanding any other provision of law and consistent with the Health Insurance Portability and Accountability Act of 1996 (Public Law 104-191, 110 Stat. 1936) and 42 C.F.R. Pt. 2 (relating to confidentiality of alcohol and drug abuse patient records), health care facilities and health care providers shall provide medical records of an individual under review without the authorization of a person of interest to the team for purposes of review under this act.” 71 P.S. § 1691.7(b).

⁵⁷ 71 P.S. § 1691.8.

⁵⁸ 35 P.S. § 872.7.

⁵⁹ “Notwithstanding any other provision of law, drug and alcohol treatment records or related information regarding a child who is alleged or who has been found to be dependent or delinquent, or the child’s parent, shall be released to the county agency, court or juvenile probation officer upon the consent of the child or the child’s parent or upon an order of the court. The disclosure of drug and alcohol treatment records under this section shall be obtained or ordered in a manner that is consistent with the procedures, limitations and criteria set forth in regulations adopted by the Department of Health and Human Services relating to the confidentiality of drug and alcohol treatment records....” 42 Pa.C.S.A. § 6352.1.

⁶⁰ Matter of Commonwealth for Order Approving Release of Patient Records from Drug and Alcohol Treatment Facility, 208 A.3d 1090, 2019 PA Super 129 (2019) (concluding that the confidentiality requirements of the Drug and Alcohol Abuse Control Act did not protect from disclosure records that were required to be disclosed under the Controlled Substances Act).

⁶¹ 208 A.3d at 1094.

⁶² 45 C.F.R. § 164.512.

⁶³ 42 CFR § 2.12(c)(6).

⁶⁴ 45 C.F.R. Part 164, Subpart E (2017).

⁶⁵ U.S. Department of Health and Human Services, Office of Civil Rights, FAQs: “Does the HIPAA Privacy Rule preempt state laws?” Available at: <https://www.hhs.gov/hipaa/for-professionals/faq/399/does-hipaa-preempt-state-laws/index.html>.

⁶⁶ “The statute authorizing the regulations in this part (42 U.S.C. 290dd-2) does not preempt the field of law which they cover to the exclusion of all state laws in that field. If a disclosure permitted under the regulations in this part is prohibited under state law, neither the regulations in this part nor the authorizing statute may be construed to authorize any violation of that state law. However, no state law may either authorize or

compel any disclosure prohibited by the regulations in this part.” 42 C.F.R. § 2.20 (Relationship to State Laws).

⁶⁷ U.S. Department of Health and Human Services, Office of Civil Rights, FAQs: “How does HIPAA interact with the federal confidentiality rules for substance use disorder treatment information in an emergency situation—which rules should be followed?” Available at: <https://www.hhs.gov/hipaa/for-professionals/faq/3005/how-does-hipaa-interact-federal-confidentiality-rules-substance-use-disorder-treatment-information-in-emergency/index.html>.

⁶⁸ 28 Pa. Code § 709.30

⁶⁹ 45 CFR 164.524(a)(3).

⁷⁰ <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html>

⁷¹ 42 C.F.R. § 2.23(a) (2019).

⁷² 42 C.F.R. § 164.501

⁷³ 42 C.F.R. § 164.514

⁷⁴ Proposed Rulemaking: Confidentiality of Patient Records and Information, 37 Pa.B. 6529 (Dec. 15, 2007). Available at: <https://www.pabulletin.com/secure/data/vol37/37-50/2307.html>; Draft DOH Regulation 10-186 (April 25, 2008). Available at:

http://www.paproviders.org/archives/Pages/DA_Archive/DOH_Confidentiality_Draft_050108.pdf.

⁷⁵ Proposed Rulemaking: Confidentiality of Patient Records and Information, 37 Pa.B. 6529 (Dec. 15, 2007). Available at: <https://www.pabulletin.com/secure/data/vol37/37-50/2307.html>.

⁷⁶ Bureau of Drug and Alcohol Programs. FAQ – BDAP (April 25, 2008). Available at http://www.paproviders.org/archives/Pages/DA_Archive/DOH_Confidentiality_FAQ_050108.pdf. (“What treatment information can a D&A treatment provider send to third party payers in the new regulations? A. A statement of whether or not the patient is in treatment for drug or alcohol abuse or dependence. B. The patient’s level of intoxication from alcohol, illicit drugs or medication, including the quantity, frequency and duration of use, and any specific withdrawal symptoms exhibited by the patient currently or in the past. C. The patient’s vital signs, specific medical conditions to include pregnancy, specific medications taken and laboratory test results. D. The patient’s specific diagnosis, prognosis, emotional or behavioral problems requiring treatment or negatively impacting responses to emotional or environmental stressors, level of functioning and treatment history. E. A brief description of the patient’s progress in treatment related to the impact of substance use, abuse or dependence on life problems, participation in program activities and motivation to change. F. The patient’s risk level for resuming substance use, abuse or dependence based on patterns of use, relapse history, existing relapse triggers and coping skills to maintain recovery. G. The patient’s social support system, environmental supports and stressors that may impact ongoing recovery.”)

⁷⁷ Proposed Rulemaking: Confidentiality of Patient Records and Information, 37 Pa.B. 6529 (Dec. 15, 2007). Available at: <https://www.pabulletin.com/secure/data/vol37/37-50/2307.html>.

⁷⁸ Kaiser Family Foundation. State Health Facts: Opioid Overdose Death Rates and All Drug Overdose Death Rates per 100,000 Population (Pennsylvania, 2008 and 2017 data). Available at: <https://www.kff.org/other/state-indicator/opioid-overdose-death-rates>.

⁷⁹ Rehabilitation and Community Providers Association (RCPA) of Pennsylvania, 2018 D&A Survey (unpublished).

⁸⁰ 28 Pa. Code § 701.1.

⁸¹ U.S. Department of Health and Human Services, Office of Civil Rights, FAQs: “Can an individual, through the HIPAA right of access, have his or her health care provider or health plan send the individual’s PHI to a third party?” Available at: <https://www.hhs.gov/hipaa/for-professionals/faq/2036/can-an-individual-through-the-hipaa-right/index.html>.

⁸² 42 Pa.C.S.A. § 6352.1.

⁸³ Matter of Commonwealth for Order Approving Release of Patient Records from Drug and Alcohol Treatment Facility, 208 A.3d 1090, 2019 PA Super 129 (2019).

⁸⁴ It is unclear whether the Executive Director here refers to an SCA or DDAP. Section 255.5 is under Part XI: Governor’s Council on Drug and Alcohol Abuse, which includes provisions describing the Office of the Executive Director (now DDAP). However, it seems unlikely that the regulations expected the Executive Director of the Governor’s Council to become involved in insurance company requests for additional information about individual clients. Executive Director is defined in 28 Pa. Code § 701.1 as “The administrator of a drug and alcohol commission.”

⁸⁵ 28 Pa. Code § 701.11(a).

⁸⁶ 28 Pa. Code § 701.11(b).

⁸⁷ 71 P.S. § 1690.108 (b).

⁸⁸ 71 P.S. § 1690.108 (c).