

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

BILL: CS/SB 2426

INTRODUCER: Education Pre-K-12 Committee and Senator Detert

SUBJECT: Student Records

DATE: April 7, 2009 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>deMarsh-Mathues</u>	<u>Matthews</u>	<u>ED</u>	Fav/CS
2.	<u>Naf</u>	<u>Wilson</u>	<u>GO</u>	Favorable
3.	_____	_____	<u>EA</u>	_____
4.	_____	_____	<u>RU</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

The bill requires the State Board of Education (SBE) and public postsecondary institutions to comply with the federal Family Educational Rights and Privacy Act (FERPA) and federal regulations.¹ The SBE must evaluate and determine if the act is consistent with specific principles that include the rights of students and their parents. The SBE is also tasked with adopting rules, monitoring FERPA, notifying the Legislature of any significant change to the federal requirements, and advising the Legislature of any change in FERPA which may create a need for an exemption to the public records requirements.

The bill conforms current law with FERPA with respect to the parties who may access otherwise confidential and exempt personally identifiable records about a student without parental and student consent, the manner in which student and parental rights are implemented, and the definition of “directory information,” “records and reports,” and “student.” The bill defines the term “education records” and “agency and institution.”

¹ 20 U.S.C. § 1232g and 34 CFR Part 99

The bill also permits a public postsecondary institution to charge a fee for the actual cost of producing a copy of a record; however, a fee may not be charged for searching or retrieving records.

This bill substantially amends ss. 1002.21, 1002.22, and 1009.94 and creates s. 1002.225 of the Florida Statutes.

II. Present Situation:

Education Records

Federal Law

The Family Educational Rights and Privacy Act protects the privacy of student education records.² The law applies to any educational agency or institution that receives funds under any program administered by the U.S. Department of Education (U.S. DOE).³

Parents have specific rights with respect to their children's education records, including the right to inspect and review education records, to seek to have education records amended in certain circumstances, and to consent to the disclosure of education records.⁴ These rights transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level. Students to whom the rights have transferred are "eligible students."⁵

The law does allow schools and postsecondary institutions to disclose education records, without consent, to comply with a judicial order or lawfully issued subpoena and to third parties that include the following:⁶ school officials, including teachers, within the agency or institution who have a legitimate educational interest; officials at other schools to which a student is transferring; appropriate parties in connection with financial aid to a student; and appropriate officials in cases of health and safety emergencies.⁷

Additionally, even after a student has become an "eligible student" under FERPA, postsecondary institutions and high schools may allow parents of students over 18 years of age to have access to their child's education records without the student's consent.⁸ A school may disclose education records under any circumstances to a parent of student who is a dependent for federal income tax purposes.⁹ Even if a student is not a dependent, a postsecondary institution may disclose education records to a student's parent if the disclosure is in connection with a health or safety emergency and is needed to protect the health or safety of the student or other individuals, and if

² Education records are those records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution.

³ 20 U.S.C. § (a)(3) and 34 CFR Part 99.1(a), December 2008.

⁴ 20 U.S.C. § 1232g

⁵ 20 U.S.C. § 1232g (d) and 34 C.F.R. § 99.5

⁶ 20 U.S.C. § 1232g(b)(1) and 34 C.F.R. § 99.31

⁷ 34 C.F.R. § 99.36(b) provides that educational information in connection with an emergency to protect the health and safety of a student may be released to teachers in the school and at other schools.

⁸ 34 C.F.R. § 99.5

⁹ Department of Education, *Final Rule, 34 CFR Part 99, Section-by-Section Analysis*, December 2008, See <http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html>. (last visited March 21, 2009).

a postsecondary student has violated any federal, state or local law, or any rule or policy of the institution governing the use or possession of alcohol or a controlled substance.¹⁰

Florida Law

Current law provides a public records exemption for personally identifiable records or reports of a student, including any personal information within the records.¹¹ While the law protects student records that are created, maintained and used by public educational institutions and codifies many of the provisions in FERPA, it has not been amended to incorporate many of the changes to the federal law.¹² Consequently, the law contains provisions that are substantially dated and inconsistent with FERPA and recent changes to the implementing regulations.¹³ The new regulations include provisions to implement the USA Patriot Act, P. L. 107-56, and the Campus Sex Crimes Prevention Act in P. L. 106-386. The regulations also revise the definitions of attendance, disclosure, and education records and add the term "biometric record" to the list of personal identifiers that constitute personally identifiable information.¹⁴

III. Effect of Proposed Changes:

K-12 Public School Students

The bill requires the SBE to comply with FERPA and federal regulations after evaluating and determining that the act is consistent with the following principles related to the rights of students and their parents to:

- Access their education records, including the right to inspect and review those records;
- Waive their access to their education records in certain circumstances;
- Challenge the content of education records in order to ensure that the records are not inaccurate, misleading, or otherwise a violation of privacy or other rights;
- Maintain the right to privacy with respect to records and reports; and
- Receive notice of their rights.

The Joint Administrative Procedure Committee developed recommendations to provide state executive branch agencies with reasonable discretion to adapt Florida's programs to changing federal guidelines, provide adequate legislative oversight, and avoid unconstitutional delegation to either the federal government or the state executive branch. The recommendations include specific legislative authority to participate in a federal program and an agency evaluation of whether federal law and regulations are consistent with specific legislatively-determined policy objectives. The bill incorporates these recommendations.

¹⁰ *Id.*

¹¹ s. 1002.22(3)(d), F.S.

¹² DOE bill analysis, March 20, 2009. The law was last amended in 2004. *See also* ss. 1002.21 and 1006.52, F.S., relating to the records of postsecondary students. Current administrative rule (6A-1.0955, F.A.C.), relating to the education records of pupils and adult students, has not been amended since 1995.

¹³ For example, the definition of a student's "record" in Florida law (s. 1002.22(2)(c), F.S.) is inconsistent with the definition in FERPA (20 U.S.C. § 1232g). Additional inconsistencies were identified by a legal work group comprised of state university, community college, and executive branch attorneys.

¹⁴ 34 C.F.R. § 99.3. Biometric record" means a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual, including fingerprints, retina and iris patterns, voiceprints, DNA sequence, facial characteristics, and handwriting.

The State Board of Education is tasked with adopting rules, monitoring FERPA, notifying the Legislature of any significant change to the federal requirements, and advising the Legislature of any change in FERPA which may create a need for an exemption to the public records requirements.

The bill repeals the current definitions of “directory information,” “records and reports,” and “student.” These terms are defined in federal law and regulations.¹⁵ The bill defines the term “agency and institution.”¹⁶

The bill also repeals the provisions in law that specify the manner in which student and parental rights are implemented (e.g., procedures for challenging the accuracy of student records, waivers by a parent or student for accessing letters of recommendation and evaluations, and the timeline for responding to requests by parents or students to access a record or report). Federal law and regulations specify how student and parental rights are exercised. The bill repeals current law with respect to the parties who may access otherwise confidential and exempt personally identifiable records about a student, without the consent of the parent or student, as the list is more limited than the parties specified in FERPA. The bill retains the substance of current law for the penalty for failure to comply with the law and for the applicability of the law to defunct private schools.

Public Postsecondary Students

The bill also requires a public postsecondary educational institution to comply with FERPA’s requirements for the education records of a student. Under the bill, the term “education records” means the definition that is used in FERPA and federal regulation. A public postsecondary institution may charge a fee for the actual cost of producing a copy of a record; however, a fee may not be charged for searching or retrieving records.¹⁷

Other Potential Implications:

The provisions of the bill may provide a method for the state to substantially comply with FERPA and ensure that federal funds are not jeopardized.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

¹⁵ 20 U.S.C. § 1232g and 34 C.F.R. 99.3. Student means any individual who is or has been in attendance at an educational agency or institution and whom the agency or institution maintains education records. It excludes individuals who have not been in attendance at the agency or institution.

¹⁶ *Id.* An educational agency or institution is a public or private agency or institution that receives funds under an applicable federal program.

¹⁷ 34 C.F.R. 99.11 provides this authority; however, a fee may not be charged if it effectively prevents a parent or student from inspecting and reviewing the student’s education records.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill allows a public postsecondary institution to charge a fee for the actual cost of producing a copy of a record; however, a fee may not be charged for searching or retrieving records. Current law allows fees to be charged for providing copies of records and reports to parents and students who wish to access records or reports.

According to the Department of Education, there is no fiscal impact associated with the provisions of the bill. Failure to comply with FERPA may result in the withholding of funds under any program administered by the U.S. DOE.¹⁸ The bill may provide a way to demonstrate compliance with federal requirements and ensure that federal funds are not jeopardized.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill is linked to CS/SB 2374, which provides a new public-records exemption for education records, as defined by the Family Educational Rights and Privacy Act and the implementing regulations, for K-12 students and public postsecondary students and applicants.

¹⁸ 20 U.S.C. § 1232g(f) and 34 C.F.R. § 99.67

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Education Pre-K-12 on March 26, 2009:

- Requires the State Board of Education (SBE) and public postsecondary institutions to comply with the federal Family Educational Rights and Privacy Act (FERPA) and federal regulations;
- Requires the SBE to evaluate and determine if FERPA is consistent with specific principles, adopt rules, monitor FERPA, and advise the Legislature of any significant federal changes to FERPA; and
- Conforms current law to FERPA.

- B. **Amendments:**

None.