

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 7117 PCB EPC 09-01 Student Records/Family Educational Rights & Privacy Act

**SPONSOR(S):** Education Policy Council; Culp

**TIED BILLS:** **IDEN./SIM. BILLS:**

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.:	Education Policy Council	11 Y, 0 N	Brock	Cobb
1)				
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**SUMMARY ANALYSIS**

The bill aligns Florida’s Student Education Records Law with requirements of the controlling federal law, known as the Family Educational Rights and Privacy Act or “FERPA.” The bill addresses both public K-12 and public postsecondary student records. The bill:

- Reaffirms the rights of students and their parents with respect to student education records, states the intent that public educational institutions and agencies comply with the federal student education records law known as FERPA, and directs the State Board of Education to evaluate FERPA and ensure that its regulations meet specific principles.
- Establishes the State Board of Education’s duties to adopt rules for public K-12 institutions to carry out FERPA and the principles of the law, monitor FERPA and notify the Legislature of any change in FERPA, and advise the Legislature of any change in FERPA that would create a new public records exemption.
- Reaffirms the provision to students and/or parents of the right to bring an action in circuit court to enforce student education records law and recover attorney’s fees.
- Reaffirms the application of the requirements of Florida law to the education records of defunct private institutions held by a school superintendent.
- Provides rulemaking authority to the State Board of Education for K-12 education system.

The Department of Education indicates that there will be no additional costs to the department to implement the requirements of the proposed council bill. Failure to comply with FERPA may result in the withholding of funds under any program administered by the U.S. Department of Education. This bill may provide a way to demonstrate compliance with federal requirements and provide that federal funds are not jeopardized.

The bill does not have a fiscal impact on K-12 public schools. The bill follows current law, which allows a public postsecondary institution to charge a fee for the actual cost of producing a copy of a record.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Present Situation**

##### **Current Law**

##### *Federal Family Educational Rights & Privacy Act*

The Family Educational Rights & Privacy Act of 1974<sup>1</sup> (FERPA), also known as the “Buckley Amendment,” applies to all public and private higher education institutions that receive federal funds, including grants, financial aid, and student loan programs. FERPA provides students and their parents or legal guardians’ rights to: control disclosure, inspect and review, and seek amendment to their “education records.” After significant study and public input, the U.S. Department of Education published substantial revisions to FERPA in December of 2008.<sup>2</sup> In order to receive federal educational funds, schools and educational institutions must have student records policies that comply with federal law in place.<sup>3</sup> Changes in federal law have added new exemptions, definitions, and processes, and in recent years have addressed the evolution of information technology, document security concerns, and the need to address campus safety in light of tragedies such as the campus shooting at Virginia Tech.<sup>4</sup>

FERPA defines “record” as directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution. Parents have rights concerning their children’s education records, which transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level.<sup>5</sup> Education records may be disclosed by schools and postsecondary institutions without consent in certain instances that include complying with a court order or subpoena and to the following: 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.<sup>6</sup>

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<sup>1</sup> 20 U.S.C. § 1232g; see also implementing regulations found at 34 C.F.R. Part 99.

<sup>2</sup> *Id.*; see the regulations at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html>.

<sup>3</sup> Department of Education Analysis on Senate Bill 2426, March 12, 2009, at 1.

<sup>4</sup> *Id.* Over the years FERPA has been amended in both the U.S. Code, and the US Department of Education regulations found in 34 C.F.R. 99.1 *et. seq.*

<sup>5</sup> 20 U.S.C. § 1232g; see also implementing regulations found at 34 C.F.R. Part 99.

<sup>6</sup> 20 U.S.C. § 1232g and 34 C.F.R. Part 99.31.

### *Florida Law: K-12 Student Education Records*

In Florida, student education records are addressed in statutes that have not been updated to comport with the requirements of the federal law, and in many cases, conflict with certain federal provisions. Florida's K-12 student education records law has not been revised since 2004 and has not been significantly revised in at least a decade.<sup>7</sup>

The specific rights and education records of public K-12 students are listed in Florida law, which contains definitions, responsibility for schools and agencies, and allows disclosure of records without consent in certain limited situations.<sup>8</sup> The statute defines "record" as official records, files, and data directly related to students that are created, maintained, and used by public educational institutions.<sup>9</sup> Four rights are provided to parents and students concerning their records: the right of access to a student's records; the right to waive access to confidential letters or statements; the right to challenge the content of any record or report and receive a hearing; and the right of privacy of a student's educational records.<sup>10</sup> Certain disclosure exceptions are listed including school officials, specified personnel from other agencies, and subpoenas.<sup>11</sup> Additionally, public educational institutions may publish and release student directory information to the general public unless the student informs the institution, in writing, that any or all of the student's information should not be released.<sup>12</sup> Students and their parents must be notified annually of their rights and procedures, and may seek relief in circuit court if necessary.<sup>13</sup>

### *Florida Law: Postsecondary Student Education Records*

College and university students have rights concerning student education records of their children, and students have rights relating to their student records including: right of access, right of waiver of access, right to a challenge and hearing, and the right of privacy.<sup>14</sup> Each university is authorized to prescribe the content and custody of records and reports that the university maintains on its students. The records are confidential and exempt from the provisions of s. 119.07(1), F.S., and are open to inspection only as provided in s. 1002.22(2), F.S., relating to student records and reports.<sup>15</sup> Rules of the State Board of Education may prescribe the content and custody of records and reports that a community college may maintain on its students. The records are confidential and exempt from s. 119.07(1), F.S., and are open to inspection only as provided in s. 1002.22, F.S., relating to student records and reports.<sup>16</sup>

### **Effect of Proposed Changes**

The Department of Education (DOE) indicates that there is a continuous need to revise the student records law to stay in alignment with the federal law. The bill may provide a method for the state to comply with FERPA and make certain that federal funds are not jeopardized.

This bill is modeled on the concept of "cooperative federalism" where federal law creates an incentive for states to carry out programs or policies in exchange for federal funding. It is not always feasible or efficient to amend Florida statutes every time the federal regulations on FERPA are amended. Conversely, the Legislature cannot delegate its lawmaking power. The "cooperative federalism" concept strikes a balance between both of these concerns.<sup>17</sup> The Joint Administrative Procedures

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<sup>7</sup> Department of Education Analysis on Senate Bill 2426, March 12, 2009, at 3.

<sup>8</sup> Section 1002.22, F.S.

<sup>9</sup> Section 1002.22(2)(c), F.S.

<sup>10</sup> Section 1002.22(3)(a)-(d), F.S.

<sup>11</sup> Section 1002.22(3)(d)1.-14., F.S.

<sup>12</sup> Section 1002.22(3)(d), F.S.

<sup>13</sup> Section 1002.22(4)&(5), F.S.

<sup>14</sup> Section 1002.21, F.S. In addition, s. 1005.36, F.S., provides protection to students through the Commission for Independent Education when independent postsecondary institutions cease operation. The commission may require an institution to convey student educational records to the commission office or another location so that students may have proper access to the records.

<sup>15</sup> Section 1006.52(1), F.S.

<sup>16</sup> Section 1006.52(2), F.S.

<sup>17</sup> Department of Education Analysis on Senate Bill 2426, March 12, 2009, at 3; see also "Elements of a Good 'Cooperative Federalism' Statute," Joint Administrative Procedures Committee, received March 27, 2009.

Committee developed recommendations to provide state executive branch agencies with reasonable discretion to adapt Florida's programs to changing federal guidelines, provide adequate legislative oversight, and avoid unconstitutional delegation to either the federal government or the state executive branch. The recommendations include specific legislative authority to participate in a federal program and an agency evaluation of whether federal law and regulations are consistent with specific legislatively-determined policy objectives. The bill incorporates these recommendations.<sup>18</sup>

The bill substantially revises s.1002.22, F. S., to maintain the fundamental purpose of the student records law and align it with the federal FERPA law and regulations, while preserving certain existing provisions of Florida law. The bill provides for student and parent rights of access, waiver, privacy, notification, and challenge of the content of student records. The State Board of Education (SBE) is required to adopt rules to address FERPA principles concerning federal student education records requirements; monitor FERPA and notify the Legislature of significant change to the requirements of FERPA or other major changes in federal law; and advise the Legislature of any change in FERPA which may create a need for an exemption to the requirements of s. 24(a), Art. I, of the *Florida Constitution*. The SBE must notify the Legislature of any significant shifts in federal law that are contrary to the established standards, or of any requirement that would create a new exemption to public records and require a two-thirds vote.

The bill repeals the current definitions of "directory information," "records and reports," and "student." These terms are defined in federal law and regulations.<sup>19</sup> The bill defines the terms "agency" and "institution."<sup>20</sup>

The bill also repeals the provisions in law which specify the manner in which student and parental rights are implemented (e.g. procedures for challenging the accuracy of student records, waivers by a parent or student for accessing letters of recommendation and evaluations, and the timeline for responding to requests by parents or students to access a record or report). Federal law and regulations specify how student and parental rights are exercised. The bill repeals current law with respect to the parties who may access otherwise confidential and exempt personally identifiable records about a student, without the consent of the parent or student, as the list is more limited than the parties specified in FERPA. The bill retains the substance of current law for the penalty for failure to comply with the law and for the applicability of the law to defunct private schools.

The bill revises s. 1002.21, F.S., and creates s. 1002.225, F.S., addressing education records of students in public postsecondary educational institutions. All public postsecondary educational institutions must comply with the FERPA concerning the education records of students. The bill also provides for fees and enforcement of rights in the circuit court.<sup>21</sup>

The bill also requires a public postsecondary educational institution to comply with FERPA's requirements for the education records of a student. Under the bill, the term "education records" means the definition that is used in FERPA and federal regulation. A public postsecondary institution may charge a fee for the actual cost of producing a copy of the record; however, a fee may not be charged for searching or retrieving records.<sup>22</sup>

## B. SECTION DIRECTORY:

**Section 1:** Amends s. 1002.21, F.S., deleting provisions relating to public postsecondary student records.

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<sup>18</sup> "Elements of a Good 'Cooperative Federalism' Statute," Joint Administrative Procedures Committee, received March 27, 2009.

<sup>19</sup> 20 U.S.C. § 1232g and 34 C.F.R. Part 99.3. "Student" means any individual who is or has been in attendance at an educational agency or institution and whom the agency or institution and whom the agency or institution maintains education records. It excludes individuals who have not been in attendance at the agency or institution.

<sup>20</sup> *Id.* An educational agency or institution is a public or private agency or institution that receives funds under an applicable federal program.

<sup>21</sup> *Id.*, The Department of Education indicates that this language, which was submitted by members of the postsecondary sector, directs institutions to ensure compliance with FERPA.

<sup>22</sup> 34 C.F.R. Part 99.11 provides this authority; however, a fee may not be charged if it effectively prevents a parent or student from inspecting and reviewing the student's education records.

**Section 2:** Substantially amends s. 1002.22, F. S., deleting certain provisions governing the release of public K-12 student records and reports to specified parties; defining terms “agency” and “institution”; requiring the State Board of Education (SBE) comply with federal law with respect to release of education records; and requiring that the SBE adopt rules.

**Section 3:** Creates s. 1002.225, F.S., addressing the student education records rights at the public postsecondary level; defining the term “education records” for purposes of records of students in public postsecondary educational institutions; requiring that a public postsecondary educational institution comply with federal law; authorizing such institution to charge a fee for furnishing copies of education records; prohibiting the institution from including the costs of searching for or retrieving the records in the fee; providing an aggrieved student with the right to bring an action in court; and providing for the award of attorney’s fees and court costs.

**Section 4:** Amends s. 1009.94, F.S., to conform a cross-reference to s. 1002.225, F.S.

**Section 5:** Provides an effective date of July 1, 2009.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not appear to affect state government revenues.

#### 2. Expenditures:

The bill does not appear to affect state government expenditures.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

The bill does not appear to affect local government revenues.

#### 2. Expenditures:

The bill does not appear to affect local government expenditures.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

The Department of Education indicates that there will be no additional costs to the department to implement the requirements of the bill.<sup>23</sup> Failure to comply with FERPA may result in the withholding of funds under any program administered by the U.S. Department of Education.<sup>24</sup> This bill may provide a way to demonstrate compliance with federal requirements and provide that federal funds are not jeopardized.

The bill does not have a fiscal impact on K-12 public schools. The bill follows current law, which allows a public postsecondary institution to charge a fee for the actual cost of producing a copy of a record.

<sup>23</sup> Department of Education Analysis on Senate Bill 2426, March 12, 2009, at 3.

<sup>24</sup> 20 U.S.C. § 1232g(f) and 34 C.F.R. Part 99.67.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require a city or county to expend funds or to take any action requiring expenditures; reduce the authority that municipalities or counties had as of February 1, 1989, to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities as of February 1, 1989.

##### 2. Other:

None.

#### B. RULE-MAKING AUTHORITY:

Section 1001.64(8), F.S., relating to community college boards of trustees powers and duties, provides rulemaking authority for student education records for community colleges. Additionally, state universities have a separate rulemaking process. For the public postsecondary institutions, few, if any changes will be required to existing institutional student education record rules as virtually all presently are drafted for compliance with the federal law and rules.<sup>25</sup>

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

N/A.

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<sup>25</sup> Correspondence with William J. Mullowney, Vice President for Policy and General Counsel, Valencia Community College, March 17, 2009.