ILLINOIS ASSOCIATION OF SCHOOL BOARDS

Lighting The Way To Excellence In School Governance

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November 6, 2013

Mr. Dale King
Director
Family Policy Compliance Office
400 Maryland Ave, SW
Washington, DC 20202-5920

RE: FERPA and Illinois' Concealed Carry Act Reporting Requirements

Dear Mr. King:

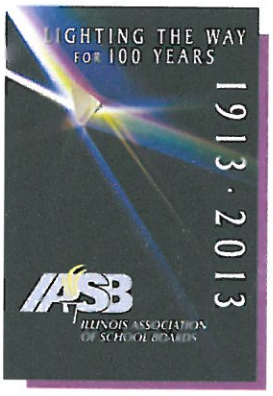
The Illinois Association of School Boards (IASB) is a statewide voluntary organization of local boards of education dedicated to strengthening the public schools through local citizen control. Although not a part of state government, IASB is organized by member school boards as a private not-for-profit corporation under authority granted by Article 23 of the Illinois School Code. The mission of the Illinois Association of School Boards is excellence in local school governance in support of quality public education.

The IASB, school officials, school attorneys, and other agencies are concerned about how to reconcile FERPA and a reporting requirement under a new Illinois law, the Firearm Concealed Carry Act (CCA). To assist FPCO in reviewing and developing guidance for this issue, we have created a section with the relevant provisions of the Illinois CCA which we believe may conflict with FERPA. For your convenience, you will find all citations in Attachment A, *Relevant Section of the Firearm Concealed Carry Act*. After the section describing the relevant provisions of the CCA, we respectfully request guidance on several questions.

Relevant Provisions of the Illinois CCA

The law, in relevant part, allows for the concealed carry of firearms in Illinois, but specifically prohibits carrying a concealed firearm in "any building, real property, and parking area under the control of a public or private elementary or secondary school," except for the limited purpose of properly concealing a firearm within a vehicle driven onto school property prior to conducting business in there.

The CCA provision in question requires a principal to make a 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" (405 ILCS 5/6-103.3; P.A. 98-63, §145). *Clear and present danger* is defined as:



> A person 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; P.A. 98-63, §150).

Emphasis added. The clear and present danger report (CPDR) "shall not be redisclosed, nor used for any other purpose," except: 1) objecting to a license being issued, and/or 2) supporting the revocation of a license (405 ILCS 5/6-103.3; P.A. 98-63, §145 and 430 ILCS 64/3.1(e)(3); P.A. 98-63, §150). Moreover, the identity of the person making a CPDR is not to be disclosed to the subject of the report (405 ILCS 5/6-103.3; P.A. 98-63, §145).

Guidance Requested

Here, we provide questions identified by Illinois school attorneys, school officials and other agencies. After each question, we provide suggestions, ask additional questions, or provide background information as appropriate.

1. **Will a CPDR itself be an "educational record" under FERPA?**

   Many attorneys agree that the report is a business record, much like a Department of Children and Family Services suspected abuse/neglect report, and, arguably, not an educational record under FERPA. CPDRs have nothing to do with the student's educational services or needs. The educational relevance component appears to be lacking because CPDR's purpose is solely to revoke a concealed carry firearm owner's identification (FOID) card or create a database of information from which to support an objection to a FOID card being issued.

   Alternatively, could the District identify the principal as a law enforcement officer for the limited purpose of reporting clear and present danger under the CCA, thereby resulting in the CPDR being a law enforcement record exempt from FERPA disclosure rules, provided the information required or reported in the CPDR is not otherwise learned from an education record?

   Finally, could the CPDR constitute a personal record maintained for the principal's exclusive use? FERPA states that a record kept in an employee's "exclusive use" for his or her *sole possession* is not an *education record*. Many attorneys feel that reliance on the *exclusive use* argument is risky for the following reasons:

   a. If the principal's knowledge comes from an already existing education record(s), the information, by definition, is not a personal note/exclusive use record in the first instance and FERPA, arguably, gives no ground to release it to the ISP.

   b. While one may argue that the principal is creating the written record for his or her own use to defend against an allegation of failure to report, should it arise, this argument weakens under the scheme of the CCA, which mandates creation of the record for use by the ISP, not the principal. FERPA, moreover, relies on records being "in the sole possession of" the individual who created them to qualify as being excluded from the definition of an education record. Once shared with the ISP, the CPDR no longer is in the principal's sole possession.

2. **If a CPDR constitutes the release of an education record (either because the information was learned from an education record or the CPDR itself is determined to be an education record), is there an exception that allows release without violating FERPA?**

   This question arises when a principal makes the determination that a student presents a clear and present danger on the basis of what s/he learned from an education record – any rerelease of that information must be consistent with FERPA. The crux of the problem lies with FERPA's prohibition on releasing education records information pursuant to state law, unless it is related to the juvenile justice system, or an emergency (20 U.S.C. §1232g(b)(1)(E) & (I)).

   It is our understanding that a CPDR has nothing to do with the juvenile justice system and its ability to serve students. As noted above, the report can only be used for purposes related to an individual's ability to obtain or retain a FOID card, a decision made outside of the juvenile justice system. Therefore, principals have no authority to release the information per FERPA's juvenile justice authority exception. FERPA does not authorize the release of information pursuant to State or federal law, generally.

   If the necessity to make a CPDR constitutes an emergency, then may the principal release information according to 20 U.S.C. §1232g(b)(1)(I) and 34 C.F.R. §99.36? Some attorneys surmise that this solves the issue. However, other attorneys bring up the fact that responding to an emergency may not always fit within the defined purpose of a CPDR. While a CPDR could be made in conjunction with an emergency as defined under 20 U.S.C. §1232g(b)(1)(I), it is also possible that a CPDR under the CCA will not be an emergency as defined under 20 U.S.C. §1232g(b)(1)(I). Moreover, it has been questioned whether the emergency exception can apply at all because of the limited use of the information associated with the CPDR which is unrelated to immediately responding to an emergency. In particular, when a FOID card is to be revoked, Illinois law provides that the individual is to be so notified and given 48 hours to turn in the card and weapon before local law enforcement personnel may obtain a warrant to secure the weapon (430 ILCS 66/70(g); P.A. 98-63, §70).

3. **If the information from an educational record was used to make a report, or if the CPDR is an education record, how should schools comply with other aspects of FERPA, including the record of release?**

   FERPA contains no provision protecting information otherwise confidential under other laws from being released to a parent if the record also qualifies as an education record (34 C.F.R. §99.32(c)(1)). It also requires maintenance of a list of information released and the purpose of the release, to which parents may have unfettered access (20 U.S.C. §1232g(b)(4)). If the student is the subject of the report, and rights have transferred to the student, the student would have the ability to determine if a CPDR report were made (assuming the report is deemed to be an education record) and then get a copy of the report despite the CCA's explicit prohibition against releasing the reporting person's identity to the individual who is a subject of a report. Even if parental rights have not yet transferred, in releasing the information to the parent

there is no manner by which to insure the parent then does not share that information with the student, an individual already deemed to present a clear and present danger to others. Moreover, because only the principal has the duty to report (430 ILCS 66/105; P.A. 98-63, §105), redacting this information from the report will not protect the identity of the person who made the report. The structure of the reporting law itself allows for identification of the individual who made the report.

Thank you in advance for providing guidance to school districts in Illinois.

Respectfully submitted,

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The following individuals, organizations and agencies join this request:

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Enclosures:

1. Attachment A, Relevant Sections of the Firearm Concealed Carry Act
2. Attachment B, Illinois Public Act 98-63

Relevant Sections of the Firearm Concealed Carry Act (PA 98-63) are described below:

The School Administrator Reporting of Mental Health Clear and Present Danger Determinations Law (Created by the Firearm Concealed Carry Act) [430 ILCS 66]

430 ILCS 66/100; P.A. 98-63, §100

Short title. Sections 100 through 110 may be cited as the School Administrator Reporting of Mental Health Clear and Present Danger Determinations Law.

430 ILCS 66/105; P.A. 98-63, §105

Duty of school administrator. 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 Department of State Police 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.

Mental Health and Developmental Disabilities Code [405 ILCS 5]

405 ILCS 5/6-103.3; P.A. 98-63, §145

Sec. 6-103.3. Clear and present danger; notice. If a person is determined to pose a clear and present danger to himself, herself, or to others by a physician, clinical psychologist, or qualified examiner, whether employed by the State, by any public or private mental health facility or part thereof, or by a law enforcement official or a school administrator, then the physician, clinical psychologist, qualified examiner shall notify the Department of Human Services and a law enforcement official or school administrator shall notify the Department of State Police, within 24 hours of making the determination that the person poses a clear and present danger. The Department of Human Services shall immediately update its records and information relating to mental health and developmental disabilities, and if appropriate, shall notify the Department of State Police in a form and manner prescribed by the Department of State Police. 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 Firearm Owners Identification Card Act, nor used for any other purpose. The method of providing this information shall guarantee that the information is not released beyond that which is necessary for the purpose of this Section and shall be provided by rule by the Department of Human

Services. The identity of the person reporting under this Section shall not be disclosed to the subject of the report. The physician, clinical psychologist, qualified examiner, law enforcement official, or school administrator making the determination and his or her employer shall not be held criminally, civilly, or professionally liable for making or not making the notification required under this Section, except for willful or wanton misconduct. This Section does not apply to a law enforcement official, if making the notification under this Section will interfere with an ongoing or pending criminal investigation.

For the purposes of this Section:

"Clear and present danger" has the meaning ascribed to it in Section 1.1 of the Firearm Owners Identification Card Act.

"School administrator" means the person required to report under the School Administrator Reporting of Mental Health Clear and Present Danger Determinations Law.

Firearm Owners Identification Card Act [430 ILCS 65]

430 ILCS 65/1.1; P.A. 98-63, §150

"Clear and present danger" means a person who:

(1) communicates a serious threat of physical violence against a reasonably identifiable victim or poses a clear and imminent risk of serious physical injury to himself, herself, or another person as determined by a physician, clinical psychologist, or qualified examiner; or

(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 65/8.1 (d); P.A. 98-63, §150

(d) If a person is determined to pose a clear and present danger to himself, herself, or to others by a physician, clinical psychologist, qualified examiner, law enforcement official, or school administrator, or is determined to be developmentally disabled by a physician, clinical psychologist, or qualified examiner, whether employed by the State or by a private mental health facility, then the physician, clinical psychologist, or qualified examiner shall, within 24 hours of making the determination, notify the Department of Human Services that the person poses a clear and present danger. The Department of Human Services shall immediately update its records and information relating to mental health and developmental disabilities, and if appropriate, shall notify the Department of

State Police in a form and manner prescribed by the Department of State Police. The Department of State Police shall determine whether to revoke the person's Firearm Owner's Identification Card under Section 8 of this Act. Any information disclosed under this subsection shall remain privileged and confidential, and shall not be redisclosed, except as required under subsection (e) of Section 3.1 of this Act, nor used for any other purpose. The method of providing this information shall guarantee that the information is not released beyond what is necessary for the purpose of this Section and shall be provided by rule by the Department of Human Services. The identity of the person reporting under this Section shall not be disclosed to the subject of the report. The physician, clinical psychologist, qualified examiner, law enforcement official, or school administrator making the determination and his or her employer shall not be held criminally, civilly, or professionally liable for making or not making the notification required under this subsection, except for willful or wanton misconduct.

Firearm Owners Identification Card Act [430 ILCS 64]

430 ILCS 64/3.1(e)(3); P.A. 98-63, §150

The Department of State Police 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 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.

Concealed Carry Act [430 ILCS 66]

430 ILCS 66/70(g); P.A. 98-63, §70

A licensee whose license is revoked, suspended, or denied shall, within 48 hours of receiving notice of the revocation, suspension, or denial surrender his or her concealed carry license to the local law enforcement agency where the person resides. The local law enforcement agency shall provide the licensee a receipt and transmit the concealed carry license to the Department of State Police. If the licensee whose concealed carry license has been revoked, suspended, or denied fails to comply with the requirements of this subsection, the law enforcement agency where the person resides may petition the circuit court to issue a warrant to search for and seize the concealed carry license in the possession and under the custody or control of the licensee whose concealed carry license has been revoked, suspended, or denied. The observation of a concealed carry license in the possession of a person whose license has been revoked, suspended, or denied constitutes a sufficient basis for the arrest of that person for violation of this subsection. A violation of this subsection is a Class A misdemeanor.