STATE OF CONNECTICUT

DEPARTMENT OF MENTAL HEALTH
AND ADDICTION SERVICES
A HEALTHCARE SERVICE AGENCY

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Testimony of Michael Norko, M.D.
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Before the Judiciary Committee
March 17, 2010

Good morning, Senator McDonald, Representative Lawlor, and distinguished members of the Judiciary Committee. I am Dr. Michael Norko, Director of Forensic Services for the Department of Mental Health and Addiction Services (DMHAS), and I am here today to speak in support of **SB 458 Possession of Firearms**.

In 1993, Congress required the creation of the National Instant Criminal Background Check System (NICS) for firearms transfers. Various categories of individuals were prohibited from being able to transfer firearms, such as those convicted of felonies. In addition, individuals were prohibited from firearms transfers for various mental health reasons when they had been: found not competent to stand trial, adjudicated Not Guilty by Reason of Insanity, involuntarily committed to a psychiatric hospital or appointed a conservator of person or estate.

In PA 05-283, the Connecticut General Assembly directed various state agencies to enter into a Memorandum of Understanding (MOU) with the FBI for the purpose of providing this data to the NICS. In November 2006, the Department of Public Safety (DPS), the Department of Mental Health and Addiction Services (DMHAS), the Judicial Branch and the FBI entered into a MOU that articulated the means by which Connecticut would provide data to the NICS. DMHAS was concerned then, as it is now, about protecting the confidentiality of psychiatric information while responding to the requirements of PA 05-283; the MOU created a system whereby the state could provide the necessary data to the FBI without releasing protected information to other agencies or the public. At that point, states like Connecticut contributed this data on a voluntary basis.

In the NICS Improvement Amendments Act of 2007 (signed into law in January 2008), states became subject to penalties of federal funds provided under the Omnibus Crime Control Act for failure to provide data to the NICS. That law also directed that states must create a system by which individuals prohibited from firearms transfers by virtue of the mental health prohibitions could petition for removal of that prohibition. Connecticut did not have such a system in place, and therefore was at risk of losing federal funds. The various involved agencies began meeting again to propose the creation of such a system.

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S.B. 458 articulates the procedures agreed to among the Judicial Branch, DMHAS and DPS to satisfy the requirement for a mechanism for individuals to petition for the removal of mental health prohibitors to firearms transfers. These procedures were tailored to the guidelines published in December 2009 by the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), entitled "State Relief From Disabilities Programs Under The NICS Improvement Amendments Act Of 2007." (copy appended to this testimony)

Under these procedures, the petitioner will have to make available all relevant health and mental health records, as well as criminal and court records, to the court hearing the petition and to the Attorney General representing the interests of the state. The petitioner will have the burden of establishing by clear and convincing evidence that the granted relief of the prohibition is not contrary to the public interest and that the petitioner is not likely to act in a manner that is dangerous to public safety.

This bill does not erode any of the protections of confidential mental health records that were established in the 2006 MOU. It represents a careful and narrowly tailored mechanism for individuals to seek the removal of prohibitions of firearms transfer based on mental health factors. DMHAS supports the passage of this bill to satisfy the requirements of federal law.

Thank you for the opportunity to address the Committee on this important bill. I would be happy to take any questions you may have at this time.

Amended December 2009

STATE RELIEF FROM DISABILITIES PROGRAMS UNDER THE NICS IMPROVEMENT AMENDMENTS ACT OF 2007

The following *minimum* criteria must be satisfied for a State to establish a qualifying mental health relief from firearms disabilities program under the NICS Improvement Amendments Act of 2007 (NIAA), Public Law 110-180, Section 105 (enacted January 8, 2008):

1. State Law [NIAA § 105(a)(2)]: The relief program must be established by State statute, or administrative regulation or order pursuant to State law.

2. Application [NIAA § 105(a)(1)]: The relief program must allow a person who has been formally adjudicated as a mental defective[1] or committed involuntarily to a mental institution[2] to *apply or petition* for relief from Federal firearms prohibitions (disabilities) imposed under 18 U.S.C. §§ 922(d)(4) and (g)(4).

3. Lawful Authority [NIAA § 105(a)(2)]: A State court, board, commission, or other lawful authority must consider the applicant's petition for relief. The lawful authority may only consider applications for relief due to mental health adjudications or commitments that occurred in the same State.

4. Due Process [NIAA § 105(a)(2)]: The petition for relief must be considered by the lawful authority in accordance with principles of due process, as follows:

    a. The applicant must have the opportunity to submit his or her own evidence to the lawful authority considering the relief application.
    b. An independent decision maker—someone other than the individual who gathered the evidence for the lawful authority acting on the application—shall review the evidence.
    c. A record of the matter must be created and maintained for review.

5. Proper Record [NIAA § 105(a)(2)]: In determining whether to grant relief, the lawful authority must receive and consider evidence concerning the following:

    a. the *circumstances* regarding the firearms disabilities imposed by 18 U.S.C. § 922(g)(4);
    b. the applicant's *record*, which must include, *at a minimum*, the applicant's mental health *and* criminal history records; and
    c. the applicant's *reputation*, developed, *at a minimum*, through character witness statements, testimony, or other character evidence.

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[1] Federal regulations at 27 C.F.R. § 478.11 define the term "adjudicated as a mental defective" as: A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) Is a danger to himself or others; or (2) Lacks the mental capacity to contract or manage his own affairs. The term shall include—(1) A finding of insanity by a court in a criminal case; and (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.

[2] Federal regulations at 27 C.F.R. § 478.11 define the term "committed to a mental institution" as: A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

6. Proper Findings [NIAA § 105(a)(2)]: In granting relief, the authority must issue findings that:

    a. the applicant will not be likely to act in a manner dangerous to **public safety**; and
    b. granting the relief will not be contrary to the **public interest**.

7. De Novo Judicial Review of a Denial [NIAA § 105(a)(3)]: The State must also provide for *de novo* judicial review of relief application denials consistent with the following principles:

    a. The applicant may petition a court of appropriate jurisdiction to review the denial, including the record of the State court, board, commission, or other lawful authority that rendered the decision.
    b. The reviewing court may, but is not required to, give deference to the decision of the lawful authority to deny the application for relief.
    c. In cases of denial by a lawful authority other than a State court, the reviewing court must have discretion to receive additional evidence necessary to conduct an adequate review.

Note: In addition to the above-mentioned requirements, NIAA § 102(c)(1)(B) requires a State, on being made aware that the basis under which the record was made available does not apply, or no longer applies, shall, as soon as practicable—

    a. update, correct, modify, or remove the record from any database that the Federal or State government maintains and makes available to NICS, consistent with the rules pertaining to the database; and
    b. notify the Attorney General that such basis no longer applies so that the record system in which the record is maintained is kept up to date.
    c. It is recommended that the State have a written procedure (*e.g.* State law, regulation, or administrative order) to provide for these NIAA requirements.