

New York's Red Flag Law can be a tool for districts to prevent school violence

By the New York State
Association of School Attorneys

In the wake of recent mass shooting tragedies in Buffalo, New York, and Uvalde, Texas, there has been increased attention—at both the state and federal level—on Red Flag laws.

New York's Red Flag Law went into effect on Aug. 24, 2019. Under certain circumstances, the law works to prevent individuals who threaten harm to themselves or others from purchasing or possessing firearms.

In roughly the first half of this year, New York judges issued 875 temporary bans (lasting a few days) and 620 final (one-year) bans of firearm purchases and possession under the Red Flag Law, according to news reports.

Cases in Suffolk County alone have resulted in the removal of over 160 guns (including five military-style rifles) from 22 individuals under 25 (11 of whom were minors). All but two of these individuals were males.

Last year, the law was challenged as allegedly violating both the U.S. Constitution and the New York State Constitution, but it was ultimately upheld in the case of *Anonymous Detective at Westchester County Police v. A.A.* However, the decision does not preclude the possibility of other constitutional claims arising in the future.

Extreme risk protection orders

Extreme Risk Protection Orders (ERPOs) are court-issued orders of protection that prohibit certain individuals from purchasing or possessing firearms upon a determination that there is probable cause to believe that individual is likely to engage in conduct resulting in serious harm to himself, herself or others. School officials may request an ERPO for a student or an individual who was a student in the school within the previous six months. ERPO cases are civil, not criminal; thus, no criminal charges or penalties may be assigned.

Whether an individual is considered likely to engage in conduct resulting in serious harm to self or others is governed by section 9.39(a) of the state Mental Hygiene Law. This has caused some confusion because the relevant portion of the Mental Hygiene Law addresses an individual who may be retained in a hospital setting due to a likelihood of causing serious harm. However, the Red Flag Law does not require hospitalization, mental health history, evaluation or treatment.

For a petition to be granted, an individual must be considered likely to cause serious harm to self or others as defined by the Mental Hygiene Law (i.e., an individual posing risk of harm to self due to threatening or attempting



The day before New York's Red Flag law became effective in August 2019, protesters in New York City rallied to advocate for a national Red Flag Law.

◆ Associated Press photo by Gabriele Holtermann-Gorden (Sipa USA)

suicide or serious bodily harm; or others through exhibiting homicidal or violent behavior.) Also, at least one of the following must be present: threats or acts of violence or the use of physical force; violations of Orders of Protection; charges or convictions for offenses involving the use of weapons; reckless use or display of a firearm, rifle, or shotgun; violations of ERPOs; abuse of controlled substances and/or alcohol within six months prior to an ERPO petition being filed; or acquisition of firearms, rifles, shotguns, or other weapons within six months prior to an ERPO petition being filed.

In the context of these situations, courts also consider the time that has passed since the relevant acts occurred and the age of the individual when such acts were committed. It is imperative that the ERPO application explicitly identifies the specific situation(s) and context that resulted in the application,

together with any supporting documentation.

Roles of school personnel

School district personnel, including principals or chief school officers may apply for an ERPO. It is also possible for these administrators to designate another school employee to apply for an ERPO, e.g., a teacher, guidance counselor, psychologist, social worker, nurse or an employee with a coaching license or certificate. But the designee must be both employed at the same school as the administrator and be authorized, in writing, to file a petition for an ERPO. School districts that allow designees to initiate an ERPO application should consider developing a written policy on such designation with procedures for applying for an ERPO.

It is prudent for schools to coordinate with law enforcement when considering ERPO petitions related to students or

upon concerns that other individuals who are not students may be at-risk of causing harm to self or others. Before a situation of concern arises, school administrators should communicate with local law enforcement to “clarify what the Red Flag Law is and identify whose responsibilities are whose,” advises Dr. Shawn Van Scoy, superintendent of Gananda Central Schools, who has experience with the Red Flag Law.

A recent amendment to the law requires law enforcement to apply for ERPOs in situations where police or sheriff departments are aware of an individual who is likely to engage in conduct resulting in serious harm to self or others. This requirement does not preclude school officials from independently filing a petition.

Petition forms are online

The process of obtaining an ERPO against a particular individual (the future respondent) begins with a petitioner, such as the qualified personnel of a school district, filing a Petition for a Temporary ERPO (bit.ly/3AThgQs) and a Request for Judicial Intervention (bit.ly/3z9k6zH). On the same day that the petition is filed, a judge will determine whether a temporary ERPO will be issued.

Upon the issuance of a temporary ERPO, a police officer will take a copy to the individual and remove any guns in their possession. The judge will hold a hearing within three to six business days to determine whether a final ERPO will be issued. Each side will be permitted to testify, call witnesses, and proffer evidence at the hearing. The judge will then determine if there is clear and convincing evidence meriting issuance of a final ERPO, which is valid for one year.

School districts should be prepared to be involved in the hearing when a student is the respondent to an ERPO application that is related to school, e.g., district representatives providing witness testimony. It is recommended that school personnel who initiate an application appear at court with your school attorney. But if they are in court as witnesses for a police application, there may not be a need for legal representation.

Even if a student's records ordinarily would be considered private and protected by the Family Educational Rights and Privacy Act (FERPA), districts may share information with law enforcement and the courts without parental consent under FERPA's health and safety emergency exception. Consult your school attorney to evaluate whether the emergency exception applies to a given case.

Final ERPOs are generally in effect for one year, although petitioners may request a hearing to extend the order. Upon the expiration of the ERPO, the individual may request for the return of their firearms. The

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petitioner will be notified of such request and may request a hearing to object to the return of the firearms.

At any time, the lawful owner of any seized firearms may apply to the issuing court to return the guns in situations where the individual is not the lawful owner of those guns. The individual will need to demonstrate ownership and/or the ability to legally possess the guns.

Practical challenges

The Red Flag Law is fairly new, and there is limited case law. This leaves room for judges to interpret the law differently. Another practical challenge is that the law does not authorize courts to mandate treatment for threatening behavior. Schools can only recommend treatment and should consider whether the student requires additional resources in school.

Nor does law prevent others in the home from possessing firearms. Van Scoy noted that this makes the law less effective for minors who are at-risk, as they may still be able to access firearms in the home that belong to their parent or other lawful owner in the home.

School districts could consider receiving training from governmental agencies on threat assessment, as Gananda Central Schools has done. Van Scoy noted that receiving such training and forming a Threat Assessment Team could proactively address concerns that arise against the backdrop of the Red Flag Law.

Increasing mental health supports in school districts can also assist with preventing students from being at-risk of harm to self or others. It is therefore advisable for school districts to have teams in place to support student needs and identify procedures for addressing potential emergency situations that could cause harm to a student or others.

Regional efforts to facilitate coordination between schools and law enforcement include the Rochester Threat Advisory Committee. “The goal is early intervention, prevention and following up,” according to Paul Ciminelli, counsel to the sheriff of Monroe County. Ideally, such coordination may obviate the need to file a Red Flag petition.

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