

**POLICY REGARDING THE USE OR DISCLOSURE OF MENTAL HEALTH
RECORDS, INCLUDING PSYCHOTHERAPY NOTES**

Purpose: To set forth the policy and procedures of WVU Physicians of Charleston (WVUPC) regarding the use or disclosure of mental health records, including psychotherapy notes.

Standard:

1. Subject to limited exceptions, the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) requires that covered entities such as WVUPC obtain individual authorization before using or disclosing psychotherapy notes. Psychotherapy notes mean any notes recorded, in any medium, by a health care provider who is a mental health professional, which document or analyze the contents of a conversation during a private counseling session or a group, joint or family counseling session and which are separated from the rest of the individual’s medical record. Psychotherapy notes do not include medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: diagnosis, functional status, the treatment plan, symptoms, prognosis and progress to date.
2. An authorization for the use and/or disclosure of psychotherapy notes may not be combined with another authorization.
3. Mental health records, other than psychotherapy notes, may be used and disclosed for treatment, payment and operational purposes to the same extent as records of other PHI, subject to any state privacy laws which are more stringent than HIPAA.
4. State law precludes the disclosure of mental health records and information to third parties without the authorization of the individual except as provided for in W. Va. Code §27-3-1 et seq.

Procedure

1. WVUPC will obtain an individual’s authorization prior to use or disclosure of psychotherapy notes unless otherwise provided for by law and/or in this policy.
2. WVUPC may use and disclose psychotherapy notes for **treatment, payment or health care operations** in the following instances without

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obtaining authorization:

- A. for use by the originator of the psychotherapy notes for treatment;
- B. for use or disclosure by WVUPC in training programs in which students, trainees, or practitioners in mental health learn under supervision to practice or improve their skills in group, joint, family or individual counseling; and
- C. for use or disclosure by WVUPC to defend a legal action or other proceeding brought by the individual.

3. WVUPC may also use or disclose psychotherapy notes in the following additional instances without obtaining authorization:

- A. for use or disclosure required by the Secretary of HHS to determine compliance with the privacy rule requirements as provided for in 45 C.F.R. §164.502;
- B. for use or disclosure required by law as provided for in 45 C.F.R. §164.512(a);
- C. for use or disclosure permitted by HIPAA for health oversight, with respect to the oversight of the originator of the psychotherapy notes as provided for in 45 C.F.R. §164.512(d); and
- D. for use or disclosure permitted by HIPAA for decedents as provided for in 45 C.F.R. §164.512(g); and
- E. for use or disclosure permitted by HIPAA for threats to public safety as provided for in 45 C.F.R. §164.512(j).

I. Uses/Disclosures of Psychotherapy Notes

1. Any time a use or disclosure of psychotherapy notes is at issue and one of the above-exceptions does not apply, WVUPC must obtain an authorization from the individual who is the subject of the notes before such use or disclosure may be made. The following specific requirements must be satisfied:

- A. WVUPC may not condition treatment of an individual on a

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- requirement that the individual provide a specific authorization for the disclosure of psychotherapy notes.
- B. Any authorization used by WVUPC for the use/disclosure of psychotherapy notes will be written in plain language.
- C. Any authorization used by WVUPC for the use or disclosure of psychotherapy notes may not be combined with any other authorization for the disclosure of records other than psychotherapy notes.
- D. Any authorization for the use or disclosure of psychotherapy notes must contain the following:
- i. a description of the information to be used or disclosed that identifies the information in a specific or meaningful fashion;
 - ii. the name or other specific identification of the person(s) or class of person(s) authorized to make the requested use or disclosure;
 - iii. the name or other specific identification of the person(s) or class of persons to whom the covered entity may make the requested use or disclosure;
 - iv. the signature of the individual and date;
 - v. an expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure;
 - vi. a statement of the individual's right to revoke the authorization in writing and the exceptions to the right to revoke;
 - vii. a description of how the individual may revoke the authorization; and
 - viii. a statement that information used or disclosed pursuant to the authorization may be subject to re-disclosure by the recipient and no longer protected by 45 C.F.R. § 164.
- E. In the event that the authorization is signed by a personal representative of the individual, the authorization will contain a description of the representative's authority to act for the individual.

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- F. WVUPC will invalidate the authorization if:
- i. the expiration date has passed or the expiration event is known by WVUPC to have occurred;
 - ii. any material information in the authorization is known by WVUPC to be false; and
 - iii. the authorization has not been filled out completely.
- G. WVUPC will document and retain the signed authorization for a period of at least six years from the date of its creation or the date when it was last in effect, whichever is later.

II. Requests for disclosures of mental health records

1. Under West Virginia law, mental health information may be disclosed to a third party only with the patient's written authorization, or under the following circumstances:

- A. in an involuntary commitment proceeding to disclose the results of an involuntary examination;
- B. in a proceeding to determine the competency of a person to stand trial in a criminal case in order to disclose the results of an involuntary examination;
- C. pursuant to a **court order** (not merely a subpoena), based upon a finding by the court that the information is sufficiently relevant to a proceeding before the court to outweigh the importance of maintaining its confidentiality. A subpoena is not the type of binding court order required by the governing statute, W. Va. Code §27-3-1.
- D. to protect against a clear and substantial danger of imminent injury by a patient or client to himself or another; and
- E. for treatment or internal review purposes, to staff of the mental health facility where the patient is being cared for or to other health professionals involved in the treatment of the patient.

2. Neither HIPAA nor West Virginia law afford the individual the right of access to psychotherapy notes.

3. Any questions which arise regarding the proper application of this policy to uses or disclosures of psychotherapy notes and/or mental

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health records generally shall be directed to the WVUPC Privacy Officer and/or General Counsel.

REFERENCES:

45 C.F.R. §164.508; 45 C.F.R. §164.502; 45 C.F.R. §164.512.

W. Va. Code §27-3-1; *Allen v. Smith*, 368 S.E.2d 924 (W. Va. 1988)

**WVU Physicians of Charleston
HIPAA Policies and Procedures**

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