

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 Rules

BILL: CS/SB 7070

INTRODUCER: Rules Committee and Education Committee

SUBJECT: Impact of COVID-19 on Educational Institutions

DATE: April 21, 2021

REVISED: _____

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

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 7070 creates liability protections for educational institutions for actions related to the COVID-19 pandemic and requires the Board of Nursing to extend an approved program's probationary status. 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.
- 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.¹

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,² most recently by Executive Order No. 21-45, issued on February 26, 2021.

Department of Education Emergency Orders

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.³

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 waiver⁴ of statewide assessment, accountability, and reporting requirements in ESEA for the 2019-2020 school year due to widespread school closures related to COVID-19.

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.⁵

On July 6, 2020, the Commissioner issued his sixth EO.⁶ The Commissioner stated in the EO that "education is critical to the success of the state and to an individual, and extended school

¹ Florida Department of Health, Division of Disease Control and Health Protection, available at [Florida's COVID-19 Data and Surveillance Dashboard \(arcgis.com\)](https://www.floridahealth.gov/disease-control-and-health-protection/COVID-19/Florida's_COVID-19_Data_and_Surveillance_Dashboard_(arcgis.com).html) (last visited Mar. 27, 2021).

² 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.

³ 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>.

⁴ 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>.

⁵ 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>.

⁶ 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>.

closures can impede educational success of students, [and] impact families' well-being.”⁷ 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.

The EO⁸ issued November 30, 2020, found that parents and districts continue to need the educational and financial benefits provided in the previous EO⁹ 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.”¹⁰

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, 2020,¹¹ 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.¹²

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.¹³

⁷ 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>.

⁸ 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>.

⁹ 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>.

¹⁰ 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>.

¹¹ 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).

¹² 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)

¹³ Board of Governors, *HIGHLIGHTS: Board of Governors’ Meeting* (Last visited Mar. 27, 2021).

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:¹⁴

[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 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.¹⁵ 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."¹⁶ 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.¹⁷ 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.¹⁸

Sovereign immunity is the "privilege of the sovereign not to be sued without its consent."¹⁹ A state agency or subdivision of the state waives the protections of sovereign immunity only when it enters into an express contract.²⁰ When an alleged contract is merely implied, however, these sovereign immunity protections remain in force.²¹ 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.²²

¹⁴ *Salerno v. Florida S. Coll.*, 488 F. Supp. 3d 1211 (M.D. Fla. 2020).

¹⁵ *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)).

¹⁶ *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)).

¹⁷ *Id.*

¹⁸ *MCI Worldcom Network Services, Inc. v. Mastec, Inc.*, 995 So. 2d 221, 223 (Fla. 2008).

¹⁹ *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)).

²⁰ *City of Fort Lauderdale v. Israel*, 178 So. 3d 444, 447–48 (Fla. 4th DCA 2015).

²¹ *City of Fort Lauderdale v. Israel*, 178 So. 3d 444, 447–48 (Fla. 4th DCA 2015).

²² 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).

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*,²³ a case which construed the access to courts provision. In broad terms, the case before the Court involved the abolition of a statute governing 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.²⁴

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.²⁵

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 NCLEX²⁶ 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

²³ *Kluger v. White*, 281 So. 2d 1 (Fla. 1973).

²⁴ *Eller v. Shova*, 630 So. 2d 537 (Fla. 1993).

²⁵ The Florida Board of Nursing, *Education and Training Programs*, <https://floridasnursing.gov/education-and-training-programs/> (last visited Mar. 31, 2021).

²⁶ 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).

passage rate in any one calendar year after a program has been placed on probationary status, the BON is authorized to terminate the program or may extend the probation for one additional year, subject to specified conditions.²⁷

Florida Nurse Education Program Graduate Passage Rates - 2019²⁸

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.”²⁹ 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

²⁷ Section. 464.019(5), F.S.

²⁸ This is the most recent Florida Center for Nursing report available, as of this writing.

²⁹ 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).

of the characteristics of the modified exam. The difficulty levels and passing standards of the exams have not changed.³⁰

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. The Board of Governors of the State University System and the State Board of Education are also included within these immunity protections.
- 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 facilities, other than housing or dining 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, the Board of Governors of the State University System or the State Board of Education for the reimbursement of tuition or fees, invoices, catalogs, and general publications of an educational institution are not evidence of an express or implied contract to provide in-person or on-campus education and related services or access to facilities during the COVID-19 public health emergency.

³⁰ 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).

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 that if an educational institution is required by federal, state, or local order or a directive of the Board of Governors of the State University System or the State Board of Education issued in response to the COVID-19 public health emergency to alter the mode of delivery of instruction and related services or access to facilities, the burden of proof for any plaintiff bringing an action against the educational institution for such change must be by clear and convincing evidence to prevail for damages against the institution.

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 liability protections so that these institutions may avoid costly litigation due to actions related to the COVID-19 virus.

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.

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 Rules on April 20, 2021

The committee substitute:

- Removes provisions related to K-12 school accountability and statewide assessments.
- Removes provisions related to early care and education programs.
- Retains provisions allowing an approved nursing program an additional year of probationary status.
- Retains liability protections for educational institutions.
- Clarifies that the Board of Governors and the State Board of Education are also included within the immunity protections.
- Excludes the closing or modifying of “residential housing or dining” as a reasonably necessary action taken by the educational institution to diminish the impact or spread of COVID-19.
- Clarifies in any action against an educational institution, the Board of Governors, or the State Board of Education for tuition or fees, that invoices, catalogs, and general

publications of an educational institution are not evidence of an express or implied contract.

- Removes the provision that liability protections apply retroactively.
- Expands from federal, state, or local orders or directives to include the Board of Governors or the State Board of Education to those that may have required an educational institution to alter instruction in response to COVID-19.
- Adds burden of proof provisions requiring a plaintiff to provide clear and convincing evidence if bringing an action against an educational institution that was required by order or directive to alter instruction in response to the COVID-19 public health emergency.

B. Amendments:

None.