

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 Committee on Governmental Oversight and Accountability

BILL: CS/SB 648

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Montford

SUBJECT: OGSR/Education Records/Family Educational Rights and Privacy Act

DATE: March 20, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Letarte</u>	<u>Klebacha</u>	<u>ED</u>	Favorable
2.	<u>McVaney</u>	<u>McVaney</u>	<u>GO</u>	Fav/CS
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 648 continues the current public records exemption for education records of K-12 students held by an educational agency or institution by removing the repeal date. The exemption is scheduled to repeal on October 2, 2014, unless saved from repeal through reenactment by the Legislature.¹

The bill takes effect on October 1, 2014.

II. Present Situation:

Florida Public Records Requirements

The Constitution of the State of Florida provides that:

[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.²

¹ Section 1002.221(3), F.S.

² Art. I, s. 24(a), Fla. Const. The Florida Statutes define the term “public records” as “all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical

Under Florida law, “[e]very person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.”³

However, the Legislature is authorized to exempt records from such laws that otherwise require accessibility.⁴ Such exemptions must be passed by a two-thirds vote of each house, state with specificity the public necessity justifying the exemption, and must be no broader than necessary to accomplish the stated purpose.⁵

Open Government Sunset Review Act

The Open Government Sunset Review Act (OGSRA) provides a review process for public records exemptions.⁶ OGSRA requires that a new exemption or substantial amendment of an existing exemption be set to repeal on October 2nd of the fifth year after enactment, unless reenacted by the Legislature.⁷

When reenacting an exemption that will repeal, a public necessity statement and a two-thirds vote for passage are required if the exemption is substantially amended but not necessary if the exemption is reenacted without expansion.⁸ A substantial amendment exists “if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption.”⁹

form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” Section 119.011(12), F.S.

³ Section 119.07(1)(a), F.S.

⁴ Art. I, s. 24(c), Fla. Const.

⁵ *Id.*

⁶ Section 119.15, F.S. The statute provides specific questions to be considered during the review process. Section 119.15(6)(a), F.S. The questions are:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

Responses to these questions from the Florida Department of Education and the State University System of Florida Board of Governors are on file with the Senate Committee on Education.

⁷ Section 119.15(3), F.S.

⁸ *See* Section 119.15(4), F.S.

⁹ Section 119.15(4)(b), F.S.

Federal and State Law Regarding Privacy of Education Records

Federal Law: Family Educational Rights and Privacy Act

The Family Educational Rights and Privacy Act (FERPA) applies to educational agencies or institutions that receive federal funds.¹⁰ FERPA prohibits funding from being provided to an educational agency or institution that does not allow access to a student's education records¹¹ by a student or a parent pursuant to FERPA, or does not appropriately limit the transfer of a student's education records in accordance with FERPA.¹² Compliance with FERPA is a condition for receiving federal funds.¹³

Florida Law: Section 1002.221, F.S., K-12 Education Records

Florida law codifies FERPA into state law to ensure compliance with FERPA and continued receipt of federal funds.¹⁴ Section 1002.221, Florida Statutes, makes education records of students in kindergarten through grade twelve (K-12) confidential and exempt from public records disclosure requirements.¹⁵ "Education records" are defined as in FERPA and its regulations and include "records, files, documents, and other materials" containing "information directly related to a student" and are "maintained by an educational agency or institution or by a person acting for such agency or institution."¹⁶

¹⁰ 20 U.S.C. §1232g(a). An "educational agency or institution" is defined as "any public or private agency or institution which is the recipient of funds under any applicable program." *Id.* §1232(a)(3).

¹¹ *Infra* note 16 and accompanying text (providing FERPA's definition of "education records").

¹² 20 U.S.C. §1232g(a) and (b). FERPA provides that funding will not be provided to a program, agency, or institution "which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information . . .) of students without written consent of their parents . . ." *Id.* §1232g(b)(1).

¹³ 20 U.S.C. §1232g(a)(1) and (2); *see* 34 C.F.R. §99.67(a) (identifying actions that may be taken against an educational agency or institution that does not comply with FERPA, which include withholding further payments, compelling compliance through a cease and desist order, and terminating eligibility to receive funding under any applicable program).

¹⁴ *See* s. 1002.221, F.S.; s. 3, ch. 2009-240, L.O.F. (providing that noncompliance with FERPA could result in the loss of federal funding and that "[t]he Legislature finds that in order to comply with the applicable federal requirements regarding the collection, use, and release of education records, such records must be made confidential and exempt from public disclosure).

¹⁵ Section 1, ch. 2009-240, L.O.F. (stating that education records, as defined by the Family Educational Rights and Privacy Act, are confidential and exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Art. I, Florida Constitution).

¹⁶ 20 U.S.C. §1232g(a)(4)(A); *see also* Florida Department of Education, *Open Government Sunset Review Questionnaire: Section 1002.221, F.S. K-12 Records* (Jan. 17, 2014) (on file with Senate Committee on Education); State University System of Florida Board of Governors, *Open Government Sunset Review Questionnaire: Section 1002.221, F.S. K-12 Records* (Jan. 13, 2014) (on file with Senate Committee on Education).

Under current law, agencies¹⁷ and institutions that are part of Florida's education system¹⁸ may not release a student's education records, or personally identifiable information therein,¹⁹ without written consent from the student or student's parent except in accordance with the FERPA.²⁰ Additionally, Florida law requires that education records released to the Auditor General and the Office of Program Policy Analysis and Government Accountability for official business be used and maintained in accordance with FERPA.²¹ In 2010, s. 1002.221, F.S. was amended to allow release of a student's record without consent, in accordance with FERPA, to "parties to an interagency agreement among the Department of Juvenile Justice, the school, law enforcement authorities, and other signatory agencies" for the purpose of reducing juvenile crime and providing appropriate programs and services to a juvenile and a juvenile's family.²²

The exemption in s. 1002.221, Florida Statutes, which removes education records of students in kindergarten through grade twelve from public records requirements, is set to repeal on October 2, 2014 unless reviewed and saved through reenactment by the Legislature.²³

III. Effect of Proposed Changes:

CS/SB 648 continues the current public records exemption for education records of students in kindergarten through grade twelve held by an educational agency or institution.²⁴ The bill does not require a public necessity statement or a two-thirds vote for passage because the bill does not create a new exemption or substantially amend an existing exemption.

If the exemption is not continued, a conflict will exist between a public educational agency or institution's obligations under Florida's public records requirements and the privacy rights afforded to students and parents under FERPA.²⁵ Noncompliance with FERPA may result in the loss of federal funding to educational agencies and institutions.²⁶

¹⁷ Section 1002.22(1)(a), F.S. (defining an agency as "any board, agency, or other entity that provides administrative control or direction of or performs services for public elementary or secondary schools, centers, or other institutions as defined in this chapter").

¹⁸ Section 1002.221(2)(a), F.S. (referencing s. 1000.04(1), (3), and (4), F.S., which describe the components for delivery of public education including public K-12 schools, Florida School for the Deaf, and Blind and the Florida Virtual School). Public K-12 schools "include charter schools and consist of kindergarten classes, elementary, middle, and high school grades and special classes; virtual instruction programs; workforce education; career centers; adult, part-time, and evening schools, courses, or classes, as authorized by law to be operated under the control of district school boards; and lab schools operated under the control of state universities." Section 1000.04(1), F.S.

¹⁹ See 20 U.S.C. §1232(g)(b)(1) (providing that funding will not be provided to an educational agency or institution that has a policy or practice of releasing such information without consent).

²⁰ Section 1002.221(2)(a), F.S.

²¹ Section 1002.221(2)(a), F.S.

²² Section 1002.221(2)(b), F.S.; s. 2, ch. 2010-192, L.O.F.

²³ Section 1002.221(3), F.S.

²⁴ See s. 1002.221, F.S.

²⁵ Florida Department of Education, *Open Government Sunset Review Questionnaire: Section 1002.221, F.S. K-12 Records* (Jan. 17, 2014) (on file with Senate Committee on Education); State University System of Florida Board of Governors, *Open Government Sunset Review Questionnaire: Section 1002.221, F.S. K-12 Records* (Jan. 13, 2014) (on file with Senate Committee on Education); see 20 U.S.C. §1232g; Art. I, s. 24(a), Fla. Const.; s. 119.011(12), F.S.

²⁶ 20 U.S.C. §1232g(a)-(b); 34 C.F.R. §99.67(a); Florida Department of Education, *Open Government Sunset Review Questionnaire: Section 1002.221, F.S. K-12 Records* (Jan. 17, 2014) (on file with Senate Committee on Education).

The bill also repeals a statement in current law that provided the purpose of an interagency agreement to allow release of certain records to DJJ, the school, law enforcement authorities, and other signatory agencies.

The bill takes effect on October 1, 2014.

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 amends section 1002.221 of the Florida Statutes.

IX. Additional Information:

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

CS by Governmental Oversight and Accountability on March 20, 2014:

The CS integrates several technical changes and repeals a statement in current law that provided the purpose of an interagency agreement to allow release of certain records to DJJ, the school, law enforcement authorities, and other signatory agencies.

- B. **Amendments:**

None.