UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

April 19, 2018

Ms. Kimberly A. Small
General Counsel
Illinois Association of School Boards
1 East 22nd Street, Suite 20
Lombard, Illinois 60148-6120

Ms. Kathryn Vander Broek
Partner
Hinshaw & Culbertson, LLP
222 N. LaSalle Street, Suite 300
Chicago, Illinois 60601

Dear Ms. Small and Ms. Vander Broek:

This is in response to your November 6, 2013 letter in which you ask about the applicability of the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) to the reporting requirement of the Illinois Firearm Concealed Carry Act (CCA), as well as subsequent communications you have had with our office about this matter. We apologize for the amount of time it has taken us to respond to your letter. As explained more fully below and based on the information you have provided, we do not believe that the applicable Illinois CCA reporting requirement conflicts with FERPA and that personally identifiable information from students' education records may be disclosed if certain conditions are met (see, in particular, the discussion on health and safety emergencies beginning on page 8).

I. State Reporting Requirement

Pursuant to the CCA,

> It is the duty of the principal of a public elementary or secondary school, or his or her designee, and the chief administrative officer of a private elementary or secondary school or a public or private community college, college, or university, or his or her designee, to report to the [Illinois] Department of State Police [(ISP)] when a student is determined to pose a clear and present danger to himself, herself, or to others, within 24 hours of the determination as provided in Section 6-103.3 of the Mental Health and Developmental Disabilities Code. "Clear and present danger" has the meaning as provided in paragraph (2) of the definition of "clear and present danger" in Section 1.1 of the Firearm Owners Identification Card Act [(FOID Card Act)].

430 Illinois Compiled Statute (ILCS) 66/105; *see also* 405 ILCS 5/6-103.3 (stating that "[i]f a person is determined to pose a clear and present danger to himself, herself, or to others by a . . .

law enforcement official or a school administrator, then the . . . law enforcement official or school administrator shall notify the [ISP], within 24 hours of making the determination that the person poses a clear and present danger."). A person who poses a "clear and present danger" is one who "(2) demonstrates threatening physical or verbal behavior, such as violent, suicidal, or assaultive threats, actions, or other behavior, as determined by a physician, clinical psychologist, qualified examiner, school administrator, or law enforcement official." 430 ILCS 65/1.1. *See also* 430 ILCS 66/105 stating that: "[c]lear and present danger" has the meaning as provided in paragraph (2) of the definition of "clear and present danger" in Section 1.1 of the Firearm Owners Identification Card Act).

The clear and present danger report (CPDR) requires reporting officials to disclose the following information about a student posing a "clear and present danger:" (i) his or her name; (ii) his or her date of birth; (iii) his or her home address; (iv) his or her campus address (if applicable); (v) his or her parents' or guardians' names (if applicable); (v) his or her contact phone number(s); and, (vi) a detailed narrative of the facts supporting the reporting official's "clear and present danger" determination. Illinois State Police, Person Determined to Pose a Clear and Present Danger reporting form, *available at* http://www.isp.state.il.us/docs/2-649.pdf. The CPDR solicits a "detailed narrative of the facts supporting the determination of "Clear and Present Danger" and states that the ISP will use the CPDR "to identify persons who, if granted access to a firearm or firearm ammunition, pose an actual, imminent threat of substantial bodily harm to themselves or another person(s) that is articulable and significant or who will likely act in a manner dangerous to public interest." *Id.* at 1. In your letter, you further explain that Illinois law prohibits redisclosure of information from the CPDR, except for purposes of "1) objecting to a license being issued, and/or 2) supporting the revocation of a license. *See also* 405 ILCS 5/6-103.3 providing that "information disclosed under this Section shall remain privileged and confidential, and shall not be redisclosed, except as required under subsection (e) of Section 3.1 of the [FOID] Card Act, nor used for any other purpose" and 430 ILCS 65/3.1(e)(3) providing that the ISP "shall provide notice of the disqualification of a person under subsection (b) of this Section or the revocation of a person's Firearm Owner's Identification Card under Section 8 or Section 8.2 of this Act, and the reason for the disqualification or revocation, to all law enforcement agencies with jurisdiction to assist with the seizure of the person's Firearm Owner's Identification Card"). Your letter also explains that the identity of the person making [the] CPDR is not to be disclosed to the subject of the report." *See also* 405 ILCS 5/6-103.3 (stating in pertinent part that: "[t]he identity of the person reporting under this Section shall not be disclosed to the subject of the report"). (Note: As indicated above, pursuant to 405 ILCS 5/6-103.3, information shall "not be redisclosed, except as required under subsection (e) of Section 3.1 of the [FOID Card Act]." Section 3.1(e)(2) of the FOID Card Act, however, requires the ISP "in accordance with State and federal law regarding confidentiality, [to] enter into a memorandum of understanding with the Federal Bureau of Investigation for the purpose of implementing the National Instant Criminal Background Check System in the State. The [ISP] shall report the name, date of birth, and physical description of any person prohibited from possessing a firearm pursuant to the [FOID Card Act] or 18 U.S.C. 922(g) and (n) to the National Instant Criminal Background Check System Index, Denied Persons Files." 430 ILCS 65/3.1(e)(2). Given that your letter neither references nor otherwise requests our analysis of this redisclosure under the FOID Card Act, we have not addressed the potential FERPA implications of any such redisclosure in this response).

II. Request for Technical Assistance

Based on our understanding of your letter, you ask the following questions with regard to your request for technical assistance:

1. Is the CPDR itself an "education record" under FERPA? Does the CPDR constitute a personal record maintained for the reporting official's exclusive use, namely, a "sole possession" record under FERPA? Can an educational agency or institution designate the reporting official as a law enforcement officer and maintain the CPDR as a law enforcement unit record under FERPA?
2. If the reporting of a CPDR to the ISP constitutes the non-consensual disclosure of a student's education record or personally identifiable information (PII) contained therein, is there an exception to FERPA's general consent requirement that permits the disclosure to the ISP?
3. If PII from an education record was used to prepare the CPDR or if the CPDR is an education record under FERPA, how should educational agencies and institutions reporting the CPDR to the ISP comply with any other applicable aspects of FERPA, such as the record of release and FERPA's redisclosure provisions?

III. Background on FERPA

FERPA is a Federal law that protects the privacy of student education records maintained by educational agencies or institutions or their respective agents. FERPA applies to all educational agencies and institutions that receive funds under any program administered by the Secretary of the Department of Education (Department). 34 CFR § 99.1(a). The term "educational agencies and institutions" generally refers to local educational agencies (LEAs), elementary and secondary schools, and postsecondary institutions. Private schools at the elementary and secondary levels generally do not receive funds from the Department and are, therefore, not subject to FERPA. A copy of FERPA's implementing regulations may be found on our website at: https://studentprivacy.ed.gov/resources/family-educational-rights-and-privacy-act-regulations-ferpa.

FERPA affords parents certain rights with respect to their children's education records maintained by educational agencies and institutions to which FERPA applies. These include the right to access their children's education records, the right to seek to have these records amended, and the right to provide consent for the disclosure of PII from these records, unless an exception to consent applies. *See* 34 CFR Part 99, Subparts B, C, and D. These rights transfer to the student when he or she reaches the age of 18 years or attends a postsecondary institution at any age, thereby becoming an "eligible student" under FERPA. 34 CFR §§ 99.3 (definition of "Eligible student") and 99.5(a)(1).

Under FERPA, an educational agency or institution may not have a policy or practice of permitting the release of education records, or PII from education records (other than directory information), without the parent's or eligible student's prior written consent or unless otherwise authorized by Federal law. 20 U.S.C. § 1232g(b)(1); 34 CFR § 99.30. Exceptions to this general rule are set forth in 34 CFR § 99.31 and 20 U.S.C. §§ 1232g(b)(1), (b)(2), (b)(3), (b)(5), (b)(6), (h), (i), and (j).

IV. Discussion

Is the CPDR itself an "education record" under FERPA? Does the CPDR constitute a personal record maintained for the reporting official's exclusive use, namely, a "sole possession" record under FERPA? Can an educational agency or institution designate the reporting official as a law enforcement officer and maintain the CPDR as a law enforcement unit record under FERPA?

Under the FERPA regulations, the term "education records" means, unless otherwise exempted, those records that are directly related to a student and maintained by an educational agency or institution or by a person acting for the agency or institution. 34 CFR § 99.3 "Education records." Neither the FERPA statute nor the FERPA regulations require that records relate to, or be used only for the purposes of, a student's educational services or needs in order to constitute education records. Rather, Congress has specifically amended FERPA to address the release of records in ways that reflect a broader scope of the term, such as by clarifying the circumstances in which disciplinary actions taken by educational agencies and institutions with respect to students may be non-consensually disclosed. *See generally* 20 U.S.C. 1232g(b)(6) (as added by the Student Right-to-Know and Campus Security Act, Pub. L. No. 101–542, § 203, and the Higher Education Amendments of 1998, Pub. L. No. 105-244, § 951(2)), (h) (as added by the Improving America's Schools Act of 1994, Pub. L. No. 103–382, § 249(5)), and (i) (as added by the Higher Education Amendments of 1998, Pub. L. No. 105-244, § 952). The FERPA regulations exclude six categories of records from the term "education records" including, but not limited to, (i) records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record, and (ii) records of the law enforcement unit of an educational agency or institution subject to the provisions of 34 CFR § 99.8. 34 CFR § 99.3 "Education records." The term "student" means, except as otherwise specifically provided, "any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records." 34 CFR § 99.3 "Student."

Here, in instances where the completion of the CPDR follows a determination that a particular "student" poses a "clear and present danger," the CPDR would "directly relate" to said student. Not only would the student be the subject of the CPDR and the CPDR would address why the student had demonstrated "threatening physical or verbal behavior, such as violent, suicidal, or assaultive threats, actions, or other behavior," but the CPDR would also contain PII about the student such as, but not limited to, his or her name, date of birth, home address, campus address (if applicable), contact phone number(s), and parents' or guardians' names (if applicable). There may also be instances where a CPDR directly relates to a student who is not the subject of the CPDR such as, for instance, where a reporting official includes PII about the student in the CPDR narrative of facts section to support his or her "clear and present danger" determination. That said, we have not received sufficient information to determine whether educational agencies and institutions in Illinois actually "maintain" CPDRs. In instances where educational agencies or institutions in Illinois are, in fact, maintaining CPDRs that directly relate to students, these CPDRs would constitute student education records under FERPA.

Further, the CPDR does not constitute a "sole possession" record under FERPA. As noted above, exempt from the definition of "education records" are those records which are kept in the sole possession of the maker of the records, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the

records. 34 CFR § 99.3 "Education records," subsection (b)(1). Therefore, if sole possession records are disclosed to any party other than a temporary substitute for the maker of the records, those records would not constitute "sole possession records" and therefore would have to meet ther requierments for the disclosure of education records subject to FERPA. Here, the CPDR does not satisfy the elements of a "sole possession" record because the CPDR is not kept in the sole possession of the school administrator responsible for its preparation. Instead, the CPDR is disclosed by the administrator to a third party, the ISP, that is not his or her temporary substitute.

That said, assuming certain conditions are met, including, that the CPDR does not include PII from the student's education records subject to FERPA's provisions on a record of release and redisclosure (note: redisclosure of properly designated directory information is not subject to these limitations), the CPDR could constitute a law enforcement unit record under, and exempt from, FERPA. As explained above, among the exclusions from the definition of "education records" – and thus from the privacy requirements of FERPA – are records of a law enforcement unit of an educational agency or institution. 34 CFR § 99.3 "Education records," subsection (b)(2). These records must be (1) created by a law enforcement unit; (2) created for a law enforcement purpose; and (3) maintained by the law enforcement unit. 34 CFR § 99.8(b)(1). Law enforcement unit records do not include the following: (1) records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or (2) records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution. 34 CFR § 99.8(b)(2). Under FERPA, "law enforcement unit" means any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or noncommissioned security guards, that is officially authorized or designated by that agency or institution to (1) enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or (2) maintain the physical security and safety of the agency or institution. 34 CFR § 99.8(a)(1). Educational agencies and institutions may disclose law enforcement unit records to anyone, subject to State or local law, including outside law enforcement authorities, without consent from parents or eligible students. Moreover, because a law enforcement unit record is not an "education record," parents and eligible student do not have a right under FERPA to inspect and review the record; however, such records may be subject to a State's open records law. You will find further explanation about law enforcement unit records and other issues relating to school safety in this guidance document on our website: https://studentprivacy.ed.gov/resources/addressing-emergencies-campus.

Here, it is our understanding that the Illinois CCA permits principals and chief administrative officers to designate others to fulfill their reporting obligations. 430 ILCS 66/105 states, in pertinent part, that "[i]t is the duty of the principal of a public elementary or secondary school, *or his or her designee*, and the chief administrative officer of a private elementary or secondary school or a public or private community college, college, or university, *or his or her designee*, to report to the [ISP] when a student is determined to pose a clear and present danger." (Emphasis added.) Therefore, it would appear that these principals and chief administrative officers could designate individuals from their respective school law enforcement units, as defined under FERPA, to perform such reporting. Were they to do so, in general, the CPDRs prepared and maintained by these designated law enforcement unit officers would constitute law enforcement unit records under, and be exempt from, FERPA. This would not be the case, however, for any

PII from a student's education that the law enforecement unit officer obtained under an exception to the requirement of consent in which such PII remained subject to FERPA's provisions on a record of release and redisclosure, such as 34 CFR § 99.31(a)(1), and then included in the CPDRs. Under 34 CFR § 99.31(a)(1), an educational agency or institution may non-consensually disclose PII from education records to any school official generally designated in the school's annual FERPA notification of rights as "school officials" with a "legitimate educational interest." Additionally, an educational agency or institution may include as "school officials" parties to whom the agency or institution has outsourced institutional services or functions, provided that the party: (1) has a "legitimate educational interest" in the PII from education records; (2) performs an institutional service or function for which the agency or institution would otherwise use employees; (3) is under the direct control of the agency or institution with respect to the use and maintenance of the education records; and (4) is subject to FERPA redisclosure requirements set forth at 34 CFR § 99.33 governing the use and redisclosure of PII from education records. (Note: The criteria for school officials and legitimate educational interests must be specified in each educational agency's and institution's annual FERPA notification of rights. 34 CFR § 99.8(a)(3)(iii); *see* our model notification on our website: https://studentprivacy.ed.gov/resources/ferpa-model-notification-rights-elementary-secondary-schools.). Thus, to the extent that an educational agency or institution designated a law enforcement unit officer as a "school official" with "legitimate educational interests," any PII from education records non-consensually obtained by that officer in his or her capacity as the agency's or institution's school official that he or she then included in a CPDR would remain subject to FERPA's provisions, such as those on recordkeeping and redisclosure.

If the reporting of a CPDR to the ISP constitutes the non-consensual disclosure of a student's educaton record or PII from a student's education records, is there an exception to FERPA's general consent requirement that permits the disclosure to the ISP?

Assuming either that a CPDR constitutes an "education record" under FERPA (and does not constitute a law enforcement unit record) or that the CPDR contains PII contained in the student's education record that is subject to FERPA's limitations on redisclosure at 34 CFR § 99.33, the educational agency or institution may not disclose the CPDR, or PII contained therein, to the ISP without the parent's or eligible student's prior written consent, or unless an exception in FERPA to the general requirement of consent has been met. 20 U.S.C. §§ 1232g(b)(1), (b)(2), (b)(3), (b)(5), (b)(6), (h), (i), and (j); 34 CFR §§ 99.30 and 99.31. Based on the information that you provided, it does not appear that educational agencies or institutions, or applicable school administrators or their respective designees, are obtaining consent from parents or eligible students that meets the requirements set forth at 34 CFR § 99.30.

In a July 30, 2014 email to our Office, Ms. Vander Broek explained that the Illinois Application for Firearm Owner's Identification Card includes a "'signature certification' which purports to authorize the police to verify information on the application." Email from Kathryn Vander Broek to Ellen Campbell dated July 30, 2014 (2014 Email), p. 1. The "signature certification" states the following:

> My signature authorizes the [ISP] to verify answers given with any government or private entity authorized to hold records relevant to my citizenship, criminal history and mental health treatment or history; to use the digital photo, demographic information and signature from my Illinois Driver's License or State Identification to create my [Firearm Owner's Identification (FOID)] card; and to share my information as described in the

> Warning contained herein. Under penalties of perjury, I certify I have examined all the information provided for my application or renewal and, to the best of my knowledge, it is true, correct, and complete.

Illinois State Police, Application for Firearm Owner's Identification Card, p. 1. We agree with your conclusion that this "signature certification" does not constitute a valid parent or eligible student consent under FERPA. *See* 2014 Email (noting that "the certification is not compliant with the content requirements of a FERPA written release."). Under FERPA, written consent must:

1. Specify the records that may be disclosed;
2. State the purpose of the disclosure; and
3. Identify the party or class or parties to whom the disclosure may be made.

34 CFR § 99.30(b). While the "signature certification" appears to permit the ISP to verify answers given by an applicant on his or her application, it does not contain language sufficient to meet the requirements of FERPA's consent requirement. That is, it does not state specifically which records may be disclosed or the purpose of the disclosure. Moreover, as Ms. Melinda Selbee, the former General Counsel for the Illinois Association of School Boards, noted, the CPDR reporting requirement applies whether or not an application for a FOID is pending and, thus the "signature certification" would not be completed by a parent or eligible student in every instance where a CPDR might be prepared. Therefore, one of the exception's to FERPA's general consent requirement must apply in order for the educational agency or institution, or applicable school administrator or his or her designee, to disclose the CPDR, or PII contained therein, to the ISP.

Pursuant to 34 CFR §§ 99.31(a)(11) and 99.37, educational agencies and institutions may generally disclose, without prior written consent, PII from education records if such PII constitutes, and is properly designated as, "directory information." Directory information is information contained in a student's education record that would not generally be considered harmful or an invasion of privacy if disclosed. 34 CFR § 99.3 "Directory Information." Directory information includes, but is not limited to, a student's name, address, telephone listing, date of birth, and most recent educational agency or institution attended. *Id.* Non-directory PII from a student's education records that is protected from disclosure by FERPA cannot be disclosed with directory information under FERPA's "directory information" exception. Further, FERPA does not permit the non-consensual disclosure of properly designated items of directory information on a student if the student's parent or, for an eligible student, the student has opted out of the disclosure of directory information. 34 CFR § 99.37(a)(2).

Here, educational agencies and institutions may not rely on the "directory information" exception to FERPA's general consent requirement in satisfaction of the CCA reporting requirement, unless the CPDR constitutes a law enforcement unit record and the only other PII from a student's eduction records that would be disclosed in the CPDR has been designated as directory information and the parent or eligible student has not opted out ouf the disclosure of such directory information. Otherwise, the CPDR requires disclosure of certain PII which cannot be designated as directory information, namely, that a student poses a "clear and present danger" to himself, herself, or others. Thus, even assuming that parents or eligible students have not opted out of the disclosure of PII in the CPDR which could otherwise be designated as directory information, such as the student's name, date of birth, address, telephone listing, most

recent educational agency or institution attended, and parents' or guardians' names, FERPA would prohibit the non-consensual disclosure of such information because the CPDR requests such information in combination with other PII that would generally be protected by FERPA that cannot be designated as directory information. However, as indicated above, if the CPDR constitutes a law enforcement unit record and the "clear and present danger" determination therein, therefore, is not protected by FERPA as PII contained in an education record, then such a determination may be disclosed to the ISP in combination with properly designated directory information from which a parent or eligible student had not opted out.

Another FERPA provision permits educational agencies and institutions to disclose, without prior written consent, education records or PII contained therein "in connection with an emergency [to] appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons." 20 U.S.C. § 1232g(b)(1)(I); *see also* 34 CFR §§ 99.31(a)(10) and 99.36. In determining whether it may rely on FERPA's health or safety emergency exception,

> an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is *an articulable and significant threat* to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If based on the information available at the time of the determination, there is *a rational basis for the determination*, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.

34 CFR § 99.36(c) (emphasis added); *see also* 73 FR 74806, 74837 (Dec. 9, 2008) (explaining that the Department amended FERPA's health or safety emergency exception to add subsection (c) in order to "provide[ ] greater flexibility and deference to school administrators so they can bring appropriate resources to bear on a circumstance that threatens the health or safety of individuals.").

We discussed the health or safety emergency exception to FERPA's general consent requirement in some detail in the preamble to the 2008 *Federal Register* notice implementing changes to the FERPA regulations, 73 FR 74806, 74836-74839 (Dec. 9, 2008) (http://www2.ed.gov/legislation/FedRegister/finrule/2008-4/120908a.pdf), and in guidance issued by the Department in June 2011 (https://studentprivacy.ed.gov/resources/addressing-emergencies-campus). In the preamble discussion in response to comments received from the public, we noted the following that is relevant to your question:

> As explained in the preamble to the [Notice of Proposed Rulemaking] (73 FR 15589), the amendment to the health or safety emergency exception in [34 CFR] § 99.36 does not allow disclosures on a routine, non-emergency basis, such as the routine sharing of student information with the local police department. 73 FR at 74837.
>
> ***

> Schools should not view FERPA's "health or safety emergency" exception as a blanket exception for routine disclosures of student information but as limited to disclosures necessary to protect the health or safety of a student or another individual in connection with an emergency. 73 FR at 74837.
>
> ***
>
> Moreover, to be "in connection with an emergency" means to be related to the threat of an *actual, impending, or imminent emergency*, such as an outbreak of an epidemic. An emergency could also be a situation in which a student gives *sufficient, cumulative warning signs* that lead an educational agency or institution to believe the student may harm himself or others at any moment. It does not mean the threat of a possible or eventual emergency for which the likelihood of occurrence is unknown, such as would be addressed in emergency preparedness activities. 73 FR at 74838 (emphasis added).
>
> ***
>
> FERPA does not require that the [appropriate] person[s] receiving the information be responsible for providing the protection. Rather, the focus of the statutory provision is on the information itself: The ''health or safety emergency'' exception permits the institution to disclose information from education records in order to gather information from any person who has information that would be necessary to provide the requisite protection. Thus, for example . . . the institution may disclose records to persons such as law enforcement officials that it determines *may be helpful in providing appropriate protection* from the threat. 73 FR at 74838-9 (emphasis added).

In the June 2011 guidance ("Addressing Emergencies on Campus") we explained the following:

> In some situations, a school official may determine that it is necessary to disclose [PII] from a student's education records to appropriate parties in order to address a health or safety emergency . . . This exception to FERPA's general consent requirement is limited to the period of the emergency and generally does not allow for a blanket release of [PII] from a student's education records. Typically, law enforcement officials, public health officials, trained medical personnel, and parents (including parents of an eligible student) are the types of appropriate parties to whom information may be disclosed under this FERPA exception. Disclosures for health or safety emergency reasons do not include disclosures to address emergencies for which the likelihood of occurrence is unknown, such as would be the case in emergency preparedness activities.

United States Department of Education, *Addressing Emergencies on Campus*, p. 3 (June 2011).

Here, the State of Illinois (State) has, in essence, determined by statute that an individual who is deemed by, among others, a school administrator to pose a "clear and present danger" to himself, herself, or others presents an articulable and significant threat to the health or safety of himself, herself, or others; and, the ISP constitutes an appropriate party to whom such individual must be reported in order to protect the health or safety of the individual or others. The applicable CPDR reporting form solicits "a detailed narrative of the facts" supporting the "clear and present danger" determination, which shows that any such determination must be well-articulated. Further, the form indicates that the reported information will be used by the ISP "to identify

persons who, if granted access to a firearm or firearm ammunition, pose an actual, imminent threat of substantial bodily harm to themselves or another person(s) that is articulable and significant or who will likely act in a manner dangerous to public interest." Your letter, however, indicates that questions have been raised about whether the ISP will use the reported information to respond to an emergency because of the limited uses for which the ISP may use information associated with the CPDR (i.e., to object to a FOID card being issued and/or to support the revocation of the FOID card) and because Illinois law provides for a 48-hour notification period to an individual to turn in his or her FOID card and weapon after his or her FOID card has been revoked.

This Office provides flexibility and deference to the State to appropriately manage circumstances that threaten the health or safety of individuals, and will not substitute its judgment for that of the State as long as there is a rational basis for the State's determination. We find that there is a rational basis for the State's determination. For instance, it is rational to conclude, in the context of firearm ownership and concealed and carry rights, that an individual who "demonstrates threatening physical or verbal behavior, such as violent, suicidal, or assaultive threats, actions, or other behavior," 430 ILCS 65/1.1, and requires reporting to law enforcement within a 24-hour period, poses an actual, impending, or imminent threat to himself, herself, or others. This standard in the CCA appears to render a disclosure that is not routine, as required under FERPA's health or safety emergency exception. Further, we are not aware of any information to suggest that the ISP does not constitute an appropriate party to whom this information should be disclosed to protect against applicable threats that are deemed to pose a clear and present danger to the safety of the student or other persons. While your letter indicates that the ISP may not always use the information associated with the CPDR to respond immediately to the reported clear and present danger threat and specifically notes that State law provides for a 48-hour notification period to an individual whose FOID card has been revoked, we believe that the State may rationally determine that the ISP needs to collect such reports of clear and present danger threats in order for the ISP to determine whether any such reports concern applicants for or recipients of FOID cards who would pose a public safety risk. We believe that the provision of a 48-hour notification period to those students who have FOID cards of the revocation of their FOID cards rationally may be viewed, on a temporal basis, as being in connection with such threats. Therefore, educational agencies and institutions, and appropriate school administrators or their respective designees, may disclose, without parents' or eligible students' prior written consent, the CPDR, or PII in a student contained in the CPDR, to the ISP under FERPA's health or safety emergency exception, as required by the CCA.

If PII from an education record was used to prepare the CPDR or if the CPDR is an education record under FERPA, how should educational agencies and institutions reporting the CPDR to the ISP comply with any other applicable aspects of FERPA, such as the record of release and FERPA's redisclosure provisions?

FERPA's recordkeeping requirements apply to the non-consensual disclosure of a CPDR where PII from a student's education records, that is not directory information, is used to prepare the CPDR or the CPDR constitutes an education record. *See* 20 U.S.C. § 1232g(b)(4)(A); 34 CFR § 99.32. FERPA's general recordkeeping requirement states as follows:

> Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals, … agencies, or organizations which have requested or obtained access to a student's education records maintained by

> such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information.

20 U.S.C. § 1232g(b)(4)(A). Where an educational agency or institution non-consensually discloses education records pursuant to FERPA's health or safety emergency exception (34 CFR §§ 99.31(a)(10) and 99.36), within a reasonable period of time after the disclosure, the educational agency or institution must record in the student's education records the articulable and significant threat to the health or safety of the student or other individual(s) that formed the basis for the disclosure, and the parties to whom the information was disclosed. 34 CFR § 99.32(a)(5). We note that FERPA does not require that an educational agency or institution record, in its record of the disclosure, any information about the school official(s) responsible for making the non-consensual disclosure.

Here, assuming that educational agencies and institutions non-consensually disclose FERPA-covered CPDRs pursuant to the health or safety emergency exception, they must record, within a reasonable period of time after the disclosure and in the applicable student's' education records, that the disclosure is to the ISP and the ISP's "legitimate interest" in receiving the CPDR. That said, FERPA would not require that the educational agency or institution include in its record of the disclosure the name of the principal or chief administrative officer, or their respective designees, who prepared the CPDR.

Further, FERPA's access provisions require that educational agencies and institutions provide parents and eligible students with the opportunity to inspect and review education records within 45 days of receipt of a request. 20 U.S.C. § 1232g(a)(1)(A); 34 CFR § 99.10(b). As such, if an educational agency or institution maintains a copy of a CPDR, assuming the CPDR is directly related to a student and does not constitute a law enforcement unit record, then the parents of that student or the student if he or she is an eligible student must be provided an opportunity, within the aforementioned time period, to inspect and review the CPDR should they make a request. Other than in instances where the CPDR contains information about more than one student, there is no basis under FERPA for educational agencies and institutions to withhold certain information contained in the CPDR from an applicable parent or eligible student who makes a request to inspect or review the same. *See* 20 U.S.C. § 1232g(a)(1)(A) (noting that "[i]f any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material."); *see also* 73 Fed. Reg. 74.832-74,833 (Dec. 9, 2008) (stating, in the context of witness statements, that "[u]nder th[e] definition [of the term "education records"], a parent (or eligible student) has a right to inspect and review any witness statement that is directly related to the student, even if that statement contains information that is also directly related to another student, if the information cannot be segregated and redacted without destroying its meaning."). That is, FERPA would not permit educational agencies and institutions to redact the name of the principal or chief administrative officer, or their respective designees, from any such CPDR that a parent or eligible student requested to inspect and review.

V. Conclusion

As discussed above, we do not believe that the applicable CCA reporting requirement conflicts with FERPA because the CPDR may be disclosed under FERPA in two ways. First, if the CPDR constitutes a law enforcement unit record, which is exempt from FERPA's coverage, then it may be disclosed to the ISP along with any properly designated directory information about the student from which the parent or eligible student had not opted out. Second, FERPA's health or safety emergency exception to the general consent requirement may apply to disclosures made to the ISP pursuant to the CCA as long as educational agencies and institutions, and appropriate school officials, comply with the requirements of this exception under FERPA. As such, educational agencies and institutions, and appropriate school administrators or their respective designees, in Illinois may disclose the CPDR, or PII on a student contained in a CPDR, to the ISP under the CCA, without the prior written consent of the student's parent or the eligible student under FERPA's health or safety emergency exception to FERPA's consent requirement. We note that, within a reasonable period of time after a disclosure is made under this exception, an educational agency or institution must record in the student's education records the articulable and significant threat that formed the basis for the disclosure, and the parties to whom the information was disclosed. 34 CFR § 99.32(a)(5). We also note that if an education record or PII contained therein is disclosed to the ISP under this exception, then the ISP may only use that record or PII for the purpose of addressing the threat posed to the safety of the student or other individuals and must meet the requirements set forth at 34 CFR § 99.33(b)(1) to further disclose that record or PII. Finally, for disclosures made under this exception of CPDRs or PII on a student contained in a CPDR, educational agencies and institutions must provide, in accordance with FERPA, parents or eligible students with an opportunity to inspect and review FERPA-covered CPDRs or the PII on a student that was contained in the CPDR. If the CPDRs are education records under FERPA, FERPA would not permit educational agencies and institutions to redact the name of the principal or chief administrative officer, or their respective designees, contained in any such CPDRs which a parent or eligible student requests to inspect and review.

We trust that this is responsive to your inquiry and adequately explains the scope and limitations of FERPA as it relates to this issue.

Sincerely,

Michael B. Hawes
Director of Student Privacy Policy

cc: Nicki Bazer, General Counsel
Illinois State Board of Education

Sara G. Boucek, Associate Director/Legal Counsel
Illinois Association of School Administrators

Brian D. Schwartz, Associate Director for External Operations/General Counsel
Illinois Principals Association