



# The Florida Senate

Interim Project Report 2004-130

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Committee on Education

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## MCKAY SCHOLARSHIP PROGRAM ACCOUNTABILITY

### SUMMARY

John M. McKay Scholarships for Students with Disabilities Program has grown dramatically and rapidly since its inception in 1999, with two participating students, to its enrollment during the 2002-2003 school year of over 9,000 students. Administrative practices likely have not kept up with this rapidly burgeoning number of scholarship students.

The program has suffered from extensive public criticism of the questionable business practices of certain private schools accepting McKay Scholarship students, as well as reports of students receiving long-term scholarships under the program for disabilities that were in fact temporary and short-lived. Some of the problems experienced in the program are likely due to technical problems in the statute governing the program, while others are due to failures in administration.

Findings from the committee interim study suggest numerous potential solutions to the program's problems. Recommendations include some legislative remedies; solutions to some problems, however, will require the implementation of rules, administrative changes, or changes in approach by the Department of Education and the State Board of Education.

The program is extremely popular with parents of disabled students, and many students have testified as to its positive impact on their lives. Additionally, the imposition of excessive requirements on participating private schools will likely prevent some schools from participating in the program, to the detriment of students' choice. The challenge will be to improve the program to prevent abuses while achieving greater focus on – and efficiency of – administration of the program.

### BACKGROUND

The John M. McKay Scholarships for Students with Disabilities Program, set forth in s. 1002.39, F.S.,

enables Florida public school students with disabilities to attend a public school or private school of their choice and provides scholarships to those students who choose to attend a private school. The program has experienced significant growth since it was established by the 1999 Legislature in one district and was expanded statewide in 2000.

The program is funded through the Florida Education Finance Program. According to the Department of Education (DOE), the program made total payments of \$3,525 for two students in the pilot program in 1999, with one participating private school. For the fiscal years ended June 30, 2001, 2002, and 2003, the program had 1,021, 5,019 and 9,130 participating students, respectively, and made scholarship payments of approximately \$6 million, \$28 million, and \$53 million.<sup>1</sup> Table A provides additional details related to scholarship payments.

**Table A**  
Scholarship Awards and Participating Private Schools

	FY 2000-2001	FY 2001-2002	FY 2002-2003
<b>Average scholarship award</b>	\$ 6,066	\$ 5,550	\$ 5,840
<b>Minimum scholarship award</b>	\$ 2,685	\$ 1,700	\$ 2,205
<b>Maximum scholarship award</b>	\$ 20,140	\$ 20,066	\$ 21,326
<b>Number of Participating Private Schools</b>	100	296	518

Source: Florida DOE, September 3, 2003

Students in kindergarten through grade 12 who have an Individual Education Plan (IEP), who spent the prior year attending a Florida public school, and who fall into the following exceptionalities are eligible to

<sup>1</sup> Office of the Auditor General, Report 03-113, 2/2003.

participate in the program: mentally handicapped, speech and language impaired, deaf or hard of hearing, visually impaired, dual sensory impaired, physically impaired, emotionally handicapped, specific learning disabled, hospitalized or homebound, and autistic.

Private schools are permitted to receive scholarship funds through the program after meeting statutory financial eligibility criteria. They are also required to comply with all other laws regulating private schools and to abide by anti-discrimination laws and health and safety codes and laws. Private schools must remain academically accountable to parents and must employ teachers who at least have some expertise that qualifies them to provide instruction in the subjects taught. Unlike the Corporate Tax Scholarship program, the state administers this program and prepares and delivers McKay scholarship funds to schools.

Over the past two decades, the percentage growth in Florida's population of children with disabilities has outpaced that of the total student population. While this is a nationwide trend, the number of children with disabilities has also been growing faster in Florida than in several other comparable states.<sup>2</sup>

The Florida Department of Financial Services is currently conducting an investigation of the McKay Scholarship Program.

## METHODOLOGY

The Senate President appointed a task force to address the issue of McKay Scholarship Program Accountability. The task force identified and reviewed the problem elements of the current scholarship program operation and recommended that an Education Committee interim project be conducted to develop a program accountability system.

In support of the task force's initial efforts, Committee staff researched and reviewed the literature, congressional hearing information, and Florida law. Staff also conducted interviews, held informal meetings with interested parties, and conducted a survey of school districts, with the assistance of the Florida Association of School Superintendents. Information

was analyzed from responses to questionnaires sent to the DOE and the Department of Financial Services. Staff met with private school representatives and monitored the efforts of the Governor's office and the DOE to improve program accountability. Finally, staff submitted accountability proposals to the Task Force members for their review and recommendations.

## FINDINGS

### *Role of the State Board of Education:*

The State Board of Education has not been actively involved in improving accountability in the McKay scholarship program, having had only one report – and no discussions – on the program in the last year. The State Board of Education currently has authority under s. 1002.39(8), F.S., to adopt rules regarding the program. The definition of “rule” under s. 120.52(15), F.S., is expansive, and rules to implement the scholarship program are almost certainly necessary; the State Board of Education has not, however, adopted any rules with respect to the program to date. The program would be well-served by the adoption of rules regarding policies involving, among others, the definition of “attendance” for scholarship payment, procedures for the investigation of complaints against private schools, and the imposition of compliance-related requirements upon participating private schools.

All new requirements or policies established for the program should be officially adopted as rules by the State Board of Education according to procedures in Ch. 120, F.S.; if not, they will likely constitute an “invalid exercise of delegated legislative authority” by the DOE under s. 120.52(8), F.S.

### *Role of School Districts; Use of Matrixes:*

Families and private schools have complained that school districts have been slow in performing their duties in connection with the program. Many school districts, in turn, report that they bear a substantial administrative burden with respect to the McKay scholarship program, which diverts resources in their local exceptional student education program from students in the public school system. Districts report that they perform the following administrative tasks with respect to the program:

- Research IEP and matrix information for each student who applies to the program;

<sup>2</sup> OPPAGA Report # 03-40, July 2003.

- Assist with or complete the scholarship enrollment process for students;
- Research and identify all discrepancies in the state's information that will ultimately become the FTE for the McKay students;
- Follow scholarship students from year to year, including maintaining accurate information concerning enrollment, drop-out reporting, and FEFP codes;
- Answer phone calls from parents, including calls that result when private schools direct parents to ask the district for information that may be obtained from the DOE's website, calls from unhappy parents who contact the district in hopes of the district correcting the private school, or calls from parents pressuring the district to reassess their child for additional funding.

Under s. 1002.39, F.S., it is the district's responsibility to complete the matrix of services that the student will require because funding for disabled students is partially based on these matrixes. Greater efficiency in the application of matrixes would reduce the administrative burden on districts, which must correct data and other errors regarding the matrixes. A recent OPPAGA report noted that matrixes for exceptional students have yet to be effectively or consistently implemented. This study revealed that 25 percent of the student files reviewed had at least one data error regarding the matrix.<sup>3</sup>

Although the DOE maintains a policy that a matrix cannot be revised after it is assigned to a student, this prohibition is not set forth in law or rule. Section 1002.39, F.S., is generally silent on the issue of changes to matrixes, neither permitting nor prohibiting such changes generally.

Department of Education personnel report that permitting changes to matrixes on an ongoing basis (throughout each student's career) would add dramatically to administration costs, due to the need for continual reassessments and the need to track and report the changing matrixes. Permitting ongoing changes to matrixes would also decrease funding certainty, while adding administrative costs in the funding process as well.

***Role of the Department of Education; Issues in the Choice Office:***

Over the last year, private schools and school

districts have complained about unresponsiveness by the DOE Choice Office to their concerns, as well as a lack of ability to communicate efficiently with DOE personnel. The Choice Office has been subject to substantial and ongoing staff turnover during the past year, in part due to reassignments of Choice Office staff initiated by DOE administration. The Office of Independent Private Education and Parental Choice as well as the Choice Office are currently being reorganized following a review of all choice initiatives in the DOE.

Published reports, former Choice Office employees and some private schools suggest that the DOE has not been performing certain screening and monitoring functions with respect to the program. Some unstable schools have been permitted to participate in the program. During the 2002-2003 school year, for example, newspapers reported on a school that was held in an abandoned house subject to numerous health code violations (and was later moved, without city permission, to a public library.) Inspectors found the house almost totally unfurnished, with few textbooks or supplies for use by the twenty or so disabled students in the school. In another case, the Florida Department of Law Enforcement investigated a person accused of mishandling McKay scholarship money, but declined to press criminal charges, in part due to a level of vagueness in s. 1002.39, F.S., that made it difficult to ascertain whether the law had been violated or not. In that case, former school employees alleged that promised specialized services were not provided to students and that the school was accepting scholarship money for students who no longer attended.

There is some confusion over the role of the DOE among various stakeholders in the program, part of which results from ambiguities in the statute. Additionally, the DOE may not have sufficient statutory authority to investigate and enforce all aspects of the program. For example, the Department lacks explicit statutory authority to investigate violations of eligibility requirements and to remove schools that violate the law from the list of schools approved to receive McKay program funds (although it has in fact done so in the past). The DOE Choice Office is also hindered in the enforcement process by the State Board of Education's failure to adopt rules for the program. For example, in response to reports of abuses by private schools, the Department has promulgated additional eligibility requirements for private schools

<sup>3</sup> OPPAGA Report # 03-40, July 2003.

in recent months, which some private schools have voluntarily met. In the event of a challenge to these new requirements, however, there is no assurance that, absent the adoption of rules relating to the requirements by the State Board of Education, the requirements would not be found an “invalid exercise of delegated legislative authority” by the DOE under s. 120.52(8), F.S.

***Lack of Independent Verification of Information by the Department of Education:***

Compliance by McKay schools with health and safety laws, antidiscrimination laws, and general laws governing private schools, as required in s. 1002.39, F.S., has not been independently verified by the DOE except in reaction to reports of violations. The DOE does require that all private schools participating in the McKay program fill out a questionnaire affirming that the schools comply with legal requirements. Current statutory and administrative schemes do not, however, provide a mechanism for the state to independently verify information provided to them by private schools, including verifying whether students are actually present at the private schools receiving McKay funds.

Under s. 1002.42(4), F.S., private schools are required to keep student attendance records. Schools participating in the McKay scholarship program self-report student attendance to the DOE. The main controls against “phantom student” charges are the existing statutory requirements that a student have been in attendance at a Florida public school prior to receiving a scholarship and that scholarship checks be received by private schools but made out to parents. In some instances, however, parents have signed powers of attorney in favor of the private school. This practice effectively removes the parent from active participation in the funding process, leading to an opportunity for fraud by the private school. Current law does not, however, specifically prohibit the grant of powers of attorney by parents to private schools.

A recent audit by the Auditor General identified that 18 of 60 McKay scholarship warrants reviewed were not endorsed according to statutory requirements.<sup>4</sup> Improper endorsement practices identified on these 18 warrants included endorsement by only one party

instead of the two required by law, failure to restrictively endorse warrants to the school, and endorsement of checks by school managers pursuant to powers of attorney accepted from parents.

The Auditor General recommended a legislative review of the program’s endorsement practices to determine if revisions are needed. In response to the audit, the DOE noted that current law does not provide for controls once the warrant has been issued and mailed. The DOE indicated that its staff would provide legislative recommendations with respect to this issue.

District oversight of McKay students will in some instances prevent the double funding of a child at both a participating private school and a public school. Additional safeguards appear necessary, however. For example, if a student moved out of state or dropped out of high school, a private school bent on committing fraud could continue to receive checks for the student and forge the parent’s signature. Assuming that the periodic student reevaluations required by federal law are performed by school districts, such a scheme could not continue indefinitely. Districts cannot mandate participation in reevaluations, however, as parental consent is required, and some districts report little participation by private school students in reevaluations. Because of these factors, reevaluations may not always function efficiently as an accountability mechanism.

At the state level, the DOE should continue to check McKay Scholarship students against lists of public school students to ensure that double funding does not occur.

***Insufficiency of Statutory Financial Eligibility Criteria and Academic Accountability Measures:***

As noted above, some unstable schools have been approved for participation in the McKay Scholarship program. Currently, statutory financial eligibility requirements for private schools are relatively insubstantial and provide little assurance of continuity of education for the students participating in the program. For example, schools may establish financial eligibility under s. 1002.39(4)(a) by having been in operation for one year. Many accreditation organizations, by contrast, will not accredit schools unless they have been in operation for at least three years. Additionally, even schools that operate successfully for a matter of years can very quickly fail if subjected to mismanagement. Additional

<sup>4</sup> Audit Report 03-113, *Florida Department of Education Operational Audit*, February 2003.

means for establishing financial stability under s. 1002.39(4)(a) include the filing of a surety bond or letter of credit with the DOE in an amount equal to one quarter's scholarship funds. These options would provide very little evidence of stability of a school, even if they were actually filed with the DOE, as required by law, and reviewed. At a minimum, if these options are retained, schools should be required to file copies with the DOE for review, but the review and ongoing tracking of these financial instruments (many of which may be effective only for a limited time duration) could result in a substantial administrative burden.

The McKay Scholarship program is based on the concept of parental oversight of academic requirements in the private school. While this parental oversight model cannot be substantially changed without dramatically raising state administrative costs and costs to private schools, it may be worthwhile to require that additional proof of academic progress be provided to parents. McKay Scholarship students, because they vary widely in ability, are not a population easily assessed using the same testing mechanism for all. Accordingly, a requirement for testing these students should give private schools the flexibility to determine the testing instrument while assuring parents of at least annual reports of their child's progress. The use of such annual assessments may provide valuable consumer protection without shifting responsibility for academic oversight away from the parent to the state.

#### ***Verification of Compliance with Criminal Background Check Requirements:***

Under current law (s. 1002.42, F.S.), only private school owners, not teachers, are required to file a set of fingerprints with the Florida Department of Law Enforcement (FDLE) for a criminal background check. The results of these background checks are then sent to the private school owners themselves – not to the DOE – with the requirement that they be made available for public inspection in the private school office. FDLE personnel report that, once the background check is performed, it is sent directly to the private school in accordance with state law and that FDLE personnel, as a matter of standard procedure (and also in accordance with the requirements of s. 1002.42, F.S.) do not review the background check results prior to sending them to the private school owner.

While state law makes it illegal (s. 1002.42, F.S.) for

a person who has been convicted of a crime of moral turpitude to own or operate a Florida private school, because no state party reviews the background check results, there is no current mechanism to check for violations of this prohibition.

#### ***Home Education Programs; Hospitalized and Homebound Students:***

Two issues arise in the context of the McKay Scholarship, hospitalized/homebound students and standard home education programs:

First, hospitalized and homebound students are specifically permitted to receive McKay scholarships under s. 1002.39(1), F.S. The category of public school students who are classified as “hospitalized/homebound” pursuant to State Board of Education rule 6A-6.03020, F.A.C., may, however, include traditional ESE students as well as students who are temporarily homebound due to a broken leg or other short-term condition. Under current law, once a McKay scholarship is awarded, it is retained by the student until high school graduation or until it is voluntarily relinquished. This means that, for example, a child who was temporarily homebound with a bad leg break in the 2<sup>nd</sup> grade could retain a McKay scholarship through high school graduation.

Second, some students with disabilities who are not in fact homebound or hospitalized as described under State Board of Education rule may receive their education in a home education program directed by their parents. These voluntarily “home-schooled” children should not receive McKay funding, as the program by law provides funding only to “private schools,” the statutory definition of which (in s. 1002.01(2), F.S.) specifically excludes home education programs. In spite of this definition, the DOE approved at least one school with a home education component for participation in the program. In that case, a “private school” was established that allegedly provided few or no services to home education students and forwarded a percentage of McKay scholarship funds to the students' parents, while retaining a percentage of the scholarship funds as a “fee.” Additionally, at least one school district has reported a “private school” that was apparently established by a home education parent for the purpose of receiving McKay scholarship funds.

***Participation of Correspondence or Distance Learning Schools in the Program:***

A private correspondence or distance learning school that is not directed by a student's parent (and so is not a "home education program" per s. 1002.01(1), F.S.), will almost certainly meet the definition of a "private school" under s. 1002.01(2), F.S. Additionally, no provision of s. 1002.39, F.S., directly or indirectly prohibits a student enrolled in a correspondence or distance learning school from receiving McKay scholarship funds.

A scholarship student's participation in a distance learning program would almost certainly mean that the student's parents could not go to the physical location of the private school to endorse scholarship checks. While the checks could be mailed by the private school to the parent for endorsement, such a procedure would permit the possibility that the parent could simply endorse the check and deposit the funds into his or her own account. Although this action would violate multiple provisions of s. 1002.39, F.S., which requires parents to restrictively endorse scholarship checks to the account of the eligible private school, in fact one scholarship funding organization participating in the Corporate Tax Credit Scholarship program reports that this situation occurred when it mailed checks to an incarcerated mother for her endorsement. Additionally, permitting distance learning and correspondence schools to participate in the program will almost certainly make it more difficult for the state to police against so-called "private schools" that channel scholarship funds to parents of students enrolled in home education programs.

***Participation by Students in Multiple State Scholarship Programs:***

As of this writing, available data are not sufficient to determine whether any McKay scholarship students are simultaneously participating in more than one state scholarship program. Current statutory language does not prohibit simultaneous participation in multiple scholarship programs. Simultaneous participation in more than one program could, however, result in a student receiving funding in excess of what would be allocated to the student in the public school system.

An audit is needed to determine whether any students are receiving scholarship funds from multiple programs. Current law requires school districts to

report all students who are attending private school under each scholarship program, and this data may be used by the DOE to check whether students are participating in multiple programs.

***Participation by Students in Department of Juvenile Justice Commitment Programs:***

Published reports suggest that students in Department of Juvenile Justice (DJJ) commitment programs have received McKay scholarship funding, contrary to the prohibition against such funding set forth in s. 1002.39(2), F.S. According to the DOE, a list of these students is in the department's student records database as a means of ensuring that students in DJJ commitment programs will not receive McKay scholarships.

## RECOMMENDATIONS

Recommendations with respect to the McKay Scholarship Program fall into the two general categories of legislative and administrative remedies.

Section 1002.39, F.S., should be revised (1) to eliminate some of the existing loopholes in the scholarship program and (2) to clarify the roles of various stakeholders to ensure that all parties are fulfilling their administrative duties. Following are recommended legislative actions:

- Revise s. 1002.39(8), F.S., to require, rather than merely permit, the State Board of Education to adopt rules with respect to the McKay scholarship program.
- Clarify the role and requirements of the DOE with respect to administration of the McKay scholarship program.
- Provide specific statutory authority for the DOE to approve the participation of private schools (i.e., to determine eligibility) and to suspend or revoke eligibility of a participating private school for failure to comply with statutory requirements.
- Provide specific statutory authority for the DOE to investigate and enforce actions against participating private schools for violations of law or rule.
- Provide specific statutory authority for the DOE to require sworn statements (affidavits) from participating private schools.

- Prohibit schools from accepting a power of attorney from parents to sign checks, and prohibit parents from giving powers of attorneys designating any private school as their “attorney in fact.”
- Stipulate that matrixes cannot be changed after initial assignment (permitting exceptions within a short period of time for correction of data entry or other similar errors.)
- Require regular state audits of a small number of endorsed warrants selected at random to confirm compliance with statutory requirements.
- Require the DOE to continue cross-checking the list of McKay scholarship students against public school student rolls and lists of other state scholarship students quarterly.
- Increase the frequency of the state Auditor General’s audits of the program from every two years to every one year. Include, as an element of these audits, random site visits to a small percentage of schools to physically verify enrollment and other self-reported information. Alternatively, require audits of small samples of private schools by a private entity on a random basis.
- Include a cross-reference in s. 1002.39(4), F.S., to the definition of “private school” in s. 1002.01(2), F.S., to provide additional notice that participating private schools do not include home education programs.
- Prohibit private schools from sending or directing McKay scholarship funds to parents of scholarship students who receive instruction at home.
- Require participating private schools to have a physical location in Florida where McKay scholarship students attend their classes.
- Require participating private school teachers to have regular direct on-site contact with students.
- Revise section 1002.39, F.S., to provide that, if reevaluations of a hospitalized or homebound student result in a determination that the child no longer has a disability, the student’s eligibility for a McKay scholarship will cease.<sup>5</sup> Additionally, provide by rule

<sup>5</sup> The issue of temporarily hospitalized/homebound students receiving permanent McKay Scholarships may be remedied by making use of existing reevaluation frameworks set forth in state and federal law.

for a tracking mechanism regarding temporarily hospitalized and homebound students to ensure timely reassessment.

- Prohibit the use of scholarships to attend correspondence and distance learning schools, but consider making an exception to this prohibition for students with a verified hospital/homebound exceptionality.
- Require, as an element of initial eligibility to participate in the program, an audit of the school and an opinion letter from an independent certified public accountant that the school is insured and has sufficient funds to maintain operations for the full school year. Require schools to submit to additional financial soundness confirmation requirements on a periodic basis, e.g., every three years.
- Repeal the options of demonstrating financial stability by being in operation for one year or obtaining a surety bond or letter of credit.
- Require schools to advertise or notify potential students and parents of the types of disabilities its staff is trained to work with, and to provide this list of disability expertise areas to the DOE.
- Require scholarship students to participate annually in an assessment process of a type that will demonstrate the student’s academic gain to the student’s parents.
- Require private schools to notify the DOE and the local health department of any changes to information previously submitted to the DOE, including the school’s address, within 15 days.
- Require background checks for all private school personnel in direct contact with students, and require

Reevaluations of hospitalized/homebound students may be conducted at any time “if conditions warrant” under State Board of Education rule 6A-6.0331(1)(c), F.A.C. Even if a parent refused consent for an additional assessment (as they are legally entitled to do), a determination of disability may be made upon a review of existing data; a review of existing data does not require parental consent. If the parent disagreed with the result of the determination, he or she could request additional assessments in accordance with federal law. Such an arrangement would ensure that disabled students retain all of their legal protections while preventing healthy students from receiving permanent McKay scholarships.

that a copy of all background check results be forwarded to the DOE for review by DOE personnel.

- Require the DOE to review background check results for compliance with the existing statutory requirement that no private school be operated by a person who has been convicted of a crime of moral turpitude.
- Prohibit students from simultaneously participating in more than one state scholarship program.

We do not recommend that accreditation be used as a substitute for any of the existing eligibility requirements of private schools. Because many accreditation organizations exist, each with different standards, and because the accreditation field itself is not subject to any government regulation, the utility of a general requirement for “accreditation” is minimal. Additionally, attempts to specify approved accreditation organizations as a means of further tailoring a general accreditation requirement would suffer from the difficulties inherent in differentiating between these organizations and the fact that some eligible private schools cater to a narrow population of students with such specific requirements that no accrediting organization may be available and appropriate to evaluate them.

The following administrative steps should be taken:

- As the head of the DOE, the State Board of Education should be a much more visible and active force in providing leadership to improve the program, and it should adopt rules to implement the program.
- The Office of Independent Education and Parental Choice and the Choice Office should improve customer assistance through attention to staffing issues, including a focus on staffing continuity and the provision of additional training to staff.
- The DOE should take a more proactive approach to monitoring the program and to implementing systems of control for program legal requirements.
- The DOE should assist school districts with local administrative burdens by streamlining administrative procedures and enhancing overall program efficiency.
- The DOE should make clearer to parents and private schools the parameters of participating in the

scholarship program to reduce the number of telephone calls erroneously made to the district.

- The DOE should provide additional training to district personnel to enhance program efficiency, including training on the proper implementation of the funding matrix.
- The DOE should create a better system of accountability in order to ensure the accuracy of the matrix.
- The DOE should establish a mechanism for districts to report to the DOE when required reevaluation notice letters sent to parents are returned due to delivery failure (for example, because the parents are no longer at their last known address.) The Department could initiate additional attendance-verification procedures at that time for the student.
- The DOE should continue to cross-check each student’s continued enrollment and attendance at a participating private school prior to disbursing quarterly payment, by checking scholarship student lists against public school student rolls, as well as students in Department of Juvenile Justice commitment programs.
- The DOE should cross-check the list of McKay scholarship students every quarter against the lists of other state scholarship students to ensure that these students do not receive multiple scholarships.
- The DOE should increase compliance verification activity within the requirements of existing law by reviewing applications and performing other existing monitoring duties.
- The DOE should add more time into the quarterly administrative scheme to ensure that verification of enrollment is performed well in advance of the time that the Department of Financial Services will have to prepare warrants.

We do not recommend a requirement that participating parents fill out a yearly customer satisfaction survey as an element of eligibility to participate in the program, due to the administrative burden of collecting and reviewing such surveys, existing mechanisms for parents to report dissatisfaction with the program, and the fact that parents may, by law, remove their child from an unsatisfactory private school at any time.