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OPINION NO.: 06-02

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MEMORANDUM OPINION

TO: Virginia Gentles, Office of Independent Education & Parental Choice

FROM: Daniel Woodring
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SUBJECT: Effect of *Bush v. Holmes* Florida Supreme Court Decision on the Opportunity Scholarship Program's Public School Attendance Option

QUESTION PRESENTED: Given the Florida Supreme Court's ruling in *Bush v. Holmes* that the granting of private school vouchers pursuant to the Opportunity Scholarship Program ("OSP") is unconstitutional, does the option remain under the OSP for parents of children who attend failing public schools to place their children in an alternate satisfactory performing public school?

CONCLUSION: Yes.

DISCUSSION: On January 5, 2006, the Florida Supreme Court ruled the OSP, §1002.38, Florida Statutes, to contravene article IX, section 1(a) of the Florida Constitution, insofar as it allows children to receive a publicly funded education in private schools. While the Florida Supreme Court's ruling did not explicitly address "severability" of the public versus private school OSP options, its logic and holding clearly distinguished them. *Bush v. Holmes*, slip op. SC04-2324, at 22, 35 (Fla. Sup. Ct., January 5, 2006) ("The OSP violates [article IX, section 1(a)] by devoting the state's resources to the education of children within our state through means other than a system of free public schools . . . Only when the private school option depends upon public funding is choice limited . . . [as] necessitated by the constitutional mandate in article IX, section 1(a) . . . that does not allow the use of state monies to fund a private school education"). Accordingly, the ruling effectively strikes down the grant of vouchers for students to attend private schools, but does not invalidate the OSP's provision for parents to move a child from a failing public school to a satisfactorily performing public school. It is a fundamental principle that where a statute contains both constitutional and unconstitutional parts, the valid part may remain effective provided the parts are severable and the valid part would have been enacted apart from the invalid part. See *Martinez v. Scanlan*, 582 So.2d 1167 (Fla. 1991); *Wright v. State*, 351 So.2d 708 (Fla.1977); *Presbyterian Homes v. Wood*, 297 So.2d 556 (Fla.1974).