

Military Mental Health Evaluations, Treatment and Hospitalization

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I. Introduction.

Concerned over the lack of procedural safeguards afforded to service members referred for mental health evaluations, treatment or hospitalization, Congress passed the Military Mental Health Evaluation Protection Act² (MMHEPA). The MMHEPA attempts to balance command authority with new due process rights for service members by requiring commanders and mental health care providers (MHCPs) to comply with several procedural requirements before subjecting service members to mental health evaluations, treatment or hospitalization. The MMHEPA's purpose is to protect service members from unwarranted mental health evaluations, treatment and hospitalization. To ensure compliance, Congress has made certain violations of the MMHEPA punitive,³ and DoD has mandated that all DoD personnel, particularly commanders and MHCPs, receive training on the MMHEPA.⁴

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²National Defense Authorization Act of 1993, Pub. L. No. 102-484, § 546, 106 Stat. 2315, 2416-19 (1992) (certain provisions codified at 10 U.S.C. § 1074). The origins of the MMHEPA trace back to the 1987-88 Congressional hearings on military whistleblower legislation. See *Whistleblower Protection in the Military, 1987-88: Hearings on H.R. 1394 Before the Acquisition Policy Panel of the House Comm. on Armed Services, 100th Cong., page 2-95 (1988)* [hereinafter *Hearings on H.R. 1394*]. For a detailed summary of the Congressional hearings, see also Major Daniel A. Lauretano, *The Military Whistleblower Protection Act and The Military Mental Health Evaluation Protection Act*, ARMY LAW., (Oct, 1998), at 1-8 [hereinafter Lauretano].

³See 10 U.S.C.A. § 1034(f)(6) (West 1998); and National Defense Authorization Act of 1993, § 546(f). Commanders face punitive consequences if they refer service members for a mental health evaluation, treatment or hospitalization in reprisal for the service member blowing the whistle on fraud, waste, abuse, etc. See U.S. DEP'T OF DEFENSE, DIR. 7050.6, MILITARY WHISTLEBLOWER PROTECTION, para. E.3.d (12 Aug. 1995) [hereinafter DoD Dir. 7050.6].

⁴U.S. DEP'T OF DEFENSE, DIR. 6490.1, MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES, paras. A.2, E.3 (1 Oct. 1997) [hereinafter DoD Dir. 6490.1]. The U.S. Army Medical Command is in the process of finalizing a draft regulation to serve as interim guidance for mental health care providers attempting to comply with DoD Dir 6490.1 and DoD Instruction 6490.4. See U.S. ARMY MEDICAL COMMAND, REG.40-38, MEDICAL SERVICES: COMMAND-DIRECTED MENTAL HEALTH EVALUATIONS (1 June 1999)(hereinafter USAMEDCOM REG. 40-38).

II. The Military Mental Health Evaluation Protection Act.

A. Current Law.

If a commander makes a discretionary⁵ mental health evaluation referral, the MMHEPA requires that commander to notify the service member of the referral and of several rights.⁶ This process must occur before a MHCP performs the mental health evaluation.⁷ The MMHEPA also places additional requirements on commanders making referrals for emergency evaluation, treatment, and involuntary hospitalization of service members.⁸ Finally, the MMHEPA makes punitive any mental health referral made against a military whistleblower in reprisal.⁹

The MMHEPA applies to all active duty and reserve¹⁰ service members in the Army, Navy, Air Force, and Marine Corps.¹¹ The MMHEPA also applies to all active and reserve service members in the Coast Guard when operating under the Navy.¹²

The DoD Directive implementing the MMHEPA exempts all non-discretionary referrals from the procedural requirements of the MMHEPA,¹³ and only requires commanders to apply its procedural requirements to referrals made as part of their "discretionary authority."¹⁴ The DoD Directive exempts several categories of

⁵See *infra*, note 14.

⁶National Defense Authorization Act of 1993, at § 546(b).

⁷*Id.*

⁸*Id.* at § 546(d).

⁹*Id.* at § 546(f). For a detailed analysis on the punitive aspects of referring a soldier to a mental health evaluation in reprisal for whistleblowing, see Lauretano, at 8-10.

¹⁰U.S. DEP'T OF DEFENSE, INSTR. 6490.4, REQUIREMENTS FOR MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES, 2-3 (28 Aug. 1997) [hereinafter DoD Instr. 6490.4]. Although the DoD Instruction does not include members of the National Guard within its definition of "members," the MMHEPA's broad definition would likely include them.

¹¹National Defense Authorization Act of 1993, § 546(g)(1).

¹²DoD Instr. 6490.4, *supra* note 10, at 2-3.

¹³DoD Dir. 6490.1, *supra* note 4, para. D.3.

¹⁴*Id.* Referrals made as part of the commander's discretionary authority must comply with the MMHEPA and DoD procedural requirements. DoD Dir. 6490.1, *supra* note 4, para. D.3.e. See also Message, 080700Z Mar 96, Headquarters, Dep't of Army, DAPE-HR-L, subject: Mental Health Evaluations (Clarification) (ALARACT 21/96) (8 Mar. 1996), para. 6 [hereinafter ALARACT 21/96]; and USAMEDCOM REG. 40-38, paragraph. 5b and c.

There are several optional but routinely directed mental health evaluations that a commander may order as part of his or her discretionary authority in accordance with (IAW) Army Regulation 635-200. They include: parenthood IAW paras. 1-34b and 5-8; alien not lawfully admitted IAW paras. 1-

mental health referrals from its procedural requirements.¹⁵ They are: "voluntary self-referrals;" criminal responsibility and competency inquiries;¹⁶ referrals to family advocacy programs;¹⁷ referrals to drug and alcohol abuse rehabilitation programs;¹⁸ referrals for evaluations expressly required by regulation without any discretion on the commander's part; evaluations made as part of special duties or occupational classification; and diagnostic referrals from other health care providers not part of the soldier's chain of command when the soldier consents to the

34b and 5-10; concealing arrest record IAW paras. 1-34b and 5-14; flight training disqualification IAW paras. 1-34b and 5-12; separations IAW paras. 1-34b, 5-16 and 5-17; dependency or hardship IAW para. 1-34b and Chapter 6; defective enlistments, reenlistments and extensions IAW para. 1-34b and Chapter 7; pregnancy IAW para. 1-34b and Chapter 8; entry level separation IAW para. 1-34b and Chapter 11; conviction by civil court IAW paras. 1-34b and 14-5b, and Chapter 14, section II; and failure of body fat standards IAW para. 1-34b and Chapter 18. U.S. DEP'T OF ARMY, REG 635-200, PERSONNEL SEPARATIONS--ENLISTED PERSONNEL, para. 5-13 (30 Mar. 1988) (C15, 26 Jun. 1996) [hereinafter AR 635-200]. Although para 1-34b requires commanders to refer soldiers for mental health evaluations when processing them for elimination for personality disorder under para. 5-13, or "other designated physical or mental conditions" under 5-18, to the extent that a commander refers a soldier to an MHCP to determine whether the soldier has a personality disorder, a para. 5-13 or 5-18 referral is discretionary. As a consequence, commanders must comply with the DoD and MMHEPA procedural requirements prior to the para. 5-13 or 5-18 referral. *Id.* See also DoD Dir. 6490.1, *supra* note 4, para. D.3.e; and USAMEDCOM REG. 40-38, paragraph. 6c(6).

Telephone interview with Commander Mark Paris, Office of the Assistant Secretary of Defense for Health Affairs, Department of Defense, Washington, D.C. (24 February 1998) [hereinafter Paris Interview]. Commander Paris, the DoD action officer for mental health evaluation issues, opined that any referral that allows the commander to exercise discretion requires compliance with the MMHEPA and the DoD procedural requirements. *Id.*

¹⁵DoD Dir. 6490.1, *supra* note 4, para. D.3.e. See also ALARACT 21/96, *supra* note 14, para. 6.

¹⁶If a commander, investigating officer, trial or defense counsel believes that the accused service member lacks either the mental capacity or mental responsibility for trial by courts-martial, such person may request that the service member undergo a mental inquiry. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 706 (a) and (b) (1995).

¹⁷Family advocacy interviews involve medical assessments and treatment of family members. See U.S. DEP'T OF DEFENSE, DIR. 6400.1, FAMILY ADVOCACY PROGRAM, 6.1 (23 Jun. 1992). See also U.S. DEP'T OF ARMY, REG 608-18, FAMILY ADVOCACY PROGRAM, paras. 3-27 to 3-30 (26 Oct. 1995).

¹⁸DoD Dir. 6490.1, *supra* note 4, para. D.3.e. See also ALARACT 21/96, *supra* note 14, para. 6. Drug and alcohol abuse interviews normally take place during the "intake procedures." Intake procedures require a mental health evaluation to determine the service member's need for "detoxification and potential for rehabilitation." See U.S. DEP'T OF DEFENSE, DIR. 1010.4, DRUG AND ALCOHOL ABUSE BY DOD PERSONNEL, E.3.b(2)(a) (3 Sep. 1997); and U.S. DEP'T OF DEFENSE, INSTR. 1010.6, REHABILITATION REFERRAL SERVICES FOR ALCOHOL AND DRUG ABUSERS (13 Mar. 1985). See also U.S. DEP'T OF ARMY, REG 600-85, ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM, para. 3-10 (21 Oct. 1988).

evaluation.¹⁹ The Army has also exempted the above listed evaluations.²⁰

B. Commanders' Responsibilities Involving Non-Emergency Outpatient and Inpatient Evaluations.

Before referring service members to a MHCP for a non-emergency outpatient mental health evaluation or treatment, commanders must consult²¹ with a MHCP²² or equivalent.²³ Although the extent of the consultation requirement is unclear under the MMHEPA, the DoD requires commanders to discuss with the MHCP the service member's "actions and behaviors" that caused the commander to make the referral.²⁴ Further, a commander must consider the MHCP's "advice and recommendations" before actually initiating the referral.²⁵

After consulting with a MHCP, a commander must provide written notice of the referral to the service member at least two business days before making a non-emergency referral.²⁶ This

¹⁹Evaluations made as part of "special duties or occupational classifications" include security clearance evaluations, recruiter evaluations, and evaluations for soldiers entering the personnel reliability program. DoD Dir. 6490.1, *supra* note 4, para. D.3.e. See also ALARACT 21/96, *supra* note 14, para. 6.

²⁰ALARACT 21/96, *supra* note 14, para. 6. See also USAMEDCOM REG. 40-38, paragraph. 5c.

²¹National Defense Authorization Act of 1993, Pub. L. No. 102-484, §546(b)(1), 106 Stat. 2315, 2416-17 (1992).

²²The MMHEPA uses the term "mental health professional," which it defines as "a psychiatrist, clinical psychologist, a person with a doctorate in clinical social work, or a psychiatric clinical nurse specialist." National Defense Authorization Act of 1993, § 546(g)(3). The DoD follows the MMHEPA's definition but labels "mental health professionals" as "mental health care providers." DoD Dir. 6490.1, *supra* note 4, at 2-2. See also DoD Instr. 6490.4, *supra* note 10, at 2-2. For purposes of clarity, this article will use the term "mental health care provider" (MHCP) throughout its text.

²³The DoD Instruction requires commanders to first consult with an MHCP before the referral. If no MHCP is available, then the commander may consult with a physician or the "senior privileged non-physician provider present." DoD Dir. 6490.1, *supra* note 4, at D.2.b; and DoD Instr. 6490.4, *supra* note 10, at F.1.a(2). The DoD indicates that what is meant by the phrase "senior privileged non-physician provider present" is "in the absence of a physician, the most experienced and trained health care provider who holds privileges to evaluate and treat patients, such as clinical social workers, a nurse practitioner, an independent duty corpsman, etc." DoD Dir. 6490.1, *supra* note 4, at 2-2; and DoD Instr.

6490.4, *supra* note 10, at 2-2. See also USAMEDCOM REG. 40-38, paragraph 8a. For an excellent summary of the commander's responsibilities under the MMHEPA, and DoD Directive and Instruction, see Major Christopher M. Garcia, Administrative Law Note, *Mental Health Evaluations*, ARMY LAW., December 1997, at 32-34.

²⁴DoD Instr. 6490.4, *supra* note 10, at F.1.a(2).

²⁵*Id.*

²⁶*Id.* at F.1.a(4).

written notice must include the date, time, place, and name of the MHCP who will perform the evaluation.²⁷ The notice must include the commander's reasons for the referral and the name of the MHCP that the commander consulted before making the referral.²⁸ The notice must include, if applicable, an explanation of the reason why the commander was unable to consult with a MHCP prior to making the referral.²⁹ The notice must also inform the service member of the names and telephone numbers of local sources of assistance (e.g., IG, JAG, chaplain, etc.) who can assist the service member challenge the referral.³⁰

A commander must also notify a referred service member of several non-waivable rights.³¹ First, a commander must notify the referred service members of the right to speak to an attorney at least two business days before the scheduled evaluation.³² Second, a commander must notify a referred service member of the right to speak to and file a complaint with the IG if the service member believes that the referral was improper.³³ Third, a commander must notify a referred service member of the right to have, at their expense, an independent MHCP evaluate them.³⁴ Finally, a commander must notify a referred service member of the right to communicate with Congress or an IG about the referral.³⁵ After the commander and the service member sign the memorandum,

²⁷National Defense Authorization Act of 1993, Pub. L. No. 102-484, § 546(b)(3)(A), 106 Stat. 2315, 2416 (1992). See also DoD Instr. 6490.4, *supra* note 10, at F.1.a(4)(a)(4).

²⁸National Defense Authorization Act of 1993, § 546(b)(3)(B) and (C). See also DoD Instr. 6490.4, *supra* note 10, at F.1.a(4)(a)1 and 2.

²⁹National Defense Authorization Act of 1993, § 546(b)(3)(C). See also DoD Instr. 6490.4, *supra* note 10, at F.1.a(4)(a)2.

³⁰National Defense Authorization Act of 1993, § 546(b)(3)(D). See also DoD Instr. 6490.4, *supra* note 10, at F.1.a(4)(a)5. For sample form memoranda see USAMEDCOM REG. 40-38, Appendix A through I, and Lauretano at 26-27.

³¹DoD Instr. 6490.4, *supra* note 10, at F.1.a(4)(d) provides, "Commanding officers shall not offer service members an opportunity to waive his or her right to receive the written memorandum and statement of rights"

³²"Upon the request of the member, an attorney who is a member of the Armed Forces or employed by the Department of Defense and who is designated to provide advice under this section shall advise the member of the ways in which the member may seek redress under this section." National Defense Authorization Act of 1993, § 546(c)(a)(1). See also DoD Instr. 6490.4, *supra* note 10, at enclosure 4.

³³National Defense Authorization Act of 1993, Pub. L. No. 102-484, §546(c)(a)(2), 106 Stat. 2315, 2416 (1992). See also DoD Instr. 6490.4, *supra* note 10, at enclosure 4.

³⁴National Defense Authorization Act of 1993, Pub. L. No. 102-484, §546(c)(a)(3), 106 Stat. 2315, 2416 (1992). See also DoD Instr. 6490.4, *supra* note 10, at enclosure 4.

³⁵National Defense Authorization Act of 1993, § 546(c)(a)(4)(A). See also DoD Instr. 6490.4, *supra* note 10, at enclosure 4.

the commander must provide the service member with a copy of the memorandum.³⁶

After complying with the consultation and notice requirements, a commander must request the mental health evaluation in writing.³⁷ The MMHEPA authorizes the inpatient admission and evaluation of a service member only when an outpatient evaluation would be inappropriate pursuant to the "least restrictive alternative principle,"³⁸ and a "qualified professional"³⁹ makes the admission.⁴⁰

After receiving the MHCP's recommendations concerning the service member's evaluation, a commander must document any action taken and the rationale behind it.⁴¹ For example, if a commander elects to retain the service member despite the MHCP's recommendation to separate, the commander must document his or her reasons for retaining the service member,⁴² and then forward a memorandum to his or her superior explaining the decision to retain within two business days after receiving the MHCP's recommendation.⁴³

³⁶National Defense Authorization Act of 1993, § 546(b)(3)(F). See also DoD Instr. 6490.4, *supra* note 10, at F.1.a(4)(a)(6). For sample form memoranda see USAMEDCOM REG. 40-38, Appendix A through I, and Lauretano at 26-27.

³⁷DoD Instr. 6490.4, *supra* note 10, para. F.1.a(3). For sample form memoranda see USAMEDCOM REG. 40-38, Appendix A through I, and Lauretano at 28.

³⁸The MMHEPA defines the "least restrictive alternative principle" as:
A principle under which a member of the Armed Forces committed for hospitalization and treatment shall be placed in the most appropriate therapeutic available setting (A) that is no more restrictive than is conducive to the most effective form of treatment, and (B) in which treatment is available and the risks of physical injury or property damage posed by such personnel are warranted by the proposed plan of treatment.

National Defense Authorization Act of 1993, Pub. L. No. 102-484, §546(g)(5), 106 Stat. 2315, 2419 (1992). The DoD Directive expands this definition to include, "such treatments form a continuum of care including no treatment, outpatient treatment, partial hospitalization, residential treatment, inpatient treatment, involuntary hospitalization, seclusion, bodily restraint, and pharmacotherapy, as clinically indicated." DoD Dir. 6490.1, *supra* note 4, at 2-1. See also DoD Instr. 6490.4, *supra* note 10, at 2-1.

³⁹"A qualified professional is a psychiatrist, or when one is not available, a mental health professional or a physician." National Defense Authorization Act of 1993, § 546(b)(2)(B).

⁴⁰*Id.* at § 546(b)(2).

⁴¹DoD Dir. 6490.1, *supra* note 4, para. D.8.

⁴²*Id.*

⁴³*Id.* at para. D.8.b.

C. Commanders' Responsibilities Involving Emergency Evaluations.

Commanders must make a "clear and reasoned judgment"⁴⁴ before making an emergency referral.⁴⁵ The "clear and reasoned judgment" standard requires commanders to carefully consider the facts and circumstances of each case before making an emergency referral.⁴⁶ In addition, a commander may only make an emergency referral if there is no time to comply with all of the MMHEPA procedural requirements before the referral.⁴⁷ An example of a proper emergency referral is one made after a commander discovers that one of his or her service members is about to seriously injure another.⁴⁸ Another example is one made for a service member that is unable to take care of himself or herself (e.g., fails to eat or drink, or "defecates or urinates in inappropriate places").⁴⁹

Even if an emergency referral is proper, commanders must still "make every effort to consult" with a MHCP prior to the referral.⁵⁰ When consulting with a MHCPs, a commander must explain why he or she believes that an emergency referral is appropriate.⁵¹ The commanders must also consider the MHCP's advice and recommendations prior to actually making the emergency referral.⁵² If prior consultation with a MHCP is impossible, the commander must consult with a MHCP at the location of the service member's evaluation.⁵³ After consulting with the MHCP, the commander must document the contents of the consultation, including the reasons for the referral.⁵⁴ The commander must then forward a copy of this memorandum to the MHCP.⁵⁵ If the commander is unable to consult with a MHCP prior to or at the location of the evaluation, the commander must document the reasons for the emergency referral and immediately forward a copy

⁴⁴DoD Instr. 6490.4, *supra* note 10, para. F.1.a(5)(a).

⁴⁵*See id.* at 2-1, for a detailed definition of the term "emergency." *See also* DoD Dir. 6490.1, *supra* note 4, at 2-1.

⁴⁶DoD Instr. 6490.4, *supra* note 10, para. F.1.a(5)(a).

⁴⁷*Id.*

⁴⁸*Id.* at 2-1.

⁴⁹*Id.*

⁵⁰*Id.* at para. F.1.a.(5)(b). Neither the MMHEPA nor the DoD Directive and Instruction specify whether the consultation must be face-to-face. If the commander is unable to consult in person, there is nothing prohibiting the commander from consulting with the MHCP by phone. *See also* USAMEDCOM REG. 40-38, para. 8b(2).

⁵¹DoD Dir. 6490.1, *supra* note 4, para. D.2.c.

⁵²*Id.*

⁵³*Id.*

⁵⁴*Id.*

⁵⁵*Id.* For sample form memoranda *see* USAMEDCOM REG. 40-38, Appendix A through I, and Lauretano at 29-30.

to the MHCP.⁵⁶ In addition, the commander must, as soon as possible, provide the referred service member with the same referral and rights notice required for non-emergency evaluations outlined above.⁵⁷ If a MHCP elects to involuntarily hospitalize a service member, the commander must further inform the service member of the "reasons for and the likely consequences of the admission."⁵⁸ Finally, the commander must advise the service members of the right to contact "a family member, friend, chaplain, attorney, or IG."⁵⁹

D. Commanders' Affirmative Duty to Refer Soldiers.

Whenever a commander believes that a service member is "likely" to harm himself or herself, or others, and is suffering from a "severe mental disorder,"⁶⁰ the commander must refer the service member for an emergency evaluation.⁶¹ Despite the affirmative duty to refer, the commander must still comply with the consultation and notice requirements outlined above for emergency referrals.⁶²

E. Mental Health Care Provider Responsibilities.

1. Ensure Compliance with Procedural Requirements.

Before MHCPs perform non-emergency mental health evaluations on service members, they must ensure that commanders have complied with the consultation, notice, and formal request requirements outlined above.⁶³ If, after reviewing the referral, a MHCP suspects that a referral is improper, the MHCP must first

⁵⁶For a sample memorandum commanders may use, see Lauretano at 29-30. See also USAMEDCOM REG 40-38, APPENDIX A THROUGH I, for sample form memoranda. According to Mr. Herb Harvell, the DoD official responsible for drafting the DoD Directive and DoD Instruction, in those *limited circumstances* where the commander is unable to consult with a MHCP prior to or at the location of the evaluation, a memorandum detailing the commander's reasons for the emergency referral would suffice. The commander must still send the memorandum to the MHCP by "facsimile, overnight mail or courier." Telephone interview with Mr. Herb Harvell, Office of Special Inquiries, Department of Defense Inspector General's Office, Washington, D.C.

(2 February 1998) [hereinafter Harvell Interview II].

⁵⁷*Id.* at para. F.1.a(5)(d). For sample form memoranda see USAMEDCOM REG. 40-38, Appendix A through I, and Lauretano at 31-32.

⁵⁸DoD Dir. 6490.1, *supra* note 4, para. F.2.b(1).

⁵⁹*Id.* at para. F.2.b(2).

⁶⁰See *id.* at 2-1, for a detailed definition of the term "mental disorder."

⁶¹DoD Dir. 6490.1, *supra* note 4, para. D.2.c(1).

⁶²DoD Instr. 6490.4, *supra* note 10, para. F.1.a(5)(d).

⁶³DoD Instr. 6490.4, *supra* note 10, para. F.1.c(1). For sample form memoranda see USAMEDCOM REG. 40-38, Appendix A through I, and Lauretano at 26-28.

"confer"⁶⁴ with the commander and clarify issues about the process and procedures used in referring the service member.⁶⁵ If, after conferring with the commander, the MHCP believes that the mental health evaluation referral may have been improper (e.g., done as a reprisal, failed to consult with a MHCP, etc.), the MHCP must report the suspected violation through his or her chain of command to the referring commander's superior.⁶⁶ In the event of an emergency referral, a MHCP must ensure that the commander first consulted with a MHCP prior to the referral.⁶⁷ In addition, the MHCP must review the commander's documented reasons for the referral.⁶⁸

2. Advice and Recommendations to Service Members and Commanders.

Once a MHCP determines that a commander has complied with all procedural requirements, he or she must, prior to the evaluation, inform the service member of the "purpose, nature, and likely consequences" of the evaluation.⁶⁹ In addition, the MHCP must also inform the service member that the evaluation is not confidential.⁷⁰ Soon after completing the evaluation, the MHCP must also advise the service member's commander of the results and recommendations.⁷¹

3. Involuntary Hospitalization.

If a MHCP decides to involuntarily hospitalize a service member, the MHCP must first notify the service member "orally and

⁶⁴It does not appear the DoD considered how this "confer" requirement should interact with the suspect rights advisement requirement of UCMJ art. 31(b) (West 1997). Judge advocates should instruct MHCPs to consult their legal advisor before questioning a commander suspected of violating the Uniform Code of Military Justice (e.g., referral of a soldier in reprisal for making a protected communication).

⁶⁵DoD Instr. 6490.4, *supra* note 10, para. F.1.c(2).

⁶⁶*Id.* Soldiers have filed IG complaints with the DoD and Army IGs accusing commanders of violating the procedural requirements of the MMHEPA. Telephone interview of Lieutenant Colonel (LTC) Robert Plummer, Assistant Inspector General and a point of contact for whistleblower and mental health referral cases, U.S. Army Inspector General Agency, Washington, D.C. (28 January 1998) [hereinafter Plummer Interview]; and Telephone interview with Lieutenant Colonel (LTC) Curtis Diggs, Assistant Inspector General and a point of contact for whistleblower cases, U.S. Army Inspector General Agency, Washington, D.C. (28 January 1998) [hereinafter Diggs Interview].

⁶⁷DoD Instr. 6490.4, *supra* note 10, para. F.1.c(1).

⁶⁸*Id.* at paras. D.6 and F.1.c(5). For a sample memorandum MHCPs may use see USAMEDCOM REG. 40-38, Appendix A through I, and Lauretano at 33-34.

⁶⁹*Id.* at para. F.1.c(3).

⁷⁰*Id.*

⁷¹*Id.* at paras. D.6 and F.1.c(5). For a sample memorandum MHCPs may use see USAMEDCOM REG. 40-38, Appendix A through I, and Lauretano at 33-34.

in writing" of the reasons for the hospitalization.⁷² Within twenty-four hours of admission,⁷³ the attending "privileged psychiatrist" must evaluate the service member and assess whether continued hospitalization is necessary.⁷⁴

4. Duty to Take Precautions Against Dangerous Service Members.

Whenever a service member intends to, and appears to have the ability to, seriously injure himself, herself or others, the MHCP must take certain precautions.⁷⁵ Such precautions may include, but are not limited to, notifying the service member's commander, military or civilian police or "potential victims."⁷⁶ Upon taking these precautions, the MHCP must notify the threatening service member of the precautions taken and document them in the service member's medical records.⁷⁷ Finally, prior to discharging the service member, the MHCP must inform the service member's commander and any "potential victims" of the discharge.⁷⁸

F. Independent Review of Admission and Continued Hospitalization.

Within seventy-two hours of a service member's involuntarily hospitalization, the medical treatment facility commander must appoint an impartial field grade medical officer to review the propriety of the admission.⁷⁹ This reviewing

⁷²National Defense Authorization Act of 1993, Pub. L. No. 102-484, §546(d)(2)(D), 106 Stat. 2315, 2419 (1992).

⁷³Although the MMHEPA requires the MTF or clinic to perform the evaluation of continued hospitalization within two days of the admission, the DoD has reduced this time period to within twenty-four hours. National Defense Authorization Act of 1993, § 546(d)(2)(C); and DoD Instr. 6490.4, *supra* note 10, para. F.2.b(3).

⁷⁴DoD Instr. 6490.4, *supra* note 10, para. F.2.b(3). If a privileged psychiatrist is not available, a privileged physician may perform the evaluation. *Id.* A privileged psychiatrist possesses "the authority and responsibility for making independent decisions to diagnose, initiate, alter, or terminate a regime of medical care." See U.S. DEP'T OF ARMY, REG 40-68, QUALITY ASSURANCE ADMINISTRATION, para. 4-1b (20 Dec. 1989).

⁷⁵DoD Instr. 6490.4, *supra* note 10, para. F.3.f.

⁷⁶Precautions MHCPs must take include: 1) notifying the service member's commander about the service member's dangerousness; 2) notifying military or civilian police; 3) notifying "potential victims;" 4) requesting that the service member's commander take safety precautions (e.g., treatment or administrative elimination for personality disorder); and 5) referring the service member to a physical evaluation board. *Id.* at para. F.3.f(1)(a) - (g). See also USAMEDCOM REG. 40-38, paragraph. 8g.

⁷⁷*Id.* at para. F.3.f(3) - (4).

⁷⁸*Id.* at para. F.3.f (2).

officer (RO) must then conduct an informal investigation and must interview the service member within seventy-two hours after the admission.⁸⁰ Prior to interviewing the service member, however, the RO must inform the service member of the purpose of the interview.⁸¹ The RO must also inform the service member of his or her right to counsel during the interview.⁸² After completing the investigation, the RO must determine whether the admission was appropriate and whether hospitalization should continue.⁸³ If the RO believes hospitalization should continue, the RO must notify the service member when the next review will occur.⁸⁴ If the RO determines that the service member's admission or continued hospitalization was in violation of the MMHEPA or DoD procedural requirements, the RO must "confer"⁸⁵ with the responsible party.⁸⁶ The responsible party could be either the commander or a MHCP.⁸⁷ The RO must then report the violation to the responsible party's next higher commander.⁸⁸

G. Army Investigations of Improper Referrals and Evaluations.

The DoD IG generally delegates to the Service IGs the investigation of unlawful or improper mental health referrals.⁸⁹ If the soldier alleges that the referral was in reprisal for a protected communication, the IG will investigate the allegations as a reprisal complaint.⁹⁰ If the soldier alleges that the referral or the evaluation was procedurally improper, the Army IG will review whether the commander complied with the consultation, referral and notice requirements outlined

⁷⁹If a privileged psychiatrist is not available to perform the review, a medical officer will suffice. *Id.* at para. F.2.c(1). See also USAMEDCOM REG. 40-38, para. 8e(3).

⁸⁰DoD Instr. 6490.4, *supra* note 10, para. F.2.c(1).

⁸¹*Id.* at para. F.2.c(3) and (4).

⁸²*Id.*

⁸³*Id.* at para. F.2.c(5).

⁸⁴Independent reviews must occur within five business days of each other. *Id.* at para. F.2.c(5).

⁸⁵It does not appear the DoD considered how this "confer" requirement should interact with the suspect rights advisement requirement of UCMJ art. 31(b) (West 1997). Judge advocates should instruct reviewing officers to consult legal before questioning a commander or MHCP suspected of violating the Uniform Code of Military Justice (e.g., referral in reprisal, etc.).

⁸⁶*Id.* at para. F.1.c(6).

⁸⁷DoD Instr. 6490.4, *supra* note 10, para. F.1.c(6).

⁸⁸*Id.*

⁸⁹U.S. DEP'T OF DEFENSE, IGDG 7050.6, GUIDE TO INVESTIGATING REPRISAL AND IMPROPER REFERRALS FOR MENTAL HEALTH EVALUATIONS, para. 2.3.b (6 Feb. 1996) [hereinafter DoD Guide 7050.6]. Plummer and Diggs Interviews, *supra* note 66.

⁹⁰DoD Guide 7050.6, *supra* note 89, at 3-2. For a detailed summary of the Military Whistleblower Protection Act, see Lauretano at 1-10.

above.⁹¹ The Army IG will also review whether the MHCP properly performed the evaluation (e.g., did the MHCP advise the soldier of the "purpose, nature, and consequences" of the evaluation, etc.).⁹² The Army IG will also review whether a MHCP reviewed the propriety of continued hospitalization.⁹³ If the Army IG determines that the referral was improper or procedurally incorrect, the Army IG may recommend "appropriate corrective action" to make the soldier "whole" or to punish the responsible official.⁹⁴

⁹¹*Id.* The Guide is currently being revised to reflect the new guidance issued in the new Directive and Instruction implementing the MMHEPA. The DoD IG is expected to issue a new DoD IG Guide this summer. Telephone interview with David Monroe, Office of Department Inquiries, Office of the Inspector General, Department of Defense, 400 Army Navy Drive, Arlington, Virginia (8 February 1999) [hereinafter Monroe Interview].

The Army IG will inquire into five areas. First, whether the commander consulted with a MHCP and when the consultation took place. Second, if the commander did not consult with a MHCP, whether the commander informed the soldier of the reasons thereof. Third, whether the referral memorandum included the date and time of the evaluation, and a "factual description of the behavior and/or verbal expressions" forming the 1-10 rationale for the referral. Fourth, whether the commander provided the soldier with a list of individuals (e.g., IG, JAG, chaplain) and phone numbers to enable the soldier to seek assistance to challenge the referral. DoD Guide 7050.6, *supra* note 89, at 3-1 to 3-3. When the referral involves an improper emergency or involuntary evaluation, treatment or hospitalization, the Army IG will normally inquire into whether the commander made a "clear and reasoned judgment" before the referral, and whether the commander, despite believing that an emergency referral was proper, made "every effort to consult" with a MHCP prior to the referral. If the commander was unable to consult with a MHCP, the investigator will inquire into whether the commander documented his or her reasons for the emergency referral and forwarded a copy of the memorandum to the MHCP as required. *Id.* at 3-4.

⁹²DoD Guide 7050.6, *supra* note 89, at 3-3 to 3-4. The Army IG will inquire whether the MHCP attempted to ensure that the referral was not a reprisal or procedurally improper prior to performing the evaluation. If the referral did appear improper, the investigator will inquire into whether the MHCP reported the improper referral to the "superior of the referring commander." *Id.*

⁹³*Id.* at 3-4. The Army IG will inquire as to whether a MHCP admitted the soldier and whether the admitting MHCP determined that an outpatient evaluation was unreasonable. The Army IG will also inquire whether the soldier was notified of "the reasons for the evaluation, the nature and consequences of the evaluation, any treatment recommended or required," soon after the admittance. The Army IG will inquire as to whether the MHCP informed the soldier of his or her right to contact "a friend, relative, attorney, or IG." If the soldier was involuntarily hospitalized, the Army IG will inquire into whether a review of the admission was performed within twenty-four hours, and whether the soldier was notified both "orally and in writing" of the decision. In addition, the Army IG will inquire as to whether a review of continued hospitalization was performed within seventy-two hours by an impartial medical officer. The Army IG will also inquire whether the medical officer advised the soldier of the "reasons for the interview," and of the right to legal representation at the interview. Finally, the Army IG will inquire whether the medical officer made a finding to either release or keep the soldier hospitalized, reviewed the initial review, and made a finding of whether it was proper. DoD Guide 7050.6, *supra* note 89, at 3-4 and 3-5.

⁹⁴*Id.* at 3-1. See also DoD Dir. 6490.1, *supra* note 4, para. E.2.

III. Practical Guidance on Implementing the MMHEPA.

The DoD Directive and Instruction implementing the MMHEPA mandates training for all commanders and MHCPs on the proper referral and evaluation of service members.⁹⁵ The DoD also requires training for all service members in identifying and properly reporting "imminently or potentially dangerous"⁹⁶ service members.⁹⁷ The purpose of this DoD training requirement is to protect "potential victims" and ensure "imminently or potentially dangerous" service members receive prompt treatment.⁹⁸ To ensure proper compliance by all DoD personnel, judge advocates must ensure that all service members, especially commanders and MHCPs, receive training on the MMHEPA and DoD procedural requirements. To aid in this training, see attached Flow Chart Diagrams for use by commanders and MHCPs (see Appendix A and B).⁹⁹ Judge advocates must also ensure that commanders coordinate and schedule training sessions to assist service personnel in identifying and properly reporting "imminently or potentially dangerous" service members.

IV. Conclusion.

This paper has attempted to provide Medical Command Judge Advocates with a comprehensive understanding of the MMHEPA. The MMHEPA creates several statutory responsibilities for DoD personnel. First, commanders must comply with the consultation, notice, and formal request requirements before subjecting service members to discretionary mental health evaluations, treatment or hospitalization. Second, MHCPs must also comply with certain notice requirements, and must further ensure that commanders have complied with their own procedural requirements before performing discretionary mental health evaluations, treatment, or hospitalization of service members. Finally, service members must be able to identify and report other "imminently or potentially dangerous" service members. The purpose of this "identify and report" requirement is to protect potential victims and provide prompt treatment to the mentally unstable.

⁹⁵DoD Instr. 6490.4, *supra* note 10, para. D.2.d. See also DoD Dir. 6490.1, *supra* note 4, para. D.1.

⁹⁶See DoD Instr. 6490.4, *supra* note 10, at 2-1, for a detailed definition of "imminently or potentially dangerous."

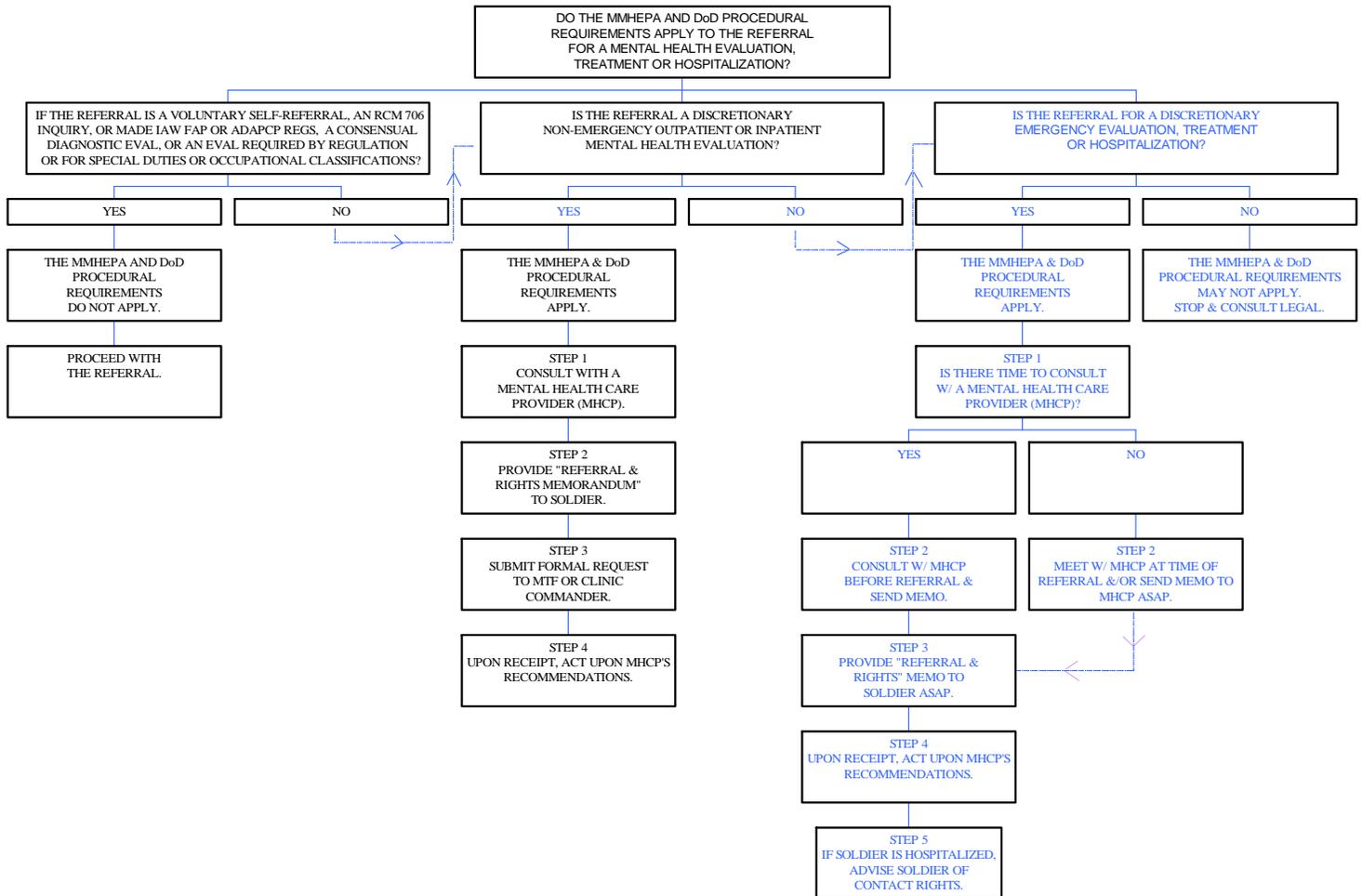
⁹⁷DoD Instr. 6490.4, *supra* note 10, para. D.2.b and c.

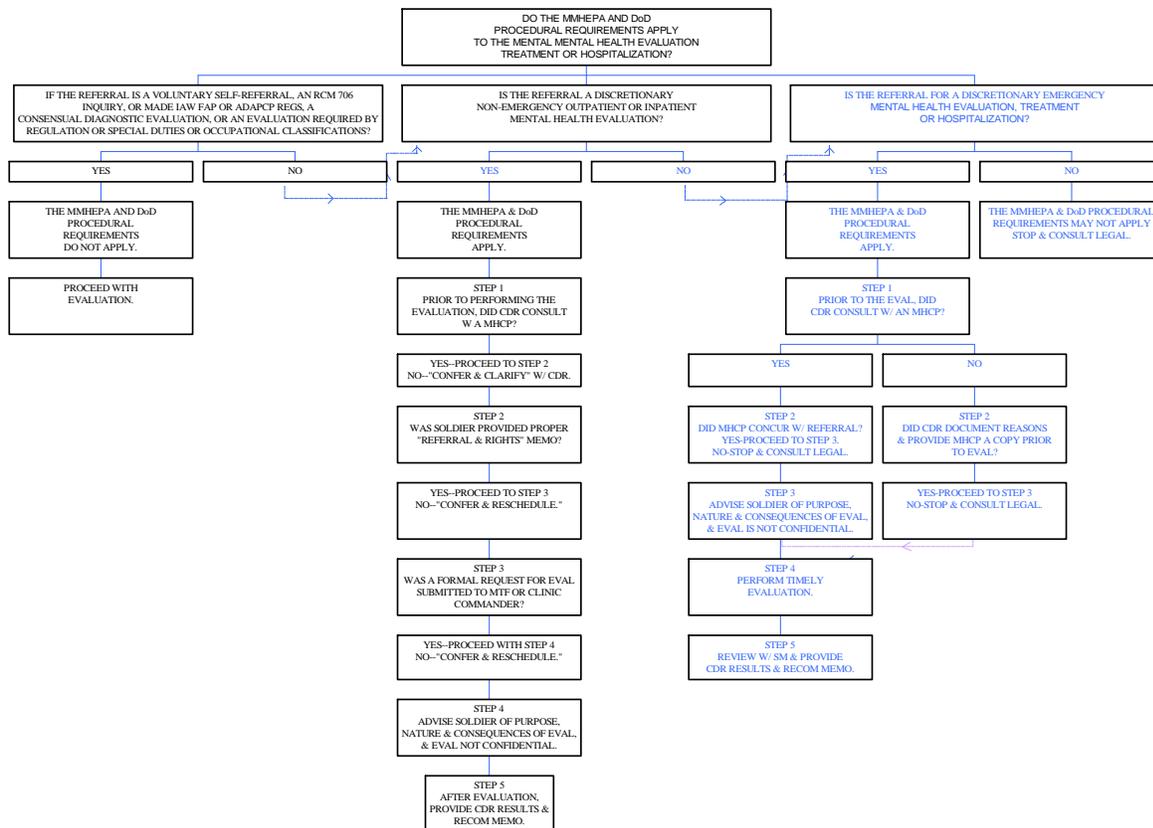
⁹⁸*Id.* at para. A; and DoD Dir. 6490.1, *supra* note 4, para. A.2.

⁹⁹For sample form memoranda see USAMEDCOM REG. 40-38, Appendix A through I, and Lauretano at 26-34.

APPENDIX A MENTAL HEALTH REFERRALS

COMMANDER'S CHECKLIST





Appendix B – Mental Health Referrals