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Committee on Education Pre-K - 12

OPEN GOVERNMENT SUNSET REVIEW OF VOLUNTARY PREKINDERGARTEN EDUCATION PROGRAM

Issue Description

The 2005 Legislature (ch. 2005-88, L.O.F.) enacted a public records disclosure exemption for the individual records of a child enrolled in the Voluntary Prekindergarten Education Program held by an early learning coalition, the Agency for Workforce Innovation, or a Voluntary Prekindergarten Education Program provider. The statute, s. 1002.72, F.S., also provides that such records include assessment data, health data, records of teacher observations, and personal identifying information of the enrolled child and his or her parent. In accordance with the Open Government Sunset Review Act of 1995 under s. 119.15, F.S., this exemption shall be repealed on October 2, 2010, unless saved from repeal through reenactment by the Legislature.

Background

Public Records

Florida has a long history of providing public access to governmental records. The Legislature enacted the first public records law in 1892.¹ One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.² Article I, s. 24 of the State Constitution, provides that:

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

The Public Records Act³ specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1)(a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency⁴ records are available for public inspection. The term "public record" is broadly defined to mean:

¹ Sections 1390, 1391 F.S. (Rev. 1892).

² Article I, s. 24 of the State Constitution.

³ Chapter 119, F.S.

⁴ The word "agency" is defined in s. 119.011(2), F.S., to mean "... any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." The Florida Supreme Court held that courts should use a "totality of factors" test for determining when a private entity is acting sufficiently on behalf of a public agency to subject it to the public records law. The court set forth a non-exclusive list of nine factors. *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596

All documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.⁵

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate, or formalize knowledge.⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

Only the Legislature is authorized to create exemptions to open government requirements.⁸ Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.⁹ A bill enacting an exemption¹⁰ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹¹

The Open Government Sunset Review Act of 1995¹² establishes a review process for public records exemptions. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2, unless the Legislature reenacts the exemption.

An exemption may be created or expanded only if it serves an identifiable public purpose and is no broader than necessary to meet that purpose. An identifiable public purpose is served if the exemption meets one of the following purposes and the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption:

- The exemption allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- The exemption protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- The exemption protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.¹³

The act also requires consideration of the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

So.2d 1029 (Fla.1992).

⁵ Section 119.011(11), F.S.

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Assocs., Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁷ *See Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁸ Article I, s. 24(c) of the State Constitution.

⁹ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

¹⁰ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹¹ Article I, s. 24(c) of the State Constitution.

¹² Section 119.15, F.S.

¹³ Section 119.15(6)(b), F.S.

- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

Finally, there is a difference between records that the Legislature has made exempt from public inspection and those that are confidential and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.¹⁴ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹⁵

Voluntary Prekindergarten (VPK) Education Program

In 2002, the State Constitution was amended to require the establishment of a prekindergarten program for every 4-year-old child in the state which is voluntary, high-quality, free, and delivered according to professionally accepted standards.¹⁶ The Legislature created the VPK program, which became effective in the 2005 school year, and provided the parents of eligible children a choice among three program options:¹⁷ a school-year VPK program delivered by a private prekindergarten provider; a school-year VPK program delivered by a public school; or a summer VPK program delivered by a public school or private prekindergarten provider.

The VPK program is administered at the local level by school districts and early learning coalitions.¹⁸ At the state level, the Department of Education (DOE) administers the educational accountability requirements of the program and the Agency for Workforce Innovation (AWI) administers the operational requirements of the program.¹⁹ The AWI's specific operational requirements are enumerated in s. 1002.75, F.S., and include determining the eligibility of private providers to deliver the VPK program.

All VPK providers must register with an early learning coalition, comply with federal antidiscrimination requirements, and may not discriminate against a parent or child, including the refusal to admit a child for enrollment in the VPK program, in violation of the antidiscrimination requirements.²⁰

School districts must administer a summer VPK program and may administer a school-year program.²¹ The district school board determines which public schools in the district will deliver the program during the summer and school year.

To participate in the program, a private provider²² must be a licensed child care facility, a licensed family day care home, a licensed large family child care home, a private school exempt from licensure,²³ or a faith-based child care provider exempt from licensure.²⁴ In addition, a private prekindergarten provider must meet the other requirements in s. 1002.55, F.S.

In 2007-2008, there were 5,158 providers that participated in the VPK program, 560 offered the summer program and 4,922 offered the school year program.²⁵ Most of the VPK providers (81 percent) were private centers.²⁶ During 2007-2008, 134,717 children were enrolled in the VPK program. Of all four-year-olds in the state, 58.7

¹⁴ Attorney General Opinion 85-62 (August 1, 1985).

¹⁵ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So.2d 289 (Fla. 1991).

¹⁶ Art. IX, s. 1(b) and (c) of the State Constitution.

¹⁷ Chapter 2004-484, L.O.F. See ss. 1002.55, 1002.61, and 1002.63, F.S.

¹⁸ Pursuant to s. 1002.51(2), F.S., early learning coalitions are created under s. 411.01(5), F.S.

¹⁹ Sections 1002.73 and 1002.75, F.S.

²⁰ Sections 1002.53(6)(c) and 1002.75(2), F.S., and 42 U.S.C. s. 2000d.

²¹ Sections 1002.61(1) and s. 1002.63, F.S.

²² Section 1002.55, F.S.

²³ Section 402.3025(2)(c), F.S.

²⁴ Section 402.316, F.S.

²⁵ Correspondence with AWI, July 16, 2009.

²⁶ Correspondence with AWI, July 17, 2009. Seventeen percent were public schools.

percent participated in the 2007-2008 VPK program.²⁷

Public Records Exemptions

Under s. 1002.72, F.S., the individual records of a child enrolled²⁸ in the Voluntary Prekindergarten Education Program held by an early learning coalition, the Agency for Workforce Innovation, or a Voluntary Prekindergarten Education Program provider are exempt from public records requirements. The statute also provides that such records include assessment data, health data, records of teacher observations, and personal identifying information of the enrolled child and his or her parent.

Findings and/or Conclusions

Florida Senate Pre-K - Education Committee professional staff worked in consultation with professional staff of the Senate Committee on Governmental Oversight and Accountability and the Florida House of Representatives Committee on Governmental Affairs Policy to determine whether the exemptions in s. 1002.72, F.S., meet the criteria for retention of the exemption. Professional staff surveyed the Agency for Workforce Innovation, Florida's 67 school districts, and a sample of VPK private providers (146 of 4,694) concerning the use of the public records exemptions and the records protected from public disclosure. Forty-one percent of the districts and 18 percent (26 of 146) private VPK providers responded to the survey.²⁹ Surveys were also sent to 31 early learning coalitions. Six early learning coalitions answered the surveys.³⁰ The response rate in each group was too low to represent the group, and inferences could not be made based on the responses from the school districts, early learning coalitions, and private VPK providers. Professional staff also considered comments from other stakeholders relating to the exemption.

Constitutional Requirements for Public Records Exemptions and Meetings

Under s. 24(c), Art. I, of the State Constitution, the exemption must be no broader than necessary to accomplish the stated purpose of the law. The Open Government Sunset Review Act³¹ provides that a public records exemption shall be maintained only if the exempted record is of a sensitive, personal nature concerning individuals; is necessary for the effective and efficient administration of a governmental program; or affects confidential information concerning an entity. The Act requires the legislative review of the exemption to consider which specific records or meetings are affected by the exemption, whom the exemption uniquely affects, the identifiable public purpose of the exemption, whether the protected information could be obtained by alternative means, whether the record or meeting is covered by another exemption, and whether there are multiple exemptions for the same type of record or meeting.

The Specific Records Affected by the Exemption

Some survey respondents representing early learning coalitions and VPK providers report that they receive, generate, ascertain, discover or collect assessment data, health data, records of teacher observations, or personal identifying information about an enrolled child and his or her parents.³²

Under current law, each parent enrolling a child in the VPK program must complete and submit an application to a coalition.³³ The application form must include the following: the child's name, date of birth, gender, home address, and social security number;³⁴ and the parent's name, home address, phone number, and relationship to the child.³⁵ The

²⁷ Correspondence with Office of Economic and Demographic Research, Florida Legislature, July 2, 2009.

²⁸ Rule 60BB-8.100(7), F.A.C., defines "enrollment" as the final step in the process of entering (or enrolling) a child in the VPK program. It means officially entering the child's name in the statewide information system as a VPK student. Registration is a step in the enrollment process.

²⁹ Response to survey by the Legislative Committee on Intergovernmental Relations, July 24, 2009, on file with the committee. Not all districts completed the entire survey.

³⁰ Response to survey by the House Governmental Affairs Policy Committee and the Senate Pre-K - 12 Education Committee, July 2009, on file with the committee.

³¹ Section 119.15, F.S.

³² Legislative Committee on Intergovernmental Relations and Senate and House surveys, on file with the committee.

³³ Section 1002.53(4), F.S.

³⁴ A child's social security number is requested under s. 119.071(5)(a)2., F.S., for use in the records and data systems of the

application requires proof of residence (e.g., utility bills, pay stubs, or government issued documents, such as a Florida driver's license) and proof of age (e.g., child's birth record or certificate, passport, certificate of arrival in the United States, insurance policy on the child's life which is effective for at least two years, valid military dependent identification card, immunization record, baptism certificate, or other religious record of the child's birth accompanied by an affidavit sworn by the parent). For each eligible child, the coalition issues to the parent a certificate of eligibility, that includes the child's name, social security number, and date of birth, as well as the home address for the child and parent.³⁶ To enroll an eligible child, the VPK provider admitting the child must submit the child's certificate and the assigned VPK class to the coalition.³⁷

Coalitions may use contract service providers to assist in carrying out the coalitions' local or regional VPK program administrative responsibilities.³⁸ Pursuant to AWI rules, when a contract service provider is used, the coalition is ultimately responsible for ensuring that the contractor performs its duties in accordance with applicable laws, rules, and AWI procedures.³⁹ The types of services provided by the contractors include determining a child's eligibility, registering a child, and enrolling a child in the statewide information system. According to AWI, some of the contract service providers are local governmental agencies and some are for-profit organizations.⁴⁰ Current law does not specifically authorize early learning coalitions to share confidential and exempt records of children enrolled in the VPK education program with contract service providers.

The AWI collects personal identifying information of an enrolled child and his or her parent.⁴¹ The AWI reports that the exemption for individual records of a child enrolled in the program held by the agency, an early learning coalition, or a VPK education program provider is necessary because:⁴²

- The exemption provides privacy for those families who use the constitutionally ensured high quality early education experience made available through the VPK program.
- Removing these protections could cause a decrease in the number of individuals who choose to exercise that right, thereby undermining the purpose of the constitutionally mandated program.

Additionally, the AWI notes that the specific exemption for assessment data, health data, records of teacher observations, and personal identifying information of an enrolled child and his or her parent is necessary because the removal could discourage individuals from enrolling their children in the VPK education program and undermine the goal of ensuring that all students in Florida are prepared to learn.⁴³

AWI, the DOE, school districts, and early learning coalitions. If submitted, the social security number is used for routine identification of a child and for correlation of a child's results on the statewide kindergarten screening to the provider or school that serves a child in the VPK program for purposes of assigning the provider or school a kindergarten readiness rate under s. 1002.69, F.S.

³⁵ Rule 60BB-8.200, F.A.C., AWI-VPK 01, Child Application Instructions, *See*

<https://cache.trustedpartner.com/docs/library/000254/VPK-01-Child%20Application-Rev.%2002-14-07.pdf>

³⁶ AWI-VPK 02, *See* http://www.floridajobs.org/earlylearning/documents/Form%20AWI-VPK-02_%20Eligibility%20and%20Enrollment_02-14-2007-Editable.pdf

³⁷ *Id.* Rule 60BB-8.202, F.A.C.

³⁸ Rule 60BB-8.100(13), F.A.C. The definition of contractor does not include certain private entities, a school district, or public school. According to the AWI, many of the early learning coalitions have chosen to carry out their local responsibilities through a subcontractor. The AWI notes that the grant agreement between the AWI and the coalitions recognizes this fact and makes coalitions ultimately responsible for providing services in its service area and ensuring that subcontractors comply with the requirements placed on coalitions. However, the Agency does not provide a standard contract for coalitions to use with their contracted service providers. Rather, the coalitions establish their own contracts.

³⁹ *Id.*

⁴⁰ Correspondence with AWI, September 1, 2009.

⁴¹ Correspondence with AWI, August 27, 2009. This includes the child's identification, name, date of birth, gender, race, ethnicity, address, and phone number.

⁴² Correspondence with AWI, July 17, 2009.

⁴³ *Id.*

Those Uniquely Affected by the Exemption

The exemption affects early learning coalitions, the AWI, VPK providers, children enrolled in the VPK program, and the children's parents.⁴⁴

The Purpose and Public Necessity for the Exemption

The 2005 law creating the exemption stated that, without the exemption, the disclosure of confidential and exempt information would cause an unwarranted invasion into the life and privacy of enrolled children and their parents thereby significantly decreasing the number of program enrollees.⁴⁵ Disclosure of such information would significantly impair the administration of the program, since parents would be less inclined to allow their children to participate in the program because sensitive, personal information would be made available to the public.⁴⁶ The 2005 Legislature also found that:⁴⁷

- Personal identifying information of a child enrolled in the VPK Education Program and the personal identifying information of the child's parent be made confidential and exempt from public disclosure. Disclosure of such information could endanger the safety and welfare of 4-year-old children, and the availability of such information could lead to increased opportunities for child abduction or identity theft;
- Assessment data and records of teacher observations contain sensitive, personal information regarding an enrolled child and the child's progress in the program. Disclosure of such information could cause embarrassment to the child and could stifle the child's progress in the program; and
- An enrolled child's health data is of a sensitive and personal nature. Matters of personal health are traditionally private and confidential concerns between a patient and a health care provider. The private and confidential nature of personal health matters pervades both the public and private health care sectors. For these reasons, an individual's expectation of a right to privacy in all matters regarding his or her personal health necessitates the exemption.

Under s. 119.15(6)(b), F.S., an identifiable public purpose is served if the exemption:

1. Allows the state or its political subdivision to effectively and efficiently administer a government program;
2. Protects information of a sensitive personal nature concerning individuals;
3. Protects information of a confidential nature concerning entities, including a formula, patent, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.

The public records exemption in s. 1002.72, F.S., meets the second criterion above in that it protects information of a confidential nature concerning children who are enrolled in the VPK program and their parents. The confidential and exempt records relate to fulfillment of the statutory mission of the AWI, early learning coalitions, and VPK providers to implement the VPK education program. The public records exemption appears to be no broader than is necessary to accomplish the purpose of protecting information of a sensitive personal nature concerning individuals.

⁴⁴ Section 1002.72, F.S., provides that a parent has the right to inspect, review, and obtain a copy of his or her child's individual VPK education program record and that personal identifying information of the enrollee's parent is confidential and exempt. Under s. 1000.21(5), F.S., and administrative rule for the VPK education program (Rule 60BB-8.100(10), F.A.C.), a parent is either or both parents of a student, any guardian of a student, any person in a parental relationship to a student, or any person exercising supervisory authority over a student in place of the parent. The AWI reports that a student's biological parents are permitted access to the records unless parental rights have been abandoned or terminated, as evidenced by a court order.

⁴⁵ Chapter 2005-88, L.O.F.

⁴⁶ *Id.*

⁴⁷ *Id.*

According to the AWI, if the exemption is repealed, “Identifying information on individual children, including their performance on evaluations used for readiness rates, would be publicly available. Releasing these records would be equivalent to making individual student records, including grades, in K-12 public schools available to the public.” The AWI also stated that “removing these protections could result in decreased participation in the constitutionally based VPK program which would undermine the ability of families to ensure that their children receive high quality early education experiences.”⁴⁸ The DOE also recommends reenactment of the exemption.

Alternative Means for Obtaining the Records

The protected information contained in the records could not be readily obtained by alternative means.

Other Exemptions Pertaining to the Records

All of the public records exemptions for the children enrolled in the VPK education program are not contained in s. 1002.72, F.S., including confidential and exempt social security numbers,⁴⁹ birth records,⁵⁰ and birth certificates.⁵¹ One survey respondent noted that s. 409.821, F.S., (personal identifying information of a Florida Kidcare program applicant or enrollee held by the Agency for Health Care Administration, the DCF, the Department of Health, or the Florida Healthy Kids Corporation) also applies.

Some school districts and private VPK providers stated that the federal Family Educational Rights and Privacy Act (FERPA)⁵² protects the privacy of student education records for children enrolled in the VPK education program.⁵³ This law applies to any educational agency or institution that receives funds under any program administered by the U.S. Department of Education (U.S. DOE).⁵⁴ This includes virtually all public schools and school districts and most private and public postsecondary institutions, including medical and other professional schools.⁵⁵ Private and religious schools at the elementary and secondary level generally do not receive funds from the U.S. DOE and may not be subject to FERPA.⁵⁶

Parents have specific rights with respect to their children's education records, including the right to inspect and review education records, to seek to have education records amended in certain circumstances, and to consent to the disclosure of education records, including personally identifiable information⁵⁷ from education records.⁵⁸ These rights transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level.⁵⁹ The law does allow schools and postsecondary institutions to disclose education records, without consent, to comply with a judicial order or

⁴⁸ Correspondence with AWI, July 17, 2009.

⁴⁹ Section 119.071(5)(a)5., F.S.

⁵⁰ Section 382.025, F.S.

⁵¹ Section 382.013(5), F.S.

⁵² 20 U.S.C. s. 1232g and 34 CFR Part 99. Pursuant to 20 U.S.C. s. 1232g(a)(4) and 34 C.F.R. s. 99.3, education records are those records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution.

⁵³ Response to Legislative Committee on Intergovernmental Relations survey, on file with the committee.

⁵⁴ 20 U.S.C. s. 1232g(a)(3) and 34 CFR s. 99.1(a)

⁵⁵ *Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) To Student Health Records*, U.S. Department of Health and Human Services and U.S. DOE, November 2008.

⁵⁶ *Id.* According to the U.S. DOE, a private school is not made subject to FERPA just because its students and teachers receive services from a local school district or state educational agency that receives funds from the department. The school itself must receive funds from a program administered by the department to be subject to FERPA.

⁵⁷ 20 U.S.C. s. 1232g (a)(5)(A) and 34 C.F.R. s. 99.3. Personally identifiable information includes: the student's name; the name of the student's parent or other family members, the address of the student or student's family; a personal identifier, such as the student's social security number, student number, or biometric record; other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name; other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

⁵⁸ 20 U.S.C. s. 1232g

⁵⁹ 20 U.S.C. s. 1232g (d) and 34 C.F.R. s. 99.5

lawfully issued subpoena and to third parties that include the following:⁶⁰ school officials, including teachers, within the agency or institution who have a legitimate educational interest; officials at other schools to which a student is transferring; appropriate parties in connection with financial aid to a student; and appropriate officials in cases of health and safety emergencies.

Directory information that is contained in an education record of a student may be disclosed if schools inform parents and adult students about the directory information disclosure and an "opt-out" opportunity for any or all directory information if disclosure is not desired.⁶¹ Directory information includes a student's name, address, telephone number, date and place of birth, photograph, and dates of attendance.⁶²

Current Florida law provides a public records exemption for education records, as defined by FERPA and the implementing regulations, for K-12 students and public postsecondary students and applicants. These records are confidential and exempt.⁶³ According to the DOE, children enrolled in a VPK program operated by a public school are afforded the same FERPA protections, in that current administrative rule⁶⁴ defines pupil as, "...any child who is enrolled in any instructional program or activity conducted under the authority or direction of a district school board."⁶⁵ The DOE notes that no other Florida or federal laws protect the records and information made confidential and exempt by the public record exemption in s. 1002.72, F.S., for a child enrolled in a VPK Education Program that is delivered by a private prekindergarten provider.⁶⁶

Some early learning coalitions and private VPK providers cited the applicability of other federal laws, including the following:⁶⁷

- The Privacy Act of 1974, as amended, governs the collection, maintenance, use, and dissemination of personal identifying information about individuals that is maintained in systems of records by federal agencies.⁶⁸
- The Health Insurance Portability and Accountability Act of 1996 (HIPAA) establishes national standards and requirements for electronic health care transactions and to protect the privacy and security of individually identifiable health information.⁶⁹ According to the DOE, HIPAA may apply to some records that are beyond the scope of FERPA.⁷⁰
- The Individuals with Disabilities Education Act (IDEA) provides federal funds to help state and local education agencies meet their obligation to educate students with disabilities.⁷¹ To be eligible to receive these federal funds, states and school districts must comply with numerous requirements, including the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the U.S. DOE, the DOE, and school districts.⁷² The DOE notes that children in public VPK programs may also be

⁶⁰ 20 U.S.C. s. 1232g(b)(1), 34 C.F.R. s. 99.31, and 34 C.F.R. s. 99.36(b)

⁶¹ 20 U.S.C. s. 1232g(a)(5)(A) and (B) and 34 C.F.R. s. 99.37

⁶² 20 U.S.C. s. 1232g(a)(5)(A) and 34 C.F.R. s. 99.3

⁶³ Chapter 2009-240, L.O.F., codified in ss. 1002.221 and 1006.52, F.S. *See also* section 1002.22, F.S.

⁶⁴ Rule 6A-1.0955(2)(c), F.A.C.

⁶⁵ Correspondence with DOE, August 26, 2009.

⁶⁶ *Id.* According to the DOE, FERPA would not apply to private providers unless they are considered an "educational institution or agency" and receive federal funding. The DOE notes that s. 1002.22, F.S., only applies to public schools and agencies, although there may be some protection for individual elements of records held by private providers (e.g., social security numbers or health information), but there is no provision that protects all of the records.

⁶⁷ Legislative Committee on Intergovernmental Relations and Senate and House surveys, on file with the committee.

⁶⁸ 5 U.S.C. s. 552a

⁶⁹ P.L. 104-191

⁷⁰ Correspondence with DOE, August 26, 2009. *See also: Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) To Student Health Records*, U.S. Department of Health and Human Services and U.S. DOE, November 2008.

⁷¹ 20 U.S.C. s. 1400 et seq., as amended by the Individuals with Disabilities Education Improvement Act of 2004, P.L.108-446.

⁷² 20 U.S.C. s. 1417(c).

receiving educational services under the IDEA.⁷³ The law specifically provides that the protections of FERPA apply to children receiving services under Part B and Part C of the IDEA.⁷⁴

One private VPK provider that is also a Head Start program provider noted that it is governed by the federal Head Start confidentiality requirements.⁷⁵

Section 1002.72(3), F.S., only authorizes the sharing of confidential and exempt information with specific agencies, organizations, and individuals in the furtherance of their duties and responsibilities.⁷⁶ Agencies, organizations, or individuals receiving such confidential and exempt records in order to carry out their official functions must protect the records in a manner that will not permit the personal identification of an enrolled child or his or her parent by persons other than those authorized to receive the records. The AWI reports that it enters into interagency data sharing agreements with the DOE and the Department of Children and Family Services (DCF) to allow for the release of VPK child demographic information and information required for the DOE to calculate VPK readiness rates as required by statute.⁷⁷ These agreements address the requirements and responsibilities of the parties for maintaining confidential and exempt information and provide time frames that encompass one year.⁷⁸ The DOE reports that it has no interagency agreements with early learning coalitions or VPK providers. While the responses are anecdotal, some VPK providers noted that they had agreements with an early learning coalition.

Possibly Combining Multiple Exemptions

There are no other statutes that create public records exemptions for children who are enrolled in the VPK program and their parents.

Options and/or Recommendations

Senate professional staff has reviewed the exemption in s. 1002.72, F.S., and finds that the exemption meets the requirements for reenactment. The exemption, viewed against the Open Government Sunset Review criteria, protect information of a sensitive personal nature concerning children and their parents and is no broader than is necessary to allow the AWI, early learning coalitions, and VPK providers to carry out their responsibilities for implementing the VPK education program.

Accordingly, professional staff recommends that the public records exemption in s. 1002.72, F.S., be reenacted with a modification to specifically authorize early learning coalitions to share confidential and exempt records of children enrolled in the VPK education program with contract service providers.

⁷³ Correspondence with DOE, August 26, 2009.

⁷⁴ *Id.* See 20 U.S.C. s. 1417(c) and 20 U.S.C. s. 1442

⁷⁵ 42 U.S.C. s. 9836a, requires policies, protections, and rights equivalent to those provided to a parent, student, or educational agency or institution under FERPA.

⁷⁶ The Secretary of the U.S. DOE, the Secretary of the Department of Health and Human Services, and the U.S. Comptroller General for the purpose of federal audits; individuals or organizations conducting studies for institutions to develop, validate, or administer assessments or improve instruction; accrediting organizations in order to carry out their accrediting functions; appropriate parties in connection with an emergency if the information is necessary to protect the health or safety of the child or other individuals; the Auditor General in connection with his or her official functions; a court of competent jurisdiction in compliance with an order of that court pursuant to a lawfully issued subpoena; and parties to an interagency agreement among early learning coalitions, local governmental agencies, VPK providers, or state agencies for the purpose of implementing the VPK program.

⁷⁷ Correspondence with AWI, July 17, 2009.

⁷⁸ Correspondence with AWI, August 5, 2009. The draft AWI agreement with DCF is for 2009-2010. The current AWI agreement with DOE is under review.