

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/CS/SB 1330

SPONSOR: Appropriations Committee, Education Committee and Senator Lynn

SUBJECT: Exceptional Students' Instruction

DATE: March 4, 2004      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>deMarsh-Mathues</u>	<u>O'Farrell</u>	<u>ED</u>	<u>Favorable/CS</u>
2.	<u>Armstrong</u>	<u>Newman</u>	<u>AED</u>	<u>Favorable/CS</u>
3.	_____	_____	<u>AP</u>	<u>Withdrawn: Favorable/CS</u>
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**I. Summary:**

The bill creates new provisions in law that apply to any nonresident student who receives instruction as an exceptional student in any type of educational facility in Florida, including, but not limited to public schools, private schools, and other enumerated facilities. Specifically, 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 or the parent is responsible for paying for these items, whichever makes the placement decision. This financial obligation is similar to that required under Federal law. The bill requires that school districts not report these nonresident exceptional education students as FTE for funding in the Florida Education Finance Program.

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 bill also makes a conforming change to a cross-reference. This bill could reduce Florida's cost for exceptional student education.

This bill amends ss. 1003.57 and 1003.58, F.S.

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

**II. Present Situation:**

**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>

Federal Child Find obligations require all children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, to be identified, located, and evaluated. States must also ensure that a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

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 disabilities. Additionally, Florida administrative rules define gifted

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<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 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.

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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<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.

**Specific Facilities**

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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.

Chapter 393, F.S., relating to developmental disabilities, defines the term “group home facility” as a residential facility which provides a family living environment, including supervision and care necessary to meet the physical, emotional, and social needs of its residents. The capacity of the facility is at least 4 residents but not more than 15 residents. The law also defines the term “intermediate care facility for the developmentally disabled” or ICF/DD as a residential facility licensed and certified in accordance with state law, and certified as a provider of Medicaid services to persons who are developmentally disabled. Under this section, the capacity of the facility is limited to 120 clients. The definition of an ICF/DD in s. 400.960(12), F.S., is identical except that it does not limit the capacity of the facility. Section 393.063(17), F.S., allows a client to establish domicile under the provisions of s. 222.17, F.S., but prohibits a minor from doing so if he or she has no parent or guardian domiciled in Florida.

Section 394.455(10), F.S., defines the term “facility” as any hospital, community facility, public or private facility, or receiving or treatment facility providing for the evaluation, diagnosis, care, treatment, training, or hospitalization of persons who appear to have a mental illness or have been diagnosed as having a mental illness. The term does not include any program or entity licensed pursuant to chapter 400, F.S.

Section 395.002(16), F.S., defines the term “intensive residential treatment programs for children and adolescents” as a specialty hospital accredited by the Joint Commission on Accreditation of Healthcare Organizations which provides 24-hour care. The primary functions of the program are the diagnosis and treatment of patients under the age of 18 having psychiatric disorders in order to restore these patients to an optimal level of functioning.

Section 419.001(1)(a), F.S., defines the term “community residential home” to mean a dwelling unit licensed to serve DCF clients, which provides a living environment for 7 to 14 unrelated residents who operate as the functional equivalent of a family, including the supervision and care by supportive staff as may be needed to meet the physical, emotional, and social needs of the residents.

### **Private schools**

District school boards, under s. 1002.42(12), F.S., may contract with approved private schools for special instruction, facilities, and services for exceptional students, in accordance with the provisions of s. 1003.57, F.S.

### **Temporary Assignment /Transferring Exceptional Students**

Current rules provide for the immediate placement of out-of-state exceptional students who are enrolling in a Florida school district or in an educational program operated by DOE through grants or contractual agreements. If the student has a current IEP and evaluation data needed to determine that the student meets Florida eligibility criteria, he or she can be placed immediately in the appropriate educational program, without temporary assignment. The receiving district may review and revise the current IEP, as needed. Also, a transferring student may be temporarily assigned to a special program for a period not to exceed six months. Districts are required to establish policies and procedures related to temporary assignments, including verifying and documenting the student’s previous program eligibility or assignment in the sending school or agency.

### **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.

### **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.

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

- 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 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).

The Commissioner of Education's response noted the following:

There are some out-of state students placed in residential facilities by other state agencies or by their parents whose educational services are provided and funded by the state of Florida. The issue of eligibility for FEFP funding for out-of-state students is much broader than exceptional student education, suggesting a need to address these concerns to a different, much wider audience.

If a school district determines that a student with a disability requires a residential placement in order to provide special education and related service, the placement, including non-medical care and room and board, must be at no cost to the parent. Consistent with the requirements of the Individuals with Disabilities Education Act (IDEA), these residential placements must meet the state requirements and school districts assume the costs for those placements. In 2002-03, there were 35 residential placements made by Florida's school districts.

Children with disabilities may be placed in residential facilities by the Department of Children and Families (DCF) for non-educational purposes. In such instances, the local school district where the child previously resided could share the cost with DCF and pay for the educational portion of the child's placement. If that does not occur, then the local school district in which the facility is located is responsible for providing special education and related services. These situations are even more complicated if such placements are made without the knowledge of the local school districts and when the DCF placement is in a private facility that provides and charges for educational services.

Florida administrative rule states that districts shall verify "that the student is a resident of the school district..." not the student's parent. Without a clearer state mandate, districts may be hesitant to refuse services.

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.

### **III. Effect of Proposed Changes:**

**Section 1.** The bill creates new provisions in s. 1003.57, F.S., that apply to any nonresident student who receives instruction as an exceptional student in any type of educational facility in Florida, including, but not limited to: a public school; a private school; a group home facility, as defined in s. 393.063(24), F.S.; an intensive residential treatment program for children and adolescents, as defined s. 395.002(16), F.S.; a facility, as defined in s. 394.455(10), F.S.; an intermediate care facility for the developmentally disabled, as defined in ss. 393.063(28) and 400.960(12), F.S.; or a community residential home, as defined in s. 419.001(1)(a), F.S. This will include gifted students, as well as students with disabilities.

The bill provides that a student who receives special instruction, facilities, or services as an exceptional student is considered a resident of the state in which the student's parent or guardian is a resident. The student's state of residence or parent must pay the cost of the instruction, facilities, and services for a nonresident student who receives instruction in Florida, whichever is

responsible for the student's placement. In addition, these nonresident students shall not be reported by school districts as FTE for Florida Education Finance Program Funding.

The Department of Education is charged with providing to each school district:

- a statement of the specific limitations of the district's financial obligation for exceptional students under federal and state law; and
- any technical assistance needed for developing a local plan to impose on a student's home state the fiscal responsibility for educating a nonresident exceptional student.

The department must develop a process that requires school districts to review the residency of each exceptional student who lives in a residential facility in Florida prior to providing services. Under the provisions of the bill, the residential facility (not the district) is responsible for billing and collecting payment for the student's educational and related services from the home state.

**Section 2.** The bill amends s. 1003.58(3), F.S., to correct a cross-reference to the due process rights that is needed due to the renumbering of the provisions in s. 1003.57, F.S.

**Section 3.** The effective date of the bill is July 1, 2004.

#### **IV. Constitutional Issues:**

**A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

#### **V. Economic Impact and Fiscal Note:**

**A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Private residential facilities may incur some additional cost associated with billing and collecting payment from the "home" state for the educational and related services provided to nonresident exceptional students.

**C. Government Sector Impact:**

The bill requires that the home state of residence pay the cost of the student's education in Florida. This requirement is similar to Federal law and policy which indicates that

either the parent or the home state pay the cost of the student's education in Florida, whichever is responsible for placement. Currently, many Florida school districts pay the cost of the non-resident instruction for students from other states placed in private institutions in Florida.

Florida school districts will no longer report nonresident exceptional education students as FTE for Florida Education Finance Program Funding. Florida's cost for exceptional student education through the Florida Education Finance Program would be reduced by roughly \$1.5 million, based on the Office of Program Policy Analysis and Government Accountability's Audit Report No. 03-58, issued in October 2003, which indicates that the state is paying the cost of at least 90 non-resident exceptional education students placed in Florida private residential facilities. However, the auditors had limited information on resident status and dealt with a subset of the students affected by this bill. Therefore the cost savings resulting from this bill could be much greater than the amount identified in the OPPAGA report.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The bill requires the DOE to develop a process for mandatory school district reviews of the residency of each exceptional student who lives in a Florida residential facility, prior to the provision of services. The purpose appears to be to determine the financial liability for education related services arising from a placement. It is unclear as to how this review would be reconciled with current administrative rules for students transferring from out-of-state public or private schools or agency programs, including the temporary assignment of students to an educational program.

**VIII. Amendments:**

None.