

**Polk County Wisconsin
USE AND DISCLOSURE OF PSYCHOTHERAPY NOTES**

Policy 601.B

Effective Date: April 15, 2003

Current Revision Date:

Purpose

To ensure that Polk County employees understand when and how they can release psychotherapy notes and mental health treatment records to requesting parties.

Definition

Under the Privacy Rule of the Health Insurance Portability and Accountability Act (HIPAA), *psychotherapy notes* means 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 counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record. ¹

Psychotherapy notes exclude 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.

Background

HIPAA and state law differ with respect to releasing mental health information. HIPAA concentrates on psychotherapy notes, which is a more narrow focus than Wisconsin law, which addresses mental health treatment records. Under Wis. Stat. § 51.30(1)(b), "treatment records" do not include notes or records maintained for personal use by an individual providing treatment services for the state, county or treatment facilities if such notes are not available to others. HIPAA defines "psychotherapy notes" as described above. There is no mention about those notes being available to others, though if the notes are separate from the medical record, one might assume that HIPAA's definition of psychotherapy notes is similar to the notes described in, and excluded from, Wisconsin's definition of treatment records.

Consequently, one could assume that Wisconsin law does not cover psychotherapy notes, and when it comes to those notes, providers should follow HIPAA guidelines for disclosure. Other information contained in a person's mental health treatment record would be subject to state law under Wis. Stat. § 51.30, which requires providers to get a client's written informed consent except in limited circumstances. Providers should consult Wis. Stat. § 51.30(4)(b) to learn about those limited circumstances.

¹ 45 CFR 164.501 (2000).

Policy

- A. **Client access to psychotherapy notes.** Even though the client has a right to access most health information, the client does not have a right to access psychotherapy notes. Therefore, Polk County is not required to fulfill a client's request for access to psychotherapy notes.² However, Polk County should inform the client of this limitation on access if the request will not be fulfilled.
- B. **Client authorization required.** In most circumstances, Polk County's employees must obtain a client's written authorization for any use or disclosure of psychotherapy notes. Polk County is not required, however, to disclose any health information, including psychotherapy notes, pursuant to an authorization. Especially with on-going authorizations, if there is a concern that a request for disclosure is unnecessary or excessive, Polk County may ask the client if the authorization for disclosure is consistent with his or her wishes.

For specific requirements of authorizations involving psychotherapy notes, see Polk County's policy "Policy On Client Authorizations."

- C. **Client authorization *not* required.** Polk County is not required to obtain an authorization for the following uses or disclosures of psychotherapy notes:
1. To carry out the following treatment, payment or health care operations:
 - a. Use by the originator of the psychotherapy notes for treatment;
 - b. Use by Polk County for our own 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; or
 - c. Use by Polk County to defend us in a legal action or other proceeding brought by the client.
 2. To respond to the federal Department of Health and Human Services to determine Polk County's compliance with HIPAA privacy rules;
 3. To comply with the law;
 4. To assist in oversight of the originator of the psychotherapy notes;
 5. To help coroners/medical examiners in the examination of deceased persons;
 6. To address serious public health or safety concerns. Special restrictions apply to disclosures made to law enforcement to identify or apprehend an individual who has admitted participation in a crime that Polk County reasonably believes may have caused serious harm to the victim. Specifically, Polk County may not disclose health information, including psychotherapy notes, if Polk County learned of the individual's participation when he or she requested or received treatment, counseling or therapy to affect the propensity to commit such a crime.³

² See Preemption Section above regarding client access to psychotherapy notes under Wisconsin law.
³ 45 CFR 164.512(j)(2)(i) & (ii) (2000).

State Preemption Issues: Section 51.30 Wis. Stats. covers disclosure of and access to “treatment records,” which are records concerning individuals who are receiving or have received services for mental health or substance issues. However, under section 51.30(1)(b), treatment records do not include notes or records maintained for personal use by a treatment provider if they are not available to others. Therefore, section 51.30(1)(b) could be interpreted as excluding psychotherapy notes from the treatment record. If so, then under Wisconsin law psychotherapy notes are never subject to disclosure, not even to the individual. However, if section 51.30 is read to include psychotherapy notes in the treatment record, the individual has a limited right to access that information. (Sections 51.30(4)(d)1. and 2. provide for an individual’s access to the treatment record subject to restrictions.) However, regarding disclosures of psychotherapy notes, HIPAA would preempt much of section 51.30 because HIPAA is generally more stringent regarding such disclosures without authorization (or without informed consent under section 51.30). In addition, HIPAA “authorization” requirements are more stringent and comprehensive than Wisconsin’s “informed consent” requirements in section 51.30(2).

However, there are instances where Wisconsin law is more stringent. For example, Wisconsin law requires a court order to disclose records without informed consent (s. 51.30(4)(b)4.), while HIPAA would allow disclosure without authorization if it were pursuant to subpoena or certain discovery requests (s. 164.512(e).) HIPAA defers to state law in section 164.512(a)(1), which permits disclosure of health information where required by law. HIPAA also defers to state law that is more stringent. (s. 160.203(b).)

References

45 CFR § 164.508(a)(2) (2002)
45 CFR § 164.512 (2002)
45 CFR § 164.501 (2000)
Wis. Stat. § 51.30 (2000)
Federal Register, Volume 67, Number 157

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