

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

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Prepared By: The Professional Staff of the Judiciary Committee

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BILL: SB 106

INTRODUCER: Senators Siplin and Sobel

SUBJECT: Postsecondary Student Fees

DATE: February 15, 2012

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Connor	Cibula	JU	<b>Unfavorable</b>
2.			HE	
3.			CJ	
4.			BC	
5.				
6.				

**I. Summary:**

This bill provides that beginning with the 2012 fall term, a student, other than a nonimmigrant alien, qualifies for in-state tuition rates at a state university or Florida College System institution if the student:

- Attended high school in Florida for 3 or more years;
- Graduated from a Florida high school or attained high school equivalency;
- Registered as an entering student or is currently enrolled at a state university or Florida College System institution; and
- In the case of a student without lawful immigration status, files an affidavit stating that the student has filed an application to legalize his or her immigration status or will do so as soon as he or she is eligible.

The bill also directs the Board of Governors of the State University System to adopt regulations and the State Board of Education to adopt rules to administer the nonresident tuition exemption.

This bill creates an unnumbered section of the Florida Statutes.

## II. Present Situation:

### Resident Status for Tuition Purposes

Section 1009.21, F.S., specifies criteria that an institution of higher education must use in determining whether a student qualifies for the in-state tuition rate. The following definitions are provided in statute:

- Dependent child: any person, whether living with a parent or not, who is eligible to be claimed by a parent as a dependent pursuant to the federal income tax code;<sup>1</sup>
- Resident for tuition purposes: a person who qualifies for the in-state tuition rate;<sup>2</sup>
- Parent: the natural or adoptive parent or legal guardian of a dependent child;<sup>3</sup>
- Legal resident or resident: a person who has maintained his or her residence in this state for the preceding year, has bought and occupied a home as his or her residence, or has established a domicile.<sup>4</sup>

A person or, if that person is a dependent child, his or her parent or parents must have established legal residence in this state and must have maintained legal residence in this state for at least 12 consecutive months immediately prior to his or her initial enrollment in an institution of higher education.<sup>5</sup> Additionally, the applicant is required to make a statement regarding length of residency in-state, and establish a bona fide domicile, for him or herself, or for a parent if the applicant is a dependent child.<sup>6</sup> The purpose of the statement is to demonstrate that the in-state residency is not intended to be temporary and for the sole purpose of qualifying for in-state tuition. The law also recognizes residency where a dependent child lives with an adult relative other than a parent in certain circumstances.<sup>7</sup>

Additionally, specific classes of military persons and their spouses and dependent children who qualify as residents for tuition purposes include:

- Active duty members of the Armed Services or the Florida National Guard residing or stationed in-state who qualify for the tuition assistance program;<sup>8</sup>
- Active duty members of the Armed Services attending a public state college or university within 50 miles of the military establishment where they are stationed, if the military establishment is within a county contiguous to Florida;<sup>9</sup>

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<sup>1</sup> Section 1009.21(1)(a), F.S.

<sup>2</sup> Section 1009.21(1)(g), F.S.

<sup>3</sup> Section 1009.21(1)(f), F.S.

<sup>4</sup> Section 1009.21(1)(d); Section 222.17(1), F.S., provides a method for manifesting and evidencing domicile by filing with the circuit court clerk of the county of residence a sworn statement showing an intent to maintain a permanent home in that county.

<sup>5</sup> Section 1009.21(2)(a)1., F.S.

<sup>6</sup> Section 1009.21(2)(a)2., F.S.

<sup>7</sup> Section 1009.21(2)(b), F.S.

<sup>8</sup> Section 1009.21(10)(a); *see also* ss. 250.10(7) and (8), F.S., authorizing the Adjutant General to establish education assistance and tuition exemption programs for members in good standing of the active Florida National Guard, provided that certain conditions are met.

<sup>9</sup> Section 1009.21(10)(b), F.S.

- Active duty members of the Canadian military residing or stationed in-state under the North American Air Defense agreement attending a state college or university within 50 miles of the military establishment where stationed; and<sup>10</sup>
- Active duty members of a foreign nation's military who are serving as liaison officers residing or stationed in this state, attending a state college or university within 50 miles of the military establishment where stationed.<sup>11</sup>

### Undocumented Alien Students

Undocumented aliens, with certain exceptions as provided in federal law, may not establish legal residence in the state for tuition purposes because their residency in the state is in violation of federal law, as they have not been properly admitted into the United States. Undocumented aliens are accordingly classified as nonresidents for tuition purposes. However, the state may not bar undocumented aliens from attending elementary, middle, or secondary schools.<sup>12</sup>

Due to the undocumented status of these individuals, the state is unable to reliably estimate their numbers. Moreover, Florida school districts are precluded from collecting data on undocumented aliens who are attending public schools pursuant to a consent decree.<sup>13</sup>

Although the United States Supreme Court has held that states must provide public education to all students equally regardless of immigration status at the elementary, middle, and secondary levels,<sup>14</sup> the Court has not directly addressed the issue of undocumented immigrant access to higher education.<sup>15</sup> The Court has struck down a Maryland state policy on Supremacy Clause grounds which denied in-state tuition to non-immigrant aliens holding G-4 visas even if such aliens were state residents who would have otherwise qualified for in-state tuition.<sup>16</sup> The Maryland law was by federal law allowing G-4 aliens to establish residency in the United States.<sup>17</sup> However, it is important to note that this case involved aliens who were lawfully present in the United States, and thus, may not extend to unauthorized student aliens.<sup>18</sup>

Nonimmigrant aliens, as defined in 8 U.S.C. s. 1101(a)(15), are aliens lawfully admitted into the United States but whose duration of stay is set forth in the applicable visa under which admittance is granted. Most nonimmigrant visas, but not all, require the holder of the visa to intend to return to the nonimmigrant's country of residence upon expiration of the visa. Students under an F visa or an M visa are required to intend to return to their country of residence. If a

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<sup>10</sup> Section 1009.21(10)(j), F.S.

<sup>11</sup> Section 1009.21(10)(k), F.S.

<sup>12</sup> See *Plyler v. Doe*, 457 U.S. 202 (1982), in which the U.S. Supreme Court held unconstitutional on equal protection grounds a Texas statute that withheld school funding for children who were not legally admitted into the United States and permitted local school districts to deny their enrollment.

<sup>13</sup> See *League of United Latin American Citizens v. Florida Board of Education*, Case No. 90-1913 (S.D. Fla. 1990).

<sup>14</sup> *Plyler*, 457 U.S. 202 (1982).

<sup>15</sup> Congressional Research Service, *Unauthorized Alien Students, Higher Education, and In-State Tuition Rates: A Legal Analysis*, 1 (2010).

<sup>16</sup> *Toll v. Moreno*, 458 U.S. 1 (1982).

<sup>17</sup> *Id.*

<sup>18</sup> Congressional Research Service, *Unauthorized Alien Students, Higher Education, and In-State Tuition Rates: A Legal Analysis*, 2 (2010).

nonimmigrant stays beyond the limitation of the visa, the nonimmigrant is no longer lawfully within the United States and is subject to deportation.

### **Postsecondary Benefits**

Federal law says that a state may enact laws to make undocumented aliens eligible for any state or local public benefit for which they would not otherwise be eligible only if the law affirmatively provides for such eligibility.<sup>19</sup> However, federal law also prohibits any alien who is unlawfully present in the United States from receiving any postsecondary education benefit on the basis of residence in a state unless a U.S. citizen or national is eligible for such benefit in the same amount, duration, and scope.<sup>20</sup> Over the years, a number of states have enacted laws providing postsecondary educational benefits to undocumented students. The U.S. Congress has also considered legislation promoting higher education for unauthorized aliens.

### **The DREAM Act**

The Development, Relief, and Education for Alien Minors Act, also commonly referred to as the DREAM Act, was first introduced in Congress in 2001 and has been subsequently introduced in various forms.<sup>21</sup> The DREAM Act restores the state option to determine residency for purposes of higher education benefits. It also provides conditional legal status to an undocumented alien who meets certain criteria. Under the act, there is a path to permanent citizenship for those going to college or serving in the military.<sup>22</sup> Versions of this legislation have been introduced for a number of years, but it has not become law.

### **State Laws Providing In-State Tuition for Undocumented Students**

A number of states have passed legislation to authorize in-state tuition for undocumented students, including Texas, California, Utah, New York, Washington, Oklahoma, Illinois, New Mexico, Kansas, Nebraska, and Wisconsin.<sup>23</sup> The laws in Kansas and California have been challenged based on the argument that they violate the federal law prohibiting educational benefits based on residency for undocumented students.<sup>24</sup>

In 2005, a federal court in Kansas considered whether a state law making undocumented students eligible for in-state tuition violated federal law and discriminated against U.S. citizens paying out-of-state tuition.<sup>25</sup> The Kansas law created an opportunity for undocumented aliens to be eligible for in-state tuition if they attended a Kansas high school for three years, received a diploma or equivalent, were not residents of another state, and signed an agreement to seek legal

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<sup>19</sup> 8 U.S.C. s. 1621(d).

<sup>20</sup> 8 U.S.C. s. 1623.

<sup>21</sup> National Immigration Law Center, *DREAM Act: Summary* (2011), available at <http://www.nilc.org/dreamsummary.html> (last visited Feb. 2, 2012).

<sup>22</sup> National Conference of State Legislatures, *In-State Tuition and Unauthorized Immigrant Students* (2011), available at <http://www.ncsl.org/default.aspx?tabid=13100> (last visited Feb. 2, 2012).

<sup>23</sup> *Id.*

<sup>24</sup> 8 U.S.C. s. 1623.

<sup>25</sup> *Day v. Sebelius*, 376 F. Supp. 2d. 1022 (D. Kan. 2005) (Plaintiffs argued that the state law was preempted by 8 U.S.C. s. 1623).

immigration status.<sup>26</sup> The Kansas law specified that it applied to “any individual” meeting the designated criteria “regardless of whether the person is or is not a citizen of the United States of America.”<sup>27</sup> The plaintiffs in the case were students at Kansas universities who were U.S. citizens but were classified as nonresidents of Kansas for tuition purposes.<sup>28</sup> The court dismissed the case on the basis that the individuals bringing the suit did not have standing because the federal law in question did not provide for a private right of action<sup>29</sup> and because the Kansas law was not discriminatory.<sup>30</sup> The dismissal was subsequently affirmed by the 10th Circuit,<sup>31</sup> and the U.S. Supreme Court denied certiorari.

In 2010, the California Supreme Court decided a case challenging a similar state law.<sup>32</sup> Much like the Kansas case, the challenge to the California law was filed on the basis that it violated 8 U.S.C. s. 1623. The California law provided any student meeting the following criteria would be exempt from paying nonresident tuition: 1) attending three years of high school in the state; 2) graduating from state high school or equivalent; 3) enrolling at a state institution; and 4) providing an affidavit of intent to legalize immigration status if the student is undocumented.<sup>33</sup> The court held that the law was not preempted because it was not based on residency, but instead on other criteria that U.S. citizens who were not California residents could also meet.<sup>34</sup> The U.S. Supreme Court has also denied certiorari for this case.<sup>35</sup>

### III. Effect of Proposed Changes:

This bill authorizes a student to qualify for in-state tuition who currently does not qualify as a resident for tuition purposes if he or she:

- Attends high school in Florida for 3 or more years;
- Graduates from a Florida high school or attained high school equivalency;
- Registers as an entering student or is currently enrolled at a state university or Florida College System institution; and
- In the case of a student without lawful immigration status, files an affidavit stating that the student has filed an application to legalize his or her immigration status or will do so as soon as he or she is eligible.

Under the bill, any student is eligible for the exemption if he or she meets the specified criteria, including undocumented students.

The bill also directs the Board of Governors of the State University System to adopt regulations and the State Board of Education to adopt rules to implement the nonresident tuition exemption.

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<sup>26</sup> K.S.A. s. 76-731a.

<sup>27</sup> K.S.A. s. 76-731a(b)(2).

<sup>28</sup> *Day*, 376 F. Supp. 2d. at 1025.

<sup>29</sup> *Id.* at 1036-37.

<sup>30</sup> *Id.* at 1039.

<sup>31</sup> *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007), *cert. denied*, 554 U.S. 918 (2008).

<sup>32</sup> *Martinez v. Regents of the University of California*, 241 P.3d 855 (Cal. 2010), *cert. denied*, 131 S. Ct. 2961 (2011).

<sup>33</sup> CAL. EDUC. CODE ch. 814, s. 2.

<sup>34</sup> *Martinez*, 241 P.3d at 863.

<sup>35</sup> *Martinez*, 131 S. Ct. 2961.

The bill provides an effective date of July 1, 2012.

#### 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:

The Supremacy Clause of the U.S. Constitution preempts state laws that impermissibly interfere with federal law.<sup>36</sup> Field preemption and conflict preemption are subcategories of implied preemption.<sup>37</sup> Field preemption applies if the scheme of federal law is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”<sup>38</sup> Conflict preemption occurs if “compliance with both federal and state regulations is a physical impossibility.”<sup>39</sup>

The U.S. Supreme Court has held that the power to regulate immigration is unquestionably an exclusive federal power, but also noted that “the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted.”<sup>40</sup> This bill does not appear to present a field preemption issue because, although it deals with aliens, it does not regulate immigration.

#### V. Fiscal Impact Statement:

##### A. Tax/Fee Issues:

None.

##### B. Private Sector Impact:

Students who currently do not qualify as residents for tuition purposes, including undocumented students, will be eligible for the reduced in-state tuition rate if they meet the criteria specified in the bill. Because of their undocumented status and the fact that Florida public schools are precluded from asking about immigration status, data is not available to estimate how many undocumented students may potentially benefit from the

<sup>36</sup> U.S. CONST. art. 5, cl. 2.

<sup>37</sup> Erwin Chemerinsky, *CONSTITUTIONAL LAW*, 367 (2d ed. 2005).

<sup>38</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>39</sup> *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

<sup>40</sup> *DeCanas v. Bica*, 424 U.S. 351, 355 (1976).

exemption. Additionally, there is also no data indicating how many students who are U.S. citizens from states other than Florida would qualify for the exemption. In most cases, students who are U.S. citizens and meet the criteria specified in the bill are already residents of Florida for tuition purposes, as the bill requires living in Florida longer than existing requirements for residency. The current average tuition rate for undergraduate students attending state universities is \$184 per credit hour for residents and \$681 for nonresidents.<sup>41</sup> Additionally, affected students may incur certain costs in order to meet the bill's affidavit requirements.

**C. Government Sector Impact:**

The fiscal impact of the bill is indeterminate, as the state does not have reliable figures indicating the number of undocumented students who will qualify for the exemption. It is also unclear how many students who are U.S. citizens, if any, would use the exemption.

Given the indeterminate number of eligible students, the fiscal impact and additional regulatory burden on community colleges and state universities in collecting and processing affidavits and confirming other eligibility requirements is not readily ascertainable. The bill would result in the state foregoing the difference between resident and nonresident tuition for students who qualify for this exemption and would not have otherwise been eligible for the resident tuition rate.

According to the Board of Governors of the State University System, an undocumented student enrolled in as a non-resident student will generate an estimated \$25,233 annually, while the same student, if classified as resident, will only generate an estimated \$5,363 annually. Thus, the effect of the reclassification from non-resident to resident will be a loss of about \$20,000 per year. Additionally, in-state credit hours would be reclassified as state fundable, requiring more state support by the Legislature.<sup>42</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

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<sup>41</sup> State University System of Florida Board of Governors, *Tuition & Fees 2011-12*, available at <http://www.flbog.edu/about/budget/current.php> (last visited Jan. 31, 2012).

<sup>42</sup> Board of Governors, *Senate Bill 106 Legislative Bill Analysis* (Sept. 20, 2011) (on file with the Senate Committee on Judiciary).

B. Amendments:

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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