

**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 Rules

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BILL: SB 7070

INTRODUCER: Education Committee

SUBJECT: Impact of COVID-19 on Educational Institutions

DATE: April 12, 2021

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

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
<u>Jahnke</u>	<u>Bouck</u>		<b>ED Submitted as Comm. Bill/Fav</b>
1. <u>Jahnke</u>	<u>Phelps</u>	<u>RC</u>	<b>Pre-meeting</b>

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**I. Summary:**

SB 7070 creates liability protections for educational institutions for actions related to the COVID-19 pandemic and creates accountability and prekindergarten provisions in recognition of the public health emergency caused by COVID-19. Specifically, the bill:

- Creates specified liability protections for an educational institution that has taken reasonably necessary actions to diminish the impact or the spread of COVID-19 and provides immunity from any civil damages, equitable relief, or other remedies relating to such actions.
- Establishes that these liability protections apply retroactively to causes of actions accruing on or after the date of the declaration of the COVID-19 public health emergency by the State Surgeon General, and must apply prospectively to causes of action that accrue before the end of the academic term during which the emergency declaration expires or is terminated.
- Creates waivers from accountability requirements relating to the use of school grades, school improvement ratings, and student performance results from the statewide, standardized assessments for the 2020-2021 school year.
- Authorizes a parent or guardian to request that his or her grade three public school student be retained.
- Waives the provision that requires a summer prekindergarten program delivered by a public school or private prekindergarten provider to consist of at least 300 hours and waives the school readiness program requirement that no more than 22 percent of funds provided to an early learning coalition to implement its approved school readiness program to be used for administrative costs, quality activities, and non-direct services.
- Authorizes a parent or guardian to submit a written request to retain his or her K-5 student, for academic reasons, for the 2021-2022 school year in the grade level to which the student was assigned at the beginning of the 2020-2021 school year.
- Provides an additional year of probationary status for an approved nursing program that has not achieved the required passage rate on the national nursing licensing examination in the 2020 calendar year. The Board of Nursing must grant that extension at a regularly scheduled meeting in 2021.

The bill may have a fiscal impact for the private sector. See Section V.  
The bill takes effect upon becoming a law.

## II. Present Situation:

### COVID-19

The COVID-19 pandemic has drastically affected the state of Florida since the outbreak began affecting the United States in early 2020. The toll on individuals, businesses, and the economy has been catastrophic. According to the Department of Health, 2,033,179 positive COVID-19 cases have been diagnosed in the state, 84,406 residents have been hospitalized, and 33,116 Florida residents have died of the virus.<sup>1</sup>

Governor DeSantis issued Executive Order No. 20-52 on March 9, 2020, declaring a state of emergency and issuing guidelines to halt, mitigate, or reduce the spread of the outbreak. The order has been extended seven times,<sup>2</sup> most recently by Executive Order No. 21-45, issued on February 26, 2021.

#### *Department of Education Emergency Orders*

##### 2020

In response to the pandemic, on March 23, 2020, the Commissioner of Education (Commissioner), through his delegated authority under the Governor's Executive Order 20-52, issued his first emergency order (EO), which addressed a comprehensive list of issues, including issues related to Florida College System (FCS) Institutions; K-12 assessments, accountability, and promotion; private schools that accept scholarship money; reallocation of funding; and service of students with IEPs or 504 Plans.<sup>3</sup>

Similar to efforts across the country and the world, this initial EO stated "all school districts are recommended to keep their facilities closed except to staff and teachers, per CDC guidance, through April 15, 2020." The EO then stated "[that] In keeping with their district continuity plan, each district must deliver educational services to students while they remain at home." Districts were encouraged to build out continuity plans to deliver instruction while students were at home, and FCS institutions were strongly recommended to operate virtually.

The Department of Education (DOE) also requested that the United States Department of Education (USDOE) approve Florida's requested waiver<sup>4</sup> of statewide assessment, accountability, and reporting requirements in ESEA for the 2019-2020 school year due to widespread school closures related to COVID-19.

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<sup>1</sup> Florida Department of Health, Division of Disease Control and Health Protection, *available at* [Florida's COVID-19 Data and Surveillance Dashboard \(arcgis.com\)](#) (last visited Mar. 27, 2021).

<sup>2</sup> A state of emergency declared under the State Emergency Management Act may not last for more than 60 days unless it is renewed by the Governor. Section 252.36(2), F.S.

<sup>3</sup> Florida Department of Education, *Emergency Order No. 2020-EO-01* (March 23, 2020), *available at* <http://www.fldoe.org/core/fileparse.php/19861/urlt/DOEORDERNO2020-EO-01.pdf>.

<sup>4</sup> Florida Department of Education, *COVID-19 Waiver Response from Assistant Secretary Frank T. Brogan Assistant Secretary for Elementary and Secondary Education* (March 27, 2020), *available at* <http://www.fldoe.org/core/fileparse.php/19861/urlt/FLCovid19WaiverResponse.pdf>.

Resulting guidance<sup>5</sup> relating to the cancellation of state assessments specified that, because the Grade 3 English language arts (ELA) Florida Standards Assessment (FSA) was a key component districts used to make promotion decisions, and such data would not be available due to the cancellation of statewide assessments for the 2019-2020 school year, promotion decisions should be made in consultation with parents, teachers, and school leaders based on the students' classroom performance and progress monitoring data.

Between March and May 2020, the DOE, local districts, teachers, parents, and all stakeholders worked to try to minimize the negative impacts that school closures and re-opening in a virtual model would have on the students.<sup>6</sup> On May 13, 2020, the Commissioner issued his second EO<sup>7</sup>, which extended various timeframes, including but not limited to, expiring licenses, applications for licenses, assessment deadlines, and others. This order also suspended the requirement to conduct annual evaluations for teachers and administrators for the 2019-2020 school year, and allowed districts to determine how to meet differentiated pay requirements for teachers on the performance salary schedule.<sup>8</sup> In addition, the EO suspended requirements that School Readiness Programs use no more than 5 percent for administrative costs and a total of 22 percent for a combination of administrative, quality and non-direct services, as long as the funds are used for purposes of emergency recovery and direct support to providers through June 30, 2020.

The Commissioner's fourth EO<sup>9</sup> suspended the requirement that summer voluntary prekindergarten (VPK) programs be 300 hours, but required such programs to be at least 200 hours. The EO also modified summer VPK certification requirements and cancelled summer VPK assessments.

On July 6, 2020, the Commissioner issued his sixth EO.<sup>10</sup> The Commissioner stated in the EO that "education is critical to the success of the state and to an individual, and extended school closures can impede educational success of students, [and] impact families' well-being."<sup>11</sup> The order would go on to say that "schools are not just the site of academic learning, schools provide many services to students that are critical to the well-being of students and families, such as nutrition, socialization, counseling, and extracurricular activities." The Commissioner also stressed the need for a comprehensive plan for reopening schools for the 2020 fall semester. Additionally, school districts and charter school governing boards with an approved reopening plan would receive both reporting flexibility and financial continuity.

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<sup>5</sup> Florida Department of Education, *Florida Department of Education (FDOE) Q&A Guidance* (March 19, 2020), available at <http://www.fldoe.org/core/fileparse.php/19861/urlt/FDOE-COVID-QA1.pdf> at p. 2.

<sup>6</sup> Florida Department of Education, *Opening Florida's Schools to Re-Open Florida's Economy* (April 22, 2020), available at <http://www.fldoe.org/core/fileparse.php/19861/urlt/FDOE-Opening.pdf>.

<sup>7</sup> Florida Department of Education, *Emergency Order No. 2020-EO-02* (May 13, 2020), available at <http://www.fldoe.org/core/fileparse.php/19861/urlt/DOEEmergencyOrder2020-EO-02.pdf>.

<sup>8</sup> *Id.*

<sup>9</sup> Florida Department of Education, *Emergency Order No. 2020-EO-04* (June 11, 2020), available at <https://www.fldoe.org/core/fileparse.php/19861/urlt/2020-EO-04.pdf>.

<sup>10</sup> Florida Department of Education, *Emergency Order No. 2020-EO-06* (July 6, 2020), available at <http://www.fldoe.org/core/fileparse.php/19861/urlt/DOE-2020-EO-06.pdf>.

<sup>11</sup> *Id.*

The EO<sup>12</sup> issued November 30, 2020, found that parents and districts continue to need the educational and financial benefits provided in the previous EO<sup>13</sup> and it further found that the flexibilities provided by emergency orders are necessary “to respond to and mitigate the impact of the emergency and promote the health, safety and welfare of persons connected with Florida’s educational system.”<sup>14</sup>

## 2021

An EO<sup>15</sup> was issued on February 15, 2021, to provide school districts with expanded statewide testing windows to ensure every student can be safely tested. The modified testing windows for the spring of 2021 for paper-based testing (PBT) and computer based testing (CBT)<sup>16</sup> were intended to allow for more district flexibility in scheduling tests. The EO did not address any other aspect of statewide, standardized testing.

The United States Department of Education (USDOE) issued guidance<sup>17</sup> to states emphasizing the importance of flexibility in administering assessments in 2020-2021 as a result of the pandemic, and supporting the use of assessment data as a source of information for parents and educators to target resources and support, rather than for accountability purposes this year.

The USDOE guidance makes clear that states should consider the ways they can do things differently this year. Flexibility available to states includes:

- Extending the testing window and moving assessments to the summer or fall,
- Giving the assessment remotely, where feasible,
- Shortening the state assessment, to make testing more feasible to implement and prioritize in-person learning time.

The USDOE guidance invited states to request a waiver for the 2020-2021 school year of the accountability and school identification requirements in the Elementary and Secondary Education Act of 1965 (ESEA). A state receiving this waiver would not be required to implement and report the results of its accountability system, including calculating progress toward long-term goals and measurements of interim progress or indicators, or to annually meaningfully differentiate among its public schools using data from the 2020-2021 school year. The state would also not be required to identify schools for comprehensive support and improvement (CSI), targeted support and improvement (TSI), and additional targeted support and improvement (ATSI) based on data from the 2020-2021 school year. Each state that receives

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<sup>12</sup> Florida Department of Education, *Emergency Order No. 2020-EO-07* (Nov. 30, 2020), available at <http://www.fldoe.org/core/fileparse.php/5673/urlt/DOEOrder2020-EO-07.pdf>.

<sup>13</sup> Florida Department of Education, *Emergency Order No. 2020-EO-06* (July 6, 2020), available at <http://www.fldoe.org/core/fileparse.php/19861/urlt/DOE-2020-EO-06.pdf>.

<sup>14</sup> Florida Department of Education, *Emergency Order No. 2020-EO-07* (Nov. 30, 2020), available at <http://www.fldoe.org/core/fileparse.php/5673/urlt/DOEOrder2020-EO-07.pdf>.

<sup>15</sup> Florida Department of Education, *Emergency Order No. 2021-EO-01*, February 15, 2021 available at <http://www.fldoe.org/core/fileparse.php/19861/urlt/2021-EO-01.pdf>.

<sup>16</sup> *Id.*, *Modified Spring 2021 Testing Windows*, February 15, 2021 available at <http://www.fldoe.org/core/fileparse.php/19861/urlt/2021-EO-01.pdf>.

<sup>17</sup> U.S. Department of Education, *U.S. Department of Education Releases Guidance to States on Assessing Student Learning During the Pandemic*, February 22, 2021, <https://www.ed.gov/news/press-releases/us-department-education-releases-guidance-states-assessing-student-learning-during-pandemic> (last visited Feb. 23, 2021).

the accountability and school identification waivers would be required to continue to support previously identified schools in the 2021-2022 school year, resume school identification in the fall of 2022, and ensure transparency to parents and the public.<sup>18</sup>

On March 17, 2021, the DOE issued a memo to school district superintendents inviting public comment on the DOE's draft waiver in response to the USDOE guidance inviting states to request a waiver for the 2020-2021 school year of the accountability and school identification requirements in the ESEA.<sup>19</sup>

### ***State University System Actions***

To respond to the potentially serious impacts of COVID-19 on the health and safety of state university students, faculty, and staff, the Board of Governors of the State University System (BOG) issued guidance to the state universities for the academic and operational continuity of the institutions during the virus outbreak.

On March 11, 2020,<sup>20</sup> the BOG directed state universities to make plans to transition to remote instruction as soon as possible. Subsequently, the BOG directed that remote instruction would continue through the end of the Spring 2020 semester at each state university and students who could return home should return home. Universities were also encouraged to consider using remote instruction for the early summer terms.<sup>21</sup>

On June 23, 2020, the BOG approved reopening plans for the state universities that, among other items, included plans to shift back to remote instruction in case of an outbreak, and to continue to provide high-quality educational experiences while utilizing technology and flexibility and prioritizing student and faculty welfare.<sup>22</sup>

### **Liability**

#### ***Lawsuits Arising from Campus Closures***

As universities moved classes online to curtail the spread of COVID-19, students across the country have raised concerns that they were still paying regular tuition prices for what became an online education. Students at several public and private universities in Florida have sued for tuition reimbursements. In one such case, the court explained that the:<sup>23</sup>

[COVID-19] pandemic has wreaked havoc on the world. In the Spring of 2020, many schools and colleges, both public and private, were forced to move their curriculum from

<sup>18</sup> U.S. Department of Education, *U.S. Department of Education Releases Guidance to States on Assessing Student Learning During the Pandemic* (February 22, 2021), available at <https://www2.ed.gov/policy/elsec/guid/stateletters/dcl-assessments-and-acct-022221.pdf>.

<sup>19</sup> Florida Department of Education, *Proposed Federal Waiver Request Opportunity for Public Comment through March 31, 2021* (March 17, 2021), available at <https://info.fldoe.org/docushare/dsweb/Get/Document-9100/dps-2021-43.pdf>.

<sup>20</sup> Board of Governors, *State University System Statement on COVID-19*, <https://www.flbog.edu/2020/03/11/state-university-system-statement-on-covid-19/> (last visited Mar. 27, 2021).

<sup>21</sup> Board of Governors, *State University System Extends Remote Learning* (Mar. 17, 2020) <https://www.flbog.edu/2020/03/17/state-university-system-extends-remote-learning/> (Last visited Mar. 27, 2020).

<sup>22</sup> Board of Governors, *HIGHLIGHTS: Board of Governors' Meeting* (Last visited Mar. 27, 2021).

<sup>23</sup> *Salerno v. Florida S. Coll.*, 488 F. Supp. 3d 1211 (M.D. Fla. 2020).

in-person to online instruction out of concern for the health of their students, faculty, and staff, and in response to government-mandated closures and social-distancing measures. This case is novel in the sense that there is no legal precedent involving a pandemic's impact on a school's promise to provide in-person learning when doing so would be unsafe and/or against government mandates. And so, like the ripple in a pond after one throws a stone, the legal system is now feeling COVID-19's havoc with the current wave of class action lawsuits that seek tuition reimbursement related to forced online tutelage.

### ***Breach of Contract***

A contract is made under Florida law when three elements are present: offer, acceptance, and consideration.<sup>24</sup> A valid contract arises when the parties' assent is manifested through written or spoken words, or "inferred in whole or in part from the parties' conduct."<sup>25</sup> A contract based on the parties' words is characterized as express, whereas, a contract based on the parties' conduct is said to be implied in fact.<sup>26</sup> A party injured by a breach of contract may recover fair and just compensation for the loss or injury caused by the breach of contract.<sup>27</sup>

Sovereign immunity is the "privilege of the sovereign not to be sued without its consent."<sup>28</sup> A state agency or subdivision of the state waives the protections of sovereign immunity only when it enters into an express contract.<sup>29</sup> When an alleged contract is merely implied, however, these sovereign immunity protections remain in force.<sup>30</sup> Generally, lawsuits relating to the COVID public health emergency, relate to the institution allegedly breaching a contract in the provision of educational services to the students.<sup>31</sup>

### ***Access to Courts – Kluger v. White***

The State Constitution provides in Article 1, s. 21, the "Access to courts" section,

The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Case law has demonstrated, however, that this provision is not absolute. In 1973, the Florida Supreme Court issued an opinion, *Kluger v. White*,<sup>32</sup> a case which construed the access to courts provision. In broad terms, the case before the Court involved the abolition of a statute governing

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<sup>24</sup> *SCG Harbourwood, LLC v. Hanyan*, 93 So. 3d 1197, 1200 (Fla. 2d DCA 2012) (citing *Pezold Air Charters v. Phoenix Corp.*, 192 F.R.D. 721, 725 (M.D.Fla.2000)).

<sup>25</sup> *Baron v. Osman*, 39 So. 3d 449, 451 (Fla. 5th DCA 2010) (citing *Commerce P'ship v. Equity Contracting Co.*, 695 So.2d 383, 385 (Fla. 4th DCA 1997)).

<sup>26</sup> *Id.*

<sup>27</sup> *MCI Worldcom Network Services, Inc. v. Mastec, Inc.*, 995 So. 2d 221, 223 (Fla. 2008).

<sup>28</sup> *City of Fort Lauderdale v. Israel*, 178 So. 3d 444, 446 (Fla. 4th DCA 2015) (quoting *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 131 (2011)).

<sup>29</sup> *City of Fort Lauderdale v. Israel*, 178 So. 3d 444, 447–48 (Fla. 4th DCA 2015).

<sup>30</sup> *City of Fort Lauderdale v. Israel*, 178 So. 3d 444, 447–48 (Fla. 4th DCA 2015).

<sup>31</sup> See, e.g., *Fagundez v. Florida Bd. of Governors*, No. 2020 CA 000910, AMCO 22 (Fla. 2d Cir. Sept. 15, 2020); *Salerno v. Florida S. Coll.*, 488 F. Supp. 3d 1211 (M.D. Fla. 2020); and *LaFleur v. Florida Board of Governors*, No. 8:20-cv-01665, ACAC 15 (M.D. Fla. Aug. 24, 2020).

<sup>32</sup> *Kluger v. White*, 281 So. 2d 1 (Fla. 1973).

a tort action for property damage in an automobile accident case. When the Legislature abolished the remedy, it did not provide an alternative protection to the injured party.

The Court was confronted with the issue of whether the Legislature could abolish a right of access to the courts. The Court determined that the Legislature may not abolish a pre-1968 common law right or a statutory cause of action unless the Legislature provides a reasonable alternative to that action or unless an overpowering public necessity exists for abolishing the right of action. The Court applies a three-part test to determine whether a statute violates the access to courts provision:

- Does the change abolish a preexisting right of access?
- If so, whether a reasonable alternative exists to protect that preexisting right of access.
- If no reasonable alternative exists, whether an overwhelming public necessity exists.<sup>33</sup>

## School Accountability

### *Every Student Succeeds Act*

The Every Student Succeeds Act (ESSA), which reauthorized the Elementary and Secondary Education Act, was signed into law on December 10, 2015.<sup>34</sup>

ESSA requires that statewide mathematics and English language arts (ELA) assessments be administered in each of grades 3 through 8 and at least once in grades 9 through 12. Statewide science assessments must be administered at least once in grades 3 through 5, grades 6 through 9, and grades 10 through 12.<sup>35</sup>

Under ESSA, each state must submit a plan that, in part, establishes a single statewide accountability system to improve student academic achievement and school success.<sup>36</sup> A state's accountability system must include all public elementary and secondary schools, including all public charter schools.<sup>37</sup> States must identify two broad categories of schools for support and improvement: those that require comprehensive support and improvement, and those that require targeted support and improvement.<sup>38</sup> ESSA authorizes additional state school improvement actions for schools identified for comprehensive support and improvement but do not meet exit criteria.<sup>39</sup>

Florida's ESSA plan received approval from the United States Department of Education (USDOE) on September 26, 2018.<sup>40</sup>

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<sup>33</sup> *Eller v. Shova*, 630 So. 2d 537 (Fla. 1993).

<sup>34</sup> U.S. Department of Education, *Every Student Succeeds Act (ESSA)*, <https://www.ed.gov/essa?src=mn> (last visited Feb. 22, 2021).

<sup>35</sup> U.S. Department of Education, *Elementary and Secondary Education Act of 1965, As Amended Through P.S. 114-95, Enacted December 10, 2015* (2015), available at <https://www2.ed.gov/documents/essa-act-of-1965.pdf>.

<sup>36</sup> 34 C.F.R. s. 200.12(a)(1).

<sup>37</sup> *Id.* In addition, each state plan must include specified subgroups of students, including economically disadvantaged, race and ethnic groups, children with disabilities, and English learners.

<sup>38</sup> United States Department of Education, *Accountability Under Title I, Part A of the ESEA, Frequently Asked Questions*, available at <https://www2.ed.gov/programs/titleiparta/eseatitleiaccountabilityfaqs.pdf>, at 33.

<sup>39</sup> *Id.*, at 58.

<sup>40</sup> Florida Department of Education, *Every Student Succeeds Act (ESSA)*, <http://www.fldoe.org/academics/essa.stml> (last visited Feb. 22, 2021).



### ***Authority to Enforce Public School Improvement***

The State Board of Education (SBE), consistent with ESSA requirements, holds all school districts and public schools accountable for student performance and is responsible for a state system of school improvement and education accountability that assesses student performance by school, identifies schools that are not meeting accountability standards, and institutes appropriate measures for enforcing improvement.<sup>41</sup> School districts must be held accountable for improving the academic performance of all students and for identifying and improving schools that fail to meet accountability standards.<sup>42</sup>

The SBE has a duty to supervise Florida's public school system, equitably enforce the accountability requirements of the state school system, and impose state requirements on school districts in order to improve the academic performance of all districts, schools, and students.<sup>43</sup> DOE annually identifies each public school in need of intervention and support to improve student academic performance.<sup>44</sup>

### ***School Grading System***

School grades provide an easily understandable way to measure the performance of a school. Parents and the general public can use the school grade and its components to understand how well each school is serving its students.<sup>45</sup> School grades are used in the state system of school improvement and accountability to determine the need for school intervention and support,<sup>46</sup> or to determine whether a school is eligible for school recognition funds.<sup>47</sup>

Schools are graded using one of the following grades:<sup>48</sup>

- “A,” schools making excellent progress (62 percent or higher of total applicable points).
- “B,” schools making above average progress (54 to 61 percent of total applicable points).
- “C,” schools making satisfactory progress (41 to 53 percent of total applicable points).
- “D,” schools making less than satisfactory progress (32 to 40 percent of total applicable points).
- “F,” schools failing to make adequate progress (31 percent or less of total applicable points).

Elementary schools, middle schools, and high schools each share a basic model for determining school grades, based on the percentage of total points earned by a school for each component in the model. All schools are graded on the percentage of eligible students who pass assessments in ELA, mathematics, science, and social studies; student learning gains in ELA and mathematics; and students in the lowest 25 percent of ELA and mathematics performers who make learning

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<sup>41</sup> Section 1008.33(2)(a), F.S.

<sup>42</sup> Section 1008.33(2)(c), F.S.

<sup>43</sup> Section 1008.33(3)(a), F.S. Based upon the provisions of the Florida K-20 Education Code, chapters 1000-1013; the federal ESEA and its implementing regulations; and the ESEA flexibility waiver approved for Florida by the United States Secretary of Education.

<sup>44</sup> Section 1008.33(4), F.S.

<sup>45</sup> Florida Department of Education, *2019 School Grades Overview* (2019), available at <http://www.fldoe.org/core/fileparse.php/18534/urlt/SchoolGradesOverview19.pdf>.

<sup>46</sup> See s. 1008.33(4), F.S.

<sup>47</sup> See s. 1008.36, F.S.

<sup>48</sup> Section 1008.34(2), F.S.; Rule 6A-1.09981(4)(d), F.A.C.



gains.<sup>49</sup> Middle and high school models include additional components beyond the basic model.<sup>50</sup>

### ***School Improvement Rating***

School improvement ratings are calculated for alternative schools and exceptional student education (ESE) center schools that choose to receive a school improvement rating in lieu of a school grade.<sup>51</sup> The commissioner prepares an annual report on the performance of each school receiving a school improvement rating.<sup>52</sup>

Schools that elect a school improvement rating in lieu of a school grade will have the rating based on student learning gains for statewide, standardized assessments for ELA and mathematics; schools will be rated on only those components for which they have sufficient data.<sup>53</sup> School improvement ratings must identify an alternative school or ESE center school as having one of the following ratings:<sup>54</sup>

- “Commendable” – a significant percentage of students attending the school are making learning gains.
- “Maintaining” – a sufficient percentage of students attending the school are making learning gains.
- “Unsatisfactory” – an insufficient percentage of students attending the school are making learning gains

A school having an insufficient percentage of students making learning gains<sup>55</sup> must have a school improvement plan, which is developed and implemented by the school’s advisory council.<sup>56</sup> It is the responsibility of each district school board to approve school improvement plans.<sup>57</sup>

### ***School Recognition Program***

The Florida School Recognition Program was created to recognize the outstanding faculty and staff in highly productive public schools.<sup>58</sup> The program provides public recognition and

<sup>49</sup> Section 1008.34(3)(b), F.S. If a school does not have at least 10 students with complete data for one or more of the components, those components may not be used in calculating the school’s grade. Section 1008.34(3)(a), F.S.

<sup>50</sup> See s. 1008.34(3)(b), F.S.; Rule 6A-1.09981(4)(a)-(c), F.A.C.

<sup>51</sup> Section 1008.341; 1008.3415, F.S.; Rule 6A-1.099822 and 6A-1.099828, F.A.C.

<sup>52</sup> Section 1008.341(1), F.S.

<sup>53</sup> Florida Department of Education, *2018-19 Guide to Calculating School Improvement Ratings, July 2019* available at <http://www.fldoe.org/core/fileparse.php/18534/urlt/SIRCalcGuide19.pdf>.

<sup>54</sup> Section 1008.341(2), F.S.

<sup>55</sup> “Learning Gains,” “annual learning gains,” or “student learning gains” means the degree of student learning growth occurring from one school year to the next as required by state board rule for purposes of calculating school grades under section 1008.349(1)(b), F.S.

<sup>56</sup> Sections 1001.42(18)(a) and 1001.452(2), F.S. School advisory councils (SACs) are composed of principals, teachers, educational support personnel, parents, students, local business representatives, and community members. Section 1001.452(1)(a), F.S. SACs are responsible for developing and implementing the school’s improvement plan, assisting in the development of the school’s budget, and assisting in determinations regarding the use of school improvement funds and school recognition awards. Sections 1001.452(2) and 1008.36(4), F.S. See also Section 1002.33(9)(n), F.S. Requires a charter school earning a “D” or “F” to submit a school improvement plan to the sponsor.

<sup>57</sup> Section 1001.42(18)(a), F.S.

<sup>58</sup> s. 1008.36 (1), F.S.

financial awards to schools sustaining high student performance or schools that demonstrate exemplary improvement in student performance.<sup>59</sup>

Public schools, including charter schools, that receive a school grade of “A,” improve at least one letter grade from the prior year, or improve more than one letter grade and sustain the improvement the following year are eligible for awards.<sup>60</sup> In addition, alternative schools that maintain a “commendable” rating or improve at least one improvement-rating level are also eligible for awards.<sup>61</sup>

### ***Improvement of Low Performing Schools***

Florida’s system of improving low-performing schools is referred to as “school improvement” (SI),<sup>62</sup> Under SI, intervention and support is provided to traditional public schools earning a letter grade of “D,” or “F.”<sup>63</sup> Intensive intervention and support strategies are applied to schools that earn two consecutive grades of “D” or a grade of “F” through turnaround option plans.<sup>64</sup>

All Florida public schools that earn grade of “D” or “F” must have a school improvement plan, which is developed and implemented by the school’s advisory council.<sup>65</sup> It is the responsibility of each district school board to approve school improvement plans.<sup>66</sup>

The Commissioner must assign a community assessment team to each school district or governing board with a school that earned a grade of “D” or “F” to review the school performance data and determine causes for the low performance, including the role of school, area, and district administrative personnel.<sup>67</sup>

### ***Intervention and Support Strategies***

If a school earns two consecutive grades of “D” or a grade of “F,” it must immediately implement a differentiated matrix of intervention and support strategies.<sup>68</sup> Districts with a school

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<sup>59</sup> Section 1008.36(2), F.S.; Florida Department of Education, Accountability Reporting, *Florida School Recognition Program: Frequently Asked Questions*, <http://www.fldoe.org/accountability/accountability-reporting/fl-school-recognition-program/FAQ.shtml> (last visited March 26, 2021).

<sup>60</sup> Section 1008.36(2) and (3), F.S. A school that serves any combination of students in kindergarten through grade 3 that does not receive a school grade because its students are not tested and not included in the school grading system receive the school grade designation of a K-3 feeder pattern school, if at least 60 percent of the students in the K-3 school are scheduled to be assigned to the graded school. Section 1008.34(3)(a)2., F.S.

<sup>61</sup> Section 1008.341(2), F.S. Alternative schools have the option of receiving a school improvement rating. There are 3 ratings: commendable, maintaining, and unsatisfactory. *Id.*

<sup>62</sup> Rule 6A-1.099811(1), F.A.C.

<sup>63</sup> Section 1008.33(3)(b), F.S.

<sup>64</sup> Section 1008.33(3)(c), F.S.

<sup>65</sup> Sections 1001.42(18)(a) and 1001.452(2), F.S. School advisory councils (SACs) are composed of principals, teachers, educational support personnel, parents, students, local business representatives, and community members. Section 1001.452(1)(a), F.S. SACs are responsible for developing and implementing the school’s improvement plan, assisting in the development of the school’s budget, and assisting in determinations regarding the use of school improvement funds and school recognition awards. Sections 1001.452(2) and 1008.36(4), F.S. *See also* Section 1002.33(9)(n), F.S. Requires a charter school earning a “D” or “F” to submit a school improvement plan to the sponsor.

<sup>66</sup> Section 1001.42(18)(a), F.S.

<sup>67</sup> Section 1008.345(6)(d), F.S.

<sup>68</sup> Section 1008.33(4)(a), F.S.

improvement school must coordinate with the DOE, the Regional Executive Director or designee, and the school to identify and implement tailored support and improvement strategies designed to address low performance at the school.<sup>69</sup>

Florida law specifies seven general types of intervention and support strategies for traditional public schools to address student performance. The intervention and support strategies may include school improvement planning; leadership and educator quality improvement; professional development; curriculum review, pacing and alignment across grade levels to improve background knowledge in social studies, science, and the arts; and the use of continuous improvement and monitoring plans and processes.<sup>70</sup>

### ***School Turnaround Options***

Schools that earn two consecutive grades of “D” or a grade of “F” must also implement a district managed turnaround plan through which the school district manages the 2-year turnaround plan at the school.<sup>71</sup> The school district must submit a district-managed turnaround plan to the SBE for approval by October 1.<sup>72</sup>

Once the district-managed turnaround plan is approved by the SBE, the school district must implement the plan for the remainder of the year and continue implementation for the next full school year.<sup>73</sup> If the school’s grade does not improve to a “C”, the school must select from the following turnaround options:<sup>74</sup>

- Reassign students to another school and monitor the progress of each student.
- Close the school and reopen as one or more charter schools with a governing board that has a demonstrated record of effectiveness.
- Contract with an external operator that has a demonstrated record of effectiveness to operate the school.
  - The external operator may include a district-managed charter school in which all instructional personnel are not employees of the school district, but are employees of an independent governing board composed of members who did not participate in the review or approval of the charter.

Based on traditional public schools that received grades in 2018 and 2019:<sup>75</sup>

- 70 percent of schools graded “D” or “F” improved their grade in 2019;
- 77 percent of schools graded “F” in 2018 improved their grade in 2019; and

<sup>69</sup> Rule 6A-1.099811(5)(a), F.A.C.

<sup>70</sup> Section 1008.33(3)(c), F.S.; *see* Rule 6A-1.099811(5)(b)1.-9., F.A.C.

<sup>71</sup> Rule 6A-1.099811(5)(a)-(b), F.A.C.

<sup>72</sup> Section 1008.33(4)(a), F.S.

<sup>73</sup> The state board may allow a school an additional year of implementation before the school must implement a turnaround option required under paragraph if it determines that the school is likely to improve to a grade of “C” or higher after the first full school year of implementation. *Id.*

<sup>74</sup> Section 1008.33(4)(b)1.-3., F.S.

<sup>75</sup> Florida Department of Education, *School Improvement Presentation to the House PreK-12 Innovation Subcommittee* (October 16, 2019), available at

[https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=3017&Session=2020&DocumentType=Meeting Packets&FileName=pki 10-16-19.pdf](https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=3017&Session=2020&DocumentType=Meeting%20Packets&FileName=pki%2010-16-19.pdf).

- 85 percent of first year turnaround schools in 2018 improved their grade to a “C” or higher and exited turnaround in 2019.

For the 2019-2020 school year, 142 schools are in SI requiring intervention and support, including:<sup>76</sup>

- 91 schools earning a grade of “D” for the first time.
- 3 schools earning a grade of “F” for the first time.
- 20 schools earning two grades of “D” or a “D” and an “F” for their last two school grades.

### ***High-Performing School Districts and Charter School Systems***

A high-performing school district meets the following criteria:<sup>77</sup>

- Earns a grade of “A” for 2 consecutive years; and
- Has no district-operated school that earns a grade of “F”;
- Complies with all class size requirements; and
- Has no material weaknesses or instances of material noncompliance noted in the annual financial audit conducted.

The SBE annually designates academically high-performing school districts. Seventeen school districts were designated as high-performing school districts for the 2018-2019 school year.<sup>78</sup>

A high-performing charter school system means an entity<sup>79</sup> that:<sup>80</sup>

- Operated at least three high-performing charter schools in the state during each of the previous 3 school years;
- Operated a system of charter schools in which at least 50 percent of the charter schools were designated as high-performing charter schools, and no charter school earned a school grade of “D” or “F” in any of the previous 3 school year, with exceptions identified in law;<sup>81</sup> and
- Did not receive a financial audit that revealed one or more of the financial emergency conditions specified in law<sup>82</sup> in the most recent 3 fiscal years for which such audits are available.

The Commissioner must verify all charter schools served by an entity, verify that the entity meets the specified criteria, and provide a letter to the entity stating that it is a high-performing charter school system. The commissioner must annually determine whether a high-performing

<sup>76</sup> Florida Department of Education, *School Improvement Presentation to the House PreK-12 Innovation Subcommittee* (October 16, 2019), available at [https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=3017&Session=2020&DocumentType=Meeting Packets&FileName=pki 10-16-19.pdf](https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=3017&Session=2020&DocumentType=Meeting%20Packets&FileName=pki%2010-16-19.pdf).

<sup>77</sup> Section 1003.621(1)(a), F.S.

<sup>78</sup> State Board of Education, *Consent Item, Designation of 2018-2019 Academically High-Performing School Districts* available at <http://www.fldoe.org/core/fileparse.php/19916/urlt/19-1.PDF>.

<sup>79</sup> “Entity” means a municipality or other public entity that is authorized by law to operate a charter school; a private, nonprofit corporation with tax-exempt status under s. 501(c)(3) of the Internal Revenue Code; or a private, for-profit education management corporation. Section 1002.332(1)(a), F.S.

<sup>80</sup> Section 1002.332(1)(b), F.S.

<sup>81</sup> Section 1002.332(1)(b)2.a. and b., F.S.

<sup>82</sup> Section 218.503(1), F.S.

charter school system continues to meet specified criteria.<sup>83</sup> Five entities were designated as high-performing charter school systems for the 2018-2019 school year.<sup>84</sup>

### **Statewide Assessment Program**

The primary purpose of the student assessment program is to provide student academic achievement and learning gains data to students, parents, teachers, school administrators, and school district staff. The data is to be used by districts to improve instruction; by students, parents, and teachers to guide learning objectives; by education researchers to assess national and international education comparison data; and by the public to assess the cost benefit of the expenditure of taxpayer dollars.<sup>85</sup>

The statewide assessment program for Florida's public schools includes statewide, standardized assessments for ELA (grades 3-10) and mathematics (grades 3-8); end-of-course (EOC) assessments for Algebra I, Geometry, Biology I, Civics, and U.S. History; and the Statewide Science Assessment (grades 5 and 8).<sup>86</sup> Results from the assessments are used to calculate school grades and school improvement ratings,<sup>87</sup> and determine student readiness for promotion to 4<sup>th</sup> grade and high school graduation.<sup>88</sup>

### ***Student Progression Measured by Statewide Assessments***

To be promoted to grade 4, a student must score a Level 2 or higher on the statewide, standardized ELA assessment required for grade 3.<sup>89</sup> The student must be retained if the student's reading deficiency is not remedied by the end of grade 3, by scoring a Level 2 or higher on the statewide, standardized assessment required for grade 3.<sup>90</sup>

The district school board may only exempt students from mandatory retention in grade 3 for good cause. A student who is promoted to grade 4 with a good cause exemption must be provided intensive reading instruction and intervention. Good cause exemptions are limited to students in grade 3 and relate to limited English proficiency students, students with disabilities, the use of alternative assessments or portfolios, and students previously retained in grades K-3.<sup>91</sup>

Receipt of a standard high school diploma requires successful completion of 24 credits,<sup>92</sup> including passing statewide, standardized assessments. Specifically, a student must pass the grade 10 ELA statewide, standardized assessment and the Algebra I end-of-course (EOC) assessment.<sup>93</sup>

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<sup>83</sup> Section 1002.332(2)(a), F.S.

<sup>84</sup> Email, Florida Department of Education (Feb. 25, 2021).

<sup>85</sup> Section 1008.22(1), F.S.

<sup>86</sup> Section 1008.22(3), F.S. and Florida Department of Education, *Statewide Assessment Program 2019-2020*, available at <http://www.fldoe.org/core/fileparse.php/5663/urlt/swapig.pdf>.

<sup>87</sup> See ss. 1008.34 and 1008.341, F.S.

<sup>88</sup> See ss. 1008.25(5) and 1003.4282(3), F.S.

<sup>89</sup> Section 1008.25(5)(b), F.S.

<sup>90</sup> *Id.*

<sup>91</sup> Section 1008.25(6)(b), F.S.

<sup>92</sup> Section 1003.4282(1)(a), F.S.

<sup>93</sup> Section 1003.4282(3)(a) and (b), F.S.

### ***School Personnel Evaluations***

School districts establish procedures for evaluating the performance of instructional, administrative, and supervisory personnel in order to increase student academic performance by improving the quality of services in public schools.<sup>94</sup>

Instructional personnel and school administrator performance evaluations must be based upon the performance of students assigned to their classrooms or schools.<sup>95</sup> A school district's performance evaluation system is not limited to student performance, but may include other criteria to evaluate instructional personnel and school administrators' performance.<sup>96</sup> The performance evaluation must be based upon sound educational principles and contemporary research in effective educational practices. The evaluation criteria must include:<sup>97</sup>

- At least one-third based on performance of students;
- At least one-third based on instructional practice;
- At least one-third based on instructional leadership (administrators only); and
- Other indicators of performance.<sup>98</sup>

The Commissioner has approved a formula to measure individual student learning growth on the statewide, standardized assessments in English Language Arts and mathematics.<sup>99</sup> Each school district may, but is not required to, measure student growth using the formula approved by the commissioner.<sup>100</sup> The Commissioner approved using a value-added model (VAM) to measure learning growth for purposes of teacher evaluation, in part because of the model's capacity to reflect an individual educator's contribution to that learning growth.<sup>101</sup> Use of the VAM data as part of the performance of student's component in a teacher's evaluation is a local district decision.

### **Exceptional Student Education**

The Individuals with Disabilities Education Act (IDEA) requires school districts to make free appropriate public education (FAPE) available to such students ages three through 21.<sup>102</sup> A FAPE must include special education and related services<sup>103</sup> provided by the public school

<sup>94</sup> Section 1012.34, F.S.

<sup>95</sup> Section 1012.34(3), F.S.

<sup>96</sup> *Id.*

<sup>97</sup> Section 1012.34(3)(a), F.S.

<sup>98</sup> For instructional personnel and school administrators, the remainder of a performance evaluation may include, but is not limited to, professional and job responsibilities as recommended by the State Board of Education or identified by the district school board and, for instructional personnel, peer reviews, objectively reliable survey information from students and parents based on teaching practices that are consistently associated with higher student achievement, and other valid and reliable measures of instructional practice. *Id.*

<sup>99</sup> Section 1012.34(7)(a), F.S.

<sup>100</sup> Section 1012.34(7)(b), F.S.

<sup>101</sup> Florida Department of Education, *Performance Evaluation, Why do we have VAM?* <http://www.fldoe.org/teaching/performance-evaluation/> (last visited Feb. 23, 2021).

<sup>102</sup> 20 U.S.C. s. 1400(d)(1)(A); 34 C.F.R. s. 300.101; Rules 6A-6.03028(1) and 6A-6.03411(1)(p), F.A.C.

<sup>103</sup> "Related services" means "transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes."

district at no cost to the parent, which meet the standards of the state and are in conformity with the student's Individualized Education Plan (IEP).<sup>104</sup> An IEP must be developed, reviewed, and revised for each eligible student or child with a disability served by a school district, or other state agency that provides special education and related services either directly, by contract, or through other arrangements.<sup>105</sup>

The student's IEP Team<sup>106</sup> is required to review the student's IEP periodically, but not less than annually, to determine whether the annual goals for the student are being achieved. The IEP team must respond to the parent's right to ask for a revision to the IEP, and to revise the IEP, as appropriate, to address any lack of progress toward annual goals or consider anticipated needs.<sup>107</sup>

### **Early Care and Education Programs**

While the SBE is responsible for K-20 public education in the state, Florida's Office of Early Learning (OEL) is responsible for statewide implementation of the School Readiness and Voluntary Prekindergarten (VPK) programs.<sup>108</sup>

#### ***The Voluntary Prekindergarten Education Program***

The Florida Constitution requires the State to provide every four-year old child a high quality prekindergarten learning opportunity in the form of an early childhood development and education program which must be voluntary, high quality, free, and delivered according to professionally accepted standards.<sup>109</sup> In 2004, the State established a free VPK program offered to eligible four-year-old children.<sup>110</sup> Parents may choose either a school-year or summer program offered by either a public or private school.<sup>111</sup>

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"Related services" also include school health services and school nurse services, social work services in schools, and parent counseling and training. 34 C.F.R. s. 300.34(a).

<sup>104</sup> 34 C.F.R. s. 300.17; Rule 6A-6.03411(1)(p), F.A.C. An individualized education plan means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with the IDEA. 20 U.S.C. s. 1414(d).

<sup>105</sup> Rule 6A-03028(3), F.A.C.

<sup>106</sup> The membership of the IEP Team is specified in Rule 6A-6.03028(3)(c), F.A.C.

<sup>107</sup> Rule 6A-6.03028(3)(j), F.A.C.

<sup>108</sup> See ss. 20.15(3)(i)1. and 1001.213, F.S.

<sup>109</sup> Art. IX, s. 1(b), Fla. Const. An early childhood development and education program means an organized program designed to address and enhance each child's ability to make age appropriate progress in an appropriate range of settings in the development of language and cognitive capabilities and emotional, social, regulatory and moral capacities through education in basic skills and such other skills as the Legislature may determine to be appropriate.

<sup>110</sup> Section 1, ch. 2004-484, L.O.F.; part V, ch. 1002, F.S.; see also Art. IX, s. 1(b)-(c), Fla. Const.

<sup>111</sup> Section 1002.53(3), F.S.



<b>Voluntary Prekindergarten Education Programs</b>			
<b>Program Characteristics</b>	<b>School-Year Programs</b>		<b>Summer Program<sup>112</sup></b>
	<b>Public School<sup>113</sup></b>	<b>Private Prekindergarten Provider<sup>114</sup></b>	
<b>Provider Type</b>	Public school	Private prekindergarten provider	Public school or private prekindergarten provider
<b>Minimum Program Length</b>	540 instructional hours	540 instructional hours	300 instructional hours
<b>Class Size</b>	4 to 20 students	4 to 20 students	4 to 12 students
<b>Prekindergarten Director Credential<sup>115</sup></b>	Not required	Required	Private prekindergarten provider only
<b>Minimum Required Instructor Credential</b>	Child Development Associate (CDA) plus 2 trainings or equivalent	CDA plus 2 trainings or equivalent	Florida-certified teacher or bachelor's or higher degree in specified major
<b>Second Instructor for Large Classes (credential not required)</b>	For classes of 12 to 20 students	For classes of 12 to 20 students	Not allowed

During the 2019-2020 academic year, the VPK program served 156,956 students.<sup>116</sup> Overall, the 2019-20 fiscal year enrollment was 17.31 FTE higher than estimated at the August 2020 Conference.<sup>117</sup> Summer VPK enrollment was particularly affected by the COVID-19 outbreak, with just 1,433.20 FTE for the full 2020 summer program, a decline of 2,932.43 FTE relative to the full 2019 summer program.<sup>118</sup> For summer 2020, July and August FTE were overall higher than May and June FTE, increasing from 521.09 FTE to 912.11 FTE.<sup>119</sup>

***The School Readiness Program***

The school readiness program provides subsidies for child care services and early childhood education for children of low-income families, children in protective services who are at risk of abuse, neglect, or abandonment, and children with disabilities.<sup>120</sup> The school readiness program offers financial assistance for child care to support working families and children to develop skills for success in school and provides developmental screening and referrals to health and education specialists where needed.<sup>121</sup> To participate in the school readiness program, a provider

<sup>112</sup> Section 1008.61, F.S.

<sup>113</sup> Section 1002.63, F.S.

<sup>114</sup> Section 1002.55, F.S.

<sup>115</sup> The Florida Department of Education establishes the minimum standards for a credential for directors of private prekindergarten providers delivering the VPK program. Section 1002.57(1), F.S.; *see also* Rule 6M-8.610, F.A.C.

<sup>116</sup> Florida Office of Early Learning, *2019-20 Annual Report* (Dec. 2020) at 8, available at [http://www.floridaearlylearning.com/Content/Uploads/floridaearlylearning.com/files/2019-20%20OEL%20Annual%20Report%20FINAL%2012-29-30-GA\(1\).pdf](http://www.floridaearlylearning.com/Content/Uploads/floridaearlylearning.com/files/2019-20%20OEL%20Annual%20Report%20FINAL%2012-29-30-GA(1).pdf).

<sup>117</sup> The Office of Economic & Demographic Research, *Voluntary Prekindergarten Estimating Conference, Executive Summary* (Dec. 10, 2020), available at <http://edr.state.fl.us/Content/conferences/vpk/VPKsummary.pdf>.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Section 1002.87, F.S.

<sup>121</sup> Section 1002.86, F.S.

must execute a school readiness contract.<sup>122</sup> During the 2019-2020 academic year, 6,932 school readiness providers served 211,711 children enrolled in a school readiness program.<sup>123</sup>

### ***School Readiness Funding***

Funding for the school readiness program is allocated among the early learning coalitions (ELC) according to law and the General Appropriations Act.<sup>124</sup> The school readiness program is funded primarily by the Child Care and Development Block Grant (CCDF).<sup>125</sup> State, federal, and local matching funds provided to an ELC for purposes of the school readiness program must be used for implementation of its approved school readiness program plan, including the hiring of staff to effectively operate the school readiness program.<sup>126</sup> However, no more than five percent of the of the state, federal, and local matching funds provided to the ELC may be used for administrative costs and no more than 22 percent of those funds may be used in any fiscal year for any combination of administrative costs, quality activities, and nondirect services.<sup>127</sup>

### **Nursing Education Program Accountability**

The Florida Board of Nursing (BON) approves new pre-licensure nursing education programs that meet the application requirements specified in Section 464.019, F.S. This section of Florida law also defines the BON's regulatory authority over established nursing education programs.<sup>128</sup>

Approved programs must have a graduate passage rate not lower than ten percent below the national average for two consecutive years. Programs are placed on probation for low performance with NCLEX<sup>129</sup> scores for two consecutive years and are subject to termination. The program director is required to present a plan for remediation to the BON that includes specific benchmarks to identify progress toward a graduate passage rate goal. The program must remain on probationary status until it achieves a graduate passage rate that equals or exceeds the required passage rate for any one calendar year. If the program does not achieve the required passage rate in any one calendar year after a program has been placed on probationary status, the

<sup>122</sup> Rule 6M-4.610, F.A.C. Form OEL-SR 20, *Statewide School Readiness Provider Contract*, available at [http://www.floridaearlylearning.com/Content/Uploads/floridaearlylearning.com/images/FormOEL-SR20StatewideSRProviderContract\\_7-8-20\\_ADA\\_final.pdf](http://www.floridaearlylearning.com/Content/Uploads/floridaearlylearning.com/images/FormOEL-SR20StatewideSRProviderContract_7-8-20_ADA_final.pdf).

<sup>123</sup> Florida Office of Early Learning, *2019-20 Annual Report*, available at [http://www.floridaearlylearning.com/Content/Uploads/floridaearlylearning.com/files/2019-20%20OEL%20Annual%20Report%20FINAL%2012-29-30-GA\(1\).pdf](http://www.floridaearlylearning.com/Content/Uploads/floridaearlylearning.com/files/2019-20%20OEL%20Annual%20Report%20FINAL%2012-29-30-GA(1).pdf), at 20 (last visited Mar. 19, 2021).

<sup>124</sup> Section 1002.89(1), F.S.

<sup>125</sup> The Office of Early Learning, *2019-2021 Child Care Development Fund State Plan*, [http://www.floridaearlylearning.com/oel\\_resources/ccdf\\_plan.aspx](http://www.floridaearlylearning.com/oel_resources/ccdf_plan.aspx) (last visited Mar. 19, 2021).

<sup>126</sup> Section 1002.89(5), F.S.

<sup>127</sup> Section 1002.89(6), F.S.

<sup>128</sup> The Florida Board of Nursing, *Education and Training Programs*, <https://floridasnursing.gov/education-and-training-programs/> (last visited Mar. 31, 2021).

<sup>129</sup> The National Council of State Boards of Nursing (NCSBN) is an independent, non-profit organization involved in the regulation of nurses and is a separate entity from the American Nurses Association (ANA) Council on State Boards of Nursing, which represents professional nurses. The NCSBN's membership is now composed of state boards of nursing and other nursing regulatory bodies that are charged with the responsibility of providing regulatory excellence for public health, safety, and welfare. To meet that goal, NCSBN developed a nurse licensure examination consistent with current nursing practice: the Nursing Council Licensure Examination (NCLEX) for registered nurse (RN) and licensed practical nurse (LPN). National Council of State Boards of Nursing, Inc., *History*, available at <https://www.ncsbn.org/history.htm> (last visited Mar. 31, 2021).

BON is authorized to terminate the program or may extend the probation for one additional year, subject to specified conditions.<sup>130</sup>

**Florida Nurse Education Program Graduate Passage Rates - 2019<sup>131</sup>**

In 2001 the Legislature created The Florida Center for Nursing (FCN) to establishing and maintaining a database on nursing supply and demand and evaluate nursing program-specific data for each approved program and accredited nursing education program to determine each program’s student populations and NCLEX passage rates.

The FCN found that Florida’s NCLEX passage rates varied by program type, and by the program’s classification as public or private. According to the FCN in 2019, “For the third year in a row, Florida’s NCLEX passage rates for RN and LPN programs were at or near the bottom of the United States and Territories.”<sup>132</sup> RN programs include graduates of bachelor’s degree nurse (BSN) programs and associate degree nurse (AARN) programs. As a group, BSN graduates performed the best, followed by LPN graduates. AARN graduates collectively performed at the lowest level.

Florida’s performance standard requires each program’s passage rate to be no more than 10 percentage points below than national passage rates of comparable degree programs in the same calendar year. Nearly half of all Florida programs scored below the state’s performance standard, including 89 AARN (54 percent), 66 LPN (47 percent), and 18 BSN (31 percent) programs.

2019 Florida NCLEX Passage Rates by Program Type

Program	National	Florida Public		Florida Private	
	Passage Rate	Passage Rate	Programs	Passage Rate	Programs
BSN	91.2	92.9	10	86.5	18
AARN	85.2	89.3	31	52.3	92
LPN	85.6	82.8	57	55.9	61

According to the FCN, prior to the COVID-19 pandemic, Florida was already experiencing a critical shortage of RNs and LPNs which was expected to worsen as demand increased.

**National NCLEX Passage Rates and COVID-19**

In response to the COVID-19 pandemic, the NCSBN introduced several carefully-evaluated and tested modifications to the NCLEX examinations. These modifications expired on Sept. 30, 2020, and, beginning Oct. 1, 2020, both NCLEX-RN and NCLEX-LPN exams will retain some of the characteristics of the modified exam. The difficulty levels and passing standards of the exams have not changed.<sup>133</sup>

<sup>130</sup> Section. 464.019(5), F.S.

<sup>131</sup> This is the most recent Florida Center for Nursing report available, as of this writing.

<sup>132</sup> Florida Center for Nursing, *Review of Florida Nurse Education Program Graduate Passage Rates on the National Council of State Boards of Nursing Licensure Examination: Calendar Year 2019*, April 2020, available at <https://floridasnursing.gov/forms/2019-nclex-pass-rates.pdf> (last visited Mar. 28, 2021) (emphasis original).

<sup>133</sup> National Council of State Boards of Nursing, Inc., *COVID-19 Impact to NCLEX Candidates*, available at <https://www.ncsbn.org/14428.htm> (last visited Mar. 28, 2021).

NCLEX pass rates appear to be starting to decrease slightly as the COVID-19 pandemic continues. NCLEX Data shows the following:

- RN: NCSBN data shows that NCLEX test takers for the RN version had been hovering around a pass rate of 89 percent for all of 2019 and into early 2020. However, the first-time passage rate for the RN test had dropped to just under 85 percent.
- LPN: NCLEX first-time test takers for the LPN version had been around 86 percent passage rate in 2019 and early 2020. The passage rate had dropped down to slightly below 83 percent.

### III. Effect of Proposed Changes:

#### Liability

The bill creates s. 768.39, F.S., to provide liability protections for educational institutions for actions related to the COVID-19 pandemic. Specifically, the bill:

- Defines an educational institution as a school, including a preschool, elementary school, middle school, junior high school, secondary school, career center, or postsecondary school, whether public or nonpublic.
- Extends the protections to an educational institution that has taken reasonably necessary actions in compliance with federal, state, or local guidance to diminish the impact or the spread of COVID-19 and provides immunity from any civil damages, equitable relief, or other remedies relating to such actions.
- Defines reasonably necessary actions taken while a state of emergency was declared for this state for the COVID-19 pandemic to include, but not limited to, any of the following:
  - Shifting in-person instruction to online or remote instruction for any period of time.
  - Closing or modifying the provision of residential housing, dining, or other facilities on the campus of the educational institution.
  - Pausing or modifying ancillary student activities and services available through the educational institution.
- Deems the provision of in-person or on-campus education and related services to have been impossible for educational institutions during any period of time in which such institutions took reasonably necessary actions described to protect students, staff, and educators in response to the COVID-19 public health emergency.
- Deems the reasonably necessary actions as justified as a result of the various governmental orders and the need for educational institutions to protect their communities.

The bill specifies that in any action against an educational institution for the reimbursement of tuition or fees, general publications of the institution are not evidence of an implied contract to provide in-person or on-campus education and related services or access to facilities during the COVID-19 public health emergency.

Additionally, the bill specifies that the provisions do not apply to losses or damages that:

- Resulted solely from a breach of an express contractual provision allocating liability in the event of a pandemic event, or
- Caused by an act or omission of a college or university which was in bad faith or malicious.

The bill provides that if any aspect of the immunity relating to the reasonably necessary actions taken by an educational institutions due to COVID-19 is limited by a court or by operation of

law from applying to certain types of claims or causes of action, the immunity must still be provided to the fullest extent authorized by law to any other types of claims or causes of action.

The bill establishes the provision that these liability protections apply retroactively to causes of actions accruing on or after March 1, 2020, the date of the declaration of the COVID-19 public health emergency by the State Surgeon General, and must apply prospectively to causes of action that accrue before the end of the academic term during which the emergency declaration expires or is terminated.

### **School Accountability**

Relating to the use of school grades for accountability provisions in the 2020-2021 school year, the bill:

- Authorizes school grades calculated for the 2020-2021 school year to be used for eligibility for the Florida School Recognition Program, as provided in the General Appropriations Act.
- Allows a school currently in turnaround status to exit turnaround status if the school receives a grade of “C” or better.
- Specifies that a school or approved virtual instruction provider that receives the same or lower grade or school improvement rating for the 2020-2021 school year compared to the 2018-2019 school year is not subject to sanctions or penalties that would occur as a result of the 2020-2021 school grade or school improvement rating.
- Provides that a charter school system or school district designated as high performing may not lose its designation based on 2020-2021 school grades.

### **Statewide Assessment Program**

The bill authorizes a parent or guardian to request that his or her K-5 public school student be retained, for academic reasons, for the 2021-2022 school year in the grade level to which the student was assigned at the beginning of 2020-2021 school year. Specifically, the bill:

- Requires that a parent or guardian who wishes for his or her K-5 student to be retained must submit, in writing, a retention request to the school principal. Only retention requests received by the principal on or before June 30, 2021, must be considered. A principal may consider a request received after that date at his or her discretion.
- Requires that the principal inform the student’s teacher and to collaboratively discuss the request with the parent or guardian any basis for agreement or disagreement with the request. As part of the discussion with the parent or guardian, the principal must disclose that the requested retention could impact the student’s eligibility to participate in high school interscholastic sports due to the student’s age.
- Specifies that in lieu of retention, the principal, teachers, and parent or guardian may collaborate to develop a customized 1-year education plan for the student with the intent of helping the student return to grade level readiness by the end of the next academic year.
  - Supplemental educational support, services and interventions;
  - Summer education;
  - Promotion in some, but not all courses; and
  - Midyear promotion.
- Specifies that the parent or guardian has the final decision whether to retain the student.

- Requires that for a student retained by request with an IEP in effect, the student's IEP team must convene to review and revise the student's IEP, as appropriate.
- Requires school districts, by June 30, 2022, to report to the DOE the number of students retained by request for all or part of the 2021-2022 school year.

The bill specifies that a student who meets all high school graduation requirements except for passing either or both statewide, standardized assessments for ELA and mathematics must be considered to have met all requirements for graduation.

The bill also states that student performance results from the 2020-2021 statewide, standardized assessments may not be used for calculating student performance measurement and evaluating personnel.

### **Early Care and Education Programs**

The bill waives the provision that requires a summer prekindergarten program delivered by a public school or private prekindergarten provider to consist of at least 300 hours. The bill states the 2021 summer prekindergarten program must consist of at least 200 hours. The full-time equivalent calculation for a student in a summer 2021 prekindergarten program delivered by a public school or private prekindergarten provider must be prorated for the number of instructional hours reported.

Additionally, for the 2020-21 and 2021-2022 school years, the bill waives the requirement that no more than 22 percent of the state, federal, and local matching funds provided to an ELC to implement its approved school readiness program plan be used for any combination of administrative costs, quality activities, and nondirect services, provided that the funds are used for purposes of emergency recovery and direct support to providers.

### **Nursing Education Program Approval and Accreditation**

The bill amends s. 464.019, F.S., to provide an additional year of probationary status for an approved nursing program that has not achieved the required passage rate on the national nursing licensing examination in the 2020 calendar year. The Board of Nursing must grant that extension at a regularly scheduled meeting in 2021.

The bill takes effect upon becoming a law.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

None.

### **B. Public Records/Open Meetings Issues:**

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may:

- Provide educational institutions with liability protections so that these institutions may avoid costly litigation due to actions related to the COVID-19 virus.
- Impact school eligibility for school recognition funds, if the program is funded.
- Allow early learning coalitions to provide additional financial supports to school readiness providers.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

The bill substantially amends section 464.019 of the Florida Statutes.

This bill creates section 768.39 of the Florida Statutes.

The bill creates an undesignated section of Florida Law.



**IX. Additional Information:**

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

None.

- B. **Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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