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: Judiciary Committee

BILL:	SPB 7106
INTRODUCER:	For consideration by Judiciary Committee
SUBJECT:	Opportunity Scholarship Program
DATE:	February 14, 2006 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Chinn	Maclure		**Pre-meeting**
2.				
3.				
4.				
5.				
6.				

I. Summary:

This bill expresses the legislative intent to propose a joint resolution amending the State Constitution, in connection with Senate Interim Project 2006-139, entitled *Legal Issues and Policy Considerations Raised by the Challenge to the Opportunity Scholarship Program*.

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 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] 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.[3] 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.[4]

[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, making education in Florida a paramount duty of the state.
[2] Section 1002.38(1), F.S.
[3] Section 1002.38(4), F.S., provides eligibility requirements.
[4] *See* s. 1002.38(2)(b), F.S.

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.

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.[5] 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.[6] 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.[7] 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.[8] 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 and legally viable 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").[9] 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").[10]

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 report refers to the parties collectively as the challengers and the state.

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[5] See s. 1002.20(6)(a), F.S., for additional programs under which a student may transfer to another public school.
[6] Opportunity Scholarship Program Statistics, http://www.floridaschoolchoice.org.
[7] 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.
[8] Based upon numbers provided by the Department of Education (DOE) for September 2005 voucher payments.
[9] *Bush v. Holmes*, Nos. SC04-2323, SC04-2324, SC04-2325, 2006 WL 20584 (Fla. January 5, 2006).
[10] *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.[11] 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."[12] 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.[13] The federal clause provides that "Congress shall make no law respecting an establishment of religion…."[14] Subsequently, the challengers to the OSP voluntarily dismissed their claims under the federal Establishment Clause and the "the school fund provision" of the Florida Constitution.[15] The only remaining issue for the trial court to decide was whether the OSP violated the no-aid provision of the Florida Constitution.[16] The trial court held that the OSP facially violated the no-aid provision.

In an en banc[17] 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?"[18] On January 5, 2006, the Supreme Court issued it 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.[19]

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."[20] 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

[11] *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.
[12] *Id*. at 675.
[13] 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.
[14] U.S. CONST. amend. I.
[15] Article IX, s. 6, FL. CONST.
[16] *Holmes II*, 886 So. 2d at 345.
[17] 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.
[18] *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.
[19] 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.
[20] 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*, 2006 WL 20584, at *14.

execution of that mandate."[21] The court reasoned that the sentences comprising the free public schools provision must be read together.[22] 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.[23]

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.[24] 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.[25] Without state regulation, the court opined, private school curriculum standards may vary greatly depending on the accrediting body.[26] 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.[27] 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…."[28] 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.[29]

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.[30] As the First District Court of Appeal is

[21] *Id*. at *10.
[22] *Id*. (employing the principal of statutory construction *in pari materia*, which means the provisions are to be construed together to ascertain the general meaning).
[23] *Id.* at *10-11. See *supra* note 11, at 2, for discussion of the statutory construction *expressio unius est exlusio alterius.*
[24] *Id*. at *16 (emphasis added).
[25] *Id*. at *13.
[26] *Id*.
[27] *Id*. at *17 (Bell, J., dissenting).
[28] *Id*. at *19.
[29] *Id*. at *17 (citing *Taylor v. Dorsey*, 19 So. 2d 876, 882 (Fla. 1944)).
[30] *Id*. at *16.

the only appellate court to address the no-aid provision in this context,[31] its ruling is "the law of Florida" unless and until the Supreme Court addresses the issue.[32] Therefore, circuit courts in Florida are bound by the First District Court of Appeal's ruling on the no-aid provision.[33] 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.[34] 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.[35] 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.[36]

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;[37] and (3) the prohibited beneficiaries of the use of state revenues are "any church, sect or religious denomination" or "any sectarian institution."[38]

The district court invalidated the OSP to the extent that it authorizes state funds to eventually reach sectarian schools.[39] 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.[40]

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[31] *Holmes II*, 886 So. 2d at 367 (stating that the issue is "one of first impression").
[32] *Stanfill v. State*, 384 So. 2d 141, 143 (Fla. 1980); *Weiman v. McHaffie*, 470 So. 2d 682, 684 (Fla. 1985).
[33] *See State v. Hayes*, 333 So. 2d 51, 52 (Fla. 4th DCA 1976).
[34] 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."
[35] *Id*. at 344.
[36] *Id*.
[37] 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.
[38] *Id*. at 352.
[39] *Id*. at 344.
[40] *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.[41] 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*,[42] 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. [43]

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.[44] 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.[45] The court noted, however, that pre-kindergarten, community colleges, adult education, and general welfare programs are not implicated by its decision.[46] 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.[47]

McKay Scholarship Program

In the area of education, there are programs structured similarly to the OSP that utilize private schools. The McKay Scholarships for Students with Disabilities Program ("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.[48] 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.[49] 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.[50]

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[41] *Id*. at 344.
[42] 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.
[43] *See Holmes II*, 886 So. 2d at 344.
[44] *Holmes*, 2006 WL 20584, at *16.
[45] *Id*. at *15.
[46] *Id*. at *14-15. 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.
[47] 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.
[48] Section 1002.20(6)(b)2., F.S.
[49] Section 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.
[50] Section 1002.39(5)(f), F.S.

One 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 Florida Constitution,[51] to adequate public funding for private school education when public schools lack services to meet the needs of students with disabilities.[52] 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*.[53] 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.[54]

Corporate Tax Credit Scholarship Program

The Corporate Tax Credit Scholarship Program ("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,[55] 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 non-profit scholarship funding organizations.[56] 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 scholarship 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 non-public schools, which may be sectarian or non-sectarian.

Similar to the other scholarship programs discussed, non-public schools participating in the CTC program must provide documentation of financial stability and comply with federal anti-discrimination law.[57] Non-public schools participating in the program must comply with all state laws regulating private schools, but there are fewer restrictions on the schools' admissions policies and curriculum. The Supreme Court did not address the CTC program, but it is discussed here because it is an educational program utilizing private schools.

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*.[58]

[51] Article I, s. 2, FL. CONST.
[52] See *Attorney General's Brief* at 17, FN 4 (citing *Scavella v. School Bd. of Dade County*, 363 So. 2d 1095, 1098 (Fla. 1978)).
[53] 363 So. 2d 1095 (Fla. 1978).
[54] *Holmes*, 2006 WL 20584, at *15.
[55] *Kotterman v. Killian*, 972 P. 2d 606 (Ariz. 1999).
[56] Section 220.187(1), F.S.
[57] Section 220.187(6), F.S.
[58] See http://www.flsenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-139ju.pdf.

III. Effect of Proposed Changes:

This bill expresses the legislative intent to propose a joint resolution amending the State Constitution, relating to the issues raised in the legal challenge to the Opportunity Scholarship Program.

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.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.