

## HOUSE OF REPRESENTATIVES FINAL BILL ANALYSIS

<b>BILL #:</b>	CS/CS/HB 195	<b>FINAL HOUSE FLOOR ACTION:</b>	
<b>SPONSOR(S):</b>	Education Committee; Choice & Innovation Subcommittee; Raburn and others	113 Y's	1 N's
<b>COMPANION BILLS:</b>	CS/CS/SB 188	<b>GOVERNOR'S ACTION:</b>	Pending

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### SUMMARY ANALYSIS

CS/CS/HB 195 passed the House on April 11, 2014, as CS/CS/SB 188. This bill strengthens Florida law regarding education data privacy and security. On September 23, 2013, after receiving feedback from stakeholders during the Governor's Education Summit, the Governor issued an Executive Order which, among other things, directed the Commissioner of Education to review and make recommendations for improving state policies regarding student data privacy and security. Accordingly, the commissioner recommended several changes to state law regarding education data privacy. This bill codifies the commissioner's recommendations by:

- Clarifying that parents must be notified annually regarding their rights with respect to education records.
- Clarifying that a parent may be awarded attorney's fees and court costs if the parent is granted injunctive relief in an action to enforce his or her rights regarding education records.
- Prohibiting any agency or institution from collecting information regarding political affiliation, voting history, religious affiliation, or biometric information of a student or student's parent or sibling.
- Prohibiting the disclosure of confidential and exempt education records to any person, public body, body politic, or political subdivision unless disclosure is authorized by the federal Family Educational Rights and Privacy Act (FERPA) or in response to a subpoena or court order. Disclosure to federal government agencies is also prohibited, unless authorized by FERPA, required by federal law, or in response to a subpoena or court order.
- Requiring that governing boards of agencies or institutions may only designate directory information in accordance with FERPA at a regularly scheduled meeting at which time the board must consider any potential risks to student privacy from such designation.

The bill defines biometric information as information collected from the electronic measurement or evaluation of any physical or behavioral characteristics that may be personally identifiable, including characteristics of fingerprints, hands, eyes, and the voice. The bill would, therefore, not allow agencies or institutions to use fingerprint scans, palm scans, retina or iris scans, face geometry scans, or voice prints. The bill provides a time-limited exception to the prohibitions regarding collection of biometric information for school districts using a palm scanner system to identify students for breakfast and lunch programs as of March 1, 2014. Such a district has until the end of the 2014-15 school year to phase out the system.

In addition, the bill requires the Florida Department of Education to create a statewide process for assigning students identification numbers that are not social security numbers (SSN), thereby phasing out the use of SSNs for that purpose.

The bill does not have a fiscal impact on state or local governments.

Subject to the Governor's veto powers, the bill is effective upon becoming law.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### Education Records Privacy

##### **Present Situation**

##### Federal Law

The Family Educational Rights and Privacy Act<sup>1</sup> (FERPA) is a federal law that grants parents the right to inspect, review, and challenge the content of their child's education records and, subject to certain exceptions, control the disclosure of education records or personally identifiable information<sup>2</sup> contained in the records.<sup>3</sup> When a student turns 18 years of age, or enters a postsecondary institution at any age, the rights under FERPA transfer from the parents to the student (eligible student).<sup>4</sup>

Educational agencies and institutions<sup>5</sup> must comply with FERPA as a condition to receiving federal education funds.<sup>6</sup> An educational agency or institution that receives federal education funds must annually notify parents and eligible students of their rights under FERPA.<sup>7</sup>

Among other things, FERPA requires educational agencies and institutions to obtain written consent from a parent or eligible student before disclosing education records or personally identifiable information contained therein.<sup>8</sup> The written consent must be signed and dated and must specify the records that may be disclosed; state the purpose of the disclosure; and identify the party or class of parties to whom the disclosure may be made.<sup>9</sup>

There are several exceptions to the "prior consent" requirement which authorize disclosure of education records or personally identifiable information. Generally, these exceptions address specific situations in which disclosure without consent is necessary for the efficient operation of the school or school district; to comply with court orders and federal audit and grant reporting requests; and to protect the health, safety, and welfare of students. These exceptions include disclosure:

- To the parent of a student who is not an eligible student or to an eligible student if he or she is not claimed as a dependent on his or her parent's income taxes.<sup>10</sup>
- To other school officials, including teachers, within the agency or institution.<sup>11</sup>

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<sup>1</sup> 20 U.S.C. s. 1232g and 34 C.F.R. part 99.

<sup>2</sup> FERPA defines "personally identifiable information" to include, without limitation, the names of the student and his or her parents or other family members; the address of the student or student's family; the student's social security number, student number, biometric record, or other personal identifier; indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name; and other information that could reasonably identify a student. 34 C.F.R. s. 99.3 (definition of "personally identifiable information").

<sup>3</sup> 20 U.S.C. s. 1232g(a) and (b); 34 C.F.R. part 99. In cases of divorced, separated, or never-married parents, each parent is presumed to have rights under FERPA unless a state statute, court order, or other legally binding document provides to the contrary. 34 C.F.R. s. 99.4.

<sup>4</sup> 20 U.S.C. s. 1232g(d); 34 C.F.R. ss. 99.3 (definition of "eligible student") and 99.5(a).

<sup>5</sup> FERPA defines "educational agency or institution" to mean any public or private agency or institution that receives federal education funding. 20 U.S.C. s. 1232g(a)(3). This includes educational institutions that provide instruction or educational services and educational agencies that are authorized to control and direct postsecondary institutions or public elementary or secondary schools, i.e., state and local educational agencies. 34 C.F.R. s. 99.1.

<sup>6</sup> 20 U.S.C. s. 1232g(a) and (b); 34 C.F.R. s. 99.1.

<sup>7</sup> 20 U.S.C. s. 1232g(e); 34 C.F.R. s. 99.7(a).

<sup>8</sup> 20 U.S.C. s. 1232g(b)(1); 34 C.F.R. ss. 99.30-99.39. Florida's policy for the disclosure of education records is similar to the relevant FERPA provisions. See rule 6A-1.0955(6)(f) and (g), F.A.C.

<sup>9</sup> 34 C.F.R. s. 99.30.

<sup>10</sup> 20 U.S.C. s. 1232g(b)(1)(H); 34 C.F.R. s. 99.31(a)(8) and (12); see 26 U.S.C. s. 152 (Internal Revenue Code definition of dependent child).

- To officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is related to the student's enrollment or transfer.<sup>12</sup>
- To authorized representatives of the U.S. Comptroller General, U.S. Attorney General, U.S. Secretary of Education, or state and local educational authorities for purposes related to audits, evaluations, or enforcement of federal legal requirements.<sup>13</sup>
- In connection with an application for student financial aid to determine eligibility, amount, and terms and conditions for such aid.<sup>14</sup>
- Authorized by a state statute concerning the juvenile justice system to enable specified state and local officials to effectively serve a juvenile prior to adjudication.<sup>15</sup>
- To organizations conducting studies for, or on behalf of, educational agencies or institutions to develop, validate, or administer predictive tests; administer student aid programs; or improve instruction.<sup>16</sup>
- To accrediting organizations to carry out their accrediting functions.<sup>17</sup>
- To comply with a judicial order or lawfully issued subpoena.<sup>18</sup>
- In connection with a health or safety emergency and disclosure is necessary to protect the health or safety of the student or others.<sup>19</sup>
- Of directory information.<sup>20</sup>
- To the victim of an alleged perpetrator of a violent crime or non-forcible sex offense<sup>21</sup> which is limited to the final results of a disciplinary proceeding conducted on the matter by a postsecondary institution, regardless of outcome.<sup>22</sup>
- In connection with a disciplinary proceeding conducted by a postsecondary institution regarding an alleged crime of violence or non-forcible sex offense perpetrated by a student in which the student is determined to have violated the institution's rules or policies.<sup>23</sup>
- To a parent of a student at a postsecondary institution regarding the student's violation of any Federal, State, or local law or institutional rule or policy governing the use or possession of

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<sup>11</sup> 20 U.S.C. s. 1232g(b)(1)(A); 34 C.F.R. s. 99.31(a)(1). Disclosure to outside contractors, consultants, and others is permitted if they perform a function typically served by employees; are directly controlled by the educational agency or institution; are permitted access only to records in which they have a legitimate educational interest; and are required to comply with FERPA requirements for redisclosure of education records. *Id.*

<sup>12</sup> 20 U.S.C. s. 1232g(b)(1)(B); 34 C.F.R. s. 99.31(a)(2).

<sup>13</sup> 20 U.S.C. s. 1232g(b)(1)(C) and (3); 34 C.F.R. s. 99.31(a)(3). Authority to conduct an audit, evaluation, or enforcement action must be established under other federal, state, or local authority and controls must be in place to prevent disclosure to unauthorized persons. 34 C.F.R. s. 99.35(a)(2) and (b).

<sup>14</sup> 20 U.S.C. s. 1232g(b)(1)(D); 34 C.F.R. s. 99.31(a)(4).

<sup>15</sup> 20 U.S.C. s. 1232g(b)(1)(E); 34 C.F.R. ss. 99.31(a)(5) and 99.38.

<sup>16</sup> 20 U.S.C. s. 1232g(b)(1)(F); 34 C.F.R. s. 99.31(a)(6)(i). Disclosure is only permitted if the educational agency or institution and organization conducting the study enter into a written agreement which specifies the purpose, scope and duration of the study; prohibits personal identification of parents and students to third parties; and requires the destruction of personally identifiable information of parents and students upon completion of the study. 34 C.F.R. s. 99.31(a)(6)(iii).

<sup>17</sup> 20 U.S.C. s. 1232g(b)(1)(G); 34 C.F.R. s. 99.31(a)(7).

<sup>18</sup> 20 U.S.C. s. 1232g(b)(1)(J); 34 C.F.R. s. 99.31(a)(9). The educational agency or institution must make a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action. Notification is not required if the disclosure is in compliance with an ex parte court order obtained by the United States Attorney concerning investigations or prosecutions of terrorism or with a federal grand jury or other law enforcement subpoena in which the court or issuing agency has ordered that information in the subpoena not be disclosed. *Id.*

<sup>19</sup> 20 U.S.C. s. 1232g(b)(1)(I); 34 C.F.R. ss. 99.31(a)(10) and 99.36(a).

<sup>20</sup> 20 U.S.C. s. 1232g(a)(5); 34 C.F.R. s. 99.31(a)(11).

<sup>21</sup> For purposes of FERPA, an "alleged perpetrator" means another student at the postsecondary institution. Crimes of violence include arson, assault, burglary, criminal homicide, destruction of property, vandalism, kidnapping, robbery, and forcible sex offenses. Non-forcible sex offenses include acts committed by a student which constitute statutory rape or incest. 34 C.F.R. s. 99.39.

<sup>22</sup> 20 U.S.C. s. 1232g(b)(6)(A); 34 C.F.R. s. 99.31(a)(13).

<sup>23</sup> 20 U.S.C. s. 1232g(b)(6)(B); 34 C.F.R. s. 99.31(a)(14). The institution may not disclose the name of any other student, including a victim or witness, without the prior written consent of the other student. This provision pertains only to disciplinary proceedings concluded on or after Oct. 7, 1998. *Id.*

alcohol or controlled substances if the student is under 21 years of age and the institution determines that the student committed the violation.<sup>24</sup>

- Regarding sex offenders and other individuals who are required to register with law enforcement under federal law.<sup>25</sup>

In addition, an educational agency or institution or recipient of education records may release education records without prior consent if all personally identifiable information is removed from the records and the agency, institution, or party reasonably determines that the student's identity cannot be ascertained from the records.<sup>26</sup>

One of the most frequently used exceptions concerns “directory information.” FERPA defines directory information as “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, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.”<sup>27</sup> An educational agency or institution must give public notice regarding the types of personally identifiable information that the agency or institution has designated as directory information and allow a reasonable opportunity for parents or eligible students to object to such release.<sup>28</sup>

### State Law

Florida law regarding education records privacy establishes a public records exemption for records held by Florida educational agencies and institutions<sup>29</sup> and requires that such records be protected in accordance with FERPA. In order to maintain the eligibility of public educational institutions and agencies for federal funding, the law directs the State Board of Education to comply with FERPA after evaluating and determining that FERPA is consistent with the following principles:

- Students and their parents shall have the right to access their education records, including the right to inspect and review those records.
- Students and their parents shall have the right to waive their access to their education records in certain circumstances.
- Students and their parents shall have the right to challenge the content of education records in order to ensure that the records are not inaccurate, misleading, or otherwise a violation of privacy or other rights.
- Students and their parents shall have the right of privacy with respect to such records and reports.
- Students and their parents shall receive notice of their rights with respect to education records.<sup>30</sup>

The state board must also monitor changes to FERPA and advise the Legislature of any changes necessitating amendments to state law.<sup>31</sup>

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<sup>24</sup> 20 U.S.C. s. 1232g(i); 34 C.F.R. s. 99.31(a)(15).

<sup>25</sup> 20 U.S.C. s. 1232g(b)(7)(A); 34 C.F.R. s. 99.31(a)(16); *see* 42 U.S.C. s. 14071 (federal requirements for sexual offender registration).

<sup>26</sup> 34 C.F.R. s. 99.31(b)(1).

<sup>27</sup> 34 C.F.R. s. 99.3 (definition of “directory information”).

<sup>28</sup> 20 U.S.C. s. 1232g(a)(5), 34 CFR 99.37. *See e.g.* U.S. Department of Education, *Model Notice for Directory Information*, <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/mndirectoryinfo.html> (last visited Jan. 25, 2014).

<sup>29</sup> Florida’s education records privacy law defines “agency” to mean any board, agency, or other entity that provides administrative control or direction of or performs services for public elementary or secondary schools, centers, or other institutions. Section 1002.22(1)(a), F.S. “Institution” means any public elementary, middle or high school; center; or institution; and the Florida School for the Deaf and the Blind and Florida Virtual School. Section 1002.22(2)(b), F.S.

<sup>30</sup> Section 1002.22(2), F.S.

<sup>31</sup> Section 1002.22 (3), F.S.

State law allows a student or parent who has his or her rights under FERPA vindicated in court to collect attorney fees and court costs, but does not specify what constitutes such a “vindication of rights.” The law is silent regarding the collection of information regarding political affiliation, voting history, religious affiliation, and biometric information. Release of directory information must be consistent with FERPA.<sup>32</sup>

### Commissioner Review and Legislative Recommendations

On September 23, 2013, after receiving feedback from stakeholders during the Governor’s Education Summit, the Governor issued an Executive Order which, among other things, directed the Commissioner of Education to make improvements to state policies regarding student data privacy and security. The order directed the commissioner to:

- Conduct a student data security review;
- Issue policies, including internal protocols and operating procedures, for the Florida Department of Education (DOE), school districts, and any assessment provider or other entity with access to student data, in order to protect student information and prevent its misuse;
- Ensure that protections are in place to prevent the release of student education records without the written consent of the student or parent, except as specifically provided by Florida law; and
- Make recommendations by December 31, 2013, for rule changes or legislation needed to protect student privacy.<sup>33</sup>

Accordingly, DOE reviewed its compliance with state and federal education records privacy laws and its internal protocols and procedures governing information security. DOE also commissioned SecureWorks to conduct an independent assessment of DOE’s information security protocols and procedures. The Auditor General is independently auditing DOE’s compliance with state laws and rules related to information security.<sup>34</sup> Among other things, DOE’s report on these activities indicates that:

- Individual, personally identifiable student information collected and maintained by the department may only be accessed by authorized individuals as prescribed by FERPA.
- Access to the student databases themselves is restricted to properly authorized individuals or school districts by user ID and password.
- Data security requirements are incorporated into the procurement process for information technology services to ensure that contracts and agreements require outside contractors to protect the privacy of student information.<sup>35</sup>
- Based upon the results of SecureWorks’ assessment, DOE will consider, among other things, establishing an information systems steering committee to develop and oversee its information security policies and take measures to review and modify various information security policies, as needed.<sup>36</sup>

DOE’s report includes data security recommendations for both the department and school districts. The Auditor General’s audit has not been completed; however, DOE indicates its willingness to consider any improvements suggested by the auditors.<sup>37</sup>

In addition, the commissioner recommended several changes to state law regarding education records privacy, including:

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<sup>32</sup> See s. 1002.22, F.S.

<sup>33</sup> Fla. Exec. Order No. 13-276 (Sept. 23, 2013).

<sup>34</sup> Florida Department of Education, *Student Data Privacy Recommendations*, at 5-9 (Dec. 2013).

<sup>35</sup> *Id.* at 5.

<sup>36</sup> *Id.* at 11-13.

<sup>37</sup> *Id.* at 9.

- Clarifying that students and parents must be notified annually regarding their rights with respect to education records.
- Clarifying that a parent or student may be awarded attorney fees and court costs if the parent or student is granted injunctive relief in an action to enforce his or her rights regarding education records.
- Prohibiting any educational agency or institution from collecting, obtaining, or retaining information on the political affiliation, voting history, religious affiliation, or biometric information of a student or student's parent or sibling.
- Prohibiting the disclosure of confidential and exempt education records to any person, public body, body politic, political subdivision, or any agency of the federal government, except when authorized or required by law or in response to a subpoena or court order.
- Requiring that governing boards of agencies or institutions may only designate directory information in accordance with FERPA at a regularly scheduled meeting after considering whether such disclosure risks violating student privacy.<sup>38</sup>

## Effect of Proposed Changes

The bill codifies the commissioner's legislative recommendations regarding student data privacy and security to clarify and strengthen several aspects of state law. By specifying that students and parents must be notified annually about their rights regarding education records, the bill aligns state law with FERPA's annual notice requirement. Provisions specifying that attorney's fees and court costs may be awarded to a student or parent who receives "injunctive relief" more clearly indicate what constitutes a vindication of rights meriting such an award.

The bill prohibits any educational agency or institution from collecting, obtaining, or retaining information on the political affiliation, voting history, religious affiliation, or biometric information of a student, a student's parent, or a student's sibling. The bill defines biometric information as information collected from the electronic measurement or evaluation of any physical or behavioral characteristics that may be personally identifiable, including characteristics of fingerprints, hands, eyes, and the voice. The bill would, therefore, not allow agencies or institutions to use fingerprint scans, palm scans, retina or iris scans, face geometry scans, or voice prints. These provisions provide specific protection from the collection of sensitive information that has little, if any, bearing on a student's education.

The bill provides a time-limited exception to the prohibitions regarding collection of biometric information for school districts using a palm scanner system to identify students for breakfast and lunch programs as of March 1, 2014. Such a district has until the end of the 2014-15 school year to phase out the system. This exception addresses concerns raised by a school district that has already implemented a palm scanner system.

The bill also prohibits disclosure of confidential and exempt education records to any person, public body, body politic, or political subdivision unless disclosure is authorized by FERPA or in response to a subpoena or court order. Disclosure to federal government agencies is also prohibited, unless authorized by FERPA, required by federal law, or in response to a subpoena or court order. These provisions provide clear guidance as to whom and when information may be disclosed.

Under FERPA, directory information is one of several exceptions to the "prior consent" requirement for disclosing education records or personally identifiable information. The bill provides additional protections regarding the disclosure of directory information by requiring the governing board of an educational agency or institution, when designating student information as directory information, to do so at a regularly scheduled public meeting. The governing board must consider whether designating the information as directory information will put students at risk of being targeted by marketing campaigns, the media, or criminals.

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<sup>38</sup> *Id.*

## **Student Identification Numbers**

### **Present Situation**

Florida law requires each district school board to request the social security number (SSN) of each student; however, a student may choose to withhold his or her SSN and school boards may not require students to provide a SSN as a condition of enrollment or graduation. Each school district must use the student's SSN as his or her student identification number in its management information system and in the student's permanent records. The school district must also indicate when the student identification number is not the student's SSN.<sup>39</sup>

Florida law states the Legislature's acknowledgment that SSNs were originally intended to be used only in the administration of the federal Social Security System. Recognizing this intent, the law expresses the Legislature's intent to maintain a balanced public policy by monitoring agency use and limiting the collection of SSNs, unless the:

- Purpose of the collection is stated in writing; and
- Collection is specifically authorized by law or is imperative for the performance of the agency's duties and responsibilities as prescribed by law.<sup>40</sup>

A 2010 report by the Office of the Inspector General of the United States questioned widespread use of SSNs as primary student identification numbers, given the increasing threat of identity theft. Furthermore, the report determined that unnecessary or redundant collection of SSNs is a significant vulnerability to student privacy. The report recommended that states and K-12 schools nationwide take measures to limit the use of SSNs as primary student identifiers.<sup>41</sup>

DOE has also recognized that using the SSN as a student identifier increases opportunities for a student's information to be misused or stolen. Consequently, DOE is implementing changes to statewide data collection practices which will deemphasize the use of SSNs as student identifiers. School districts will continue to collect each student's SSN for enrollment purposes and for initial entry into the state data system; however, once entered into the system, each student will be assigned a primary identification number that is not the SSN. This unique number will then be used to identify the student for record keeping and data collection purposes, thereby decreasing the likelihood that a student's identity can be linked to his or her SSN.

### **Effect of Bill**

The bill requires each school district to request a student's SSN *upon initial enrollment* in a Florida public school. It also requires DOE to create a statewide process for assigning student identification numbers that are not SSNs. Once the process is implemented, school districts will be prohibited from using SSNs in their management information systems. These changes decrease the likelihood of duplicative requests for student SSNs, thereby increasing the security and confidentiality of student SSNs.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

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<sup>39</sup> Section 1008.386, F.S.

<sup>40</sup> Section 119.071(5)(a)1. and 2., F.S.

<sup>41</sup> U.S. Office of the Inspector General, *Kindergarten Through 12th Grade Schools' Collection and Use of Social Security Numbers* Report No. A-08-10-11057, at 2, 4, and 6 (July 22, 2010), available at <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-08-10-11057.pdf>.

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill requires the Department of Education to establish a process for assigning a unique student identification number to each student in the state. The department is currently establishing the process using a mixture of recurring state and federal funds. Thus this requirement can be completed using existing resources.