

**NEW YORK SECURE AMMUNITION AND FIREARMS ENFORCEMENT ACT  
(NY SAFE ACT)**

NYS Office of Mental Health  
NYS Office for People With Developmental Disabilities  
Guidance Document

On January 15, 2013 Governor Cuomo signed the New York Secure Ammunition and Firearms Enforcement Act (SAFE) into law. Reflecting a comprehensive approach to reducing gun violence, the law toughens criminal penalties on those who use illegal guns; closes a private sale loophole to ensure all gun purchases are subject to a background check; allows authorities to track ammunition purchases in real time to alert law enforcement to high volume buys; requires recertification of pistol permits every five years; and strengthens the state’s ban on high-capacity magazines and assault weapons.

In addition, the law contains several provisions pertaining to the duties of mental health professionals regarding patients who may pose a danger to self or others. The following is a brief summary of these provisions and guidance regarding their implementation.

**1. Mental Hygiene Law Section 9.46 - Reporting Requirements for Mental Health Professionals:**

**A. Reporting Process:**

SAFE establishes a new Section 9.46 of the Mental Hygiene Law (MHL), which requires four groups of mental health professionals (i.e., physicians, psychologists, registered nurses, and licensed clinical social workers), in the exercise of their reasonable professional judgment, to make a report as soon as practicable to county mental health officials if an individual for whom they are providing mental health treatment is “likely to engage in conduct that will cause serious harm to self or others.” Upon receiving a

Section 9.46 report, if the county mental health official agrees with the mental health professional's determination, he or she will then report "non-clinical identifying information" to the New York State Division of Criminal Justice Services (DCJS). DCJS will then determine whether the person possesses a firearms license and, if so, will notify the appropriate local licensing official, who must suspend or revoke the license as soon as practicable. The person must surrender such license and all firearms, rifles, or shotguns to the licensing officer, but if the license and weapons are not surrendered, police and certain peace officers are authorized to remove all such weapons.

#### B. Reporting Standard:

With respect to initial reports made by mental health professionals, the reporting standard is "likely to engage in conduct that will cause serious harm to self or others." This standard is consistent with the "likely to result in serious harm to self or others" standard that a DCS or designee uses to direct emergency "removals" from the community to a psychiatric hospital for examination under MHL Section 9.45. This is also consistent with the standard for emergency admissions for observation, care and treatment pursuant to MHL Section 9.39.

As such, decision making with respect to a Section 9.46 report requires a clinical determination that a person's clinical state creates either: "(a) a substantial risk of physical harm to the person, as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that the person is dangerous to himself or herself, or (b) a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior which places others in reasonable fear of serious physical harm<sup>1</sup>."

This standard differs from the non-emergency, involuntary commitment standard pursuant to MHL Section 9.27 (i.e., the "2 PC" standard). The "2 PC" standard requires certification by two physicians that an individual has a mental illness for which care and

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<sup>1</sup> See Mental Hygiene Law Section 9.01

treatment as a patient in a hospital is essential to the person's welfare. Furthermore, the person's judgment must be so impaired that s/he is unable to understand the need for care and treatment. The courts have interpreted the 2 PC standard as requiring both mental illness and a finding that the person is dangerous to self or others, but such dangerousness may be found even without an active display of dangerous behavior, conduct, or threats if the person has a history of dangerous conduct associated with noncompliance with mental health treatment programs. Accordingly, a person could meet the "2 PC" standard, but still not pose a risk of harm that justifies action pursuant to either the emergency removal or admission standard, or the 9.46 standard.

Because the 9.46 standard is consistent with the standard that is used for emergency removals and admissions under MHL Article 9, a person who requires a Section 9.46 report could simultaneously require an emergency removal to a psychiatric hospital for an examination pursuant to MHL Section 9.41, 9.43, or 9.45. Depending on the results of the examination, such person could also thereafter be admitted and retained in a hospital pursuant to MHL Section 9.39.

The inclusion of the county mental health official in the reporting ladder is intended to ensure appropriate action is taken with respect to persons with mental illness who pose immediate threats of serious harm.

### C. Confidentiality and Liability Concerns:

With any mandatory reporting requirement, concerns regarding confidentiality and liability (for making a report or, conversely, failing to make a report) may be raised. These concerns are addressed as follows:

- The law specifically provides that mental health professionals will not be subject to any civil or criminal liability if the professional's decision with respect to whether or not to report was made "reasonably and in good faith."

- Once the conditions for making a report are met, the law requires the mental health professional to report to the county Director of Community Services, or designee. If the county mental health official agrees with the determination, a report is then made to DCJS. Because these disclosures are required in the law (once the conditions for reporting are met) the mandated reports can legally be made without requiring the person’s consent. Under 45 CFR § 164.512(a), the HIPAA Privacy Rule permits disclosures of protected health information without the authorization or consent of the individual to the extent that such disclosure is “required by law” and the disclosure complies with the requirements of that law.

SAFE also amends Mental Hygiene Law Section 33.13 governing disclosure of mental health clinical information to ensure the disclosures of information necessary to comply with the various reporting requirements of the new law can be legally made. The law provides that only a patient’s name and other “non-clinical identifying information” (e.g., name, date of birth, race, sex, SS#, or address) can be disclosed by the county mental health official to DCJS, so that this information can be used to determine if the patient has a firearms license. If so, DCJS will report that information to the local firearms licensing official, who must either suspend or revoke the license. If the licensing official wants to obtain additional information regarding the report, the licensing official may obtain a subpoena, pursuant to the Section 33.13(c)(1) of the Mental Hygiene Law. In addition, action will be taken to remove the license and any weapons owned or possessed by the individual.

## **2. Background Checks for Firearms Licenses:**

The federal Brady Handgun Violence Prevention Act of 1993 established the National Instant Criminal Background Check System (NICS) and requires Federal Firearms Licensees (FFL) to contact NICS before transferring a firearm to an unlicensed person. NICS will provide the FFL with information on whether the person is prohibited from receiving or possessing a firearm under federal law. Among other disqualifying criteria,

the Brady Act prohibits the receipt or possession of firearms by an individual who has been adjudicated as having a mental disability or has been involuntarily committed to a mental institution.

In response to the NICS Improvement Act of 2007, New York State began to populate the NICS database with non-clinical identifying records of individuals with mental disabilities who would meet the Brady Act disqualifying criteria. This includes persons who have been involuntarily committed or confined pursuant to Articles 9, 10 or 15 of the Mental Hygiene Law, Article 730 or Section 330.20 of the Criminal Procedure Law, Section 402 or 508 of the Correction Law, or Section 322.2 or 353.4 of the Family Court Act. Note, however, this does not include records of persons admitted to psychiatric hospitals only for observation or those who were voluntarily, and not involuntarily, admitted. The Office of Mental Health (OMH) and the Office for People With Developmental Disabilities (OPWDD) regularly update and submit this information to the NYS Division of Criminal Justice Services (DCJS), which forwards these records to the NICS database.

SAFE expands upon these provisions by creating a statewide database of firearms license holders maintained by the New York State Police. It also amends the Mental Hygiene Law to require OMH and OPWDD to transmit the information that is being submitted to the NICS database to DCJS, for the purpose of enabling DCJS to determine whether a person is disqualified from possessing a firearm under federal or state law. DCJS will check pending firearm license applications against the disqualifying data provided to it, as well as the Mental Hygiene Law Section 9.46 reports. If DCJS discovers that the applicant has such a mental health record, it will report that information to the licensing official who will be determining if a license should be granted. DCJS also will periodically check the statewide firearms license database against criminal convictions, mental health, and all other records necessary to determine if an individual is no longer eligible to possess a firearm. If DCJS discovers data suggesting that an individual is no longer eligible to possess a firearm, DCJS will then notify the appropriate licensing official, to facilitate the process to suspend or revoke the firearms license. In addition,

action will be taken to remove the license and any weapons owned or possessed by the individual.

Under NICS and State law, New York State has established a “certificate of relief from disabilities” process to permit a person who has been disqualified from possessing a firearm due to a mental disability to petition for relief from that civil rights disability. For persons who have been so disqualified, that process originates with OMH (or OPWDD). Information about how to petition for a certificate of relief can be found on OMH’s public website at [www.omh.ny.gov/omhweb/nics/](http://www.omh.ny.gov/omhweb/nics/) or at OPWDD’s website at [www.opwdd.ny.gov/opwdd\\_resources/opwdd\\_forms/nyerr\\_application\\_requirements](http://www.opwdd.ny.gov/opwdd_resources/opwdd_forms/nyerr_application_requirements).

### **3. Assisted Outpatient Treatment (AOT):**

In 1999, New York State enacted “Kendra’s Law,” which established a process of requiring “assisted outpatient treatment” (in lieu of commitment to a facility) for certain persons with mental illness who otherwise may be deemed to be dangerous. SAFE expands Kendra’s Law in the following ways:

- The duration of an initial assisted outpatient treatment order has been extended to one year, from the current six months.
- Provisions are included to ensure that a treatment order “follows the person” from one county to another if the person moves. This is achieved by clarifying that the “appropriate” Director of Community Services (DCS) is the DCS in the county where the assisted outpatient resides, even if it is not the county where the AOT order was originally issued. Further, the DCS in an AOT patient’s new county of residence must be notified when the patient has or will move.
- Thirty days prior to the expiration of an AOT order, SAFE requires the DCS to evaluate the need for continued AOT.
- Explicit authority is given to the DCS to file a petition to renew an expiring AOT order when the person is missing and cannot be evaluated prior to the expiration of the order.

- Kendra's Law, which had a current sunset date in 2015, has been extended for two additional years until June 30, 2017.