

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 1043 w/CS                      Exceptional Students  
**SPONSOR(S):** Pickens  
**TIED BILLS:**                                      **IDEN./SIM. BILLS:** SB 1330

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Education K-20	24 Y, 0 N w/CS	Porter	Bohannon
2) Appropriations			
3)			
4)			
5)			

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**SUMMARY ANALYSIS**

The bill provides that exceptional students who receive special instruction, facilities, or services are considered residents of the state in which the student’s parent or guardian is a resident and that state is responsible for paying for the instruction, facilities and services.

The bill directs the Department of Education (DOE) to provide specific information and assistance to school districts, including a process for prior district school board review of the residency of exceptional students who live in a Florida residential facility. Residential facilities are responsible for billing and collecting payment from the student’s home state.

The effective date of the bill is July 1, 2004.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |                              |                             |   |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government?                | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes?                      | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families?                 | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

#### B. EFFECT OF PROPOSED CHANGES:

##### **Free and Appropriate Public Education (FAPE)**

Federal law requires states to make a free appropriate public education available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.<sup>1</sup> Children who are placed in or referred to private schools or facilities by the state or appropriate school districts are provided special education and related services at no cost to their parents. There are more limited obligations for school districts to children with disabilities when the public agency made a free and appropriate public education available and the parents elected to place them in a private school or facility without the public agency’s consent or referral.<sup>2</sup>

The state educational agency must exercise general supervision over all educational programs for children with disabilities in the state, including all such programs administered by any other state or local agency, and ensure that programs meet the educational standards of the State educational agency. However, the law does not limit the responsibility of agencies in the state other than the state educational agency to provide, or pay for some or all of the costs of, a free appropriate public education for any child with a disability in the state.<sup>3</sup>

U.S. Department of Education (U.S. DOE) policy, through official letters of clarification about responsibility for out-of-state children in residential facilities, specified that residency of ESE students is determined by the state where their parents or guardians reside. A child who is a ward of the state is considered a resident of that state.<sup>4</sup>

##### **Exceptional Students in Florida**

Florida law (s. 1003.01(3) (a), F.S.) defines the term “exceptional student” as any student who has been determined eligible for a special program in accordance with State Board of Education (SBE) rule and includes students who are gifted and students with disabilities. The law further defines the term “exceptional students with disabilities.”<sup>5</sup> Gifted students are not considered a subset of students with

<sup>1</sup> 20 U.S.C. s. 1412. See also 34 CFR s. 300.121

<sup>2</sup> 20 U.S.C. s. 1412(a)(10)(C)(i).

<sup>3</sup> 34 C.F.R. s. 300.600

<sup>4</sup> U.S. DOE, Office of Special Education Programs, correspondence dated June 9, 1994, and October 24, 1995, to the Office of the Utah Attorney General and the Massachusetts Department of Education, respectively.

<sup>5</sup> Exceptional students with disabilities (s. 1003.01(3)(a), F.S.) are those who are mentally handicapped, speech and language impaired, deaf or hard of hearing, visually impaired, dual sensory impaired, physically impaired, emotionally

disabilities. Additionally, Florida administrative rules define gifted students.<sup>6</sup> Similarly, federal law appears to make a distinction between students with disabilities and students with special learning needs, including students who are gifted and talented.<sup>7</sup>

The DOE reported that 387,617 students were served in the ESE program in the fall of 2002. The program serves individuals aged 3 through 21, with children aged three to five being served by the program's Prekindergarten Disabilities component. Some school districts opt to serve children from birth through two years.

### **Special Education Services**

The law defines these services as specially designed instruction and such related services as are needed for an exceptional student to benefit from education, and may include: transportation; diagnostic and evaluation services; social services; physical and occupational therapy; job placement; orientation and mobility training; braillists, typists, and readers for the blind; interpreters and auditory amplification; rehabilitation counseling; transition services; mental health services; guidance and career counseling; specified materials, assistive technology devices, and other specialized equipment; and other such services as approved by SBE rules.<sup>8</sup>

### **District School Boards**

Current law (s. 1001.42(4), F.S.) requires district school boards to:

- provide for an appropriate program of special instruction, facilities, and services for exceptional students, as prescribed by the State Board of Education (SBE) as acceptable in accordance with the provisions of s. 1003.57, F.S.;
- provide, in accordance with the provisions of chapter 1006, F.S., alternative educational programs, according to SBE rules, to students who reside in residential care facilities operated by the Department of Children and Family Services; and
- offer services to students in detention facilities, in accordance with the provisions of chapter 1006, F.S.

The law (s. 1003.57(5), F.S.) prohibits a student from being given special instruction or services as an exceptional student until he or she has been properly evaluated, classified and placed in the manner prescribed by SBE rule. The parent of an exceptional student evaluated, placed, or denied placement must be notified of each evaluation, placement, or denial. In addition, parents must be notified of the right to a due process hearing.

State law and administrative rule require district school boards to provide for an appropriate program of special instruction, facilities, and services for exceptional students either within the district school system, in cooperation with other district school systems, or through contracts with approved private schools or community facilities that meet standards established by the Commissioner of Education. When a parent is offered an appropriate education program by the school district and the parent waives this opportunity in favor of a program selected by the parent, the parent assumes full financial responsibility for the student's education.

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handicapped, specific learning disabled, hospital and homebound, autistic, developmentally delayed children, ages birth through 5 years, or children, ages birth through 2 years, with established conditions that are identified in State Board of Education rules.

<sup>6</sup> Rule 6A-6.03019, F.A.C., defines a gifted student as a student who has superior intellectual development and is capable of high performance and establishes the eligibility criteria for gifted instructional programs.

<sup>7</sup> See 20 U.S.C.A. ss. 6622 and 6623, related to grants under Chapter 70, Strengthening and Improvement of Elementary and Secondary Schools.

<sup>8</sup> s. 1003.01(3)(b), F.S.

### **Contracts with Approved Private Schools and Community Facilities**

When the district school board determines that no special education program offered by it, a cooperating district school board, or a state agency can adequately provide the educational program for the student, the school district must provide special education programs with approved private schools or community facilities through contracts, according to criteria specified in rule. This includes the provision of the educational component of a residential placement for exceptional students when the placement is made by another public agency for the primary purpose of addressing residential and other non-educational needs. In this instance, the student's individual education plan (IEP) must state that the placement is not required in order for the student to benefit from special education which could otherwise be provided by the district during the day.<sup>9</sup>

Districts must assure that the proposed program at the private school or community facility is appropriate to meet the educational needs of students who are placed through contracts. However, this provision does not limit the responsibility of agencies other than the state's school districts for providing or paying some of all of the cost of a free appropriate education to be provided to handicapped children. Contracts between the district school board and private schools or community facilities must contain specific information, including:

- the method of determining charges and sharing costs with other agencies for the placements under the contract, including the projected total cost to the district; and
- identification of financial responsibility; and
- method of resolving interagency disputes when the school board initiates action to secure reimbursement from other agencies.

Prior to executing contracts, districts must ensure that the private school or community facility meet specific criteria, including health, safety, and welfare certificates and inspections, staffing by qualified personnel, and a written description of the support services that are available and will be provided to each student placed under the contract, in accordance with the student's IEP. As well, these criteria must be met for an exceptional student enrolled in a special program in a private school or community facility to generate Florida Education Finance Program (FEFP) funds for the district. Under Florida administrative rule, contracts between school districts and private schools or community facilities for the provision of educational facilities to exceptional students may not extend beyond one school fiscal year.

### **Department of Children and Families (DCF)**

District school boards must provide educational programs to students who reside in residential care facilities operated by the DCF, according to SBE rules.<sup>10</sup> However, the law prohibits districts from being charged for any rent, maintenance, utilities, or overhead at these facilities. As well, districts have full and complete authority in assigning and placing these students in educational programs. Districts are required to have a written agreement with DCF that outlines the duties and responsibilities of each party.

### **Residency**

Florida administrative rule requires school districts to verify that the student is a resident of the school district and is enrolled in, or has made application for admittance to a district school education program. The rule does not, however, require verification that the student's parent is a resident of the district. According to DOE, the agency's database contains an element (Resident Status, State/County) in which districts are asked to indicate if the student is an out-of-state student enrolled in the school district. This element is not, however, currently used to determine eligibility for FEFP funding at the state level.

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<sup>9</sup> s. 1003.57, F.S., and Rule 6A-6.0361, F.A.C.

<sup>10</sup> s. 1003.58, F.S.

## **OPPAGA Study**

OPPAGA recently reviewed the number of out-of-state children living in Florida private residential facilities and the state's cost of providing ESE services to these children.<sup>11</sup> OPPAGA determined that Florida could avoid \$1.5 million annually in ESE costs for these students. The report noted that children may be placed by their parents, the local school district, or by a state agency. While most placements are made in-state, children may be placed in an out-of-state facility if no school district in the state offers the specific services the child needs.

### **Study Findings:**

- Although DOE maintains a database on ESE students, it lacks reliable information on the number of children served in residential facilities or whether these students are residents of another state.
- The DOE database does not contain reliable information on the residency status of ESE students in residential facilities. OPPAGA identified 417 ESE students in private residential facilities, of whom 90 were residents of other states and had been placed in Florida facilities by agencies and school districts from other states and parents in their home state.
  - Most of these out-of-state ESE children (98%) are funded at level 4 or 5, the highest levels of the ESE funding matrix.
  - The funding provided to these out-of-state children equaled the funding provided to 443 non-disabled Florida students during the same school year.
- Residency status determines financial responsibility for an exceptional student's education.
- DOE's practice is to pay costs for out-of-state students, although this practice is not required by federal law and is not necessary. Florida DOE considers any child in a residential facility in Florida to be a state resident, regardless of the parents' state of residence, creating a financial obligation for Florida and the local district where the facility is located to provide ESE services to the child, even if the child's parents are residents of another state.
- Florida DOE bases its ESE residency practice on the desire to avoid paying educational costs for Florida students placed in other states by another state agency.
- Florida's state agencies (Department of Children and Families' Children's Mental Health and Developmental Disabilities) did not place children outside the state for residential treatment.
- The DJJ also makes residential facility placements; however, these placements are made for reasons related to a child breaking the law, not because of a disability. For this reason, DJJ was not a part of this study and OPPAGA's findings do not extend to the DJJ population.
- Districts reported that during the 2002-03 school year they placed two children out of state. In both cases, the district is paying the entire cost of the out-of-state placement, including educational costs.
- Orange County School District has adopted policies against claiming FEFP funding and providing services for out-of-state children.
- Florida's current practice may create the potential for out-of state parents to override the determinations of their own school districts regarding the need for residential services and provide an incentive for residential facilities to locate within the state and for parents from other states to place children within Florida, further increasing state costs.
- Of the seven states contacted by OPPAGA, only one has a policy similar to Florida's while five do not fund out-of-state children. One state has not established a policy on the issue and allows districts to make this decision.
- Controls do not exist to prevent double-billing of education services. Neither the Florida DOE nor local school districts contact home states of out-of-state ESE children to determine if educational costs are covered in an out-of-state child's residential contract. Some school administrators in

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<sup>11</sup> OPPAGA, *Special Review*, Report #03-58, October 2003.

districts that have private residential facilities said that they would not know if the facilities were double-billing both Florida and the student's home state for services.

- OPPAGA recommended revising current law to clarify that, consistent with federal law, residency is a requirement for funding ESE services and that a child's residency is determined by the residency of the parent. OPPAGA also recommended that:
  - DOE should:
    - revise its existing practice to ensure that out-of-state children placed in residential facilities within Florida are no longer counted for FEFP funding.
    - advise local school districts of the specific limitations of their financial obligation for these students under both federal and state law.
    - provide technical assistance to local districts in developing locally suitable plans to return the fiscal responsibility to the home states.
    - develop a process under which school districts would review the residency of students in residential facilities prior to serving them to ensure that the home states of these children (or their parents) are held financially responsible for the cost of ESE services.
  - The child's home state should provide the funding for services to out-of-state children placed in residential facilities within Florida.
  - The private residential facility, not the local school district, is responsible for billing the home state for ESE services.
  - If Florida chooses to continue the practice of paying for educational services for out-of-state students, school districts and/or DOE need to develop a process for protecting against abuse (e.g. double-billing by the facility of both the local school district and a child's home state).

Prior to the February 2004 Full-Time Equivalent (FTE) Survey period, the DOE will direct school districts to verify the residency of the parent or guardian of each student with a disability who resides in a location other than with their parent or guardian (e.g., all students in residential facilities - including the state's two residential charter schools and the state's DJJ facilities). Information about this directive will also be sent to all residential facilities and residential private schools registered with the DOE.

## **HB 1043**

The bill defines a student who receives special instruction, facilities, or services as an exceptional student as a resident of the state where the student's parents or guardian reside.

The bill requires the cost of non-resident exceptional student instruction, facilities, and services to be paid by the student's resident state.

The bill requires the Department of Education to provide each school district a statement of the specific limitations of the district's financial obligation for exceptional students under federal and state law.

The bill requires the Department of Education to provide each school district with the necessary technical assistance for developing a local plan to impose the fiscal responsibility for educating a nonresident student on the student's resident state.

The bill requires the Department of Education to develop a process for districts to determine the residency of a student prior to the provision of services in a residential facility.

The bill stipulates that the residential facility, not the district, is responsible for billing and collecting payment from the student's resident state when educational and related services are provided to a non-resident student.

The bill applies the provisions to any non-resident student receiving instruction as an exceptional student in any type of educational facility, including a public school, private school, or juvenile justice commitment facility.

C. SECTION DIRECTORY:

Section 1 – Amends s. 1003.57, F.S.; relating to exceptional student instruction.

Section 2 – Amends s. 1003.58, F.S.; correcting cross reference.

Section 3 – provides an effective date.

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

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not impact state revenue.

2. Expenditures:

The bill will decrease the expenditures of the state currently expended on the care and education of non-resident children receiving exceptional student services. The anticipated amount of expenditures that could be reduced is not readily available because the Department of Education has not accumulated the data on student residency to calculate the anticipated savings. However, the report issued by OPPAGA indicated that an estimated \$1.5 million dollars could be saved by the state.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not impact local governments.

2. Expenditures:

The bill does not impact local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an economic impact on the private sector because the responsibility to bill and collect from a non-resident student's home state is placed on the residential facility and not the school district. This places a burden on private sector residential care facilities providing services to non-resident students that did not exist prior to the bill. There may also be timing consequences for the residential facility and/or the student caused by delays in the collection of fees from the student's resident state. If the student's resident state is slow in payment or refuses to pay for the services, the student could be evicted from the residential care facility and forced to return to the student's home state. This could decrease or eliminate the provision of services to non-resident students currently receiving exceptional student services in the state.

D. FISCAL COMMENTS:

The bill places a duty on the Department of Education and the school districts to review the residency of students receiving exceptional student services. The additional procedures required by the bill should not have a material fiscal impact on the department or on school districts through the determination of a student's residency.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

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

The bill does not require a city or county to spend funds or to take any action requiring the expenditure of funds.

##### 2. Other:

To the extent that the bill would preclude an ESE student with a disability covered by the Americans with Disabilities Act or otherwise protected under the free and public education requirements of 20 U.S.C. s. 1412 from receiving federally-required services in Florida, the bill will conflict with federal law and may be pre-empted.

In addition, and given sovereign immunity, it is unclear how a local school district could legally "impose" upon a state of residence the cost of ESE services short of a contractual relationship between that district (or the state) and the state of residence.

#### B. RULE-MAKING AUTHORITY:

The bill does not create any rulemaking authority. However, the bill requires DOE to develop a process for school district review of student residency. This requirement may result in de facto rulemaking and should comply with Chapter 120, F.S. to avoid a rule challenge.

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

The bill applies to any non-resident student receiving exceptional student instruction in any type of educational facility in the state. This will include school districts, private schools, and juvenile justice commitment facilities. However, the bill addresses only residential care facilities when identifying the responsibility for billing and collection of the fees from the student's home state. Though not specifically mentioned in the bill, school districts and the Department of Juvenile Justice would appear to be required to bill a student's home state for services rendered. This implies that the state will no longer pay for non-resident students residing or receiving services from these facilities or the school districts.

The state is required to provide a free education to all students residing in the state. Many of the students receiving these exceptional student education services are protected under the Americans with Disabilities Act and must be provided appropriate accommodations under Federal law. School districts and the Department of Juvenile Justice would lose funding for non-resident students under the provisions of the bill but would still be required to provide the services. If the student's home state refuses to pay, the districts or Department of Juvenile Justice would not be able to recoup the cost of providing services for the student without legal action that may prove to be highly expensive and eventually unproductive. To the extent that any exceptional student education students receive services from the Department of Children and Family Services, the department could be negatively impacted by the bill. While no information was available for a determination, there is a possibility that some students receiving a McKay Scholarship could also be affected by the bill.



Student's residing in private residential facilities or attending private schools could be evicted from their current accommodations or facilities and forced to return to their home states. If a student is receiving services from a private sector residential care facility or private school currently being paid for by the state, the service provider will be responsible for billing the students home state for the cost of services provided to the student. If the student's home state is slow to pay or refuses to reimburse the facility for the cost of services, the student will most likely not be permitted to continue receiving services from the private sector provider. This could force these students to return to their home state or enroll in Florida public schools when possible.

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

The bill was amended on March 15, 2004 in the Education K-20 by Rep. Pickens to:

- Provide clarity as to the party responsible for the payment of services for a non-resident student.
- Prohibit school districts from including non-resident students in their FTE count for FEFP funding.
- Provide conforming language to the Senate companion.
- Provide further definition to the types of resident care facilities addressed by the bill.
- Provide for a corresponding title amendment.