

What School Districts Need to Know About the New Red Flag Law

On February 25, 2019, Governor Cuomo signed the “Red Flag” bill into law. The purpose of this law, also known as the “extreme risk protection order” law, is to prevent individuals from accessing firearms, rifles and shotguns who have been determined by a court to be likely to engage in conduct that would result in serious harm to themselves or others. A provision of this law that is particularly relevant to schools¹ is the provision allowing a school administrator, or a school administrator’s designee, to file a petition for an “extreme risk protection order” against a student. This law goes into effect 180 days after it was signed by the governor, meaning it will become effective this August.

Background

The Red Flag bill was introduced because family members and school officials are often the first to know when someone is experiencing a crisis or exhibiting dangerous behavior. They may even report their fears to law enforcement; but in New York, as in many other states, law enforcement officers often did not have the authority to intervene. This lack of intervention has sometimes resulted in preventable tragedies, including interpersonal gun violence or suicide involving a gun. The New York State legislature determined that enacting extreme risk protection orders will help keep individuals safe while respecting due process rights.

The law provides for a two-stage process: a temporary extreme risk protection order and a final extreme risk protection order.

Temporary Extreme Risk Protection Order

A school official (who may, of course, act through school legal counsel) may file an application or petition in the supreme court of the county in which the student resides for an extreme risk protection order. A decision regarding whether to grant the application will be made by the court on the same day that the application is filed. Upon the court’s issuance of a temporary extreme risk protection order, the student would be prohibited from purchasing, possessing or attempting to purchase or possess a firearm, rifle or shotgun. The determination will be based upon a finding that there is probable cause to believe that the student is likely to engage in conduct that would result in serious harm to himself, herself or others.

In determining whether grounds for a temporary extreme risk protection order exist, the court may conduct an examination, under oath, of the school official and any witness the school official may produce. The court shall consider any relevant factors including, but not limited to, the following acts of the student:

- a. A threat or act of violence or use of physical force directed toward self, the school official or another person;
- b. A violation or alleged violation of an order of protection;
- c. Any pending charge or conviction for an offense involving the use of a weapon;
- d. The reckless use, display or brandishing of a firearm, rifle or shotgun;

¹ Pursuant to this law, “school” is defined as a school district, a public school, a charter school, a nonpublic school, a board of cooperative educational services (BOCES), a special act school district, an approved preschool special education program and an approved private residential or non-residential school for the education of students with disabilities.

- e. Any history of a violation of an extreme risk protection order;
- f. Evidence of “recent”² or ongoing abuse of controlled substances or alcohol; or
- g. Evidence of recent acquisition of a firearm, rifle, shotgun or other deadly weapon or dangerous instrument, or any ammunition.

Upon the court’s issuance of a temporary extreme risk protection order, the court will notify the division of state police and any other law enforcement agency with jurisdiction, all applicable licensing officers, and the division of criminal justice services. A law enforcement officer will conduct a search for and take possession of all firearms, rifles and shotguns in the student’s possession.

Final Extreme Risk Protection Order

Within three to six days after the student is served with a temporary extreme risk protection order, the court will hold a hearing to determine whether a final extreme risk protection order will be issued.³ At the hearing, the school official will have the burden of proving, by clear and convincing evidence, that the student is likely to engage in conduct that would result in serious harm to himself, herself or others. If the final extreme risk protection order is issued, any firearm, rifle or shotgun removed pursuant to the temporary extreme risk protection order will be kept by law enforcement, and the student’s firearm license will be suspended.

The final extreme risk protection order will extend for a period of up to one year. Once an order is issued, the court will notify the appropriate agencies, including law enforcement and criminal justice services, and the Federal Bureau of Investigation.

Questions and Answers

- Q:** How does this law have any impact upon K-12 students in New York, since only persons 21 years of age and older are legally permitted to own a handgun?
- A:** Although only persons 21 years of age and older are permitted to own a handgun, persons as young as the age of 16 are permitted to own a rifle in New York and to possess certain ammunition and a hunting license.
- Q:** How would the law affect a student who doesn’t “own” any firearms himself, but whose parent keeps one or more firearms in the home?
- A:** If another person can demonstrate that he or she is the lawful owner of the firearm surrendered or removed pursuant to a protection order, the court shall direct the firearm to be returned to its rightful owner and inform the owner of their obligation to safely store it in accordance with Section 265.45 of the Penal Law.
- Q:** If students have certain federal privacy rights pursuant to the Family Educational Rights and Privacy Act (FERPA), does a school official’s reporting of student information pursuant to New York’s Red Flag Law violate the student’s FERPA rights?
- A:** Generally, schools must have written permission from the parent or eligible student in order to release any information from a student’s education record. However, FERPA allows schools to disclose student records without consent in certain situations. Consent is not needed to disclose student records to appropriate officials in cases of health and safety emergencies. While we will monitor guidance from the New York State Education Department and/or the United States Department of Education Family Policy Compliance Office, we believe that the FERPA exception for health and safety emergencies will almost certainly justify such disclosures.

² “Recent” means within the six months prior to the date the petition was filed.
³ The student may request additional time to prepare for the hearing.

- Q:** Can a teacher submit an application for a temporary extreme risk protection order?
- A:** A teacher may not submit an application for a temporary extreme risk protection order without being designated in writing by a school administrator to do so. The following individuals may be designated in writing by a school administrator to file a petition: a school teacher, school guidance counselor, school psychologist, school social worker, school nurse, other school personnel required to hold a teaching or administrative license or certificate, and full or part-time compensated school employees required to hold a temporary coaching license or professional coaching certificate.
- Q:** Who qualifies as a school administrator under this law? Does it include vice principals or assistant principals?
- A:** No, it does not include vice principals or assistant principals. A school administrator means the principal or other chief school officer. Additionally, the administrator must work at the school in which the student is currently enrolled or has been enrolled within six months immediately prior to the filing of the petition.
- Q:** Will this new legislation apply equally to students with and without disabilities?
- A:** The Red Flag Law does not treat students with and without disabilities differently. However, if there is a related disciplinary proceeding at the school, the way that a student is disciplined by the school may differ if the student has a disability. It is best to consult with your school attorney to ensure that you are in compliance with all applicable laws.

Practical Considerations

If there is a student who is currently enrolled or has been recently enrolled at your school who is exhibiting dangerous behavior and should not have access to firearms, contact your school attorney immediately. He or she can assist in the process of seeking an extreme risk protection order. Districts should establish a clear process by which teachers or other staff members at each school can bring concerns about a student to their administrator. Staff and administrators should receive training on the aspects of the new law that apply to schools, including warning signs to look for in students, and what to do if they suspect that a student is a danger to himself, herself or others.

If you have any questions regarding the information in this memo or would like information about staff training on this issue, please feel free to contact [Candace J. Gomez](#), Megan K. Thomas or the attorney in the firm with whom you are regularly in contact.



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