

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 Judiciary

BILL: CS/SB 188

INTRODUCER: Education Committee and Senator Hukill and others

SUBJECT: Education Data Privacy

DATE: March 3, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Hand</u>	<u>Klebacha</u>	<u>ED</u>	Fav/CS
2.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	Favorable
3.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	Pre-meeting

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 188 implements changes proposed by the Florida Department of Education (DOE) in its report on *Student Data Privacy Recommendations*. The bill contains provisions to make students and their parents aware of their educational privacy rights. The bill also prohibits the collection and limits the dissemination of certain types of information and requires the replacement of social security numbers with student identification numbers. The bill applies to K-12 schools and agencies that provide administrative control or direction or perform services for them. The bill:

- Specifies that students and their parents must be notified annually about their rights regarding education records;
- Clarifies existing law to authorize that attorney fees and court costs be awarded upon receipt of injunctive relief, rather than when the parent or student's rights are "vindicated";
- Prohibits certain agencies or institutions from collecting or retaining information regarding the political affiliation, voting history, religious affiliation, or biometric information of a student, parent, or sibling of a student and defines biometric information;
- Prohibits the disclosure of confidential and exempt education records unless the disclosure is authorized by law;
- Requires governing boards, in a public meeting, to identify which student education records the board intends to include as publicly available student directory information; and
- Requires DOE to establish a process for assigning a non-social security number as a Florida student identification number, and once DOE completes the process, a school district may

not use social security numbers as student identification numbers in its management information systems.

II. Present Situation:

Privacy of Student Education Records

The privacy of student education records is established by a comprehensive system of federal and state laws. This system safeguards the privacy of student education records and ensures that the records are accessible by students and their parents at the public school district, college, university, and state levels.

The Family Educational Rights and Privacy Act (FERPA) is a federal law that applies to all educational agencies or institutions that receive program funds from the United States Department of Education (U.S. DOE).¹ Congress enacted FERPA in 1974 by using its spending power and tied the receipt of federal funds to compliance with certain access and disclosure requirements.² FERPA's purpose is two-fold: to ensure that students and parents can access the student's education records,³ and to protect their privacy rights by limiting the transferability of the student's education records without student or parent consent.⁴ Compliance with FERPA is a mandatory condition for receiving federal funds.⁵

The federal law ensures that public school districts, colleges, universities, and state educational agencies protect student or parent rights and do not disclose student education records without student or parent consent, unless authorized by FERPA.

Florida has codified FERPA in state law. Additionally, as explained in this analysis, Florida has also generally used state law to build upon and strengthen FERPA's provisions.⁶

¹ 20 U.S.C. s. 1232(g) and 34 C.F.R. s. 99.1.

² *Gonzaga University v. Doe*, 536 U.S. 273, 278 (2002).

³ The phrase "student education records," as used here, encompasses two intertwined categories of student information – "education records" and "personally identifiable information." FERPA prohibits funds from being made available under any applicable program to any educational agency or institution (i.e., any public or private agency or institution that is the recipient of funds under any applicable program) that has a policy or practice of: (1) "permitting the release of education records (or personally identifiable information contained therein...);" or (2) "releasing or providing access to, any personally identifiable information in education records..." unless otherwise permitted by FERPA. 20 U.S.C. ss. 1232g(b)(1) & (2). The term "education records" means those records, files, documents, and other materials which contain information directly related to a student, and are maintained by an educational agency or institution. 20 U.S.C. s. 1232g(a)(4) and *Owasso Independent School Dist. v. Falvo*, 534 U.S. 426 (2002) (FERPA implies that education records are institutional records kept by a single central custodian). "Personally identifiable information" is essentially information that would allow a reasonable person in the school community to identify the student with reasonable certainty. See 34 C.F.R. s. 99.3.

⁴ 73 Fed. Reg. 74831 (December 9, 2008). "As such, FERPA is not an open records statute or part of an open records system." *Id.*

⁵ 20 U.S.C. s. 1232g(a)(1) and 34 C.F.R. s. 99.67.

⁶ Section 1002.221, F.S. Florida law states that a student's education records, as defined in FERPA and the federal regulations issued pursuant thereto, are confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I, Fla. Const. See ss 1002.221(1) and 1006.52(1), F.S. In light of FERPA and the federal regulations and preamble issued thereto (see footnote 3), Florida's public record exemption encompasses both "education records" (i.e., institutional records) and the subset of "personally identifiable information" (i.e., information that identifies a student, regardless of format). See 20 U.S.C. s. 1232g, 34 C.F.R. part 99, and ss. 1002.221 and 1006.52, F.S.

Parent or Student Rights

The federal law obligates school districts, colleges, universities, and state educational agencies to ensure that students or parents enjoy their rights to:

- Inspect, review, and contest the student’s educational records;⁷ and
- Authorize the disclosure of student education records by written consent.⁸

Florida law codifies FERPA into state law, further ensuring the responsibility of school districts, colleges, universities, and state educational agencies to guard these student and parent rights.⁹ However, there are differences between FERPA and state law. For example:

- The federal law requires school districts, colleges, and universities to annually notify students or parents of their rights pertaining to educational records.¹⁰ Florida law does not specifically identify how frequently the notice is to be provided to students or parents.¹¹
- The federal law allows a parent or student to file a written complaint with U.S. DOE, but does not explicitly authorize students or parents to file a lawsuit to protect their rights.¹² Florida law authorizes a student or parent to file a lawsuit seeking an injunction to protect his or her rights. Additionally, Florida law allows attorney fees and court costs to be awarded if the rights “are vindicated.”¹³

Authorized Disclosure of Student Education Records

The federal law authorizes school districts, colleges, and universities¹⁴ to disclose student education records¹⁵ without the consent of the student or parent if the disclosure meets limited conditions.¹⁶ Examples of conditions include, but are not limited to, disclosure of student education records to:

- Other school officials within the school or school district determined to have a legitimate educational interest;¹⁷
- Schools to which a student is transferring;¹⁸

⁷ 34 C.F.R. s. 99.5, 34 C.F.R. s. 99.10, 34 C.F.R. s. 99.12, and 34 C.F.R. ss. 99.20-99.22.

⁸ 34 C.F.R. s. 99.30.

⁹ Section 1002.22(2), F.S.

¹⁰ 20 U.S.C. s. 1232g(e) and 34 C.F.R. s. 99.7.

¹¹ Section 1002.22(2)(e), F.S.

¹² 34 C.F.R. s. 99.63 (see 34 C.F.R. ss. 99.60-99.67 for the enforcement procedures in general). Enforcement action may include withholding payments or terminating program eligibility. 34 C.F.R. s. 99.67(a) and *Gonzaga University v. Doe*, 536 U.S. 273, 290 (2002).

¹³ Section 1002.22(4), F.S.

¹⁴ FERPA uses the term “educational agencies or institutions,” which refers to local education agencies (i.e., school districts), elementary and secondary schools, postsecondary institutions (i.e., colleges and universities), and schools operated by the United States Department of Interior Bureau of Indian Education. 76 F.R. 75606 (December 2, 2011). The term does not generally include a state education agency (i.e., the Florida Department of Education). *Id.*

¹⁵ “Education records” means those records that are directly related to a student, and maintained by an educational agency or institution or by a party acting for the educational agency or institution. 34 C.F.R. s. 99.3.

¹⁶ 20 U.S.C. s. 1232g(b)(1) and (2) and 34 C.F.R. s. 99.30(a).

¹⁷ 20 U.S.C. s. 1232g(b)(1)(A) and 34 C.F.R. s. 99.31(a)(1)(i)(A).

¹⁸ 20 U.S.C. s. 1232g(b)(1)(B) and 34 C.F.R. s. 99.31(a)(2).

- A contractor, consultant, or other party to whom an agency has outsourced institutional services or functions;¹⁹ and
- Organizations conducting studies for, or on behalf of, school districts, colleges, or universities to: develop, validate or administer predictive tests; administer student aid programs; or improve instruction.²⁰

Florida law provides that student education records are confidential and exempt from disclosure, and may not be released without student or parent consent, except as permitted by FERPA.²¹

For each student who attends a public school in Florida, the student's education records are created by the school or school district.²² Thus, the student's education records may initially be disclosed by the school district (as authorized by FERPA and state law) to a state educational agency—which in Florida is generally the Florida Department of Education (DOE). DOE, as authorized by FERPA and state law, may “redisclose” student education records in the same manner that an initial disclosure is authorized.²³

Biometric Information

The Florida K-20 Education Code is silent on the issue of whether biometric information may be collected from students. Federal law, in contrast, permits the collection of biometric information and states that “personally identifiable information” includes a student’s “biometric record.”²⁴

Directory Information

Federal law provides that “directory information” is “information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.”²⁵ Examples of directory information are: the student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, e-mail address, photograph, date and place of birth, grade level, dates of attendance, and participation in sports.²⁶ Directory information does not include a student’s social security number.²⁷

Under FERPA school districts, colleges, and universities are authorized to disclose directory information if they give public notice to students or parents of the types of student information that is being designated as directory information.²⁸ Because directory information constitutes a

¹⁹ 20 U.S.C. s. 1232g(b)(1) and 34 C.F.R. s. 99.30(a)(1)(i)(B).

²⁰ 20 U.S.C. s. 1232g(b)(1)(F) and 34 C.F.R. s. 99.31(a)(6).

²¹ Section 1002.221(1), F.S.; s. 1006.52(1), F.S. Florida law defines a student’s education records “as defined” in FERPA. *Id.*

²² 76 Fed. Reg. 75606 (December 2, 2011). The definition of “student” means any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records. 34 C.F.R. s. 99.3.

²³ 34 C.F.R. s. 99.33.

²⁴ 34 C.F.R. s. 99.3 provides that “*Biometric record*, as used in the definition of *personally identifiable information*, means a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints; retina and iris patterns; voiceprints; DNA sequence; facial characteristics; and handwriting.”

²⁵ 34 C.F.R. s. 99.3.

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

²⁷ 34 C.F.R. s. 99.3.

²⁸ 34 C.F.R. s. 99.37. This notice includes the ability to opt-out of being included in the student directory. *Id.*

permissible disclosure of student education records without student or parent consent,²⁹ Florida's codification of FERPA into statute also incorporates these requirements.³⁰

Social Security Numbers

Federal law does not prohibit the use of a student's social security number as a personal identifier or as a way to connect students to their records.³¹ However, according to the U.S. DOE, best practices dictate that states should limit use of student social security numbers to instances in which there is no feasible alternative.³²

Florida law requires school districts to request and use social security numbers as student identification numbers in the school district's management information system.³³

Florida Department of Education Legislative Recommendations

On September 23, 2013, after the Governor's Education Summit, Governor Scott issued Executive Order Number 13-276. The executive order directed the Commissioner of Education to "immediately conduct a student data security review" and to "make recommendations regarding any needed rule or legislative change to safeguard the privacy of our students' data...."³⁴

The Department of Education subsequently issued a report covering security initiatives, school district activities, and information technology security reviews.³⁵ The report contained various recommendations, including recommendations that the Legislature:

- Require that school districts give annual notice to students and parents of their rights regarding education records;
- Clarify that a student or parent who has received injunctive relief to enforce his or her rights may be awarded attorney fees and court costs;
- Establish limitations on the collection of student information by certain entities that are part of, or perform services for, Florida's public education system. The limitations would prohibit the collection, obtainment, or retention of: biometric information; political affiliation; voting history; religious affiliation; health information; and correspondence from community agencies or private professionals;
- Establish limitations on the disclosure of confidential and exempt student education records for entities that are part of, or perform services for, Florida's public education system, except

²⁹ 20 U.S.C. s. 1232g(a)(5); 34 C.F.R. s. 99.31(11); 34 C.F.R. s. 99.37.

³⁰ Sections 1002.221, and 1006.52, F.S.

³¹ 76 Fed. Reg. 75611 (December 2, 2011). However, the U.S. Department of Education recognizes the importance of limiting social security number use, as FERPA prohibits schools from designating student social security numbers as directory information. 34 C.F.R. s. 99.3 and 76 Fed. Reg. s. 75611 (December 2, 2011) (referring to the definition of "directory information").

³² 76 Fed. Reg. s. 75611 (December 2, 2011).

³³ Section 1008.386, F.S. However, it appears that a student is not required to provide his or her social security number as a condition for enrollment or graduation. *Id.*

³⁴ Executive Order No. 13-276, dated September 23, 2013.

³⁵ Florida Department of Education, Student Data Privacy Recommendations, *available at* <http://www.fldoe.org/pdf/DataSecurityReport.pdf> (last viewed on February 24, 2014).

when the disclosure is authorized by state or federal law, or in response to a lawfully issued subpoena or court order;

- Require directory information to be designated in accordance with FERPA at regularly scheduled governing board meetings, and requires that the governing board consider the extent to which the disclosure would put students at risk; and
- Establish a computer generated student identifier for state and local systems to protect the confidentiality of student records.³⁶

In summary, the DOE report identifies areas where state law could be strengthened to further ensure that public school districts, colleges, universities, and state educational agencies protect student or parent rights and the privacy of student education records.

III. Effect of Proposed Changes:

This bill contains provisions to make students and their parents aware of their educational privacy rights. The bill also prohibits the collection and limits the dissemination of certain types of information and requires the replacement of social security numbers with student identification numbers. The bill applies to K-12 schools and agencies that provide administrative control or direction of, or perform services for, them.

The bill implements changes proposed by DOE in its *Student Data Privacy Recommendations*. The bill:

- Specifies that students and their parents must be notified annually about their rights regarding education records, which corresponds with the federal Family Educational Rights and Privacy Act's annual notice requirement;
- Clarifies existing law to authorize the payment of attorney fees and court costs to a parent or student who is granted injunctive relief in a suit to enforce his or her education record rights, rather than when the parent or student's rights are "vindicated";
- Prohibits educational agencies or institutions related to K-12 schools from collecting, obtaining, or retaining information regarding the political affiliation, voting history, religious affiliation, or biometric information of a student, parent, or sibling of the student;
- Defines biometric information as "information collected from the electronic measurement or evaluation of any physical or behavioral characteristics that are attributable to a single person" and gives examples such as fingerprint, hand, eye, vocal, or other physical characteristics used for electronic identification;
- Prohibits the disclosure of confidential and exempt student education records to a person, public body, body politic, political subdivision, or agency of the Federal Government unless authorized by a specified law or in response to a lawfully issued subpoena or court order;
- Creates new obligations in law to require the governing board of a school district, college, or university, in a regularly scheduled public meeting, to identify which student information the governing board will designate as publicly available directory information, and to consider whether the disclosure of the identified directory information would put students at risk;

³⁶ *Id.*

- Confirms the ability of the school district, college, or university, to charge fees for providing copies of directory information in response to public records requests;
- Deletes the requirement in state law that school districts use student social security numbers as student identification numbers; and
- Requires DOE to establish a process for assigning a non-social security number as a Florida student identification number, and once DOE completes the process, a school district may not use social security numbers as student identification numbers in its management information systems.

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.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

According to DOE, existing federal and state funds are adequate to provide for the development of the student identification number process.

VI. Technical Deficiencies:

Section 3 of the bill, which requires DOE to establish a process for assigning Florida student identification numbers, does not require DOE to begin or complete the process by a specific date. The Legislature might want to set a date for implementation of this provision.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 1002.22, 1008.386, and 1011.622. This bill creates section 1002.222, 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 Education on February 4, 2014

CS/SB 188 differs from SB 188 in that:

- SB 188 provided that school districts that wanted to collect student biometric information must: (1) create policies governing the collection and use of the biometric information; and (2) not collect biometric information on a student unless the parent chose to opt-in. CS/SB 188 reframes and expands the concepts in SB 188 to prohibit entities that are part of, or perform services for, Florida's public education system, from collecting, obtaining, and retaining the biometric information, political affiliation, voting history, and religious affiliation of a student, parent, or sibling of the student; and
- CS/SB 188 implements recommendations from the DOE Student Data Privacy report.

- B. **Amendments:**

None.