

# 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.)

Prepared By: Education Appropriations Committee

BILL: CS/SB 1920

SPONSOR: Education Committee and Senator Lynn

SUBJECT: Postsecondary Education

DATE: April 21, 2005                      REVISED: \_\_\_\_\_

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

**Please see last section for Summary of Amendments**

- Technical amendments were recommended
- Amendments were recommended
- Significant amendments were recommended

**I. Summary:**

This bill clarifies the lines of authority and constitutional duties of the Board of Governors and the Legislature with regard to the State University System.

The bill prohibits any member of the statewide Board of Governors of the State University System, and any member of a state university board of trustees, from having any employment or contractual relationship as a legislative lobbyist requiring annual registration and reporting pursuant to s. 11.045, F.S.

This bill creates an unnumbered section of the Florida Statutes and amends Section 112.313, F.S. by adding subsection (17).

**II. Present Situation:**

Prior to January 7, 2003, the State Board of Education was comprised of the Governor and the Cabinet. This board served as the chief policy-making body for public education in the state. Among other powers and duties, the State Board of Education exercised general supervision and control over the Board of Regents (the governing board for the State University System) and the State Board of Community College (the oversight and coordinating board for public community colleges) prior to the repeal of these two boards effective July 1, 2001.

In the 1998 General Election, Floridians amended the State Constitution, effective January 7, 2003, to require a new state board of education consisting of seven members appointed by the Governor and subject to confirmation by the Senate.

In 1999, the Commissioner of Education convened a 35-member Blue Ribbon Committee representing all regions of the state and all sectors of the education community to make recommendations for a seamless education system under the new state board. This committee presented its final report prior to the 2000 Legislative Session.

The 2000 Legislature addressed the 1998 amendment by enacting the Florida Education Governance Reorganization Act of 2000 (Chapter 2000-321, L.O.F.). This act proposed to achieve, within existing resources, true systemic change in education governance by establishing a seamless academic system that fosters an integrated continuum of kindergarten through graduate school education for Florida's citizens. The act established guiding principles for a coordinated, seamless system for all education that is student-centered in every facet; that maximizes education access and academic success; and that safeguards equity and refuses to compromise academic excellence. The act provided for the creation of an 11-member Task Force to address implementation issues for the new governance system. The Task Force submitted its recommendations to the Legislature on March 1, 2001.

Based on recommendations from the Task Force, the 2001 Legislature enacted the Florida Education Governance Reorganization Implementation Act (Chapter 2001-170, L.O.F.) to expedite the transition process. This act created an interim 7-member Florida Board of Education, appointed by the Governor and operating under the direction of the State Board of Education, to begin implementation of Florida's new K-20 governance structure effective July 1, 2001. The act abolished the Board of Regents and the State Board of Community Colleges and transferred all powers, duties, functions, personnel, etc., of these two boards to the newly created transitional Florida Board of Education, which became the constitutional State Board of Education effective January 7, 2003, with the duties as stipulated in Chapter 2002-387, L.O.F. The act created 11-member boards of trustees for each state university and outlined the powers and duties of those boards. Each university board of trustees was vested with the authority to govern its university in accordance with law and rules of the State Board of Education and required to perform all duties assigned by law or by rule of the State Board of Education.

In the 2002 General Election, Floridians amended the State Constitution to require, effective January 7, 2003, a single state university system comprised of all public universities with a 13-member board of trustees administering each university and a 17-member statewide board of governors to govern the state university system. The 2003 Legislature enacted Chapter 2003-392, L.O.F., to reflect the adoption of this amendment.

Neither the State Constitution nor the Florida Statutes define the term "public university." Section 1000.21(6), F.S., defines the term "state university" to include the following institutions and any branch campuses, centers, or other affiliates of the institution: the University of Florida; the Florida State University; the Florida Agricultural and Mechanical University; the University of South Florida; the Florida Atlantic University; the University of West Florida; the University

of Central Florida; the University of North Florida; the Florida International University; the Florida Gulf Coast University; and New College.

Section 18 of Article III of the State Constitution confers upon the Legislature the duty to prescribe a code of ethics for all state employees and nonjudicial officers, prohibiting conflict between public duty and private interests. The Legislature has implemented the following standards for state officers and legislators:

“No member of the Legislature, appointed state officer, or statewide elected officer shall personally represent another person or entity for compensation before the government body or agency of which the individual was an officer or member for a period of 2 years following vacation of office. No member of the Legislature shall personally represent another person or entity for compensation during his or her term of office before any state agency other than judicial tribunals or in settlement negotiations after filing of a lawsuit.”<sup>1</sup>

Currently, members of the Florida Elections Commission are also prohibited from lobbying state or local government while serving on the Commission.<sup>2</sup>

Section (1)(d) of Article VII of the State Constitution requires that provision must be made by law for raising sufficient revenue to defray the expenses of the state for each fiscal period.

Section (1)(e) of Article VII of the State Constitution defines “state revenues” to include “taxes, fees, licenses, and charges for services imposed by the legislature on individuals, businesses, or agencies outside state government.” It also specifically excludes certain items from the term “state revenues”: revenues that are necessary to meet the requirements set forth in documents authorizing the issuance of bonds by the state; revenues that are used to provide matching funds for the federal Medicaid program with the exception of the revenues used to support the Public Medical Assistance Trust Fund or its successor program and with the exception of state matching funds used to support the Public Medical Assistance Trust Fund or its successor program and with the exception of state matching funds used to fund elective expansions made after July 1, 1994; proceeds from the state lottery returned as prizes; receipts of the Florida Hurricane Catastrophe Fund; balances carried forward from prior fiscal years; taxes, licenses, fees, and charges for services imposed by local, regional, or school district governing bodies; or revenue from taxes, licenses, fees, and charges for services required to be imposed by any amendment or revision to this constitution after July 1, 1994.

The Legislature has established fiscal policy in substantive law and the General Appropriations Act that students attending public postsecondary educational institutions and programs, including state universities, should pay a portion of the cost to the state to provide the education the students receive. Non-resident students pay a greater portion of this cost than residents. The cost to a student in a graduate course is greater than the cost to the student in an undergraduate course reflecting the greater cost to the state of providing graduate courses as opposed to undergraduate courses.

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<sup>1</sup> Section 112.313 (9)(a)3, F.S.

<sup>2</sup> Section 106.24 (1)(b), F.S.

Section 215.85(3)(b), F.S., defines the term “public funds” as all moneys under the jurisdiction or control of the state, a county, or municipality, including any district, authority, commission, board, or agency thereof and the judicial branch, and includes all manner of pension and retirement funds and all other funds held, as trust funds or otherwise, for any public purpose.

Section 216.321, F.S., stipulates that nothing contained in any legislative budget or operating budget is to be construed to be an administrative or legislative construction affirming the existence then of the lawful authority to make an expenditure or disbursement for any purpose not otherwise authorized by laws of the particular agency, judicial branch, or legislative branch and the general laws relating to the expenditure or disbursement of public funds.

Section 1009.01(1), F.S., defines the term “tuition” to mean the basic fee charged to a student for instruction provided by a public postsecondary educational institution in this state. A charge for any other purpose shall not be included within this fee.

Section 1009.01(2), F.S., defines the term “out-of-state fee” to mean the additional fee for instruction provided by a public postsecondary educational institution in this state, which fee is charged to a non-Florida student as defined in rules of the State Board of Education. A charge for any other purpose shall not be included within this fee.

Section 1009.24, F.S., authorizes state universities to charge a number of other fees, in addition to tuition and out-of-state fees, for services and programs provided by the university.

Section 1011.42, F.S., permits university boards of trustees to designate the depositories for university funds, including the State Treasury, and sets forth requirements regarding depositories that may be used.

Section 1011.91, F.S., appropriates all moneys received by universities, other than from state and federal sources, from student building and capital improvement fees, and from vending machine collections to the use of the respective universities collecting the same, to be expended as the university board of trustees may direct and requires that the funds be expended in accordance with detailed budgets filed with the State Board of Education.

Section 1009.53, F.S., creates the Bright Futures Scholarship Program. The Bright Futures Scholarship Program awards scholarships to Florida high school graduates who attain specified levels of academic achievement. Three types of awards are available to students, each paying a different percentage of tuition and fees based on academic performance. Florida Academic Scholars receive 100% of tuition and fees plus \$600 (Top Scholars, a subset of Academic Scholars, receive an additional \$1,500). Florida Medallion Scholars and Florida Gold Seal Vocational Scholars receive 75% of tuition and fees. Each award has different high school grade point average and college entrance examination requirements.

Section 1009.98, F.S., creates the Florida Prepaid College Program. The Florida Prepaid College Program encourages families to save for future education expenses by providing parents and other purchasers the ability to establish an account for the beneficiary (the future college student) to “lock-in” the future cost of a two-year (community college) or four-year (university) program,

or a combination of two years in each (“two plus two” articulation between a community college and a university). Account holders may make lump sum or periodic payments, and they may purchase local fee and dormitory plans in addition to tuition plans. Prices are based on the beneficiary’s age and assumptions about rates of tuition, fee, and dormitory cost inflation and investment return. The Florida Prepaid College Program is the largest in the nation.

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

The bill expresses legislative findings that the powers of the Legislature in section 1 of Article IX of the State Constitution and the powers of the Board of Governors in section 7 of Article IX of the State Constitution must and can be defined in harmony to give each entity its full measure of constitutional responsibility while fitting together in the balanced symmetry envisioned by the voters of Florida who expressed their desire for a constitutionally placed Board of Regents type of executive oversight of the State University System. The bill clarifies the constitutional governance structure of the State University System by assigning management powers to the Board of Governors while reserving fiscal and other constitutionally required legislative powers for the Legislature.

This bill clarifies the governance structure of the State University System by establishing the respective constitutional duties of the Board of Governors and the Legislature. The bill:

- Expresses legislative intent through a series of whereas clauses;
- Provides definitions of relevant terms, including Board of Governors, institutions of higher learning, public officer, state agency, and state university;
- Expresses legislative findings on the constitutional duties of the Board of Governors of the State University System;
- Expresses legislative findings on the constitutional duties of the Legislature; and
- Expresses the Legislature’s intent to reenact laws relating to the Board of Governors, the university boards of trustees, the State Board of Education, and the postsecondary education system in accordance with the finding of this bill.

The Board of Governors, or the board's designee, has the following constitutional duties:

- Defining the distinctive mission of each constituent university.
- Defining the articulation of each constituent university in conjunction with the Legislature's authority over the public schools and community colleges.
- Ensuring the well-planned coordination and operation of the State University System.
- Avoiding wasteful duplication of facilities or programs within the State University System.
- Accounting for expenditure of funds appropriated by the Legislature for the State University System as provided by law.
- Submitting a budget request for legislative appropriations for the institutions under the supervision of the board as provided by law.
- Adopting strategic plans for the State University System and each constituent university.
- Approving, reviewing, and terminating State University System degree programs.

- Governing admissions to the state universities.
- Serving as the public employer with respect to all public employees of state universities for collective bargaining purposes.
- Establishing a personnel system for all state university employees; however, the Department of Management Services shall retain authority over state university employees for programs established in ss. 110.123 (state group insurance program), 110.1232 (health insurance coverage for certain retirees under state-administered retirement systems), 110.1234 (health insurance for retirees under the Florida Retirement System), 110.1238 (state group health insurance plan; refunds of provider overcharges), and 110.161 (pretax benefits program), F.S., and in chapters 121 (Florida Retirement System), 122 (State and County Retirement System), and 238 (Teachers' Retirement System), F.S.
- Complying with, and enforcing for institutions under the board's jurisdiction, all applicable local, state, and federal laws.

The Legislature has the following constitutional duties:

- Making provision by law for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.
- Appropriating all state funds through the General Appropriations Act or other law.
- Establishing tuition and fees.
- Establishing policies relating to merit and need-based student financial aid.
- Establishing policies relating to expenditure of, accountability for, and management of funds appropriated by the Legislature or revenues authorized by the Legislature. This includes, but is not limited to, policies relating to: budgeting; deposit of funds; investments; accounting; purchasing, procurement, and contracting; insurance; audits; maintenance and construction of facilities; property; bond financing; leasing; and information reporting.
- Maintaining the actuarial and fiscal soundness of centrally administered state systems by requiring state universities to continue to participate in programs such as the Florida Retirement System, the state group health insurance programs, the state telecommunications and data network (SUNCOM), and the state casualty insurance program.
- Establishing and regulating the use of state powers and protections, including, but not limited to, eminent domain, certified law enforcement, and sovereign immunity.
- Establishing policies relating to the health, safety, and welfare of students, employees, and the public while present on the campuses of institutions of higher learning.

The bill expresses Legislative intent to reenact laws relating to the postsecondary education system in accordance with the bill.

The bill prohibits any member of the statewide Board of Governors of the state University System, and any member of a state university board of trustees, from having any employment or contractual relationship as a legislative lobbyist requiring annual registration and reporting pursuant to s. 11.0445, F.S.

The bill takes effect upon becoming a law.

#### 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:

In 2002, an initiative proposal amended the state constitution to create a separate governing board to manage the state university system. As an initiative proposal, the effect of the proposal on the branches of government was determined by the Florida Supreme Court before its placement on the ballot. *Advisory Opinion to the Attorney General Re Local Trustees and Statewide Governing Board to Manage Florida's University System*, 819 So.2d 725 (2002). Significant issues relating to the construction of the amendment have been raised; most importantly, to what extent the amendment intended to limit the power of the Legislature.

The amendment established a board of trustees to administer each public university and a separate board of governors to govern the state university system. The board of governors has the responsibility to “operate, regulate, control, and be fully responsible for the management of the whole university system.”

#### Separation of Powers

Legislative power is impacted initially by the placement of these boards in the constitution. The constitution now dictates a form of governance for the state university system within the constitutional choice of a 2-tiered governance system.

At oral argument before the Supreme Court, all sides agreed that the Board of Governors would be a part of the executive branch of state government. Under Article IV of the Florida Constitution an executive branch agency operates, regulates, controls, and is responsible for the management of the powers and duties entrusted to it by law. The essence of the executive power is the implementation of the laws, as opposed to making the laws (legislative) or judging the laws (judicial).

The sponsor of the amendment characterized this proposal to the Florida Supreme Court as not substantially affecting the legislative branch. In its brief, the amendment's sponsor, Education Excellence for Florida (EEF) stated that

[t]he drafters... realized that the governance system... would be located within the executive branch. The only descriptive terms used in the Title “manage”, Ballot Summary “administer” “operation”, and Text “administer,” “administered” “operate, regulate, control” “management” of the proposed amendment are those calling for the exercise of executive responsibility.

In contrast, the power to appropriate is clearly a legislative function.

*Initial Brief of Education Excellence for Florida*, p. 22, *Advisory Opinion to the Attorney General Re Local Trustees and Statewide Governing Board to Manage Florida’s University System*, 819 So.2d 725 (Fla. 2002).

In his argument before the Court, counsel for EEF stated that “[w]e have had a board of governance system since 1905 and until 2001 and that was in the executive branch. It did not perform any legislative functions.... This would do no more than put that in the constitution, where it would perform an executive function.” Oral Argument of Robin Gibson, Fla. Sup. Ct., May 9, 2002, *Advisory Opinion to the Attorney General Re Local Trustees and Statewide Governing Board to Manage Florida’s University System*, Case No. SC02-449.

Contrary arguments were raised by counsel for Floridians for Education Reform (FER) which appeared in opposition to placing the amendment on the ballot. The FER argued that the intent of the amendment is to take away all legislative power and give the Legislature nothing but the purse, which would have a significant adverse impact on the fundamental powers of the legislative branch. *Id.* The FER specifically argued that “the proposed amendment would effectively eliminate the Legislature’s authority to adopt programs, create legislative bodies, or even provide for scholarships in the university system.” *Initial Brief of Floridians for Education Reform*, p.17, *Advisory Opinion to the Attorney General Re Local Trustees and Statewide Governing Board to Manage Florida’s University System*, *Id.*

In its opinion, the Court rejected the FER position and gave an initial construction of the proposal. The Court held that the amendment did not substantially alter the functions of more than one branch of government. The Court advised that “[e]ven though the proposed amendment interacts with ... [section 1 of Article IX which directs the legislature to provide for the establishment, maintenance, and operation of institutions of higher learning], it does not substantially affect or change ... [it].” *Advisory Opinion to the Attorney General Re Local Trustees and Statewide Governing Board to Manage Florida’s University System*, 819 So.2d 725, 730 (Fla. 2002). The Court construed the responsibilities of the Board of Governors as equivalent to the powers and duties exercised by the Florida Board of Education. *Id.* at 729. The Board of Education clearly was not empowered or authorized to exercise any of the Legislature’s power.

The legislative power described in Article III is the power to enact a law or to declare what the law shall be. The legislative power includes the power to make the laws on any



subject not specifically prohibited by the constitution. The legislative power is not limited to laws involving the spending and taxing powers of the state and those subjects do not fairly describe the extent of the essence of legislative power. In fact, Florida recognizes a particularly stringent form of the non-delegation doctrine and stringently enforces the separation of the powers clause, see e.g., *Askew v. Cross Key Waterways, et al.*, 372 So.2d 913 (Fla. 1978) which precludes an executive entity from the exercise of essential legislative functions. Moreover, in its execution of the law an executive entity may act only within designated limitations which constrain it from exercising its own discretion to determine what the law is. *State v. Atlantic Coast Line Railroad Company*, 47 So. 969 (Fla. 1908).

In light of these specific constitutional provisions and the Florida Supreme Court's 2002 advisory opinion, the amendment cannot be construed to imply that the Legislature has lost all of its power to enact any law that the executive Board of Governors is charged with enforcing. In this regard, the Legislature has an appropriate role in defining the executive powers to be exercised by the Board of Governors and the legislative power of the Legislature. *State v. Kaufman*, 430 So.2d 904 (Fla. 1983).

### **Construing the Constitution**

The Florida courts comprise the branch that judges the laws—that construes the meaning of terms of the constitution. The Legislature too, through its lawmaking function, also plays a significant role in refining the meaning of the Florida Constitution.

In fact, “where a constitutional provision may well have either of several meanings, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is well-nigh, if not completely, controlling.” *Greater Loretta Improvement Association v. State ex rel. Boone*, 234 So.2d 665 (Fla. 1970).

In the case of the 2002 amendment, construction begins with the Supreme Court's holding that the powers of the branches were not substantially altered. It is appropriate that the Legislature define and harmonize its legislative powers vis-à-vis the new executive entity. Myriad statutes will need examination dependent on the Legislature's policies. The judicial branch is not empowered to undertake this type of policy review and revision of the laws required in this instance.

When the Legislature has exercised its constitutional role in implementing and construing the Constitution, the courts will uphold the construction unless “manifestly erroneous.” *Kaufman, Id. at 907*.

In addition to the provisions of this bill which set out a legislative construction of the interplay between these constitutional provisions, a suit has been filed in the Circuit Court in Leon County, Florida wherein Floridians for Constitutional Integrity, a group of litigants are seeking to have the judiciary determine the construction of these constitutional provisions in the absence of any legislative action. *Floridians for Constitutional Integrity, Inc. v. State Board of Education, Case No. 04-CA-3040, (2nd*

*Cir., Leon Co., Fla. 2004*). As of this time, the circuit court has scheduled argument on a pending motion to dismiss on April 25, 2005 and on other pending motions on April 27.

### **Rule-Making Authority**

The bill does not purport to grant rulemaking authority to the Board of Governors. Florida courts have held that the Legislature does not have the authority to require constitutional entities to comply with the Administrative Procedure Act (APA) in the exercise of their constitutionally-granted powers. *Airboat Ass'n of Florida, Inc. v. Florida Game and Fresh Water Fish Commission*, 498 So.2d 629 (Fla. 3d DCA 1986). Statutory duties assigned to such agencies may be made subject to the APA. Therefore, resolving what powers of the Board of Governors are constitutional and what may be statutory is of importance in the sphere of rulemaking.

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

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

None.

### **B. Private Sector Impact:**

Any current member of the Board of Governors or state university boards of trustees who personally represents another person or entity for compensation before the Legislature will be required to either cease representation of that person or entity for compensation, or resign from the respective board.

### **C. Government Sector Impact:**

The bill clarifies that constitutional authority over fiscal issues remains with the Legislature.

### **Revenues:**

The bill maintains Legislative authority over revenue generated by the state university system. Under the statutory appropriations provided in section 1011.91, F.S., state universities currently retain possession of tuition and fees paid by students and do not transfer that revenue to the state for redistribution or reallocation. In 2004-05, state universities are estimated to generate and retain \$749.7 million in tuition and fees from students. The Legislature sets tuition increases and controls the fee rates. In 2004-05, in-state undergraduate tuition increased by 7.5% while all other levels (graduate, professional, and non-resident) increased by 12.5%.

### **Expenditures:**

For 2004-05, state universities received over \$2 billion in state funds for education and general activities, medical centers, and the Institute of Food and Agricultural Sciences

(IFAS). State universities also received \$94.9 million in state matching funds for academic matching grants (University Major Gifts Program) and \$18.2 million in state matching funds for facilities matching grants (Alec P. Courtelis University Facility Enhancement Challenge Grant Program). Additionally, state universities received \$249.7 million from state funds for fixed capital outlay maintenance and new construction projects.

University tuition and fee increases directly affect the Bright Futures Scholarship Program under sections 1009.53-1009.5385, F.S. The 2004-05 appropriation for Bright Futures Scholarships is \$276 million. Currently, 130,194 students participate in the Bright Futures program with 106,491 in state universities at a cost of approximately \$250 million. Of those in state universities, 26,212 are receiving scholarships covering 100% of tuition and fees (Academic Scholars and Top Scholars) and 80,279 are receiving 75% (Medallion Scholars and Gold Seal). For 2005-06, the February 2005 financial aid estimating conference projects a \$2.6 million increase in Bright Futures costs for each 1% increase in university tuition and fees.

University tuition and fee increases also directly affect the Florida Prepaid College Program under sections 1009.97-1009.984, F.S. Since the program's inception in 1988, 1,051,193 total contracts have been sold, representing 738,375 students. As of June 30, 2004, there were 699,168 remaining contracts (tuition, local fee, and/or dormitory plans) with \$5.073 billion in future contract benefits and expenses. The majority of these plans are for university tuition and fees. Any tuition increases above expected scenarios could cause mandatory state supplemental payments to the Prepaid Board to meet contractual requirements in future years.

The majority of need-based student financial assistance state funds are appropriated to the Office of Student Financial Assistance (OSFA) for the Florida Student Assistance Grant (FSAG) program where they are distributed to state universities for scholarships to applicable Florida students. State universities received \$35.1 million for FSAG in 2004-05. An additional amount of need-based student financial assistance state funds (\$20.3 million in 2004-05) is appropriated directly to state universities.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.



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## VIII. Summary of Amendments:

### **Barcode #891174 by Education Appropriations:**

Provides flexibility for university boards of trustees to set tuition and fees for graduate, graduate professional, and nonresident students, unless otherwise provided by law. (WITH TITLE AMENDMENT)

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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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