

**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.)

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Prepared By: The Professional Staff of the Committee on Criminal Justice

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BILL: CS/SB 188

INTRODUCER: Education Committee and Senator Hukill and others

SUBJECT: Education Data Privacy

DATE: February 11, 2014

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Hand</u>	<u>Klebacha</u>	<u>ED</u>	<b>Fav/CS</b>
2.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	<b>Favorable</b>
3.	_____	_____	<u>JU</u>	_____

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 188 tightens state and local requirements to emphasize the rights of students and parents, and bolster the privacy of student education records. The bill specifically:

- Strengthens existing local requirements to emphasize the rights of students and parents;
- Limits the collection of certain student, parent, and sibling information by entities that are part of, or perform services for, Florida's public education system;
- Reaffirms the prohibition on disclosing confidential and exempt education records by entities that are part of, or perform services for, Florida's public education system, unless the disclosure is authorized by law, and
- Requires governing boards, in a public meeting, to identify which student education records the board intends to include as publicly available student directory information; and
- Requires school districts to transition from using student social security numbers to using a unique Florida student identification number.

The bill takes effect upon becoming a law.

## II. Present Situation:

### Privacy of Student Education Records

The privacy of student education records is established by a comprehensive system of federal and state laws. This system ensures that student education records at the public school district, college, university, and state level are accessible by students and parents, while also safeguarding the privacy of student education records.

The Family Educational Rights and Privacy Act (FERPA) is a federal law that applies to educational agencies or institutions that receive United States Department of Education (U.S. DOE) program funds.<sup>1</sup> The purpose of FERPA is two-fold: to ensure that students and parents can access the student's education records,<sup>2</sup> and to protect the privacy rights of students and parents by limiting the transferability of the student's education records without student or parent consent.<sup>3</sup> Compliance with FERPA is a condition for receiving federal funds.<sup>4</sup>

FERPA ensures that public school districts, colleges, universities, and state educational agencies protect student or parent rights and do not disclose student education records without student or parent consent, unless authorized by FERPA.

Florida has codified FERPA in state law. Additionally, as explained herein, Florida has also generally utilized state law to build upon and strengthen FERPA's provisions.<sup>5</sup>

#### *Parent or Student Rights*

FERPA obligates school districts, colleges, universities, and state educational agencies to ensure that students or parents enjoy their rights to:

- Inspect, review, and contest the student's educational records;<sup>6</sup> and

<sup>1</sup> 20 U.S.C., s. 1232g and 34 C.F.R. 99.1.

<sup>2</sup> The phrase "student education records," as used herein, encompasses two intertwined categories of student information – "education records" and "personally identifiable information." FERPA prohibits funds from being made available under any applicable program to any educational agency or institution (i.e., any public or private agency or institution which is the recipient of funds under any applicable program) that has a policy or practice of: (1) "permitting the release of education records (or personally identifiable information contained therein...)," or (2) "releasing or providing access to, any personally identifiable information in education records..." unless otherwise permitted by FERPA. 20 U.S.C. 1232g(b)(1) & (2). The term "education records" means those records, files, documents, and other materials which contain information directly related to a student, and are maintained by an educational agency or institution. 20 U.S.C. 1232g(b)(4) and *Owasso Independent School Dist. v. Falvo*, 534 U.S. 426 (2002) (FERPA implies that education records are institutional records kept by a single central custodian). "Personally identifiable information" is essentially information that would allow a reasonable person in the school community to identify the student with reasonable certainty. *See* 34 C.F.R. 99.3

<sup>3</sup> 73 FR 74831 (December 9, 2008). "As such, FERPA is not an open records statute or part of an open records system." *Id.*

<sup>4</sup> 20 U.S.C. 1232g(a)(1) and 34 C.F.R. 99.67.

<sup>5</sup> Section 1002.22, F.S. Florida law states that a student's education records, as defined in FERPA and the federal regulations issued pursuant thereto, are confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I, Fla. Const. *See* Sections 1002.221(1) and 1006.52(1), F.S. In light of FERPA and the federal regulations and preamble issued thereto (see footnote 2), Florida's public record exemption encompasses both "education records" (i.e., institutional records) and the subset of "personally identifiable information" (i.e., information that identifies a student, regardless of format). *See* 20 U.S.C. 1232g, 34 C.F.R. Part 99, and ss. 1002.221 and 1006.52, F.S.

<sup>6</sup> 34 C.F.R. 99.5, 34 C.F.R. 99.10, 34 C.F.R. 99.12, and 34 C.F.R. 99.20-99.22.

- Authorize the disclosure of student education records by written consent.<sup>7</sup>

Florida law codifies FERPA into state law, further ensuring the responsibility of school districts, colleges, universities, and state educational agencies to guard these student and parent rights.<sup>8</sup> However, there are differences between FERPA and state law. For example:

- FERPA requires school districts, colleges, and universities to annually notify students or parents of their rights pertaining to educational records.<sup>9</sup> Florida law does not specifically identify how frequently the notice is to be provided to students or parents.<sup>10</sup>
- FERPA allows a parent or student to file a written complaint with U.S. DOE, but does not explicitly authorize students or parents to file a lawsuit to protect their rights.<sup>11</sup> Florida law authorizes a student or parent to file a lawsuit seeking an injunction to protect their rights. Additionally, Florida law allows attorney's fees and court costs to be awarded if the rights "are vindicated."<sup>12</sup>

#### *Authorized Disclosure of Student Education Records*

FERPA authorizes school districts, colleges, and universities<sup>13</sup> to disclose student education records<sup>14</sup> without consent of the student or parent if the disclosure meets limited conditions.<sup>15</sup> Examples of conditions include, but are not limited to, disclosure of student education records to:

- Other school officials within the school or school district determined to have a legitimate educational interest;<sup>16</sup>
- Schools to which a student is transferring;<sup>17</sup>
- A contractor, consultant, or other party to whom an agency has outsourced institutional services or functions;<sup>18</sup> and
- Organizations conducting studies for, or on behalf of, school districts, colleges, or universities to: develop, validate or administer predicative tests; administer student aid programs; or improve instruction.<sup>19</sup>

<sup>7</sup> 34 C.F.R. 99.30.

<sup>8</sup> Section 1002.22(2), F.S.

<sup>9</sup> 20 U.S.C. 1232g(e) and 34 C.F.R. 99.7.

<sup>10</sup> Section 1002.22(2)(e), F.S.

<sup>11</sup> 34 C.F.R. 99.63 (*see* 34 C.F.R. 99.60-99.67 for the enforcement procedures in general). Enforcement action may include withholding payments or terminating program eligibility. 34 C.F.R. 99.67(a) and *Gonzaga University v. Doe*, 536 U.S. 273, 290 (2002).

<sup>12</sup> Section 1002.22(4), F.S.

<sup>13</sup> FERPA uses the term "educational agencies or institutions," which refers to local education agencies (i.e., school districts), elementary and secondary schools, postsecondary institutions (i.e., colleges and universities), and schools operated by the United States Department of Interior Bureau of Indian Education. 76 F.R. 75606 (Dec. 2, 2011). The term does not generally include a state education agency (i.e., the Florida Department of Education). *Id.*

<sup>14</sup> "Education records" means those records that are directly related to a student, and maintained by an educational agency or institution or by a party acting for the educational agency or institution. 34 C.F.R. 99.3.

<sup>15</sup> 20 U.S.C. s. 1232g(b)(1) and (2) and 34 C.F.R. 99.30(a).

<sup>16</sup> 20 U.S.C. s. 1232g(b)(1)(A) and 34 C.F.R. 99.31(a)(1)(i)(A).

<sup>17</sup> 20 U.S.C. s. 1232g(b)(1)(B) and 34 C.F.R. 99.31(a)(2).

<sup>18</sup> 20 U.S.C. s. 1232g(b)(1)(A) and 34 C.F.R. 99.30(a)(1)(i)(B).

<sup>19</sup> 20 U.S.C. s. 1232g(b)(1)(F) and 34 C.F.R. 99.31(a)(6).

Florida law provides that student education records are confidential and exempt from disclosure, and may not be released without student or parent consent, except as permitted by FERPA.<sup>20</sup>

For a student attending a public school in Florida, the student's education records are created by the school or school district.<sup>21</sup> Thus, the student's education records may initially be disclosed by the school district (as authorized by FERPA and state law) to a state educational agency — which in Florida is generally the Florida Department of Education (DOE). DOE, as authorized by FERPA and state law, may “rediscover” student education records in the same manner that an initial disclosure is authorized.<sup>22</sup>

### *Directory Information*

FERPA defines “directory information” as “information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.”<sup>23</sup> Examples of directory information are: the student's name, address, telephone listing, e-mail address, photograph, date and place of birth, grade level, dates of attendance, and participation in sports.<sup>24</sup> Directory information does not include a student's social security number.<sup>25</sup>

FERPA authorizes school districts, colleges, and universities to disclose directory information if they give public notice to students or parents of the types of student information that is being designated as directory information.<sup>26</sup> As directory information constitutes a permissible disclosure of student education records without student or parent consent,<sup>27</sup> Florida's codification of FERPA into statute also incorporates these requirements.<sup>28</sup>

### *Social Security Numbers*

FERPA does not prohibit the use of a student social security number (SSN) as a personal identifier or as a linking variable.<sup>29</sup> However, according to the U.S. DOE, best practices dictate that states should limit use of student SSNs to instances in which there is no feasible alternative.<sup>30</sup>

Florida law requires school districts to use SSNs as student identification numbers in the school district's management information system.<sup>31</sup>

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<sup>20</sup> Section 1002.221(1), F.S.; s. 1006.52(1), F.S. Florida law defines “education records” as defined in FERPA. *Id.*

<sup>21</sup> 76 F.R. 75606 (Dec. 2, 2011). The definition of “student” means 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 C.F.R. 99.3.

<sup>22</sup> 34 C.F.R. 99.33.

<sup>23</sup> 34 C.F.R. 99.3.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> 34 C.F.R. 99.37. This notice includes the ability to opt-out of being included in the student directory. *Id.*

<sup>27</sup> 20 U.S.C. 1232g(a)(5); 34 C.F.R. 99.31(11); 34 C.F.R. 99.37.

<sup>28</sup> Sections 1002.221, and 1006.52, F.S.

<sup>29</sup> 76 F.R. 75611 (Dec. 2, 2011). However, the U.S. Department of Education recognizes the importance of limiting SSN use, as FERPA prohibits schools from designating student SSNs as directory information. 34 C.F.R. 99.3 and 76 F.R. 75611 (Dec. 2, 2011) (referring to the definition of “directory information”).

<sup>30</sup> 76 F.R. 75611 (Dec. 2, 2011).

<sup>31</sup> Section 1008.386, F.S.

## Florida Department of Education Legislative Recommendations

On September 23, 2013, Governor Scott issued Executive Order Number 13-276. The executive order directed the Commissioner of Education to “immediately conduct a data security review” and to “make recommendations regarding any needed rule or legislative change to safeguard the privacy of our students’ data....”<sup>32</sup>

DOE subsequently issued a report covering security initiatives, school district activities, and information technology security reviews.<sup>33</sup> The report contained various recommendations, including legislative changes to:

- Require that school districts give annual notice to students and parents of their rights with respect to education records;
- Clarify that a student or parent who has received injunctive relief to enforce his or her rights may be awarded attorney’s fees and court costs;
- Establish limitations on the collection of student information by entities that are part of, or perform services for, Florida’s public education system, to prohibit collecting, obtaining, or retaining: biometric information; political affiliation; voting history; religious affiliation; health information; and correspondence from community agencies or private professionals;
- Establish limitations on the disclosure of confidential and exempt student education records, entities that are part of, or perform services for, Florida’s public education system, except when the disclosure is authorized by state or federal law, or in response to a lawfully issued subpoena or court order;
- Require directory information to be designated in accordance with FERPA at regularly scheduled governing board meetings, and the governing board must consider the extent to which the disclosure would put students at risk; and
- Establish a computer generated student identifier for state and local systems.<sup>34</sup>

In sum, the DOE report identifies areas where state law could be strengthened to further ensure that public school districts, colleges, universities, and state educational agencies protect student or parent rights and the privacy of student education records.

### III. Effect of Proposed Changes:

CS/SB 188 tightens state and local requirements to emphasize the rights of students and parents, and bolsters the privacy of student education records.

The bill implements the recommendations of the DOE Student Data Privacy report. The bill:

- Specifies that school districts, colleges, and universities must annually, rather than at their discretion, provide students and parents notice of their education record rights;

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<sup>32</sup> Executive Order No. 13-276, dated September 23, 2013.

<sup>33</sup> Florida Department of Education, Student Data Privacy Recommendations, *available at* <http://www.fldoe.org/pdf/DataSecurityReport.pdf> (last viewed on February 11, 2014).

<sup>34</sup> *Id.*

- Clarifies existing law to authorize attorney’s fees and court costs to be awarded upon receipt of injunctive relief, rather than when the parent or student’s rights are “vindicated”;
- Creates a new law prohibiting entities that are part of, or perform services for, Florida’s public education system from collecting, obtaining, or retaining the political affiliation, voting history, religious affiliation, or biometric information of a student, parent, or sibling of the student;
- Defines, identifies characteristics, and gives examples of biometric information;
- Reaffirms the prohibition of disclosure of confidential and exempt student education records by entities that are part of, or perform services for, Florida’s public education system without parent consent, unless authorized or required by law;
- Creates new obligations in law to require the governing board of a school district, college, or university, in a regularly scheduled public meeting, to identify which student information the governing board will designate as directory information, and to consider whether the disclosure of the identified directory information would put students at risk;
- Confirms the ability for the school district, college, or university, to charge fees for providing directory information in response to public records requests;
- Deletes the requirement in state law that school districts use student social security numbers as student identification numbers; and
- Once DOE completes a process for creating a non-SSN Florida student identification number, requires school districts to use the (non-SSN) Florida student identification number.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

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:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 1002.22, 1008.386 and 1011.622. This bill creates section 1002.222 of the Florida Statutes.

**IX. 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 on February 4, 2014**

CS/SB 188 differs from SB 188 in that:

- SB 188 provided that school districts that wanted to collect student biometric information must: (1) create policies governing the collection and use of the biometric information; and (2) not collect biometric information on a student unless the parent chose to opt-in. CS/SB 188 reframes and expands the concepts in SB 188 to prohibit entities that are part of, or perform services for, Florida's public education system, from collecting, obtaining, and retaining the biometric information, political affiliation, voting history, and religious affiliation of a student, parent, or sibling of the student; and
- CS/SB 188 implements recommendations from the DOE Student Data Privacy report.

**B. Amendments:**

None.