June 7, 2013

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: ANPRM on HIPAA Privacy Rule and the National Instant Criminal Background Check System (NICS)

Dear Mr. Rodriguez:

The Consortium of Citizens with Disabilities (CCD) Rights Task Force submits these comments in response to the Office of Civil Rights' Advance 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.

We urge OCR not to amend its HIPAA Privacy Rule to create a special exception requiring different treatment of mental health records that would allow records otherwise protected by the Privacy Rule to be reported to the NICS database. First, there is no compelling reason for OCR to promulgate such a regulation, and doing so would only serve to exacerbate the stigma faced by people with mental illnesses. The ostensible purpose of such a regulation would be to "reduce gun violence" by "mak[ing] it as simple as possible for States to report" to the National Instant Criminal Background Check System (NICS) database people who are prohibited from purchasing firearms due to mental health-related reasons.[1] The premise that such reporting would have a significant impact on gun violence, however, is flawed.

[1] 78 Fed. Reg. 23872, 23875 (Apr. 13, 2013).

While much of the public discussion around preventing future gun violence has focused on people with significant mental illnesses, studies show that "severe mental illness alone [is] not statistically related to future violence . . . ."[2] 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.[3] The study showed that the two groups' prevalence for violence was "statistically indistinguishable."[4] 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."[5]

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.[6] "The main risk factors for violence still remain being young, male, single, or of lower socio-economic status."[7] 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."[8]

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[2] 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).

[3] 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.").

[4] *Id*.

[5] Elbogen & Johnson, *supra* note 2, at 157.

[6] *Id.*

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

[8] Elbogen & Johnson, *supra* note 2, at 155.

Moreover, the "mental health prohibitors" that render individuals ineligible to purchase guns are not effective predictors of gun violence. Indeed, 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 only one exception,[9] none of these individuals had been committed to an institution,[10] 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.[11] This is unsurprising, given the lack of connection between the prohibitors and gun violence. For example, a finding that an individual is unable to manage his or her own affairs without help does not suggest a propensity toward gun violence. Nor does the fact that an individual was, at some point in the past, committed to a psychiatric hospital[12] or found to be a danger to self or others suggest that the individual is *currently* dangerous, much less that the individual has a propensity to engage in gun violence. In fact, psychiatric disabilities are not static conditions, and people who have been hospitalized at some point routinely go on to live normal lives.

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 ensure that every record that might indicate that a person falls within one of the mental health prohibitor categories could be reported to the NICS database, it could easily have done that. Instead, Congress chose to keep current privacy rules in place.[13]

OCR has struck an appropriate balance in its current HIPAA privacy regulations. The same rules should apply to people with psychiatric disabilities that apply to everyone else. As HHS points out, current HIPAA regulations already permit the reporting to the NICS database of many records concerning mental health prohibitors to the NICS database – for example, because a state law requires reporting to the NICS database, because the records do not contain protected health information, or because disclosure would not be by an entity covered by HIPAA. To the extent that HIPAA does not permit disclosure now, it would be inappropriate to create a special rule for records concerning mental health prohibitors (for example, providing that records containing individually identifiable health information such a code indicating that a person was involuntarily committed to a psychiatric hospital are not protected, or providing that disclosure by HIPAA-covered entities that perform mental health adjudications including temporary psychiatric "holds" are not covered for

[9] 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.

[10] 18 U.S.C. § 922(g).

[11] 27 C.F.R. §§ 555.11(a), (b).

[12] Furthermore, in some states a finding of dangerousness is not required for involuntary civil commitment.

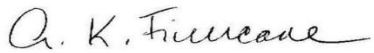
[13] Moreover, as OCR notes, where state mental health adjudications are structured in a way that would prevent reporting of records to the NICS database, states that wish to eliminate that barrier to reporting can do so now – for example, by enacting a law requiring reporting of these records or by designating entities as hybrid entities that can report prohibitor information as part of their non-health care functions.

purposes of reporting records to the NICS database). As noted above, there is not a compelling reason to do so, and doing so 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.

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

Sincerely,

Curt Decker
National Disability Rights Network



Sandy Finucane
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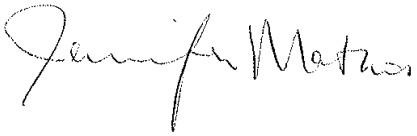

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