

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/CS/CS/SJR 2170

INTRODUCER: Education Appropriations Committee, Education Committee, and Judiciary Committee

SUBJECT: Equal Opportunity Education

DATE: April 19, 2006

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Chinn</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>Brown</u>	<u>Matthews</u>	<u>ED</u>	<u>Fav/CS</u>
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4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This Senate Joint Resolution (SJR) provides that every child deserves an equal opportunity to obtain a high quality education regardless of family income, religion, or race, and that:

- Funding for a high quality public K-12 education is fundamental;
- The Legislature is required to ensure that public school funding is primarily used on classroom instruction, rather than administration; and
- Students who are prekindergarten through college may participate in publicly funded private schools as provided by law if they are:
 - Disabled;
 - Economically disadvantaged; or
 - Meet other legislatively determined qualifications.

The SJR authorizes the Legislature to enact and publicly fund prekindergarten through college programs regardless of the following:

- Any existing provision in Article IX or the no-aid provision of Section 3 of Article I of the State Constitution; and
- The religious nature of any participant or nonpublic provider.

This SJR specifies that this joint resolution does not create a right to an education program that is not provided by law.

This SJR creates section 8, Article IX, of the Florida Constitution.

II. Present Situation:

Opportunity Scholarship Program

The Legislature created the Opportunity Scholarship Program (OSP) in 1999 as part of a broad education reform package known as the “A+ Plan.”¹ The program was designed to provide parents of students in “failing schools” the opportunity to send their children to another public school that is performing satisfactorily, at a “C” grade or above, or to an eligible private school. For purposes of the OSP, a failing school is a school that has received an “F” grade for two years in a four-year period.²

To be eligible to participate in the Opportunity Scholarship Program, a private school must:

- Be a Florida private school, whether non-sectarian or sectarian;
- Show fiscal soundness by operating for one school year or providing the Department of Education (DOE) with a CPA statement confirming that the school is insured and that the owners have sufficient capital, through statement, surety bond, or letter of credit;
- Notify the DOE of its intent to participate by May 1 of the preceding school year;
- Comply with federal antidiscrimination laws and state and local health and safety laws;
- Accept scholarship students on a random and religious-neutral basis, except where a sibling has already been accepted;
- Hire teachers who have at least three years teaching experience or special skills;
- Comply with state law regarding private schools;
- Accept as full tuition and fees the amount provided by the state for each student; and
- Agree not to compel religious worship on an OSP student.³

The maximum opportunity scholarship is equal to the Florida Education Finance Program (FEFP) base student allocation multiplied by the appropriate program cost factor and the district cost differential, the same funding formula as that applied to public school student allocations.⁴

A voucher utilized by an opportunity scholar is a warrant made payable to the parents of the student attending a private school. Upon receiving notification of the number of students utilizing vouchers, the DOE transfers funds from the respective districts’ appropriated budgets to an account for the OSP. Then, the Chief Financial Officer sends the warrants to the respective private schools, and parents must endorse them for the schools to receive OSP funds.⁵

Opportunity Scholarship Program Participation

As mentioned above, the OSP has both private school choice and public school choice components. The number of students utilizing the *public* school choice aspect has been difficult to track because of other provisions in statute that also allow parents to choose among schools

¹ The Legislature enacted ch. 99-398, L.O.F., in response to the November 1998 amendment to art. IX, s. 1, of the Florida Constitution, recognizing voter intent to make education in Florida a paramount duty of the state.

² s. 1002.38(2)(a)1., F.S.

³ s. 1002.38(4), F.S.

⁴ s. 1002.38(6)(a), F.S.

⁵ s. 1002.38(6)(f) and (g), F.S.

within their district.⁶ The DOE does not have a means of delineating whether a student is transferring under the OSP or under one of the other programs provided in statute. With respect to utilization of the *private* choice option, there were five private schools that accepted the 57 OSP students when the program was first implemented in 1999.⁷

Participation of students and private schools has steadily increased as additional public schools have been deemed failing.⁸ For the 2004-2005 school year, fifteen schools qualify as failing schools.⁹ According to the latest figures released in February 2006, there are 733 students attending 53 private schools. Of the private schools participating in the OSP, 69.1 percent are sectarian, and 25.5 percent are classified as non-religious. Military schools represent 1.8 percent of private schools and 3.6 percent did not specify. The majority of private schools accepting OSP students have fewer than 10 students utilizing vouchers.¹⁰ There are a few private schools, however, with larger numbers of students in the Miami-Dade and Palm Beach County school districts. The average student allocation is \$4,098 for the 2004-2005 school year, in contrast to the \$3,074 provided through the FEFP in 1999-2000.

Legal Challenge to the OSP – Bush v. Holmes

From the time of its implementation in 1999, the OSP has been the subject of a constitutional challenge. The evolution of that litigation over the ensuing six years has today resulted in two distinct lines of reasoning invalidating the program. The Florida Supreme Court recently found that the OSP violates the provision of the State Constitution requiring the state to offer a uniform system of free public schools (the “free public schools provision”).¹¹ In addition, the First District Court of Appeal has found that the program violates the state constitutional provision prohibiting the state from disbursing funds in aid of religious institutions (the “no-aid provision”).¹²

The origins of the challenge to the OSP can be traced to consolidated lawsuits filed by unions, parents, guardians, Florida citizens, and interest groups alleging that the program violated federal and state constitutional provisions. This report refers to the parties collectively as the challengers and the state.

Bush v. Holmes, District Court of Appeal: 2000 (Also known as “Holmes I”)

In 2000, the First District Court of Appeal reviewed a trial court decision which found the OSP unconstitutional on its face, as a violation of art. IX, s. 1 of the State Constitution, which provides:

SECTION 1. Public education.—

⁶ See s. 1002.20(6)(a), F.S., for additional programs under which a student may transfer to another public school.

⁷ Opportunity Scholarship Program Statistics, <http://www.floridaschoolchoice.org>.

⁸ Preliminary numbers for the 2005-2006 school year, however, show that there are 30 fewer students attending private schools on opportunity scholarships than the previous school year.

⁹ Opportunity Scholarship Program Statistics, *supra* note 7; The majority of these schools are in the following counties: Broward, Miami-Dade, Orange, and Palm Beach.

¹⁰ Based upon numbers provided by the Department of Education (DOE) for September 2005 voucher payments.

¹¹ *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006).

¹² *Bush v. Holmes*, 886 So.2d 340 (Fla. 1st DCA 2004) (“*Holmes II*”).

(a) The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children....by law for a uniform....high quality system of free public schools that allows students to obtain a high quality education....

By authorizing the use of state funds to pay for private school tuition, the trial court reasoned, the state established an alternative to the constitutional mandate requiring a high quality education through the system of free public schools.¹³ On appeal, the state argued that the trial court erred in applying the principle of “expressio unius est exclusion alterius.” This principle is a rule of construction which provides that to express or include one thing implies the exclusion of the other.¹⁴ In referring to the provision of public education through a system of free public schools, the trial court held, the Florida Constitution impliedly prohibited the ability of the state to provide for a K-12 public education in any other way.

In holding that the trial court erred in applying the maxim of expressio unius, as the State Constitution does not expressly prohibit the use of public funds at private schools, the District Court of Appeal reversed the trial court’s finding of facial unconstitutionality and remanded the case to the trial court.¹⁵

Bush v. Holmes, District Court of Appeal: 2004 (Also known as “Holmes II”)

In 2004, the First District Court of Appeal upheld the trial court’s finding that the OSP was unconstitutional under a different provision of the State Constitution. Here, the court invalidated the OSP under the no-aid clause of the State Constitution. Article I, section 3, of the Florida Constitution provides, in part:

No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

In the majority opinion, the Holmes court summarized the history of the no-aid provision, which was added to the State Constitution in 1868. Commonly known as Blaine Amendments, governments routinely incorporated these amendments into state constitutions, for the purpose of barring the use of public funds to support religious schools. According to the court, “Into the 19th century, state governments looked to the church to provide education, often with government aid, and political disputes frequently arose over which churches or sectarian organizations should receive public assistance.”¹⁶ From 1840 to 1875, 19 states added no-aid provisions to their constitutions. After 1858, West Virginia remained the only state admitted to the Union to delete the no-aid provision from its constitution. Currently, less than a half-dozen states have omitted these provisions from state constitutions.¹⁷

¹³ *Bush v. Holmes*, 767 So.2d 668, 673 (Fla. 1st DCA 2000).

¹⁴ *Id.* at 674.

¹⁵ *Id.* at 677.

¹⁶ 886 So.2d 340 (2004), 348-349, citing *Lemon v. Kurtzman*, 403 U.S. 602, 645-646(1971).

¹⁷ *Id.* at 349; Estimates of state constitutions that contain no-aid clauses range from 30 to 37; *See, i.e.*, Richard D. Komer, *School Choice: Answers to Frequently Asked Questions About State Constitutions’ Religion Clauses*, Institute for Justice (March 2004), Website address: www.ij.org

The Holmes court cited the test set out in *Lemon v. Kurtzman*, commonly known as the Lemon test. Here, the U.S. Supreme Court enacted a three-pronged test in its review of Establishment Clause issues, to require that all government action:

- Have a secular purpose;
- Not have the primary effect of either advancing or inhibiting religion; and
- Not result in excessive government entanglement with religion.¹⁸

The state argued that the no-aid provision was substantively synonymous with the Establishment Clause of the First Amendment, and that the Lemon test resolved the matter.¹⁹ The court, however, classified the no-aid provision as more restrictive than the federal Establishment Clause. Although the U.S. Supreme Court recently upheld a voucher program in Ohio under a Federal Constitution argument, the Holmes court pointed out that the presence of the no-aid provision in the Florida Constitution warranted additional scrutiny beyond that provided in the Lemon test.²⁰ Specifically, the court identified a fourth criterion, which is that a law is impermissible where it authorizes the use of public moneys directly or indirectly, in aid of any sectarian institutions.²¹ This, the court held, is where the OSP fails. Subsequent to finding the OSP violative of the no-aid provision, the Holmes court certified the following question to the Florida Supreme Court:

Does the Florida Opportunity Scholarship Program...violate article I, section 3 of the Florida Constitution?²²

In a concurring opinion, the Court reiterated the application of art. IX, s. 1, of the State Constitution, to a finding of unconstitutionality:

While the point was not...reargued on the present appeal...this...does not preclude affirming today on grounds that take into account that using public money for private school tuition payments does not discharge the constitutionally imposed “paramount duty” to provide “by law for a uniform...safe, secure, and high quality system of free public schools.” Art. IX, s. 1, Fla. Const.²³

Bush v. Holmes, Florida Supreme Court: 2006

The Supreme Court accepted review from the Holmes II court, and similar to the approach of the original trial court, applied the maxim of *expressio unius*.²⁴ The court cited earlier Supreme Court opinions, which held that where the Constitution expressly provides a method of doing something, it impliedly prohibits its being done in a substantially different manner, therefore

¹⁸ 403 U.S. 602, 612-613 (1971).

¹⁹ *Bush v. Holmes*, *supra* note 16, at 358.

²⁰ The case that upheld the Ohio program was *Zelman v. Simmons-Harris*, 122 S.Ct. 2460(2002).

²¹ *Bush v. Holmes*, *supra* note 16, at 358.

²² *Id.* at 367.

²³ *Id.* (Benton, J., concurring with an opinion in which Allen, Davis, Padovano, and Browning, JJ., concur).

²⁴ *Bush v. Holmes*, 919 So.2d 392, 407(2006).

making the manner prescribed exclusive.²⁵ As art. IX, s. 1, mandates that a system of free public schools is the manner in which the state is to provide a free education, publicly funding a private school education “is a ‘substantially different manner’ of providing a publicly funded education than...the one prescribed by the Constitution.”²⁶ The court additionally indicated that the OSP diverts funds that would otherwise be provided to the system of free public schools.²⁷ Finally, the court analyzed whether the OSP complies with the art. IX, s. 1 requirement of uniformity, as follows:

- While public school teachers are required to be state-certified and subject to background screening, private school educators are not;
- Public school teachers must hold, at a minimum, bachelor’s degrees, while teaching at a private school requires only teaching experience, or special skills or knowledge; and
- While public education instruction is based on the Sunshine State Standards, private school education is not subject to these same standards.²⁸

The court found the OSP unconstitutional in two respects:

- The diversion of money reduces public funds for a public education;
- The OSP uses public funds to provide an alternative education in private schools that are not required to comply with the uniformity mandated for public schools.²⁹

In so ruling, the Supreme Court grounded its decision in art. IX, s. 1 (“free public schools”), rather than art. 1, s. 3 (“no-aid”) of the State Constitution. In fact, the court acknowledged that it did not address the Holmes II court’s ruling of unconstitutionality based on the no-aid provision. To prevent disruption of student voucher recipients in the current school year, the court provided for its ruling to apply prospectively to begin at the end of the current school year.³⁰

Other Scholarship Programs

There are other state programs that provide funding for private school education at the discretion of the parent. These include the McKay Scholarship Program and the Corporate Tax Credit Scholarship Program.

McKay Scholarship Program

The McKay Scholarships for Students with Disabilities Program (“McKay program”) provides scholarships to students with disabilities where a child’s parent is “dissatisfied with the student’s progress” at the child’s assigned public school.³¹ The McKay Scholarship can be used at another public school, or at a private school of choice. To participate in the McKay program, a private school must:

²⁵ *Id.* at 407; *See, i.e., Weinberger v. Bd. Of Pub. Instruction*, 93 Fla. 470(1927); *S & J Trans., Inc. v. Gordon*, 176 So.2d 69, 71(Fla. 1965).

²⁶ *Id.*, citing *Holmes v. Bush*, No.CV99-3370 at 10, 2000 WL 526364 (2nd Cir. Ct. order filed March 14, 2000).

²⁷ *Id.* at 408-409.

²⁸ *Id.* at 409-410.

²⁹ *Id.* at 412.

³⁰ *Id.* at 413.

³¹ s. 1002.39(2), F.S.

- Be a Florida private school and may be sectarian or non-sectarian;
- Demonstrate fiscal soundness;
- Notify the DOE of its intent to participate in the program;
- Comply with federal antidiscrimination law;
- Meet state and local health and safety laws;
- Be academically accountable to the parent; and
- Hire teachers who have a minimum of special skills or knowledge in the area.³²

Funding is based on the FEFP base student allocation multiplied by the appropriate cost factor and district cost differential.³³ As the recipients are exceptional students, however, a matrix level of services is additionally considered in the calculation.³⁴

A distinction of the McKay program is that it provides funding for disabled students, making a challenge based upon the State Constitution more complex in terms of legal analysis. In its brief, the state argued that students have a right, under the “basic rights” provision of the Florida Constitution,³⁵ to adequate public funding for private school education when public schools lack services to meet the needs of students with disabilities.³⁶ To fail to provide these funds, the state argued, could result in a violation of equal protection for students with disabilities. The Supreme Court’s opinion did not squarely address the McKay program, but alluded to a similar program for disabled students challenged in *Scavella v. School Board of Dade County*.³⁷ The court noted that the program in *Scavella* was structurally different from the OSP, and it rejected the suggestion that programs like the one in *Scavella* would necessarily be affected by the court’s decision.³⁸

Current figures estimate that 60.1 percent of the private schools that participate in the McKay Scholarship Program are religious, compared to 38.1 percent that are non-religious.³⁹

Corporate Tax Credit Scholarship Program

The Corporate Tax Credit Scholarship Program (“CTC program”) uses a different mechanism to fund education. In fact, as one court has described it, the result of a credit is that the money never enters the state’s control,⁴⁰ i.e., its treasury, and therefore the money never becomes “state” funds. The Legislature created tax credit scholarships in 2001 to encourage private, voluntary contributions from corporate donors to non-profit scholarship funding organizations, for children from families that are economically disadvantaged.⁴¹ A corporation can receive a dollar for dollar tax credit of up to 75 percent of its income tax liability for donations to private scholarship

³² s. 1002.39(4), F.S.

³³ s. 1002.39(6), F.S.

³⁴ *Id.*

³⁵ Article I, s. 2, FL. CONST.

³⁶ *See Attorney General’s Brief* at 17, FN 4 (citing *Scavella v. School Bd. of Dade County*, 363 So. 2d 1095, 1098 (Fla. 1978)).

³⁷ 363 So. 2d 1095 (Fla. 1978).

³⁸ *Bush v. Holmes*, 919 So.2d 392, 411-412.

³⁹ John M. McKay Scholarship Program, February Quarterly Report (2006).

⁴⁰ *Kotterman v. Killian*, 972 P. 2d 606 (Ariz. 1999).

⁴¹ s. 220.187(1), F.S.

funding organizations. There is an overall cap of \$88 million on the amount of tax credits that can be granted each year. Scholarships are distributed by the private funding organizations to students in grades kindergarten through 12 to attend nonpublic schools.

Similar to the other scholarship programs discussed, nonpublic schools participating in the CTC program must provide documentation of financial stability and comply with federal anti-discrimination law.⁴² Nonpublic schools participating in the program must comply with all state laws regulating private schools. The Supreme Court did not address the CTC program, but it is discussed here because it is an educational program utilizing private schools.

Currently, 80.6 percent of schools that participate in the CTC Program are religious, compared to about 16.4 percent that are non-religious.⁴³

Senate Interim Project

During the 2005-2006 interim, the Senate Committee on Judiciary conducted an interim research project on the legal challenge to the OSP put forth in *Bush v. Holmes*. The report released by the committee is entitled *Legal Issues and Policy Considerations Raised by the Challenge to the Opportunity Scholarship Program*.⁴⁴

III. Effect of Proposed Changes:

This joint resolution proposes the creation of a new section in art. IX of the Florida Constitution. If adopted by the voters, this new section in the education article would provide for the equal opportunity to obtain a high quality education for every child.

Funding for Education (Kindergarten – Grade 12)

This SJR provides that funding for a high quality public education for students in kindergarten through grade 12 is fundamental. To provide for a high quality public K-12 education, this SJR requires that the Legislature ensure that public school funding is primarily used for classroom instruction, rather than administration. What constitutes “classroom instruction” and “administration” shall be defined by law.

The Legislature is currently authorized to require school districts who fail to meet minimum academic performance standards to increase emphasis on classroom instruction from operating funds.⁴⁵ To accomplish this, s. 1011.64(3)(b), F.S., provides for the Department of Education to annually calculate for each district and the entire state, the percentage of classroom expenditures to total operating expenditures, under a calculation formula. “Primarily” as provided in the SJR is not defined and the effect on school district budgets and budgetary procedures upon implementation of this requirement is not known. It is also not known what fund sources (federal, state, or local) constitute “funding for public schools”.

⁴² s. 220.187(6), F.S.

⁴³ Corporate Tax Credit Scholarship Program, February Report (2006).

⁴⁴ See http://www.flsenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-139ju.pdf.

⁴⁵ s. 1011.64, F.S.

Education Programs – Participation and Creation (Prekindergarten – College)

Students in prekindergarten through college who are disabled, economically disadvantaged, or qualify pursuant to legislatively-created criteria are authorized to participate in education programs, to include nonpublic schools, as provided by law.

The joint resolution provides that the Legislature may enact and provide public funding for education programs that utilize nonpublic providers, regardless of the religious nature of those providers or participants. The language states that the Legislature may create these types of education programs irrespective of other state constitutional provisions under art. IX and the no-aid provision of s. 3, art. I of the State Constitution.⁴⁶

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:

Article XI, section 1, of the State Constitution provides that the Legislature may propose to amend one or more articles by joint resolution agreed to by three-fifths of the membership of each house of the Legislature. If the amendment is approved, the default provision is that a proposed amendment would be submitted to the electors at the next general election more than 90 days after the proposed amendment is filed.⁴⁷ However, the Legislature can move up the date of submission to the electors of a single amendment by enacting a law providing for submission at an earlier special election more than 90 days after the proposed amendment is filed.⁴⁸

⁴⁶ It is uncertain whether the proposed amendment would be considered to be *in conflict* with the existing provisions cited above or would be considered to be *an exception* to existing provisions. In *State v. Div. of Bond Finance of the Dept. of Gen'l Serv.*, the Supreme Court addressed both of these interpretations as applied and upheld an amendment to the constitution. 278 So.2d 614 (Fla. 1973). The court opined that a limitation or exception created by a later amendment “modifies other provisions of the Constitution...only to the extent defined in the amendment, and that...*such limitations are in harmony with constitutional amendments generally* and except as to the ‘purpose’ of the amendment, the parent provision continues in force.” *Id.* at 618 (emphasis added) (affirming the court’s previous holding in *Gray v. Golden*, 89 So. 2d 785 (Fla. 1956), which allowed for the limitation or modification of other provisions of the constitution with a later amendment). Further, the court noted that where an amendment cannot be construed so as to harmonize with other constitutional provisions, the amendment, being the last expression of the will of the people, will prevail. *Id.* at 617.

⁴⁷ Article XI, s. 5(a), FLA. CONST.

⁴⁸ *Id.*

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

If the SJR passes and the amendment is approved by the voters, some students who might not otherwise be able to receive public support to attend private schools may be able to receive funding.

C. Government Sector Impact:

Each constitutional amendment is required to be published in a newspaper of general circulation in each county, once in the sixth week and once in the tenth week preceding the general election.⁴⁹ The cost for advertising varies depending upon the amount of text that must be published because the amount charged for each advertisement is based upon column inches. More words contained in the amendment and ballot summary translates into a longer, more expensive ad.

Currently, ballot summaries for a constitutional amendment by initiative are limited to 75 words, and the Department of State (DOS) bears the cost of publishing the summary, fiscal impact,⁵⁰ and entire proposed constitutional amendment. The DOS staff estimates the cost for advertising each citizens initiative amendment that makes it to the ballot is \$50,000. Estimating the cost for publishing a legislatively proposed constitutional amendment is less precise because legislative initiatives are not limited to 75 words in the ballot summary, and amendments are not limited to a single subject. Thus, the \$50,000 estimate used to represent the cost of a citizens initiative provides a baseline for what a legislatively proposed amendment would cost, but the actual cost could be more or less, depending upon how the overall length of the amendment and ballot summary compares to the length of the average citizens initiative advertisement.

If the SJR passes and the amendment is approved by the voters, public funds which might not otherwise be available to support students' attendance in private schools may continue to be expended for this purpose.

Additionally, school districts may be required to spend a greater percentage of their budgets on classroom-related costs, depending upon how the legislature implements this provision.

⁴⁹ Article XI, s. 5(d), FLA. CONST.

⁵⁰ Section 5(c), art. XI, Fl. Const., and s. 101.161(1), F.S., provide for a fiscal impact statement to be provided to voters.

VI. Technical Deficiencies:

As used in the SJR, it is unclear what is meant by the term “college.” It may be advisable to define the term in an implementing bill or to revise the term to encompass the eligible institutions intended as participants in the scholarship programs.

VII. Related Issues:

None.

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

VIII. Summary of Amendments:

None.

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