

# 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 Committee

---

BILL: CS/CS/SB 2234

INTRODUCER: Education Committee and Judiciary Committee

SUBJECT: Education/Failing Schools

DATE: April 18, 2006

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Chinn</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>deMarsh-Mathues</u>	<u>Matthews</u>	<u>ED</u>	<u>Fav/CS</u>
3.	_____	_____	<u>EA</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

---

## I. Summary:

This bill creates a new program to enhance the performance of failing schools. The bill provides for corporate tax credit scholarships to students attending failing schools so that a student has the choice of attending a higher performing public school or a private school while the failing public school to which a student is assigned is improving. While the new program is being implemented, students currently receiving Opportunity Scholarships are eligible to receive a tuition voucher under the existing Corporate Tax Credit Scholarship Program. The bill also revises the current Corporate Tax Credit Scholarship Program and the income tax code to conform to the creation of the new program. The existing Opportunity Scholarship Program is repealed by the bill.

Additionally, the bill revises the income tax code to provide that all corporate income tax revenue shall be deposited into a new trust fund rather than General Revenue. The new trust fund would have to be created in a separate bill.<sup>1</sup>

This bill creates sections 1008.3455 and 220.1875, Florida Statutes, and repeals section 1002.38, Florida Statutes. This bill amends the following sections of the Florida Statutes: 213.053, 220.02, 220.13, 220.187, 220.701, 1001.10, 1001.42, 1002.20, and 1002.39.

---

<sup>1</sup> Senate Bill 2406 creates a new Corporate Income Tax Trust Fund for this purpose.

## 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.<sup>2</sup> 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 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.<sup>3</sup> An OSP-eligible private school is a private school—non-sectarian or sectarian—that has notified the Department of Education (DOE) of its intent to participate in the program and meets the requirements set forth in statute.<sup>4</sup> Students who utilize the program to attend another public school or utilize a voucher to attend a private school may attend the school they choose through graduation if the high school to which the student is assigned is a “D” or “F” school or if the chosen private school educates students through the twelfth grade.<sup>5</sup>

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.<sup>6</sup>

The maximum opportunity scholarship is equal to the base student allocation in the Florida Education Finance Program (FEFP) under the same funding formula as that applied to public school student allocations.<sup>7</sup>

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

---

<sup>2</sup> 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, making education in Florida a paramount duty of the state.

<sup>3</sup> s. 1002.38(1), F.S.

<sup>4</sup> s. 1002.38(4), F.S., provides eligibility requirements.

<sup>5</sup> See s. 1002.38(2)(b), F.S.

<sup>6</sup> s. 1002.38(4), F.S.

<sup>7</sup> s. 1002.38(6)(a), F.S.

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.

### **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 within their district.<sup>8</sup> 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.<sup>9</sup> At that time, four of the five private schools accepting students were religiously affiliated.

Participation of students and private schools has steadily increased as additional public schools have been deemed failing.<sup>10</sup> Currently, there are 733 students attending 53 private schools. Of the private schools participating in the OSP, 71.7 percent are sectarian, and 55.3 percent of the OSP students utilizing vouchers are attending those sectarian schools. The majority of private schools accepting OSP students have fewer than 10 students utilizing vouchers.<sup>11</sup> There are a few private schools, however, with larger numbers of students in the Miami-Dade and Palm Beach County school districts.

### **Legal Challenge to the OSP – *Bush v. Holmes***

The OSP has been the subject of a constitutional challenge since it was implemented in 1999. The evolution of that litigation over the ensuing six years has today resulted in two distinct reasons for invalidating the program. The Florida Supreme Court 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”).<sup>12</sup> 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”).<sup>13</sup>

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

---

<sup>8</sup> See s. 1002.20(6)(a), F.S., and the federal No Child Left Behind Act for additional programs under which a student may transfer to another public school.

<sup>9</sup> Opportunity Scholarship Program Statistics, <http://www.floridaschoolchoice.org>

<sup>10</sup> 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.

<sup>11</sup> Based upon numbers provided by the Department of Education (DOE) for September 2005 voucher payments.

<sup>12</sup> *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

<sup>13</sup> *Bush, et al. v. Holmes, et al.*, 886 So. 2d 340 (Fla. 1st DCA 2004) (“*Holmes II*”).

In fall 2000, the trial court invalidated the OSP based on the free public schools provision.<sup>14</sup> On appeal, the First District Court of Appeal disagreed with the lower court's ruling that this provision created an implied prohibition on state funds going to private schools, finding that nothing in the provision "clearly prohibits the Legislature from allowing the well-delineated use of public funds for private school education."<sup>15</sup> The appellate court reversed the lower court's ruling based upon the free public schools provision and remanded the case for the trial court to address the remaining constitutional issues challengers raised.

While the case was pending on remand, the U.S. Supreme Court upheld a program similar to the OSP. In *Zelman v. Simmons-Harris*, the Court held that the Ohio Pilot Project Scholarship Program was constitutional under the federal Establishment Clause.<sup>16</sup> The federal clause provides that "Congress shall make no law respecting an establishment of religion..."<sup>17</sup> Subsequently, the challengers to the OSP voluntarily dismissed their claims under the federal Establishment Clause and the "the school fund provision" of the State Constitution.<sup>18</sup> The only remaining issue for the trial court to decide was whether the OSP violated the no-aid provision of the Florida Constitution.<sup>19</sup> The trial court held that the OSP facially violated the no-aid provision.

In an en banc<sup>20</sup> opinion, the First District Court of Appeal affirmed the trial court's finding that the OSP violates the no-aid provision. The majority certified to the Florida Supreme Court the following question: "Does the Florida Opportunity Scholarship Program, section 229.0537, Florida Statutes (1999), violate article I, section 3 [the no-aid provision] of the Florida Constitution?"<sup>21</sup> On January 5, 2006, the Supreme Court issued its ruling but declined to address the no-aid provision in its opinion. Instead, the court invalidated the OSP based upon the free public schools provision.<sup>22</sup>

### **Supreme Court Rules: Free Public Schools**

The court held that the OSP violates the free public school provision's requirement that adequate provision be made for a "uniform, efficient, safe, secure, and high quality system of free public schools."<sup>23</sup> The court found that the provision acted as a "limitation on the Legislature's power because it provides both a mandate to provide for children's education and a restriction on the

<sup>14</sup> *Bush v. Holmes, et. al.*, 767 So. 2d 668, 674 (Fla. 1st DCA 2000). The trial court applied the canon of construction *expressio unius est exclusio alterius*, meaning to "express or include one thing implies the exclusion of the other, or of the alternative." In other words, the court found that because the constitution provided for public funding for public schools it excluded public funding for private schools.

<sup>15</sup> *Id.* at 675.

<sup>16</sup> See 536 U.S. 639 (2002). The Ohio program allowed parents of Cleveland schoolchildren to receive a tuition voucher redeemable either in participating Cleveland private schools or public schools in adjacent districts.

<sup>17</sup> U.S. CONST. amend. I.

<sup>18</sup> Article IX, s. 6, FL. CONST.

<sup>19</sup> *Holmes II*, 886 So. 2d at 345.

<sup>20</sup> The appeal was originally heard by a three-judge panel, which is customary in cases appealed to the district court of appeal level, but the panel's opinion was withdrawn and the case was heard by all members of the court.

<sup>21</sup> *Holmes II*, 886 So. 2d at 367. Section 229.0537, F.S., cited by the court, was renumbered as a result of ch. 2002-387, L.O.F., and is now s. 1002.38, F.S.

<sup>22</sup> The original trial court ruling and a concurring opinion in the district court would have invalidated the program under the free public schools provision, as well.

<sup>23</sup> The court also noted that art. IX, s. 6, or the state school fund provision, limiting disbursement of funds to the "support and maintenance of free public schools," reinforced its opinion invalidating the OSP. *Holmes*, 919 So. 2d at 410.

execution of that mandate.”<sup>24</sup> The court reasoned that the sentences comprising the free public schools provision must be read together.<sup>25</sup> The sentence mandating that “adequate provision” for public education be made must be read in conjunction with the successive sentence prescribing the manner for carrying out that mandate. Following the first trial court’s reasoning, the Supreme Court found that the two sentences read together create an implied prohibition against the Legislature providing state funds for any means of education other than the public school system.<sup>26</sup>

The court also expressed concern that the private schools that students attend on opportunity scholarships are “not subject to the *uniformity* requirements of the public school system,” mentioned in the constitution.<sup>27</sup> Though OSP students must take statewide assessment tests, the court noted that a private school’s curriculum and teachers are not subject to the same standards or supervision applied to public schools.<sup>28</sup> Without state regulation, the court opined, private school curriculum standards may vary greatly depending on the accrediting body.<sup>29</sup> Based upon this reasoning, the court found the alternative system of private schools receiving funding through the OSP did not meet the uniformity requirement.

The dissent argued that the majority opinion erred in applying statutory construction principles to interpret the meaning of the free public schools provision. The dissent found that the language in the provision was plain and unambiguous and therefore required no interpretation.<sup>30</sup> Contrary to the majority’s opinion, the dissent argued, the second sentence of art. IX, s. 1(a), “requires the Legislature to make adequate provision by law *for* a system of free public schools....”<sup>31</sup> The dissent noted that the text does not use the words “by” or “through,” which would imply exclusion or preclusion of other methods when placed in this context. Following the dissent’s reasoning, the word choice employed by the drafters could reasonably be interpreted to allow state funds to flow to private schools, leaving reasonable doubt as to whether the law creating the program is unconstitutional. Where a statute is challenged, every doubt should be resolved in favor of the constitutionality of the law, according to the dissent.<sup>32</sup>

### **Supreme Court Does Not Rule: No-Aid**

Neither the majority nor the dissenting opinion addressed the question certified by the district court as to whether the OSP violates the state’s no-aid provision. While the Supreme Court affirmed the district court’s invalidation of the OSP, the majority briefly noted that it “decline[d] to reach” the lower court’s determination with respect to the no-aid provision and that it neither approved nor disapproved of that aspect of its ruling.<sup>33</sup> As the First District Court of Appeal is

---

<sup>24</sup> *Id.* at 406.

<sup>25</sup> *Id.* at 406-407 (employing the principle of statutory construction *in pari materia*, which means the provisions are to be construed together to ascertain the general meaning).

<sup>26</sup> *Id.* See *supra* note 11, at 2, for discussion of the statutory construction *expressio unius est exclusio alterius*.

<sup>27</sup> *Id.* at 412 (emphasis added).

<sup>28</sup> *Id.* at 409-410.

<sup>29</sup> *Id.* at 410.

<sup>30</sup> *Id.* at 413 (Bell, J., dissenting).

<sup>31</sup> *Id.* at 416.

<sup>32</sup> *Id.* at 413-414 (citing *Taylor v. Dorsey*, 19 So. 2d 876, 882 (Fla. 1944)).

<sup>33</sup> *Id.* at 413.

the only appellate court to address the no-aid provision in this context,<sup>34</sup> its ruling is “the law of Florida” unless and until the Supreme Court addresses the issue.<sup>35</sup> Therefore, circuit courts in Florida are bound by the First District Court of Appeal’s ruling on the no-aid provision.<sup>36</sup> A lower court applying the district court’s ruling as precedent, however, would have to consider the language the appellate court employed in an attempt to limit its ruling to the OSP.<sup>37</sup> Because of the precedential value of the district court’s decision with respect to its application of the no-aid provision to the OSP, the decision is analyzed below.

### *District Court of Appeal*

As noted above, the no-aid provision was the only constitutional ground upon which the trial and district courts based their opinions when *Bush v. Holmes* was heard a second time. Because the U.S. Supreme Court in *Zelman* held that a program similar to the OSP does not violate the federal Establishment Clause, the district court’s majority opinion concentrated on how Florida’s no-aid provision is more restrictive than the federal clause. The district court held that while the first sentence of Florida’s provision is synonymous with the federal clause, the additional language of the state’s no-aid provision expands restrictions on aid to religion by specifically prohibiting the expenditure of public funds “directly or indirectly” to aid sectarian institutions.<sup>38</sup> To disregard the additional language, wrote the court, would ignore the clear meaning and intent of the text and the unambiguous history of the provision.<sup>39</sup>

There were three elements with which the majority expressed concern:

- (1) the prohibited state action [involves] the use of state tax revenues; (2) the prohibited use of state revenues is broadly defined, in that the state revenues cannot be used “directly or indirectly in aid of” the prohibited beneficiaries;<sup>40</sup> and
- (3) the prohibited beneficiaries of the use of state revenues are “any church, sect or religious denomination” or “any sectarian institution.”<sup>41</sup>

The district court invalidated the OSP to the extent that it authorizes state funds to eventually reach sectarian schools.<sup>42</sup> The court went on to invalidate the entire statute because it could not find that the Legislature would have intended for provisions of the statute to be severable or that the Legislature would have adopted the OSP without the intent that vouchers would be used at private sectarian schools.<sup>43</sup>

<sup>34</sup> *Holmes II*, 886 So. 2d at 367 (stating that the issue is “one of first impression”).

<sup>35</sup> *Stanfill v. State*, 384 So. 2d 141, 143 (Fla. 1980); *Weiman v. McHaffie*, 470 So. 2d 682, 684 (Fla. 1985).

<sup>36</sup> *See State v. Hayes*, 333 So. 2d 51, 52 (Fla. 4th DCA 1976).

<sup>37</sup> *See Holmes II*, 886 So. 2d 340, 362 (Fla. 1st DCA 2004). “Our holding in this case resolves the case before us and leaves for another day, if need be, a decision on the constitutionality of any other government program or activity which involves a religious or sectarian institution.”

<sup>38</sup> *Id.* at 344.

<sup>39</sup> *Id.*

<sup>40</sup> The opinion is unclear with respect to whether “indirectly or directly” modifies the manner in which the funds are taken from the state’s treasury or the benefit to the sectarian institution. *See, e.g., Holmes II*, 886 So. 2d at 346, 351, 352.

<sup>41</sup> *Id.* at 352.

<sup>42</sup> *Id.* at 344.

<sup>43</sup> *Id.* at 346, FN 4. In an opinion concurring in part and dissenting in part, Judge Wolf would have upheld the provision allowing students to utilize vouchers at non-sectarian private schools (*id.* at 371).

The appellate court noted that its application of the no-aid provision to the program—finding that state aid to non-religious schools could be allowed but aid to religious schools could not—does not violate the federal Free Exercise Clause of the First Amendment.<sup>44</sup> The Free Exercise Clause prevents government from “prohibiting the free exercise [of religion],” prohibiting the government from directly penalizing or discriminating based upon the exercise of religious beliefs. Citing the U.S. Supreme Court’s ruling in *Locke v. Davey*,<sup>45</sup> the district court held that the state is allowed to create the program without offending the Establishment clause, but the Free Exercise clause does not require the state to allow its use to further religious study.<sup>46</sup>

### **Effect on Existing Programs**

The Supreme Court’s opinion invalidating the OSP provides that the ruling is to apply prospectively at the end of the current school year to avoid disruption of the students currently utilizing the scholarships.<sup>47</sup> Similar to the district court’s opinion, which sought to limit its application to the OSP, the Supreme Court attempted to limit its ruling, stating that the effect of its decision on other programs would be speculation.<sup>48</sup> The court noted, however, that pre-kindergarten, community colleges, adult education, and general welfare programs are not implicated by its decision.<sup>49</sup> Despite the tenor of the court’s ruling, there are some educational programs that could still be open to challenge under either the Supreme Court’s ruling on the free public schools provision or the district court’s ruling on the no-aid provision.<sup>50</sup>

### ***John M. McKay Scholarships for Students with Disabilities Program (McKay program)***

In the area of education, there are programs structured similarly to the OSP that utilize private schools. The McKay program provides scholarships to students with a disability where the child’s parent is dissatisfied with the student’s progress at the child’s assigned public school.<sup>51</sup>

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:

- 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;

<sup>44</sup> *Id.* at 344.

<sup>45</sup> 540 U.S. 712, 719 (2004). In *Locke*, a Washington regulation limiting the use of a state scholarship toward a degree in devotional theology stemmed from a state constitutional provision that restricts the state from indirectly funding religion. The U.S. Supreme Court held that Washington’s action fell within a “play in the joints” between the Establishment and Free Exercise Clauses, where state action is permitted by the former but not required by the latter.

<sup>46</sup> *See Holmes II*, 886 So. 2d at 344.

<sup>47</sup> *Holmes*, 919 So. 2d at 413.

<sup>48</sup> *Id.* at 412.

<sup>49</sup> *Id.* at 411-412. The court found these programs were not implicated because pre-kindergarten is addressed separately in the free public schools section and does not have a requirement that it be provided by particular means; community colleges and adult education programs are not within the general conception of free public schools or institutions of higher learning; and many of the other public welfare programs are not affected by the constitutional provision upon which this opinion is based—article IX.

<sup>50</sup> *See Governor’s Brief*, Appendix F, for a list of programs that the state argued could be vulnerable to challenge under the no-aid provision.

<sup>51</sup> s. 1002.20(6)(b)2., F.S.

- Be academically accountable to the parent; and
- Hire teachers who have a minimum of special skills or knowledge in the area.<sup>52</sup>

Funding is based on the FEFP base student allocation multiplied by the appropriate cost factor and district cost differential.<sup>53</sup> As the recipients are exceptional students, however, a matrix level of services is additionally considered in the calculation.<sup>54</sup>

The criteria for private schools participating in the McKay program and the OSP are similar in that private schools are eligible to accept scholarship students so long as the schools meet certain conditions.<sup>55</sup> Additionally, the distribution of McKay scholarship funds utilizes the same methodology as the OSP: warrants are made payable to parents who must endorse the warrant over to the school of their choice.<sup>56</sup>

A distinction of the McKay program is that among its scholars are disabled students, making a challenge based upon the State Constitution more complex in terms of the legal analysis. In its brief, the state argued that students have a right, under the “basic rights” provision of the State Constitution,<sup>57</sup> to adequate public funding for private school education when public schools lack services to meet the needs of students with disabilities.<sup>58</sup> 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*.<sup>59</sup> The court noted that the program in *Scavella* was structurally different from the OSP, and it rejected the suggestion that programs like the program in *Scavella* would necessarily be affected by the court’s decision.<sup>60</sup>

For FY 2003-2004, DOE reports that there were 673 participating schools and 13,739 scholarship recipients. For FY 2004-2005, 15,910 students received scholarships to attend 703 participating schools. For FY 2005-2006 (as of November 1, 2005), 16,144 students received scholarships to attend 727 schools, with a total of \$97,276,718 in scholarship awards and an average scholarship award of \$6,117.

#### ***Corporate Tax Credit Scholarship Program (CTC program)***

The CTC program illustrates a wholly different type of funding for education. In fact, as one court has described it, the result of a credit is that the money never enters the state’s control,<sup>61</sup> i.e., its treasury, and therefore the money never becomes “state” funds. Tax credit scholarships were created to encourage private, voluntary contributions from corporate donors to nonprofit

<sup>52</sup> s. 1002.39(4), F.S.

<sup>53</sup> s. 1002.39(6), F.S.

<sup>54</sup> *Id.*

<sup>55</sup> s. 1002.39(4), F.S. Conditions include the school notifying the DOE of its intent to participate in the McKay program, providing certification of its financial stability, complying with federal antidiscrimination provisions, and adhering to hiring requirements for teachers.

<sup>56</sup> s. 1002.39(5)(f), F.S.

<sup>57</sup> Article I, s. 2, FL. CONST.

<sup>58</sup> See *Attorney General’s Brief* at 17, FN 4 (citing *Scavella v. School Bd. of Dade County*, 363 So. 2d 1095, 1098 (Fla. 1978)).

<sup>59</sup> 363 So. 2d 1095 (Fla. 1978).

<sup>60</sup> *Holmes*, 919 So. 2d at 411-412.

<sup>61</sup> *Kotterman v. Killian*, 972 P. 2d 606 (Ariz. 1999).



scholarship-funding organizations.<sup>62</sup> A corporation can receive a dollar for dollar tax credit toward up to 75 percent of its state income tax liability for donations to private nonprofit scholarship-funding organizations (SFOs). 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 nonprofit scholarship-funding organizations to students in grades kindergarten through 12 to attend private schools.

Similar to the other scholarship programs discussed, private schools participating in the CTC program must provide documentation of financial stability and comply with federal anti-discrimination law.<sup>63</sup> Private 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.

According to unverified data provided by the SFOs, 970 students received scholarships in FY 2001-2002 to attend a private school and no students received scholarships to attend a public school. Scholarship values ranged from \$284 to \$1,775. In FY 2002-2003, 19,206 students received scholarships to attend a private school and 107 students received scholarships to attend a public school, with a scholarship value ranging between \$100 and \$3500.<sup>64</sup> In FY 2003-2004, 11,550 students received scholarships to attend 924 participating schools. In FY 2004-2005, 10,473 students received scholarships to attend 973 schools. For 2005-2006, (as of November 1, 2005), 13,497 students received scholarships to attend 852 schools.

For FY 2005-2006, the DOE approved the following SFOs: Florida PRIDE, YES Opportunities, H.E.R.O.E.S., Children First Central Florida (CFCF) and Academy Prep. Florida PRIDE and YES Opportunities merged to become Florida PRIDE, while H.E.R.O.E.S. and CFCF merged to become Children First Florida (CFF). The Faith Based Scholarship Foundation of Florida and FloridaChild no longer participate in the program.

The following summarizes information related to the tax credits approved by the Department of Revenue:<sup>65</sup>

Tax Year	Number of Approved Tax Credit Applications	Number of Taxpayers	Total Amount of Tax Credits Approved for All Taxpayers	Number of Small Businesses Approved for Tax Credits	Total Amount of Tax Credits Approved for Small Businesses
2002-03	77	48	\$47,686,000	4	\$186,000
2003-04	114	56	\$47,579,000	3	\$ 79,000
2004-05	102	58	\$47,560,000	2	\$ 60,000
2005-06	113	69	\$74,020,071	1	\$ 1,000

The following reflects the credit allocations per SFO for 2005-2006:<sup>66</sup>

Academy Prep Foundation, Inc.	\$ 641,500
Children First Central Florida	\$ 18,003,750

<sup>62</sup> s. 220.187(1), F.S.

<sup>63</sup> s. 220.187(6), F.S.

<sup>64</sup> The DOE reports that 15,585 students received scholarships for FY 2002-2003 rather than 19,206 as reported by the SFOs.

<sup>65</sup> Department of Revenue, December 1, 2005.

<sup>66</sup> Department of Revenue, December 1, 2005.

Credit Carry Forward	\$ 6,188,478
Faith Based Scholarship Foundation of Florida	\$ 0
Florida School Choice Fund (Florida Pride)	\$ 32,466,411
FloridaChild	\$ 0
H.E.R.O.E.S.	\$ 13,916,182
YES OPPORTUNITIES, INC.	\$ 2,803,750
Total Allocations	\$ 74,020,071

The DOE approved the following scholarship-funding organizations with contributions received per indicated state fiscal year, according to information provided by the scholarship-funding organizations:

SFO	FY 2001-2002	FY 2002-2003	FY 2003-2004 (As of 9/2003)
Academy Prep Foundation	\$0	\$237,000	\$0
Children First Central Florida	\$829,375	\$14,187,000	\$1,320,297
Faith Based Scholarship Foundation of Florida	\$0	\$0	\$0
FloridaChild	\$475,000	\$18,845,425	\$2,745,333
Florida PRIDE	\$468,000	\$8,913,500	\$2,604,125
H.E.R.O.E.S.	\$0	\$5,193,500	\$1,050,000
Silver Archer Foundation	Unknown	Unknown <sup>67</sup>	Unknown
Yes Opportunities	\$0	\$1,050,000	\$250,000

**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*.<sup>68</sup>

**III. Effect of Proposed Changes:**

This bill creates a new program to enhance the performance of failing schools. The bill also provides for corporate tax credit scholarships to students attending failing schools so that a student has the choice of attending a higher performing public school or a private school while the failing public school to which a student is assigned is improving. While the new program is being implemented, students currently receiving opportunity scholarships are eligible to receive a tuition voucher under the existing Corporate Tax Credit Scholarship Program under s. 220.187, F.S. The proposed language also revises the current corporate tax credit scholarship program and provisions of the income tax code to conform to the creation of the new program. The existing Opportunity Scholarship Program is repealed by the bill.

<sup>67</sup> The Silver Archer Foundation LTD received \$412,500 in tax year 2003. The Chairman and Director of the Silver Archer Foundation were found guilty of Grand Theft in the first degree. See Florida Department of Financial Services, Consumer eViews, *Isenhour Found Guilty of Stealing Education Funds*, November 11, 2005, available at [http://www.fldfs.com/pressoffice/newsletter/2005/111405/November\\_1405.htm](http://www.fldfs.com/pressoffice/newsletter/2005/111405/November_1405.htm). DOE removed Silver Archer Foundation from the list of approved SFOs.

<sup>68</sup> See [http://www.flsenate.gov/data/Publications/2006/Senate/reports/interim\\_reports/pdf/2006-139ju.pdf](http://www.flsenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-139ju.pdf).

The bill provides whereas clauses to explain the basis for the proposed legislation. The clauses acknowledge the Supreme Court's ruling in *Bush v. Holmes*, and state that the Legislature is creating this program in response to the court's ruling that the constitution requires the state to provide a system of uniform, efficient, safe, secure, and high-quality public schools to provide free education to all children in the state.

The language in the clauses acknowledges that the court invalidated the OSP because the program allowed state funds to be disbursed to private schools. However, the language also states that there continue to be failing schools and that students attending those schools should have the choice of attending higher performing schools. Noting that the Legislature intends for the state to develop and implement a comprehensive plan for improving the schools, the language expresses the Legislature's intent to provide an alternative school choice for students in failing schools while the schools are improved.

### **School Improvement Program**

The bill creates s. 1008.3455, F.S., to provide for a new program designed to improve schools failing to make adequate progress based upon the school performance grading categories already in statute. School performance grade designations ("A," "B," "C," "D," and "F") are based upon a combination of student achievement scores, student learning gains (as measured by annual FCAT assessments in grades 3 through 10) and improvement of the lowest 25th percentile of students in the school in reading, math, or writing on the FCAT, unless these students are performing above the satisfactory performance level.<sup>69</sup>

The new section directs the Commissioner of Education to create a comprehensive strategic program to facilitate improvement of schools to be submitted to the Legislature by February 1, 2007. The program is targeted at improving "F" schools, and consists of the following:

- Assessing the extent to which new policies, or enhancements to existing policies, could be used to facilitate improvement of schools over a 5-year period of time;
- Creating an advisory committee comprised of teachers, staff, and parents to assist the Commissioner in creating and implementing the new program;
- Requiring the Commissioner to consult with other entities and to report annually to the Governor and presiding officers in the Legislature on the program's implementation; and
- Requiring specific recommendations for legislative action.

### **Corporate Income Tax Credit Scholarship Programs**

The bill revises the existing Corporate Tax Credit Scholarship Program (CTC) in s. 220.187, F.S., to conform to the creation of a similar program for students attending failing schools and provides that surplus funds collected under the existing CTC may be used for scholarships under the new program, upon approval of the DOE.

The definition of a qualified student under the existing CTC is revised to allow students currently receiving opportunity scholarships to be eligible to apply for a CTC tuition voucher under s.

---

<sup>69</sup> s. 1008.34, F.S.

220.187, F.S., while the provisions of the new scholarship program are implemented. Opportunity scholars who apply for a scholarship under the existing CTC program would be eligible to receive the maximum amount of the existing CTC scholarship for tuition—\$3,500—and would be subject to the new matriculation policy provided in s. 220.1875(8), F.S. In addition, the bill requires scholarship-funding organizations to give priority in awarding scholarships to students who currently receive opportunity scholarships.<sup>70</sup>

The proposed legislation adds a new section<sup>71</sup> under the Income Tax Code, chapter 220, F.S., to allow corporate income tax credits for donations to and the creation of a scholarship program for students attending schools failing to make adequate progress. Several components of the new program are similar to the existing CTC program, but the distinguishing elements between the two programs are that the new program:

- Defines a qualified student based upon attendance in a failing school instead of economic status;
- Allows eligible nonprofit scholarship-funding organizations under the existing CTC to be eligible for the new program, with the approval of the DOE;
- Requires the school district to notify qualified students of their eligibility to attend a higher-performing school in the same district, to apply for a scholarship toward transportation expenses associated with attending a public school in an adjoining district, or to apply for a scholarship to attend a private school;
- Limits the amount of tax credits that may be granted under the new program to \$5 million per year;
- Provides eligibility requirements for private schools participating in the new program;<sup>72</sup>
- Limits the duration of the scholarship based upon matriculation to different levels of education (e.g. elementary, middle, and high school); and
- Instructs failing public schools that lose students to continue to count scholarship students for purposes of receiving full state education funding.

A failing public school will continue to receive funding for the remainder of the time the scholarship student would have attended that school. The bill allows for surplus funds collected under the existing CTC program to be used for payment of scholarships under the new program, upon approval of the DOE. For the department to make this determination, it may be advisable to require the SFOs to provide the DOE with a copy of the annual financial and compliance audit that is submitted to the Auditor General. To track the transfers, it may be advisable to require all transferred funds to be deposited into the receiving organization's scholarship account and separately disclosed in the audit.

The bill allows an eligible SFO to give priority to a student who received a scholarship the prior school year. The scholarship does not have to have been provided by the SFO.

---

<sup>70</sup> s. 220.187(4)(b), F.S., currently requires that qualified students who received a scholarship from an eligible nonprofit scholarship-funding organization be given priority in scholarship awards. The bill would require that opportunity scholars be given equal consideration.

<sup>71</sup> Proposed s. 220.1875, F.S.

<sup>72</sup> The requirements essentially reflect those for current OSP participating schools.

The bill revises the tax code to conform to the creation of the new CTC scholarship program for families of students attending schools failing to make adequate progress.<sup>73</sup> Additionally, the income tax code is revised to provide that all corporate income tax revenue shall be deposited into a new trust fund rather than General Revenue. The new trust fund would have to be created in a separate bill.<sup>74</sup>

The bill repeals the Opportunity Scholarship Program and makes conforming changes to relevant provisions of law.

The bill provides an effective date of July 1, 2006.

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

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

Section 7 of the bill provides that taxes collected under chapter 220, F.S., the corporate income tax chapter, are to be deposited in a new Corporate Income Tax Trust Fund created under s. 220.7015, F.S., rather than in the General Revenue Fund as current law requires. Article III, s. 19, requires a separate bill to create or recreate a trust fund of the state or other public body. Senate Bill 2406 has been proposed for this purpose.

D. Other Constitutional Issues:

This bill appears to be designed to respond to the state courts' rulings on the Opportunity Scholarship Program (OSP) on state constitutional grounds. The Florida Supreme Court invalidated the program based upon art. IX, s. 1, or the free public schools provision, and the First District Court of Appeal invalidated the program based upon art. I, s. 3, or the no-aid provision. It is not known how a court would rule on these issues if the provisions of the bill were to be challenged in the future. For a more thorough explanation of the legal issues involved in the challenge to the OSP, see the "Present Situation" of this staff analysis.

---

<sup>73</sup> Specifically, ss. 213.053(7)(y), 220.02(8), and 220.13(1)(a), F.S.

<sup>74</sup> Senate Bill 2406 creates a new Corporate Income Tax Trust Fund for this purpose.

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

The bill would allow a corporation to receive a dollar for dollar tax credit toward up to 75 percent of its state income tax liability for donations to private scholarship funding organizations.

**B. Private Sector Impact:**

The bill would provide scholarships or transportation vouchers to families of students attending public schools failing to make adequate progress to cover expenses so that students may attend private schools or public schools in other districts, respectively. While the new program is being implemented, students currently receiving opportunity scholarships would be eligible to receive a tuition voucher under the existing CTC program. Opportunity scholars who apply for a scholarship under the existing CTC program would be eligible to receive the maximum amount of the existing CTC scholarship for tuition, which is currently \$3,500. This amount is less than the most recent average opportunity scholarship voucher amount, which is \$4,205 for the 2005-2006 school year.<sup>75</sup> Parents would be financially responsible for any remaining amount of the tuition, assuming it is higher than \$3,500.

In addition, the new matriculation policy provided in proposed s. 220.1875(8), F.S., would limit the duration of the scholarship based upon matriculation to different levels of education (e.g. elementary, middle, and high school). Thus, a student would no longer be eligible for a scholarship through graduation of high school unless the student is assigned to a failing school at each level of education.

**C. Government Sector Impact:**

The cost of implementing a comprehensive, long-term plan for improving schools, as envisioned by the bill, is indeterminate at this time. To the extent that the planning process is coordinated with the DOE's school improvement efforts under the federal No Child Left Behind Act, the cost may be mitigated.

The bill is not fiscally neutral in that payment is made to the private school for a scholarship student and to the public school that the student would have attended. Essentially, payment is made twice for the same student.

The bill revises the tax code to conform to the creation of the new Corporate Tax Credit scholarship program for families of students attending schools failing to make adequate progress. Additionally, the income tax code is revised to provide that all corporate income tax revenue shall be deposited into a new trust fund rather than General Revenue. The Department of Revenue reports that this bill has no fiscal impact on the operation of the department.

---

<sup>75</sup> Information provided by Department of Education staff.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Pursuant to s. 1.04, F.S., acts passed during the same legislative session and amending the same statutory provision are read in pari materia, and full effect should be given to each, if that is possible. Amendments enacted during the same session are in conflict with each other only to the extent that they cannot be simultaneously given effect. Senate Bill 256, which passed the Education Committee, amends several provisions relating to the John M. McKay Scholarships for Students with Disabilities Program and provisions related to the Corporate Tax Credit Scholarship Program. These changes may be in conflict with the bill's eligibility requirements for students who wish to participate in this program, for private schools, and for nonprofit scholarship-funding organizations. SB 256 also addresses concerns about the accountability of scholarship programs.<sup>76</sup>

---

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

---

---

<sup>76</sup> See *Audit of the McKay Scholarship, Opportunity Scholarship, and Corporate Tax Credit Scholarship Programs*, Department of Financial Services, Chief Financial Officer, December 10 2003, *John M. McKay Scholarships for Students with Disabilities Program Accountability and Corporate Tax Credit Scholarship Program Accountability*, Senate Education Committee interim project reports (2004-130 and 2004-132), November 2003, and *Florida Department of Education Operational Audit*, Audit Report 03-113, Office of the Auditor General, February 2003.





## **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.

---