

# Command-Directed Mental Health Evaluations: A Simplified Process

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## I. Background

Recent changes to both federal law and Department of Defense (DoD) policy have streamlined the procedures associated with command-directed mental health evaluations (CDMHEs).<sup>1</sup> These changes remove many of the due process requirements necessary to effectuate these evaluations and greatly enhance commanders' ability to compel treatment for their most vulnerable Soldiers.<sup>2</sup> Although these changes diminish many of the protections designed to prevent perceived abuses associated with the CDMHE process, they promote efficiency and safety in an environment plagued by violence associated with the military.<sup>3</sup>

The policy concerning CDMHEs historically involved a balancing between two competing, but equally important, interests.<sup>4</sup> The policy sought to balance the commander's need to protect his Soldiers with the individual Soldier's right to engage in whistleblowing activities without fear of reprisal.<sup>5</sup> The 1997 policy on CDMHEs weighed much more heavily toward protecting the individual Soldier's interest by implementing a series of procedural safeguards necessary to effectuate a CDMHE.<sup>6</sup> However, by 2012, the social and political environment necessitated a reconsideration of this balance.<sup>7</sup>

## II. The Old Rule

The DoD's policy regarding CDMHEs remained relatively unchanged for over sixteen years. It was governed by both DoD Directive (DoDD) 6490.1 and DoD Instruction (DoDI) 6490.4.<sup>8</sup> These policy instruments implemented Section 546 of the National Defense Authorization Act (NDAA) of 1993, which mandated a series of notice requirements associated with CDMHEs.<sup>9</sup> For *non-emergency*

*referrals*, a commander was required to provide a servicemember (SM) written notice of his "rights" prior to any involuntary examination.<sup>10</sup> These rights included the following: (1) the right to consult with an attorney; (2) the right to consult with the inspector general (IG); (3) the right to also be evaluated by a mental health professional of the Soldier's choosing (if a non-DoD professional, at the Soldier's own expense); (4) the right to unrestricted communication with an IG, attorney, member of Congress, or others about the member's referral for a mental health evaluation; and (5) the right to at least two business days before a scheduled mental health evaluation to meet with an attorney, IG, chaplain, or other appropriate party.<sup>11</sup> The commander was also required to consult with a mental health professional prior to any referral, provide the SM a memorandum explaining the reasons for the referral with information on the mental health provider, and provide a formal written request to the servicing military treatment facility requesting the mental health evaluation.<sup>12</sup>

For situations calling for *emergency referrals*, DoD policy shifted toward the safety of the SM. If the SM was deemed imminently or potentially dangerous to himself or others, the commander was required to take immediate physical control of the SM through the use of command escorts or military police and transport the Soldier to mental health services or the emergency room for treatment.<sup>13</sup> However, the commander was required to make every effort to consult with a mental health professional prior to this emergency referral.<sup>14</sup> Following these immediate steps, the commander was then required to complete a memorandum to the SM explaining the facts necessitating the command referral and notify the SM of his rights.<sup>15</sup> Further, the commander was required to provide the Military Treatment Facility (MTF) a written synopsis of the observations and

<sup>1</sup> See National Defense Authorization Act (NDAA) for Fiscal Year 2012, Pub. L. No. 112-81, § 711(b) (2012) [hereinafter 2012 NDAA, § 711(b)]; U.S. DEP'T OF DEF., INSTR. 6490.04 Mental Health Evaluations of Members of the Military Services (4 Mar. 2013) [hereinafter DoDI 6490.04].

<sup>2</sup> See DoDI 6490.04, *supra* note 1, para. 3.

<sup>3</sup> See, e.g., Bill Mears, *Fort Hood Shooting Jury Recommends Death Penalty For Nidal Hasan*, CNN (Aug. 29, 2013), <http://www.cnn.com/2013/08/28/us/nidal-hasan-sentencing/>; Jim Sciutto et al., *Washington Navy Yard: Police Say All Clear After Lockdown*, CNN (July 2, 2015), <http://www.cnn.com/2015/07/02/politics/navy-yard-shooting-lockdown-police-activity/>.

<sup>4</sup> See DEP'T OF DEF., DIR. 6490.1 Mental Health Evaluations of Members of the Armed Forces (1 Oct. 1997) [hereinafter DoDD 6490.1].

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* para. 4.3.

<sup>7</sup> See *A History of Shootings at Military Installations in the U.S.*, NBCWASHINGTON.COM (Sep. 16, 2013),

<http://www.nbcwashington.com/news/local/A-History-of-Shootings-at-Military-Installations-in-the-US-223933651.html>.

<sup>8</sup> See DoDD 6490.1, *supra* note 4; DEP'T OF DEF., INSTR. 6490.4 Requirements for Mental Health Evaluations of Members of the Armed Forces (28 Aug. 1997) [hereinafter 1997 DoDI 6490.4].

<sup>9</sup> See National Defense Authorization Act (NDAA) for Fiscal Year 1993, Pub. L. No. 102-484, § 546 (1993) [hereinafter 1993 NDAA].

<sup>10</sup> *Id.*

<sup>11</sup> See 1997 DoDI 6490.4, *supra* note 8, encl. 4.

<sup>12</sup> *Id.* para. 6.1.1.2.

<sup>13</sup> *Id.* para. 6.1.1.5.

<sup>14</sup> *Id.* para. 6.1.1.5.2.

<sup>15</sup> *Id.* para. 6.1.1.5.4. These are the same rights provided for non-emergency command referrals. *Id.*

circumstances precipitating the referral.<sup>16</sup> Therefore, even in emergency situations, DoD policy provided mechanisms by which Soldiers could challenge their CDMHEs, albeit after being seen by a physician, in order to discourage any attempted use of these evaluations for the purpose of reprisal.<sup>17</sup>

### III. New Rule

Section 711(b) of the 2012 NDAA repealed the procedural protections associated with CDMHEs.<sup>18</sup> Section 711(b) is codified at 10 U.S.C. § 1090a.<sup>19</sup> This provision retains the express language prohibiting the use of CDMHEs as retaliation against military whistleblowers.<sup>20</sup> However, it removes the statutory authorization for the extensive due process requirements found in DoDD 6490.1 and DoDI 6490.4.<sup>21</sup> Therefore, simultaneously with the codification of section 711(b), DoDI 6490.04 was updated to expressly state that CDMHEs have “the same status as any other military order”<sup>22</sup> and therefore require no additional steps for their lawful compliance.

The DoDI 6490.04 incorporates and cancels DoDD 6490.1, and implements the statutory changes embodied in section 711(b) of the 2012 NDAA.<sup>23</sup> The procedural requirements for non-emergency CDMHEs found in DoDI 6490.04 are greatly simplified to encourage their use.<sup>24</sup> The commander now has three basic responsibilities: (1) he must advise the SM that there is no stigma associated with obtaining mental health services; (2) refer the SM to a mental health provider, providing both the name and contact information; and (3) tell the SM the date, time, and place of the examination.<sup>25</sup> This is all the new process requires.<sup>26</sup> The commander is no longer required to provide written requests for examinations and formal notifications of rights.<sup>27</sup>

The process associated with emergency CDMHEs has also changed. Once the SM is escorted to the mental health provider, the commander is no longer required to follow up with a written notification to the SM.<sup>28</sup> However, commanders are still required to report the circumstances and observations that led to the referral to the MTF either prior to or en route to the emergency evaluation.<sup>29</sup>

### IV. Conclusion

The new policy embodied in DoDI 6490.04 has dramatically reduced the procedural requirements associated with CDMHEs.<sup>30</sup> This reduction has changed the dynamic associated with CDMHEs from adverse proceedings requiring a formal notification of SM rights to procedures primarily concerned with safety and efficiency.<sup>31</sup> The current policy continues to prohibit the use of CDMHEs as retaliatory measures associated with military whistleblowers.<sup>32</sup> However, it clearly places more trust in commanders to use these important evaluations to save lives, not stifle dissent.

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<sup>16</sup> *Id.* para. 6.1.1.5.5.

<sup>17</sup> *Id.* para. 6.1.2.

<sup>18</sup> *See* 2012 NDAA, § 711(b), *supra* note 1.

<sup>19</sup> *See* 10 U.S.C. § 1090a (2015).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *See* DoDI 6490.04, *supra* note 1, para 3(b) (2013).

<sup>23</sup> *Id.* para. 1(c).

<sup>24</sup> *Id.* encl. 3.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* para. 2(c).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* para. 3(e).