

Use and Disclosure of Psychotherapy Notes

September 2021

I. Supporting Policies

- a. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule (45 CFR 164.508(a)(2)) establishes special rules regarding the use and disclosure of psychotherapy notes.
- b. The Department of Defense Manual DoDM 6025.18, Implementation of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule in DoD Health Care Programs, implements the above part of the HIPAA Privacy Rule within the Military Health System (MHS).

II. Definitions Associated with Use and Disclosure of Psychotherapy Notes

- a. Covered Entity: A health plan or a health care provider who transmits any health information in electronic form in connection with a standard transaction covered by HIPAA.
- b. Disclosure: The release, transfer, provision of access to, or other divulging in any manner of protected health information (PHI) outside the entity holding the information.
- c. DoD Covered Entity: In the case of a health plan administered by DoD, the DoD covered entity is the DoD Component or subcomponent that functions as the administrator of the health plan. Not all health care providers affiliated with the Military Services are DoD covered entities. Examples of providers that are not DoD covered entities are providers associated with Military Entrance Processing Stations or DoD Medical Examination Review Board and Reserve components practicing outside the authority of military treatment facility's (MTFs) who do not engage in electronic transactions covered by DoDM 6025.18.
- d. Military Health System (MHS): All DoD health plans and all DoD health care providers that are, in the case of institutional providers, organized under the management authority of, or in the case of covered individual providers, assigned to or employed by, the DHA, the Surgeon General of the Army, the Surgeon General of the Navy, or the Surgeon General of the Air Force.
- e. Protected Health Information (PHI): Individually identifiable health information that is transmitted or maintained by electronic or any other form or medium. PHI excludes individually identifiable health information in employment records held by a DoD covered entity in its role as employer. Information which has been de-identified in accordance with

DoDM 6025.18 Paragraph 4.5(a) is not PHI. PHI is a subset of personally identifiable information (PII) with respect to living persons.

- f. Psychotherapy Notes: Notes recorded, in any medium, by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private, group, joint, or family counseling session and that are separated from the rest of the individual's medical record. Psychotherapy notes exclude:
 - i. Medication prescription and monitoring,
 - ii. Counseling session start and stop times,
 - iii. The modalities and frequencies of treatment furnished,
 - iv. Results of clinical tests, and
 - v. Any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.
- g. Use: With respect to individually identifiable health information, the sharing, employment, application, utilization, examination, or analysis of such information within an entity that maintains such information.

III. Guidance Regarding Use and Disclosure of Psychotherapy Notes

- a. Generally, HIPAA's Privacy Rule applies uniformly to all protected health information, without regard to the type of information. One exception to this general rule is for psychotherapy notes, which receive special protections. Per the HIPAA Privacy Rule and DoDM 6025.18, DoD covered entities must obtain a valid written authorization from the patient prior to any use or disclosure of psychotherapy notes except:
 - i. To carry out the following treatment, payment, or health care operations:
 - 1. Use by the originator of the psychotherapy notes for treatment,
 - 2. Use or disclosure by the DoD covered entity for its own training programs, or
 - 3. Use or disclosure by the DoD covered entity to defend itself in a legal action or other proceeding brought by the individual whose PHI is used or disclosed.
 - ii. A use or disclosure that is:
 - 1. Required by the Department of Health and Human Services (HHS),
 - 2. Required by law,
 - 3. For health oversight activities with respect to the originator of the psychotherapy notes,
 - 4. About decedents to coroners and medical examiners,
 - 5. To avert a serious and imminent threat to the health or safety of a person or the public. This may include serious and imminent threats to:
 - a. Military personnel,

- b. A specific military mission, or
- c. National security.

- b. Access to Psychotherapy Notes. Individuals do not have a right to access the psychotherapy notes that document or analyze the contents of a counseling session with the individual, as such A DoD covered entity may deny an individual access to psychotherapy notes without providing an opportunity for review.

IV. FAQ

- a. What are Psychotherapy Notes?
 - Psychotherapy Notes are medical information recorded in any medium by a mental health professional documenting or analyzing the contents of a conversation during a private, group, joint, or family counseling session and that are separated from the rest of the individual's medical and billing records
 - Psychotherapy Notes are the provider's personal notes regarding the treatment encounter
- b. What are some examples of Psychotherapy Notes?
 - Observations made by the mental health provider
 - Hypotheses regarding the diagnosis
 - Any thoughts or feelings relating to the therapy session
 - Questions to ask others or to follow up
- c. Can you use or disclose psychotherapy notes?
 - Generally, the answer is NO with few exceptions. Psychotherapy notes receive a heightened level of protection under HIPAA and DoDM 6025.18. and require a valid authorization from the patient before use or disclosure
- d. Are there any exceptions to requiring an authorization before disclosing psychotherapy notes?
 - Yes, psychotherapy notes can be used or disclosed without an authorization in these three instances to carry out treatment, payment, or healthcare operations (TPO):
 - The psychotherapy notes can be used by the original mental health provider who wrote the notes, for treatment purposes
 - The DoD covered entity may use the psychotherapy notes for its own training programs
 - The DoD covered entity may use or disclose the psychotherapy notes to defend itself in a legal action or other proceeding brought by the patient whose PHI is used or disclosed
- e. Are there any scenarios where disclosure not involving treatment, payment, or healthcare operations (TPO) is permitted without an authorization from the patient?



- Yes, the rule allows the disclosure of psychotherapy notes in the following instances not related to TPO:
 - When required by the Department of Health and Human Services (HHS)
 - When required by law (consider state law as well)
 - Health oversight activities with respect to the originator of the psychotherapy notes
 - Disclosures about decedents to coroners and medical examiners
 - To avert a serious and imminent threat to the health or safety of a person or the public; This may include serious and imminent threats to:
 - Military personnel
 - A specific military mission
 - National security
- f. Can a mental health provider disclose a patient's psychotherapy notes to another provider for treatment purposes?
 - Yes, but only with a valid authorization from the patient
- g. Does a parent have a right to receive a copy of psychotherapy notes pertaining to their child's mental health treatment?
 - Defer to state law

If you have any questions about any of the information above, please contact the DHA Privacy Office at: DHA.PrivacyMail@mail.mil.

