The Florida Senate

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Committee on Judiciary Senator Daniel Webster, Chair

LEGAL ISSUES AND POLICY CONSIDERATIONS RAISED BY THE CHALLENGE TO THE OPPORTUNITY SCHOLARSHIP PROGRAM

SUMMARY

Florida's Opportunity Scholarship Program (OSP) allows a student at a failing public school to attend another non-failing public school or a private school, sectarian or non-sectarian. On January 5, 2006, the Florida Supreme Court ruled that the OSP violates art. IX, s. 1(a), of the State Constitution, requiring that adequate provision shall be made for a "uniform, efficient, safe, secure, and high quality system of free public schools." The court held that this language creates both a mandate to provide for children's education and a restriction on the execution of that mandate. Specifically, the provision requires the state to maintain a system of free *public* schools that is *uniform* throughout the state. Thus, according to the court, the Legislature is restricted from fulfilling the state's mandate by diverting public funds from the uniform system of public schools to competing private, non-uniform schools.

The court's ruling affirmed the First District Court of Appeal's invalidation of the OSP but did not address the certified question on art. I, s. 3, of the State Constitution. Also known as the "no-aid" provision, this portion of the constitution prohibits the state from disbursing funds in aid of any sectarian institution.

This report evaluates the legal issues and rationale put forth in *Bush v. Holmes*, to give the Senate a framework for evaluating policy responses that it may wish to explore in response to the courts' opinions.

BACKGROUND

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]

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

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

[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] s. 1002.38(1), F.S.
[3] Section 1002.38(4), F.S., provides eligibility requirements.
[4] *See* s. 1002.38(2)(b), F.S.

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.

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

[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*").
[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.

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]

The purpose of this interim project is to evaluate the legal issues and rationale put forth in *Bush v. Holmes*, to give the Senate a framework for evaluating policy responses that it may wish to explore in response to the Supreme Court and district court opinions.

METHODOLOGY

Committee staff reviewed decisions, briefs, and oral arguments related to *Bush v. Holmes*; reviewed relevant federal and state case law, legal literature, and statutory and constitutional history; and interviewed state education personnel, legal counsel involved in *Bush v. Holmes*, constitutional scholars, and a sampling of administrators in private schools.

FINDINGS

Florida's Free Public Schools Provision

The state first provided for a system of free public schools when it adopted the Constitution of 1868.[20] The constitution provided that it was the "paramount duty" of the state to provide for education and that the Legislature was to provide a "uniform system of Common Schools."[21] The specifications of the degree to which the state must provide for education within its borders have changed over the years, but revisions to art. IX, s. 1, in 1998 saw a return to education being a "paramount duty" of the state.[22] The Constitutional Revision Commission's intent to revise the provision to codify a Florida Supreme Court decision relating to education as a "fundamental value" of the state was also evident in the language of the 1998 revision.[23] Today the provision reads, in part:

> *Adequate provision shall be made by law for a **uniform**, efficient, safe, secure, and high quality system of **free public schools** that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require. (Art. IX, §1(a))*

One constant through all revisions to the public schools provision has been that the school system be "uniform." Case law has defined uniform in the educational context to mean that the public school system is "established upon principles that are of uniform operation throughout the State and that such system [is] liberally maintained."[24] The idea of uniformity is not that public schools must deliver equal service to each student or to spend equally, but rather, the duty to each student is a substantially equal chance at an education.[25] In fact, variance from county to county is permissible "so long as no district suffers a disadvantage in the basic educational opportunities available to its students, as compared to the basic educational opportunities available to students of other Florida districts."[26]

Florida's No-Aid Provision

The constitutional provision that the district court used to invalidate the OSP is generally referred to as the no-aid provision or the state's Blaine Amendment. The origin of Blaine Amendments can be traced to 1875 during the administration of President Ulysses S. Grant, who recommended an amendment to the U.S. Constitution denying all direct or indirect public support to sectarian institutions. Then-Speaker of the U.S. House of Representatives James G. Blaine proposed an amendment to effectuate Grant's wishes.[27] The measure passed overwhelmingly in the House (180-7), but failed to satisfy the supermajority needed in the Senate by four

[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] At that time, the phase "common schools" was used to denote public schools.

[21] Article VIII, ss. 1 and 2, FL. CONST. (1868).

[22] *Holmes*, 2006 WL 20584, at *7 (quoting William A. Buzzett and Deborah K. Kearney, *Commentary*, art. IX, s. 1, 26A FLA. STAT. ANN.).

[23] *Id*. at *6.

[24] *State ex rel. Clark v. Henderson*, 188 So. 351, 352 (Fla. 1939).

[25] Jon Mills and Timothy McLendon, *Setting a New Standard for Public Education: Revision 6 Increases the Duty of the State to Make "Adequate Provision" for Florida Schools*, 52 Fla. L. Rev. 329, 355 (2000).

[26] *Id*. (quoting *Dept. of Educ. v. Glasser*, 622 So. 2d 944, 950 (Fla. 1993) (Kogan, J., concurring)).

[27] See http://blaineamendments.org for the text of the proposed federal Blaine Amendment.

votes. When the amendment failed at the federal level, supporters turned their attention to the states. Provisions were voluntarily adopted in several existing states and were required as part of gaining statehood in others.

Florida originally adopted its no-aid provision in the Constitution of 1885.[28] The Constitutional Revision Commission that participated in the drafting of the most recent version of Florida's constitution proposed a version of art. I, s. 3, that omitted the no-aid language.[29] The final version that passed the Legislature and was ratified by the voters in 1968, however, retained the no-aid provision and reads:

> *There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof....**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. (Art. I, §3)*

The language has not been amended since its adoption in 1968.

Supreme Court Rules: Free Public Schools

Although the case came before the Supreme Court on the specific issue of whether the OSP violated the constitution's prohibition against public funds aiding sectarian institutions, the questions posed by some justices during oral arguments were perhaps foretelling of the court's interest in the constitution's free public schools provision, as well. Ultimately, 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."[30]

The court found that the free public schools 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 execution of that mandate."[31] The court reasoned that the sentences comprising the free public schools provision must be read together.[32] 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.[33]

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.[34] 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.[35] Without state regulation, the court opined, private school curriculum standards may vary greatly depending on the accrediting body.[36] 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.[37] 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…."[38] 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

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[28] Declaration of Rights, s. 6, FL. CONST. (1885) read that:
> No preference shall be given by law to any church, sect or mode of worship, and no money 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.

[29] *Holmes II*, 886 So. 2d at 351.

[30] 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.

[31] *Id*. at *10.

[32] *Id*. (employing the principal of statutory construction *in pari materia*, which means the provisions are to be construed together to ascertain the general meaning).

[33] *Id.* at *10-11. See *supra* note 11, at 2, for discussion of the statutory construction *expressio unius est exlusio alterius*.

[34] *Id*. at *16 (emphasis added).

[35] *Id*. at *13.

[36] *Id*.

[37] *Id*. at *17 (Bell, J., dissenting).

[38] *Id*. at *19.

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.[39]

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.[40] As the First District Court of Appeal is the only appellate court to address the no-aid provision in this context,[41] its ruling is "the law of Florida" unless and until the Supreme Court addresses the issue.[42] Therefore, circuit courts in Florida are bound by the First District Court of Appeal's ruling on the no-aid provision.[43] 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.[44] 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.[45] 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.[46]

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;[47] and (3) the prohibited beneficiaries of the use of state revenues are "any church, sect or religious denomination" or "any sectarian institution."[48]

The district court invalidated the OSP to the extent that it authorizes state funds to eventually reach sectarian schools.[49] 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.[50]

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.[51] 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*,[52] the

[39] *Id*. at *17 (citing *Taylor v. Dorsey*, 19 So. 2d 876, 882 (Fla. 1944)).
[40] *Id*. at *16.
[41] *Holmes II*, 886 So. 2d at 367 (stating that the issue is "one of first impression").
[42] *Stanfill v. State*, 384 So. 2d 141, 143 (Fla. 1980); *Weiman v. McHaffie*, 470 So. 2d 682, 684 (Fla. 1985).
[43] *See State v. Hayes*, 333 So. 2d 51, 52 (Fla. 4th DCA 1976).
[44] 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."
[45] *Id*. at 344.
[46] *Id*.
[47] 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.
[48] *Id*. at 352.
[49] *Id*. at 344.
[50] *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).
[51] *Id*. at 344.
[52] 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

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. [53]

The dissent would have upheld the program based upon its finding that Florida's no-aid provision is no different than the federal Establishment Clause.[54] Though the federal clause does not explicitly contain the language of Florida's no-aid provision, the U.S. Supreme Court's *interpretations* of the federal clause address both direct and indirect aid.[55] Applying this reasoning, the dissent drew its own comparison of the OSP to the state program upheld in *Zelman*.

The question asked by the Court in *Zelman* was "whether a program that distributes aid to beneficiaries, rather than directly to service providers, has the primary effect of advancing or inhibiting religion."[56] Consideration of the primary effect of a program consists of two factors: whether the program administers aid in a neutral fashion, without differentiation based on the religious status of beneficiaries or providers; and whether beneficiaries of indirect aid have a genuine choice among religious and nonreligious organizations when determining where to direct that aid.[57] If a program does not satisfy either of these considerations, it would fail the primary-effects prong of a test used to show whether a program is in violation of the federal Establishment Clause.

Like the program in *Zelman*, OSP vouchers are distributed to students based upon nonreligious criteria and parents have religious and nonreligious schools to which they may direct vouchers. Assuming that the state's no-aid provision is no more restrictive than the federal Establishment Clause, the dissent would uphold the program for the same reasoning espoused in *Zelman*.[58]

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.[59] 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.[60] The court noted, however, that pre-kindergarten, community colleges, adult education, and general welfare programs are not implicated by its decision.[61] 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.[62]

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.[63] 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.[64] Additionally, the distribution of McKay

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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.

[53] *See Holmes II*, 886 So. 2d at 344.

[54] *Holmes II*, 886 So. 2d at 386 (Polston, J., dissenting).

[55] *Id*.

[56] *Id*. at 386-387 (quoting *Zelman v. Simmons-Harris*, 536 U.S. 639, 668-669 (2002) (O'Connor, J., concurring)). The Court was applying the primary-effects prong of the *Lemon v. Kurtzman* test used in federal Establishment Clause funding cases.

[57] *Id*. (quoting *Zelman* at 668-669) (O'Connor, J., concurring).

[58] *Id*. at 387. The reasoning in *Zelman* was that the program was part of a general and multifaceted undertaking by the state to provide educational opportunities to the children of a failed school district on neutral terms, with no reference to religion. *Zelman*, 536 U.S. at 653.

[59] *Holmes*, 2006 WL 20584, at *16.

[60] *Id*. at *15.

[61] *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.

[62] 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.

[63] s. 1002.20(6)(b)2., F.S.

[64] 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.

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.[65]

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,[66] to adequate public funding for private school education when public schools lack services to meet the needs of students with disabilities.[67] 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*.[68] 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.[69]

The Corporate Tax Credit Scholarship Program ("CTC program") illustrates a wholly different type of funding for education. Tax credit scholarships were created to encourage private, voluntary contributions from corporate donors to non-profit scholarship funding organizations.[70] 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.[71] 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.

Another program that utilizes private providers is the Voluntary Prekindergarten Education Program ("VPK program"). Implemented in the 2005-2006 school year, the program allows public and private schools to receive funding for educating students who are four years old.[72] Apart from allowing religiously affiliated providers, the eligibility criteria for the VPK program providers are dissimilar to OSP and McKay program requirements.[73] The funds disbursement is also distinct from the other two programs: the Agency for Workforce Innovation disburses funds to 31 early learning coalitions, which then distribute funds directly to providers on the basis of the number of students enrolled in the program.

The Supreme Court held that the language of the constitutional amendment mandating the state to provide prekindergarten does not provide the means that must be utilized to achieve this mandate.[74] Further, the Legislature is "free under section 1(b) to provide for pre-kindergarten education in any manner it desires, *consistent with other applicable constitutional provisions.*"[75] The Supreme Court found that, because it is not subject to language similar to the free public schools provision, the VPK program is not affected by the court's invalidation of the OSP. However, the dicta above notes that VPK must still be consistent with other constitutional provisions. Similar to the McKay and CTC programs, which utilize private sectarian schools, VPK may be challenged under the no-aid provision used as the basis for invalidating the OSP in the district court's ruling.[76]

RECOMMENDATIONS

The Florida Supreme Court based its recent invalidation of the Opportunity Scholarship Program (OSP) on the free public schools provision of the State Constitution. The court held the provision establishes a mandate that the state must provide for education through a uniform system of free public schools. In its opinion, however, the court declined to reach the District Court of Appeal's earlier determination that the OSP violates the no-aid

[65] s. 1002.39(5)(f), F.S.
[66] Article I, s. 2, FL. CONST.
[67] See *Attorney General's Brief* at 17, FN 4 (citing *Scavella v. School Bd. of Dade County*, 363 So. 2d 1095, 1098 (Fla. 1978)).
[68] 363 So. 2d 1095 (Fla. 1978).
[69] *Holmes*, 2006 WL 20584, at *15.
[70] s. 220.187(1), F.S.
[71] s. 220.187(6), F.S.
[72] Article IX, s. 1(b), FL. CONST.
[73] *See*, *generally*, s. 1002.55, F.S.
[74] *Holmes*, 2006 WL 20584, at *14.
[75] *Id*. (emphasis added).
[76] See *supra* notes 42 and 43, at 5 (holding that lower courts are bound by a district court ruling until the Supreme Court addresses an issue).

provision, which prohibits the state from disbursing public funds in aid of a sectarian institution. If the Legislature wishes to respond to the Supreme Court or district court decisions, it could consider from among, or a combination of, the following approaches:

- Proposing a joint resolution to amend Article IX, the education article of the constitution;
- Proposing a joint resolution to amend the no-aid provision of the constitution;
- Exploring the extent to which statutory reforms to the OSP could address the constitutional issues.

Amending the Education Article

Because the Supreme Court reasoned that a uniform system of free public schools is the constitutionally required manner in which the state must meet its education mandate, an approach that seeks to amend Article IX could include the addition of language to make clear that the Legislature is not limited to this one particular manner of meeting its mandate. The proposed constitutional language, for example, could generally authorize other kinds of education programs or specifically authorize vouchers or other private educational scholarship programs as provided by law.

It is not known to what extent a future court might rely on the rationale of the *Bush v. Holmes* decision to conclude that the Legislature is similarly restricted elsewhere in the constitution to delivering public policies in a particular manner. Thus, it is not known whether including additional authority in the education article would create a precedent for comparable language having to be present in other areas.

Amending the No-Aid Provision

If the Legislature wishes to respond to the district court's invalidation of the OSP based on the no-aid provision, it could pursue a joint resolution to repeal either the words "directly or indirectly" or the entire third sentence (i.e., the no-aid provision) from art. I, s. 3, of the State Constitution. The First District Court of Appeal and the challengers have cited the "directly or indirectly" language in justifying their views that the State Constitution requires more than the federal constitution. It would stand to reason that, if all or part of this provision were removed, Florida law would then follow federal precedent on federal Establishment and Free Exercise Clauses, which have upheld voucher programs.[77] A drawback to this approach is that it may leave interpretation of the State Constitution to future U.S. Supreme Court decisions. An alternative solution could be to amend the constitution to *add* language that limits the no-aid provision's applicability, but it is not certain how a court would interpret added language.

Exploring Statutory OSP Reforms

If the Legislature pursues statutory reforms to the OSP, it could explore funding mechanisms that arguably do not detract from or compete with the public school system. The Corporate Tax Credit Scholarship Program may serve as a guide for such a legislative approach. As one court has described it, the result of a credit is that the money never enters the state's control,[78] i.e., its treasury, and therefore the money never becomes "state" funds. If the money is not considered state funds, it would not be subject to the restrictions put forth in the free public schools or no-aid provisions of the constitution.

If the Legislature were to address the Supreme Court's Article IX concerns constitutionally (without statutorily restructuring the funding mechanism), the Legislature could revise the program to limit participation to public and non-sectarian private schools in order to address concerns about the no-aid provision. A potential consideration of such an approach, however, is that the revised OSP statute might be challenged under the federal Free Exercise Clause if it can be argued that not including religious institutions discriminates against religion.[79]

The Legislature could also modify the OSP by revising a statutory framework for private religious schools participating in the OSP. The revision could require schools participating in the OSP to erect a formal legal division between the sectarian portion of the enterprise and the separate educational entity.[80] A consideration under this approach, however, would be that it could create government entanglement with religion in violation of federal case law with respect to the Establishment Clause.[81] Additionally, a majority of the participating private schools have fewer than 10 opportunity scholars, and it is unknown whether requiring sectarian schools to create a legally separate entity would discourage school participation.

[77] *See, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

[78] *Kotterman v. Killian*, 972 P. 2d 606 (Ariz. 1999).

[79] *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

[80] *Brief of Professor Steven G. Gey as Amicus Curiae Supporting Appellees* at 17.

[81] *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).