

# 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.)

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Prepared By: Education Committee

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BILL: CS/SB 866

SPONSOR: Education Committee and Senator Haridopolos

SUBJECT: Student Financial Assistance

DATE: April 20, 2005

REVISED: \_\_\_\_\_

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Matthews	O'Farrell	ED	<b>Favorable/CS</b>
2. _____	_____	JU	_____
3. _____	_____	EA	_____
4. _____	_____	_____	_____
5. _____	_____	_____	_____
6. _____	_____	_____	_____

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## I. Summary:

Beginning in the 2006-2007 academic year, this bill would bar foreign students who are attending a public postsecondary educational institution in this state on an F-1 or M-1 student visa from receiving financial assistance funded either directly or indirectly through an appropriation or any tuition or fee revenues generated by state residents.

The funds are redirected to provide additional need-based financial assistance to students classified as state residents for tuition. If these students have unmet need without relying on loans, the remaining funds must be used for merit-based financial assistance to students classified as residents for tuition purposes.

The bill exempts compensation paid to students for assistantships or participation in work-study programs.

Each state university and community college must report to the Legislature by December 31, 2005, the total amount of funds appropriated directly or indirectly to the postsecondary institution and the tuition and fee revenues generated by state residents that was used to provide financial assistance during the 2003-2004 academic year to students holding F-1 visas, M-1 visas, and for state residents. Furthermore, each public postsecondary institution must report to the Legislature by July 1, 2007, and annually thereafter the number of state residents benefiting from the use of redirected funds.

This bill creates an undesignated section of the Florida Statutes.

## II. Present Situation:

Federal law defines which foreigners may be admitted into the U.S., the activities they may conduct while here, and the duration of their visit. Foreign students entering the U.S. to study at a postsecondary education institution in the U.S. often are admitted on an F or M visa. An F visa may be granted to those foreign students, who have no intention of abandoning their residence in a foreign country and who are qualified bona fide students who seek entry into the U.S. temporarily and for the sole purpose of pursuing a full course of study.<sup>1</sup> The spouse and dependent children of the foreign student may be admitted under the F-2 visa; however, their visa's duration is entirely dependent on the parent's F-1 visa.<sup>2</sup> Likewise, a foreign student enters the U.S. under similar qualifications as an F visa but receives an M visa if the pursued study is at a vocational or other recognized nonacademic institution.<sup>3</sup> Again, the spouse and dependent children of an M visa may receive an M-2 visa.<sup>4</sup> Additionally, these foreign students must demonstrate that they have sufficient funds to fund the full cost of the program as well as living expenses.<sup>5</sup>

For the 2002-2003 academic year, 6460 F visa students received some type of financial aid, including scholarships, fellowships, loans, grants, stipends, tuition waivers, or other type of financial assistance at the state universities.<sup>6</sup> Of those students, 4942 were graduate students.<sup>7</sup> The state universities have argued that providing assistance to international students aids the state by bringing talented people to the U.S. to receive an advanced education and to return home valuing the U.S. and its democratic and educational institutions.<sup>8</sup> In addition, the state universities use many of the graduate international students as teaching or research assistants.<sup>9</sup> Finally, some of the talented students remain in the U.S. and become leaders in industry and technology.<sup>10</sup>

## III. Effect of Proposed Changes:

Beginning in the 2006-2007 academic year, foreign students who are attending a public postsecondary educational institution in this state on an F-1 or M-1 student visa would be barred from receiving financial assistance funded either directly or indirectly through an appropriation or any tuition or fee revenues generated by state residents. It is unknown whether the bill may have an impact on international student matriculation at the state universities and community colleges.

The funds are redirected to provide additional need-based financial assistance to students classified as state residents for tuition purposes. If these students have unmet need without

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<sup>1</sup> 8 U.S.C.A. s. 1101(a)(15)(F)

<sup>2</sup> See id.

<sup>3</sup> 8 U.S.C.A. s. 1101(a)(15)(M)

<sup>4</sup> See id.

<sup>5</sup> 8 C.F.R. s. 214.2(f) and 8 C.F.R. s. 214.2(m)

<sup>6</sup> These numbers are unverified.

<sup>7</sup> Id.

<sup>8</sup> Correspondence from Dr. David Colburn, Provost and Senior Vice President of the University of Florida, to Nell Kelly, Florida Board of Governors, dated March 17, 2004.

<sup>9</sup> Id.

<sup>10</sup> Id.

relying on loans, the remaining funds must be used for merit-based financial assistance to students classified as residents for tuition purposes.

The bill defines eligible Florida resident as a student classified at the time of initial enrollment at a state university or community college as a resident for tuition purposes under s. 1009.21, F.S.

The bill exempts compensation paid to students for assistantships or participation in work-study programs. However, fellowships are not exempted.

Each state university and community college must report to the Legislature by December 31, 2005, the total amount of funds appropriated directly or indirectly to the postsecondary institution and the tuition and fee revenues generated by state residents that was used to provide financial assistance during the 2003-2004 academic year to students holding F-1 visas, M-1 visas, and for state residents. Furthermore, each public postsecondary institution must report to the Legislature by July 1, 2007, and annually thereafter the number of state residents benefiting from the use of redirected funds.

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

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

None.

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

None.

##### **C. Trust Funds Restrictions:**

None.

##### **D. Other Constitutional Issues:**

##### *Equal Protection*

The Fourteenth Amendment to the United States Constitution guarantees the equal protection of the laws to persons. The term “persons” for purposes of equal protection would include nonimmigrant visa holders.<sup>11</sup> Generally, state laws which enact classifications based on alienage are subject to strict scrutiny.<sup>12</sup> Accordingly, a state law

<sup>11</sup> See *Plyler v. Doe*, 457 U.S. 202, 214, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982) (holding that the equal protection guaranteed by the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a state).

<sup>12</sup> See *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971) (applying a strict scrutiny standard in holding that states cannot deny welfare benefits to aliens under equal protection); *In re Griffiths*, 413 U.S. 717, 93 S.Ct. 2851, (1973) (applying a strict scrutiny standard in holding that states may not prevent resident aliens from practicing law); *Pena v. Board of Education of the City of Atlanta*, 620 F.Supp. 293 (N.D. Ga 1985) (applying a strict scrutiny standard to an Atlanta Public Schools policy that required certain nonimmigrant visaholders such as an F-1 to pay for tuition but allowed other nonimmigrant visaholders to avoid paying tuition); Compare *Ambach v. Norwick*, 441 U.S. 68, 99 S.Ct. 1589, 60 L.Ed.2d 49 (1979) (applying a rational basis standard in upholding on equal protection grounds a New York law that prohibited certain non-citizens of the United States, unless they have manifested an intention to apply for

that classifies persons on the basis of alienage must seek to advance a compelling governmental interest and must be narrowly tailored to advance that interest.<sup>13</sup> This is a heavy burden for a state to meet.<sup>14</sup> The state must not only show that its purpose is both constitutionally permissible and substantial, but must also demonstrate that its use of the classification is necessary to the accomplishment of its purpose.<sup>15</sup> Finally, conservation of state resources is not a sufficient reason, in of itself, for denying resources to a particular group.<sup>16</sup>

This bill prohibits the use of any state funds appropriated directly or indirectly to a public postsecondary educational institution or any tuition or fee revenues generated by state residents to provide financial assistance to any student holding an F-1 or M-1 visa. There does not appear to be any binding precedent directly on point. However, the bill appears to create a classification based on alienage. Accordingly, the state may be required to demonstrate a compelling interest and the bill must be narrowly tailored to accomplish that interest.<sup>17</sup>

The prohibition in the bill on F-1 and M-1 visaholders may not be necessary to the accomplishment of the state's purpose. The state could devise alternatives that would not necessarily require F-1 and M-1 visaholders to bear the burden of the state's fiscal policies. These policies could include increased funding for state residents for postsecondary education, prohibiting nonresidents of the state from reclassifying, or lowering tuition for state residents, among other options. In addition, according to estimates by the Department of Education, in 2002-2003 the bill would have redirected \$7.7 million in funds from F-1 and M-1 visaholders to students classified as residents for tuition purposes. This may represent a very small fraction of the funds appropriated or generated at the local level. Accordingly, a court could find that the bill is not necessary to accomplishment of the state's purpose.

Moreover, the bill does not apply to private postsecondary institutions that receive state funds such as through the Florida Resident Access Grant or the Access to Better Learning and Education Grant Program. Since the bill's provisions do not apply to F-1 and M-1 student visaholders that are enrolled in private postsecondary education institutions that receive state funds, the classification used by the state is not uniformly applied to all F-1 and M-1 visaholders causing further constitutional concerns. In other words, the bill's classification may be too narrowly drawn to accomplish the stated purpose.

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*citizenship, from becoming public school teachers because the position of public school teacher was bound up with the operation of the state as a governmental entity); Ahmed v. University of Toledo, 664 F.Supp. 282 (N.D. Ohio 1986), appeal dismissed Ahmed v. University of Toledo, 822 F.2d 26 (6<sup>th</sup> Cir. 1987) (applying a rational basis test to a university policy that required international students to maintain health insurance because the policy seeks to protect students' ability to exist in the community rather than strike at the students' ability to exist in the community).*

<sup>13</sup> *Id.*

<sup>14</sup> *In re Griffiths, 413 U.S. at 721, 93 S.Ct. at 2855, 37 L.Ed.2d 910 citing McLaughlin v. Florida, 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222 (1964).*

<sup>15</sup> *Id.*

<sup>16</sup> *Plyler v. Doe, 457 U.S. at 227, 102 S.Ct. at 2400, 72 L.Ed.2d, (holding that state's fiscal interest in preserving limited resources for its citizens was not a sufficiently compelling governmental interest).*

<sup>17</sup> *See Graham v. Richardson, 403 U.S. at 372, 91 S.Ct. at 1852, 29 L.Ed.2d 534.*

Furthermore, the bill does not demonstrate why F-1 and M-1 visaholders are the appropriate group to exclude from the state's benefits as opposed to citizens of other states; other non-immigrant visaholders, including F-2, M-2, and G visaholders; asylees; parolees; or other temporary immigrant classifications.<sup>18</sup> This distinction may undercut the state's argument to show a compelling interest.

Finally, the bill provides that it is the intent of the Legislature to redirect a portion of the state's limited resources to expand postsecondary education access and to reduce student indebtedness by increasing need-based financial assistance for state residents. This redirection of resources would produce economic benefits to the state by increasing the levels of higher educational attainment and earning potential of the state's citizenry. The bill's stated purpose appears to be merely a restatement of preserving limited state resources for the educational benefit of its citizens which is insufficient, in of itself, to meet the state's heavy burden to demonstrate a sufficient compelling interest to override equal protection guarantees.<sup>19</sup>

Based on these issues, this bill may be constitutionally suspect under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

### *Supremacy Clause*

Article VI, clause 2 of the United States Constitution, provides, in pertinent part, that the U.S. Constitution and the laws of the U.S. made under the Federal Constitution are the supreme law of the land. Under article I, section 8 of the U.S. Constitution, Congress has the power to establish a uniform rule of naturalization. Congress has broad constitutional powers in determining which aliens shall be admitted to the U.S., the period they may remain, regulation of their conduct, and the terms and conditions of their naturalization.<sup>20</sup> Accordingly, any state law that conflicts with overriding national policies in an area entrusted to Congress would be struck down under the Supremacy Clause.<sup>21</sup> Although it may appear to be unlikely that as the bill currently stands it necessarily conflicts with federal law, it would be prudent to expect a constitutional challenge based on the Supremacy Clause.

### *Board of Governors; Art. IX, Section 7 of the State Constitution*

Article IX, Section 7 of the State Constitution provides that the Board of Governors shall operate, regulate, control, and be fully responsible for the management of the whole university system. The courts have not interpreted this provision with respect to the extent of the powers and duties of the Board of Governors. A lawsuit was filed on December 21, 2004, against the Board of Governors and the State Board of Education seeking a declaratory action, among other things, regarding the Board of Governor's

<sup>18</sup> See *Plyler v. Doe*, 457 U.S. at 226-227, 102 S.Ct. at 2400, 72 L.Ed.2d, (holding that state's fiscal interest in preserving limited resources for its citizens was not a sufficiently compelling governmental interest).

<sup>19</sup> See *id.*

<sup>20</sup> See *Graham v. Richardson*, 403 U.S. at 377, 91 S.Ct. at 1854, citing *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419, 68 S.Ct. 1138, 1142, 92 L.Ed. 1478 (1948).

<sup>21</sup> See *id.* at 378; see also *Toll v. Moreno* 458 U.S. 1, 13, 102 S.Ct. 2977, 2983, 73 L.Ed.2d 563 (1982).

powers and duties with respect to the state university system including the power to set tuition and fees. The results of this lawsuit may have an impact on the constitutionality of the bill with respect to the state universities.

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

**A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Foreign students on an F-1 or M-1 visa would incur additional costs to attend a public postsecondary education institution. However, the overall fiscal impact of the bill is indeterminate as public postsecondary education institutions may waive certain fees or redirect private financial aid or scholarships to foreign students, where these funds may have been previously awarded to state residents.

**C. Government Sector Impact:**

The Department of Education estimates that for the 2002-2003 school year, \$7.7 million in state funds and tuition and fee revenues would have been redirected to students classified as residents for tuition purposes. Of course, based on the Office of Program Policy Analysis and Government Accountability (OPPAGA) Report, it is not entirely clear that these students classified as residents for tuition purposes are actually bona fide state residents.<sup>22</sup>

In addition, it would be anticipated that the state universities and community colleges would incur some administrative costs to comply with the requirements of this bill. The amount of the cost is indeterminate at this time.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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<sup>22</sup> *Non-Residents Qualify Too Easily for Much Lower Resident Tuition Rates*, Office of Program Policy Analysis and Government Accountability, Report No. 03-29, April 2003. The report found that the state loses approximately \$28.2 million per year based on improper reclassifications of nonresidents as residents for tuition purposes.

## **VIII. Summary of Amendments:**

None.

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