March 10, 2014

Leon Rodriguez
U.S. Department of Health and Human Services
Office of Civil Rights
Hubert H. Humphrey Building, Room 509F
200 Independence Ave. SW
Washington DC 20201
Attention: HIPAA Privacy Rule and NICS

Re: Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule and the National Instant Criminal Background Check System (NICS) Notice of Proposed Rulemaking

Dear Mr. Rodriguez:

The Consortium for Citizens with Disabilities (CCD) Rights Task Force submits these comments in response to the Office of Civil Rights' Notice of Proposed Rulemaking concerning the HIPAA Privacy Rule and the National Instant Criminal Background Check System (NICS). CCD is a coalition of national disability-related organizations working together to advocate for national public policy that ensures full equality, self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society.

I. OCR Has No Authority Under the Administrative Procedures Act to Promulgate the Proposed Rule

We believe that OCR has no authority under the Administrative Procedures Act (APA) to promulgate the proposed amendment to its HIPAA Privacy Rule. OCR's proposed amendment would create a special exception requiring different treatment of individuals with mental illnesses, allowing HIPAA-covered entities to report any individual falling within the "mental health prohibitor" to the NICS gun database. OCR points to no factual basis for the proposed

regulatory change. Indeed, the proposed rule is explicitly based on *perception* rather than *facts*. By OCR's own admission, "the rule is intended to address *perceptions* that HIPAA creates a barrier to entities reporting information to the NICS"[1] (emphasis added).

A. The APA Requires a Rational Connection Between the Facts Found and the Choice Made

The Administrative Procedures Act (APA) requires a federal agency conducting a notice-and-comment rulemaking to "examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Motor Veh. Mfrs. Ass'n v. State Farm Ins*., 463 U.S. 29, 43 (1983) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).[2] Moreover, there is a presumption "against changes in current policy that are not justified by the rulemaking record." *Id*. at 42.

Where, as here,[3] Congress has amended the governing statute without expressing any disapproval of the agency's previous implementing rules, "such congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 274-75 (U.S. 1974).

B. There is No Rational Connection Between the Facts Found and the Choice Made

OCR does not identify a *single state* where HIPAA poses a barrier to the reporting of individuals covered by the "mental health prohibitor" to the NICS database. OCR undertook a public process to solicit specific information concerning whether HIPAA poses barriers to states reporting these individuals to the NICS,[4] and received over 2050 responses. Apparently this process yielded no examples of states that were unable to report these individuals to the NICS due to HIPAA. The only bases identified by OCR for the proposed rule change are concerns expressed by commenters about perceived barriers without *any* evidence that such barriers actually exist. Strikingly, all of the public comments described by OCR discuss perceptions and theoretical concerns. For example:

---

[1] Proposed Rule at 788.

[2] *See also* Jeffrey S. Lubbers, A GUIDE TO FEDERAL AGENCY RULEMAKING 477-489 (4th ed. 2006).

[3] When Congress enacted the NICS Improvement Amendments Act in 2008, incentivizing states to report mental health records to the NICS database, it did so without changing the HIPAA health information privacy rules put in place only two years earlier. If Congress had meant to change current privacy rules to promote even greater reporting of individuals falling within the mental health prohibitor to the NICS, it could easily have done that. Instead, Congress chose to keep current privacy rules in place.

[4] *See* Advance Notice of Proposed Rulemaking, 78 Fed. Reg. 23872 (Apr. 23, 2013).

" . . . concerns have been raised that the HIPAA Privacy Rule's restrictions on covered entities' disclosures of protected health information *may* be preventing certain States from reporting the relevant information to the NICS."[5]

A GAO report "raised the *possibility* that States that do not report to the NICS the identities of individuals who are prohibited from possessing firearms for reasons related to mental health *may* experience challenges to reporting related to the HIPAA Privacy Rule."[6]

"Other commenters supported the proposal as removing a *perceived* barrier to an important and necessary public safety measure."[7]

"Two of the State agency commenters agreed with our statement in the ANPRM that creating an express permission in HIPAA for disclosures to the NICS would resolve any *perceived ambiguity* and be generally beneficial."[8]

"Several other commenters agreed, and asserted that an individual's right to the privacy of his or her medical records should not be placed ahead of the safety and welfare of the population as a whole."[9] [no evidence was offered that current privacy protections endanger the safety and welfare of the population]

One commenter "reported that . . . HIPAA continues to be cited as a *perceived* barrier to reporting to the NICS in a number of States." The commenter noted "at least eleven States rely, at least in part, on a mental health facility to report information on individuals in a prohibited category. This commenter reported that all of those States have statutes requiring such reporting, but noted that some of the State laws only require reporting to State repositories, and not to the NICS database."[10] [no evidence was offered that any of these

---

[5] Proposed Rule at 787.

[6] *Id*. OCR notes that the GAO report states that officials from three of the states reviewed said that the lack of *state* statutory provisions explicitly authorizing the sharing of mental health records (rather than HIPAA) was an impediment to reporting individuals to the NICS. Neither OCR nor the GAO report in question offers any suggestion that these states were actually precluded from reporting individuals to the NICS, much less that HIPAA precludes reporting to the NICS in these states. Indeed, this statement suggests that HIPAA is irrelevant to NICS reporting, and that what would facilitate more reporting by state officials is explicit reporting authority in *state* law.

[7] *Id*. at 788.

[8] *Id*. at 789.

[9] *Id*.

[10] *Id*.

state repositories were HIPAA covered entities themselves, or that HIPAA posed any barrier to states reporting to the NICS individuals whose names were in any of these state repositories]

"However *we do not have information about whether, or how many, covered entities would begin to report or increase reporting to the NICS as a result of the rule*."[11]

Notably, none of the four states that commented on the Advance Notice of Proposed Rulemaking indicated that HIPAA prevented them from reporting individuals covered by the mental health prohibitor to the NICS.[12] Indeed, Vermont indicated that amending HIPAA would not be effective in achieving the goal of the proposed amendment, and would damage patient/provider relationships and create difficulties for mental health providers.[13] Ironically, in assuming—without evidence—that HIPAA is responsible for the choice of many states not to report individuals to the NICS based on mental health reasons, OCR ignores the obvious possibility that the considerations cited by Vermont may explain states' decisions not to report such individuals to the NICS.

OCR acknowledges "most of the information relevant to the Federal mental health prohibitor is held by entities that are not covered by HIPAA," and that "[f]or those few HIPAA covered entities that may be involved in the relevant commitments or adjudications, the Privacy Rule contains paths for disclosure."[14]

---

[11] *Id*. at 795.

[12] North Carolina Comments, at 1 ("HIPAA is not a barrier in North Carolina because the reporting entity (the Clerks of Court) are not health care providers"); Washington Comments, at 2-3 ("In 2009, the Washington State legislature passed Engrossed House Bill 1498 . . . [which] transferred responsibility for reporting from DSHS (a covered entity under HIPAA) to AOC (a non-covered entity). Any ambiguity as to whether HIPAA authorized the transfer of mental health records to NICS was resolved"); Colorado Comments, at 2 ("As a law enforcement agency Colorado's designated repository, the CBI, is not a HIPAA covered entity. State law requires reporting of individuals subject to the mental health prohibitor to NICS through this repository and expressly shields provision of the required mental health prohibitor information to CBI from consideration as theft of medical information under Colorado statute."); Vermont Comments, at 1 (Amending the Privacy Rule to allow or require providers of mental health services to notify NICS of information related to their patients' care and treatment will not effectively realize the stated goal of the proposal. Instead, it will certainly have a detrimental impact on the patient/provider relationship and will create difficulties for providers in knowing when and who to contact with what information and how to appropriately respond to their patients' inquiries about the same.")

[13] *See* comments of Vermont, *supra* note 12.

[14] For example, states can organize their reporting systems to ensure that non-HIPAA covered entities report individuals covered by the mental health prohibitor to NICS, as many states have, or can establish "hybrid" entities that separate functions covered by HIPAA and functions not covered by HIPAA.

Nonetheless, despite a rulemaking record devoid of even a shred of evidence that HIPAA actually poses a barrier to any state's efforts to report individuals to the NICS, OCR concludes that:

> After considering the comments we received, we agree that the creation of an express permission in the HIPAA Privacy Rule to disclose information relevant to the Federal mental health prohibitor for NICS purposes is necessary to address ambiguity and ensure relevant information can be reported for this important purpose.

In the absence of any factual basis to support this conclusion, OCR has not met the standard required by the APA for notice-and-comment rulemaking.

II. The Proposed Amendment Would Be Ineffective in Reducing Gun Violence

Not only is there is no reason for OCR to promulgate such a regulation, but doing so would be ineffective in reducing gun violence and would only serve to exacerbate the stigma faced by people with mental illnesses. The premise that such reporting would have a significant impact on gun violence is flawed.

While much of the public discussion around preventing future gun violence has focused inappropriately on people with significant mental illnesses, studies show that "severe mental illness alone [is] not statistically related to future violence . . . ."[15] The seminal study on risk of violence and mental illness—the MacArthur Violence Risk Assessment Study—compared the prevalence for violence among individuals with mental illnesses to the prevalence for violence among other residents of the same neighborhoods.[16] The study showed that the two groups'

---

[15] Eric B. Elbogen & Sally C. Johnson, *The Intricate Link Between Violence and Mental Disorder: Results from the National Epidemiologic Survey on Alcohol and Related Conditions*, 66 ARCH. GEN. PSYCHIATRY 152, 157 (Feb. 2009); David J. Vinkers, ET AL., *Proportion of Crimes Attributable to Mental Disorders in the Netherlands Population*, 11 WORLD PSYCHIATRY 134 (June 2012) (discussing a study indicating that the proportion of violent crime directly attributable to mental illness is 0.16 percent). Some other studies have shown a "modest relationship between [serious mental illness] and violence," but acknowledge that "other factors contribute more strongly to violent events for persons with mental disorder than does one's 'mental illness' alone." *See* R. Van Dorn, ET AL., *Mental Disorder and Violence: Is There a Relationship Beyond Substance Use?*, 47 SOCIAL PSYCHIATRY AND PSYCHIATRIC EPIDEMIOLOGY 487, 499 (2012).

[16] Henry J. Steadman, et al., *Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 ARCH. GEN. PSYCHIATRY 393, 400 (May 1998). The authors chose control subjects from the same neighborhoods as discharged patients in an effort to isolate mental illness from other socio-economic and environmental factors that correlate with mental illness. *Id*. at 401; Heather Stuart, *Violence and Mental Illness: An Overview*, 2 JOURNAL OF WORLD PSYCHIATRY 121, 122 (June 2003) ("The MacArthur Violence Risk Assessment . . . stands out as the most sophisticated attempt to date to disentangle [the] complex relationships" of mental illness, prior history of violence, co-morbid substance abuse, and "broad environmental influences such as socio-demographic or economic factors that may have exaggerated differences in past research.").

prevalence for violence was "statistically indistinguishable."[17] Indeed, "if a person has severe mental illness without substance abuse and history of violence, he or she has the same chances of being violent . . . as any other person in the general population."[18]

Mental illness is not an effective predictor of violence. In fact, experts have little ability to predict violence. To the extent that research has identified risk factors, demographic variables such as age, gender and socioeconomic status are more reliable predictors of violence than mental illness.[19] "The main risk factors for violence still remain being young, male, single, or of lower socio-economic status."[20] The most relevant factors to predicting *serious* violence include "having less than a high school education, history of violence, juvenile detention, perception of hidden threats from others, and being divorced or separated in the past year."[21]

Moreover, the "mental health prohibitor" rendering individuals ineligible to purchase guns—as it is interpreted by many—is not an effective predictor of gun violence.[22] Indeed,

---

[17] *Id*.

[18] Elbogen & Johnson, *supra* note 15, at 157.

[19] *Id.*

[20] Heather Stuart, *Violence and Mental Illness: An Overview*, 2 JOURNAL OF WORLD PSYCHIATRY 121, 122 (June 2003).

[21] Elbogen & Johnson, *supra* note 15, at 155.

[22] The discussion in the proposed rule seems to assume that the federal mental health prohibitor includes anyone who, at any time in his or her life, was committed to a mental institution or adjudicated as a "mental defective." We believe, however, that the proper interpretation of the statutory definitions of "committed to a mental institution" and "adjudicated as a mental defective" excludes individuals who have been discharged from treatment. This exclusion is consistent with Congress's intent to limit the mental health-related firearm restrictions to individuals who are dangerous, and with Congress's bar on federal agencies reporting to the NICS individuals who have subsequently been found no longer dangerous, NICS Improvement Amendments Act of 2007, Public Law 110-180, tit. I, sec. 101(c)(1), 121 Stat. 2559, 2562-63 (2008). It makes little sense to interpret the mental health prohibitor to apply to individuals who were found to pose a danger to self or others at some point in the past—often the distant past—but were subsequently found no longer dangerous (as routinely occurs when individuals are released from civil commitment).

The fact that Congress prohibited federal, but not state or local, agencies from reporting such individuals to the NICS database does not mean that Congress intended these individuals to be covered by the mental health prohibitor if they were subjected to state or local commitments. Instead, the prohibition on federal agency reporting merely reflects the greater authority that Congress has to direct the actions of federal agencies, and does not speak to the scope of the mental health prohibitor. Indeed, it would be an absurd result to interpret the statute to authorize reporting of individuals committed by state or local agencies to the NICS database even if they were subsequently found no longer dangerous, but not to authorize individuals in identical circumstances who were committed by federal rather than state or local agencies.

almost all of the individuals with mental illness who were involved in the mass shootings that have occurred in recent years would not have been in the database regardless of HIPAA requirements. With one possible exception,[23] none of these individuals had been committed to an institution,[24] or found to be a danger to self or others or incompetent to stand trial, not guilty by reason of insanity, or lacking capacity to manage their own affairs.[25] Furthermore, the fact that an individual has, at some point in the past, been committed to a psychiatric hospital or found to be a danger to self or others does not in any way suggest that the individual is *currently* dangerous, much less that the individual has a propensity to engage in gun violence.

While OCR acknowledges the existence of stigmatizing attitudes toward individuals with mental illness, it suggests that the proposed amendment would not significantly increase stigma because "the Federal mental health prohibitor does not apply to all individuals with mental health conditions, but instead a subset of individuals who have been involuntarily committed or otherwise adjudicated to be a danger to themselves or others, or unable to manage their own affairs, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease."[26] The fact that the proposed rule unfairly targets a subgroup of people with mental illness, rather than all people with mental illness, as a public safety threat, hardly minimizes the stigma that will result. *Cf. Hargrave v. Vermont*, 340 F.3d 27 (2003) (differential treatment of advance directives of individuals with mental illness who are civilly committed is disability-based discrimination violative of the ADA).

As noted above, there is no factual basis for the proposed rule, and adopting it would send a message to people with psychiatric disabilities that sensitive psychiatric records are less worthy of privacy protections, and that mental illness is perceived by the government as inextricably linked with violence. Doing so will provide no meaningful protection from gun violence, but will increase the stigma around mental illness and discourage people from seeking treatment.

III. Authorizing Reporting to the NICS of Any Individuals Covered by Broader State Reporting Laws Would Violate the Supremacy Clause

---

If individuals committed by federal agencies do not pose a sufficient concern to warrant reporting to the database, neither do similarly situated individuals committed by state or local agencies.

[23] Seng-Hui Cho, who committed the mass shooting at Virginia Tech, was found to be a danger to self or others, though he was not "committed to a mental institution" under the mental health prohibitor statute.

[24] 18 U.S.C. § 922(g).

[25] 27 C.F.R. §§ 478.11(a), (b).

[26] Proposed Rule at 795.

OCR solicited comments concerning "whether the permission should instead be broad enough to also include reporting of persons to the NICS who are subject to State firearm prohibitions, in light of the many State laws that restrict firearms possession for mental health related reasons."[27] Authorizing reporting to the NICS of all individuals who are covered by state mental health prohibitors would violate the Supremacy Clause and OCR should not do it. To the contrary, OCR should specifically *prohibit* states from reporting such individuals to the NICS.

Federal law expressly limits the group of individuals who may be reported to the NICS based on mental health reasons. Only individuals "committed to a mental institution" and individuals "adjudicated as a mental defective" (defined as individuals adjudicated a danger to themselves or others or adjudicated to lack the mental capacity to contract or manage their own affairs) may be reported to the NICS.[28]

Many state laws contain mental health prohibitors that are significantly broader than the federal mental health prohibitor, and would apply to individuals who cannot be reported to the NICS under the federal prohibitor. For instance, New York requires all mental health professionals to report any person undergoing treatment that is "likely to engage in conduct that would result in serious harm to self or others."[29] California's prohibitors include individuals undergoing voluntary inpatient treatment, even though such individuals are explicitly excluded by the federal prohibitor.[30] Illinois and Hawaii have prohibitors that apply to all individuals with particular diagnoses.[31] States may authorize or require reporting to their *own* databases. But permitting states to report individuals to the *federal* NICS database for mental health reasons when federal law forbids such reporting of those individuals to the NICS would permit states to ignore a federal law. This is simply unlawful.

In addition, many of these state prohibitors apply without any adjudication by a court, board, commission or other lawful authority, as required for the federal prohibitor. For example, New York's SAFE Act requires mental health treatment providers to report covered individuals

---

[27] *Id*. at 790.

[28] 18 U.S.C. § 922(g), 27 C.F.R. § 478.11.

[29] N.Y. Mental Hyg. Law § 9.46.

[30] Cal. Welf. & Inst. Code § 8100(a); 27 CFR 478.11.

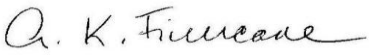
[31] 430 Ill. Comp. Stat. 65/8(g) ("A person who is intellectually disabled"), (s) ("A person who has been found to be developmentally disabled"); Haw. Rev. Stat. Ann. § 134-7 ("(c) No person who [...] (3) Is or has been diagnosed as having a significant behavioral, emotional, or mental disorders as defined by the most current diagnostic manual of the American Psychiatric Association or for treatment for organic brain syndromes; shall own, possess, or control any firearm or ammunition therefor, unless the person has been medically documented to be no longer adversely affected by the addiction, abuse, dependence, mental disease, disorder, or defect").

to a state database; no adjudicatory process is required.[32] California requires mental health facilities to report to a state database individuals involuntarily held as an inpatient under a 72-hour hold,[33] without the type of adjudication required by federal law before a person may be reported to the NICS.[34] Reporting to the NICS of individuals who have not been afforded the procedural protections required by the federal mental health prohibitor would not only violate the Supremacy Clause but would also raise significant due process concerns.

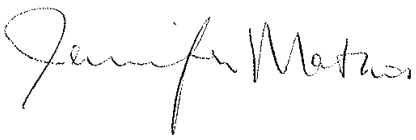
Thank you for the opportunity to comment on this Notice of Proposed Rulemaking.

Sincerely,

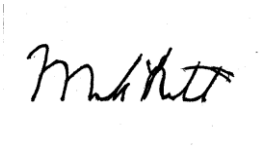
Curt Decker
National Disability Rights Network



Sandy Finucane
Epilepsy Foundation



Jennifer Mathis
Bazelon Center for Mental Health Law



Mark Richert
American Foundation for the Blind

Co-Chairs, CCD Rights Task Force

[32] N.Y. Mental Hyg. Law § 9.46.

[33] Cal. Welf. & Inst. Code § 8103(f) and Cal. Welf. & Inst. Code § 5150.

[34] 18 U.S.C. § 922(g); *U.S. v. Rehlander*, 666 F.3d 45, 50 (1st Cir. 2012) ("… due process is now a countervailing concern, supported by considerable Supreme Court precedent. And, in enacting section 922, nothing suggests that Congress had in mind temporary hospitalizations supported only by ex parte procedures").