

States May Alter Policies on Criminal Background Checks for Gun Purchases

May 17, 2007--As a result of the publicity surrounding the recent shootings at Virginia Tech, many states are re-examining their rules and practices for submitting the names of certain people with mental disabilities to the Federal Bureau of Investigation's list of individuals who are barred from purchasing a gun.

The issue of concern to mental health advocates is not the need to limit access to guns (no one wants a person who is dangerous to have such access), it is the potential for the list of individuals with mental disabilities to be used for other purposes that is of concern. Many individuals who are not a danger to self or others may be included on these lists and there is a significant danger that those names will be shared with other agencies or entities (legally, accidentally or illegally) in addition to the FBI.

As these state efforts move forward, mental health advocates will want to be fully informed on the current federal law and on how their states can make this system work efficiently without creating undue harm for people who need treatment.

Key Issue is Addition of Names to National Background Check System

Many states have not, until now, paid much attention to the federal Brady Handgun Violence Prevention Act (18 U.S.C. §922, note) and have not been sending many (or in some cases any) names to the National Instant Criminal Background Check System (NICS). There are now efforts in Congress to tighten the requirements that states submit these names (which the Bazelon Center and other advocates are attempting to mitigate in terms of potential harm to individuals with mental illnesses). In the meantime, Governors and state legislatures across the country are focusing on the NICS and reconsidering how their states will comply with this requirement in the aftermath of the shootings at Virginia Tech.

This alert summarizes the federal requirements on the NICS and offers guidance to ensure that states do not go beyond federal requirements in terms of the people whose names are included on such lists and take every precaution to prevent the list from being shared with any party other than the FBI.

Federal Requirements

Federal law and regulation require that states send a list of individuals who, under the federal Brady Handgun Violence Prevention Act, are barred from possessing or purchasing a firearm. This is accomplished through the NICS, run by the FBI. States are required to send information about certain individuals with mental disabilities to the FBI so these names can be entered into the NICS.

The federal law applies to individuals who have been "adjudicated as a mental defective or ha[ve] been committed to any mental institution" (27 C.F.R § 178.11). The applicable regulations define the term "adjudicated as a mental defective" to include:

- Individuals who as a result of mental illness are a danger to themselves or others; or
- Individuals who lack the mental capacity to contract or manage their own affairs; or
- Individuals found to be insane by a court in a criminal case (i.e, not guilty by reason of insanity or not criminally responsible or other such equivalent finding).

The regulations specifically exclude individuals who receive care in a mental institution on a voluntary basis.

Potential State Policies

To comply with the law, and to protect individuals with mental illnesses, state procedures should:

- Limit the categories of individuals whose names are submitted to the NICS;
- Limit the information sent to the NICS to the minimum required by law;
- Limit the length of time the name remains on the list;
- Protect the privacy of the names submitted.

Limit the Individuals Whose Names are Submitted to the NICS

- To those who are committed to an inpatient facility on the basis of dangerousness to self or others. (Individuals under an outpatient commitment order need not be forwarded. Outpatient commitment does not fall within the regulation's definition of "mental institution," which is limited to "facilities";
- Those found by a criminal court to be insane, unless a court determines they have regained their sanity; and
- Those who have been adjudicated as lacking the mental capacity to manage their own affairs, unless there is a finding that the individual's incapacity is limited to only certain specific areas of their life.

Limit the Information Sent to the NICS to the Minimum Required by Law

- States should ensure that the information sent to the NICS is limited to basic identification data (name and address) and that information indicating that the person has a mental illness, their diagnosis or treatment is never sent.

Limit the Length of Time the Name Remains on the List

Consistent with the data accuracy and integrity provisions of the NICS regulations (28 C.F.R § 25.5), states should require that the person's name be removed from the list (in other words, that the state agency should inform the NICS that the person no longer falls within the requirements of the law) when:

- An individual who has been committed as dangerous to self or others is discharged (California law has such a provision, see California Wellness & Inst. Code §8100 and §8103.);
- An individual found not guilty by reason of insanity is found to have recovered his or her sanity;
- An individual previously denied on the basis of incapacity to manage his or her own affairs has been found to have regained capacity;
- For an individual who had been found a danger to self or others, after a period of three years, unless there has been a more recent finding of dangerousness to self or others.

Protect the Privacy of the Names Submitted

Consistent with the restricted-access provisions of the NICS regulations (28 C.F.R. 25.6(j)), states should prohibit the mental health authority and any other entity that handles the transmission of this data to the FBI from sharing this information with:

- Any other state agency or state agency official;
- Any individual who does not have a specific need to access the information in order to comply with the Brady Handgun Violence Prevention Act.

What You Can Do

By taking these actions, states can ensure that they are complying with federal law while also protecting people with mental illnesses and their right to privacy regarding their health care status.

Watch for indications that your state is taking up this issue. Then work with legislators, the Governor's office or any special commission or task force formed to look at the issue. The state mental health authority should be heavily involved in writing the specifics of the rules, so advocacy with that entity is particularly important.