

## BHS Policies and Procedures



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BEHAVIORAL HEALTH SERVICES

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### **POLICY/PROCEDURE REGARDING: Responding to a Family Following Death of a Behavioral Health Services Client: Grief Intervention and Disclosure of Protected Health Information**

<p>Issued By: Kavos Ghane Bassiri, LMFT, LPCC <i>KG</i> Director of Behavioral Health Services</p> <p>Effective Date: March 1, 2019</p>	<p>Manual Number: 3.06-16</p> <p>References: Welfare &amp; Institutions Code §5328; Code of Federal Regulations, Title 42, Part 2 &amp; Title 45, Part 164; Civil Code, §§56.10-56.16, 56.1007; Evidence Code, §§1010-1027; Family Code §6924, §6929; Health &amp; Safety Code, §§123100-123149.5, §124260; Probate Code, §58; DPH Privacy Policy; and DPH Authorization for Use and Disclosure of Protected Health Information.</p>
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**Substantive Revision. Replaces Policy 3.06-16 dated February 21, 2014.**

#### **Purpose:**

This policy is designed to assist providers with issues related to responding to a family's grief at the loss of a loved one and related risk management, client privacy and medical record release concerns.

#### **Scope:**

This policy pertains to all providers within Behavioral Health Services. This policy does not supersede any additional requirements and/or mandates (e.g., State Licensing and other regulatory agencies) for programs in the event of a client death. This policy is not intended to encourage providers to do outreach, but rather that providers exercise professional judgment when determining the best course of action. Upon learning about the death of a client, the provider may need to decide whether or not to respond to an inquiry. Supervision or consultation is advised at this juncture given the stringent protections for the confidentiality of mental health and substance use disorder health information.

#### **Policy:**

It is the policy of Behavioral Health Services (BHS) that all BHS providers respond to family members and others as authorized by law following the death of a client in a manner that is both clinically and legally appropriate. It is imperative that providers understand that *protected health information* (PHI) of a deceased client remains confidential for fifty years following the date of death, and that there are federal and state laws, including special disclosure provisions, governing the protection and release of PHI

pertaining to deceased individuals. PHI refers to any individually identifiable client health information maintained or transmitted in any medium.

For the purposes of this policy, “family” is defined as any person or persons so identified by the client or known to the provider to be significant to the client. “Others as authorized by law” includes individuals who, depending upon the circumstances, may have legal access to the deceased client’s PHI, such as coroners or medical examiners, and the deceased client’s legally authorized executor or administrator, or other personal representative who is otherwise legally authorized to act on the behalf of the deceased client or of the client’s estate. Even in these instances where the disclosure of PHI is permitted or required by law, providers are reminded to limit PHI to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request.

### **Legal Considerations Regarding the Disclosure of Decedent PHI**

All BHS providers have a statutory obligation to maintain confidentiality of the deceased client’s PHI including the fact that the client is or is not known to the program. Access to or disclosure of the deceased client’s PHI is not allowed unless the individual requesting information is legally authorized to do so. Providers are encouraged to consult with legal counsel if there are questions about the disclosure of the decedent’s PHI.

BHS providers of mental health services may disclose PHI of the deceased client to a coroner or medical examiner for the purposes of identifying the decedent, locating and informing next of kin, determining a cause of death, or other duties as authorized by law (45 CFR, §164.512(g)). BHS providers of substance use disorder services are not permitted by law to release information to a coroner or medical examiner unless the deceased client’s death was the result of a crime occurring at the provider site.

For both mental health and substance use disorder PHI, access to or the consent to disclosure of PHI of a deceased client may be authorized by the decedent’s personal representative who holds this privilege (42 CFR §2.15(b)(2); 45 CFR, §164.502(g)(4); Civil Code §56.11; Evidence Code §1013). A decedent’s personal representative is an executor, administrator, or other person who has legal authority under applicable law to act on behalf of the deceased client or the decedent’s estate. In most instances, a parent, guardian, or other person acting *in loco parentis* (collectively “parent”) is the personal representative of the unemancipated minor and can exercise the deceased minor’s rights with respect to protected health information; however, in the following circumstances, the parent may not be the personal representative with respect to certain health information about the minor and therefore may not control the protected health information related to that care:

- When State or other law does not require the consent of a parent or other person before a minor can obtain a particular health care service (Family Code §6924, §6929; Health & Safety Code §124260) and the minor consents to the health care service (e.g., State law provides an adolescent the right to obtain mental health treatment without the consent of one’s parent, and the adolescent consents to such treatment without the parent’s consent);
- When someone other than the parent is authorized by law to consent to the provision of a particular health service to a minor and provides such consent (e.g., the court); and
- When a parent agrees to a confidential relationship between the minor and the behavioral health care provider.

## **Responding to Inquiries about the Client's Death**

BHS providers should not respond to inquiries about a client's death unless the individual is the decedent's personal representative; however, in some situations, BHS providers may consider responding to a person who is not the client's personal representative, but rather a person with whom a current and specific authorization with the appropriate scope was in effect at the time of the decedent's death, unless doing so is inconsistent with any prior expressed preference of the deceased client known by the provider. In deciding how to proceed, the provider should consider the quality of this relationship, the deceased client's desire regarding privacy, and any prior requests to disclose, restrict or prohibit the release of PHI.

If the program decides that a response to the inquiry would be both legally and clinically appropriate, the program should consider that a supervisor or other clinician not directly involved in the care of the deceased client be the one to respond. An appropriate response could include acknowledgement of the client's death, expressed concern, and availability to help identify needed grief resources. A meeting with the individual may be appropriate if the grieving loved one needs the opportunity to express feelings and to obtain referrals for further support (e.g., a referral for grief counseling at another program, provision of crisis telephone numbers such as Suicide Prevention).

The focus of the conversation should be the individual's grief and not the behavioral health care received by the client. While questions about the client, the treatment process, or the circumstances surrounding the client's death are to be expected, ***the provider should not reveal any information about the client's treatment unless the individual is legally authorized to access PHI as the decedent's personal representative and the disclosure, however seemingly minor, is legally and clinically appropriate.*** In situations where the individual is legally entitled to access information (i.e., personal representative), the provider should exercise care in revealing any information about the client's behavioral health treatment. The provider may validate concerns and discuss the treatment process in general terms. This may be an opportunity to educate the individual as to the nature of behavioral health illnesses and behavioral health services. For those individuals whose grief is significant, the provider should offer a referral for on-going support. In general, it is not recommended that programs provide on-going services for the decedent's loved ones, but rather refer to another program to avoid potential problems (e.g., dual relationship, breach of the decedent's PHI). Providers are advised to utilize supervision and consultation for guidance and support in addressing grieving loved ones.

## **Risk Management Approach**

It is not the intention of these interventions to prevent a grieving loved one from seeking legal counsel. Likewise, a provider should use caution when addressing grieving loved ones and not incriminate one's self or the program. Nor should the provider discuss any related investigations or risk management activities with the individual. Programs are advised to consider the needs of staff and/or the therapeutic milieu following the death of a client and to encourage individual grief counseling and/or arrange for debriefings as indicated.

## **Release of a Decedent PHI**

The PHI of a deceased client remains confidential. It is the policy of the San Francisco Department of Public Health to comply with all applicable federal and state confidentiality laws by obtaining

authorization before using or disclosing PHI, unless the use or disclosure is specifically permitted or required by law. Confidentiality laws generally protect a decedent's PHI to the same extent of the PHI of living individuals, however do include a number of special disclosure provisions relevant to deceased individuals (42 CFR §2.15(b)(2); 45 CFR Part 164 Subpart E). PHI of a deceased client can be released by an executor, administrator, or other personal representative who has legal authority to act on behalf of the decedent or of the decedent's estate. A decedent's personal representative may be named under the will or appointed by the court after the client's death. Providers should verify the legal authority of the personal representative (e.g., ask to see the appointment papers by the court) and to seek legal counsel if in doubt.

When a BHS civil service program receives a request for a decedent's confidential behavioral health information, the program should consult Health Information Management (HIM) who will determine the validity of the authorization and assist the program in processing the request. BHS contract programs should seek its own legal counsel regarding the validity of the authorization.

### **Media Inquiries**

Any media inquiries pertaining to a client's death should be referred directly to the DPH Director of Communications at 415-554-2507.

### **Contact Person:**

Quality Management, 255-3400

### **Distribution:**

BHS Policies and Procedures are distributed by the Behavioral Health Services Compliance Office

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