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# New Hampshire's New School Voucher Statute

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*Presented by*



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## **New Hampshire's New School Voucher Statute, RSA 194-F, and the State Board of Education's Implementing Rules**

By Gerald M. Zelin  
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### **1. The General Scheme.**

During the 2021 session of the New Hampshire legislature, many proposed statutes originated as separate bills, but then migrated to omnibus bills that each addressed multiple subjects. The new school voucher statute, RSA 194-F, is one example.

The voucher proposal found its way into the largest omnibus bill, HB 2, the 210-page "budget trailer bill." The Governor signed HB 2 on June 28, 2021.<sup>1</sup> The section enacting RSA 194-F took effect 60 days after passage.<sup>2</sup>

RSA 194-F creates a school choice program that reimburses participating parents, with public funds, for educationally related goods and services they privately purchase. Parents enroll their child in the program by creating an Education Freedom Account (EFA) for the student.

RSA 194-F:1, XII authorizes just one scholarship organization to administer the program.<sup>3</sup> On August 4, 2021, New Hampshire's Executive Council, which approves state contracts, selected the Children's Scholarship Fund (CSF) to administer the EFA program.

CSF is a private nonprofit Section 503(c) corporation. According to

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<sup>1</sup> N.H. Laws of 2021, Chapter 91, Sections 431.

<sup>2</sup> N.H. Laws of 2021, Chapter 91, Section 433.

<sup>3</sup> RSA 194-F:1, XII refers to a scholarship organization approved under "RSA 77-G" The legislature meant to cite "RSA 77-G," which creates a separate school choice program (a "scholarship fund" that pays for students to attend school outside their district of residence's public schools). The scholarship fund created by RSA 77-G is financed through private donations by businesses and individuals, who may claim their donations as credits when calculating taxes they owe to the state.

## NOTES

Kevin Landrigan of the *Manchester Union Leader*, CSF denies that it is subject to RSA 91-A, New Hampshire's Right to Know Law, which requires that government agencies conduct their business in public and make their records available for public inspection.

Under RSA 194-F, 100 percent of the money the state would ordinarily pay a school district to educate a resident student is instead diverted to the child's Education Freedom account.<sup>4</sup> This includes basic "adequacy aid," which is currently \$3,786.66 annually.<sup>5</sup> It also includes any "differentiated aid," which consists of:

- \$1,893.32 for each pupil eligible for a free or reduced price meal;
- \$2,037.11 for each student receiving special education;
- \$740.87 for each English language learner; and
- \$740.87 for each third grade pupil with a score below the proficient level on the reading component of the state assessment administered pursuant to RSA 193-C:6 or on an authorized locally-administered assessment.<sup>6</sup>

Those amounts may not be sufficient to defray all costs for a student to attend a private school. RSA 194-F consequently allows parents to "make payments for the costs of educational goods and services not covered by the funds in their student's EFA."<sup>7</sup>

The EFA program is limited to low and moderate income families. To qualify, a student must be:

a resident of this state eligible to enroll in a public elementary or secondary school and whose annual household income *at the time the student applies to the program* is less than or equal to 300 percent of the federal poverty guidelines as updated annually

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<sup>4</sup> RSA 194-F:2, I.

<sup>5</sup> RSA 198:40-a; <https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/sonh/fy2022-explained.pdf>.

<sup>6</sup> *Id.*

<sup>7</sup> RSA 194-F:2, V.

in the Federal Register by the United States Department of Health and Human Services under 42 U.S.C. section 9902(2).<sup>8</sup>

The bill as originally introduced contained no income restrictions.

Importantly, students participating in the EFA program are not required to enroll, either full- or part-time, in a private school or nonpublic online school.<sup>9</sup> In fact, students enrolled in an EFA program are exempt from New Hampshire's compulsory school attendance law.<sup>10</sup>

On the other hand, while participating in the EFA program, a child may not enroll "as a full-time student" in the district of residence's public schools.<sup>11</sup>

The bill, when originally introduced, allowed students being home-schooled under RSA 193-A to participate in the EFA program. The enacted statute now states that enrollment in an EFA program automatically terminates a student's home-school program.<sup>12</sup>

Parents enrolling their child in the EFA program must sign an agreement with the scholarship organization stating that they will provide an education for the student in core knowledge domains. These domains include science, mathematics, language, government, history, health, reading, writing, spelling, the history of the constitutions of New Hampshire and the United States, and an exposure to and appreciation of art and music.<sup>13</sup> Parents must also agree to provide an annual record of "educational attainment," and to comply with the rules and requirements of the EFA program.<sup>14</sup>

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<sup>8</sup> RSA 194-F:1, VI (emphasis added). For instance, as of July 2021, 300 percent of the Federal poverty guidelines was \$65,880 for a household of 3 and \$106,750 for a household of 6. Median family income in New Hampshire was \$97,112 in 2019, which is the most current available information for that statistic.

<sup>9</sup> RSA 194-F:2, VIII.

<sup>10</sup> N.H. Laws of 2021, Chapter 91, Section 432 (inserting RSA 193:1, I(i)).

<sup>11</sup> RSA 194-F:3, III(d)(2).

<sup>12</sup> RSA 194-F:2, IX.

<sup>13</sup> RSA 194-F:3, III(d)(1).

<sup>14</sup> RSA 194-F:3, III(d)(3).

## NOTES

According to RSA 194-F:2, II, parents may use funds deposited in their child's account "only for the following qualifying expenses to educate the EFA student":

- (a) Tuition and fees at a private school.
- (b) Tuition and fees for non-public online learning programs.
- (c) Tutoring services provided by an individual or a tutoring facility.
- (d) Services contracted for and provided by a district public school, chartered public school, public academy, or independent school, including, but not limited to, individual classes and curricular activities and programs.
- (e) Textbooks, curriculum, or other instructional materials, including, but not limited to, any supplemental materials or associated online instruction required by either a curriculum or an education service provider.
- (f) Computer hardware, internet connectivity, or other technological services and devices that are primarily used to help meet an EFA student's educational needs.
- (g) Educational software and applications.
- (h) School uniforms.
- (i) Fees for nationally standardized assessments, advanced placement examinations, examinations related to college or university admission or awarding of credits and tuition and/or fees for preparatory courses for such exams.
- (j) Tuition and fees for summer education programs and specialized education programs.
- (k) Tuition, fees, instructional materials, and examination fees at a career or technical school.
- (l) Educational services and therapies, including, but not limited to, occupational, behavioral, physical, speech-language, and audiology therapies.
- (m) Tuition and fees at an institution of higher education.

(n) Fees for transportation paid to a fee-for-service transportation provider for the student to travel to and from an education service provider.

(o) Any other educational expense approved by the scholarship organization.

Subsection “(o)” is controversial because it delegates to the scholarship organization, a private organization, unfettered discretion to expand the categories of goods and services that qualify for public funding, so long as they are “educational.”

When an EFA child enrolls in a private school, the public school the student previously attended must provide a “complete copy” of the student’s “school records” to the private school “in a timely manner.”<sup>15</sup> However, the public school must comply with the federal Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, when disclosing records.<sup>16</sup>

## 2. State Board of Education Rulemaking.

On August 27, 2021, the State Board of Education adopted interim rules implementing RSA 194-F.<sup>17</sup> The rulemaking was rushed in order to allow families to join the EFA program for the 2021-22 school year. Because these are merely interim rules, the State Board did not conduct a public hearing.

The state legislature’s Joint Legislative Committee on Administrative Rules (JLCAR) reviewed the proposed interim rules on August 19, 2021. JLCAR does not have authority to veto rules. However, if JLCAR objects to a rule and anyone later challenges the rule in court, the state agency bears the burden of proving the rule is valid.<sup>18</sup>

Democrats on JLCAR, who were in the minority, criticized the

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<sup>15</sup> RSA 194-F:8.

<sup>16</sup> *Id.*

<sup>17</sup> N.H. Board of Education Minutes, Aug. 27, 2021, adopting Ed 324.

<sup>18</sup> RSA 541-A:13, VI.

proposed interim rules on a variety of grounds, including the delegation of so much discretion to a private entity, the scholarship organization. JLCAR's own attorneys questioned whether such broad delegation is permissible.

For example, the proposed interim rules directed the scholarship organization to write the notice of IDEA rights EFA students forfeit. Whoever *writes* the notice *decides* what rights are forfeited.

JLCAR ultimately voted to approve the interim rules with three conditions:

- That “[t]he State Department of Education work with the Legislature to correct ambiguities in the language of RSA 194-F, as outlined in the Committee staff’s comments to the conditional approval request.”
- That “[t]he Board commence regular rulemaking ... as soon as possible.”
- That “[t]he Department review and approve the notice given to parents by the scholarship organization specifying the rights that will be retained and lost by students participating in the EFA program.<sup>19</sup>

On September 9, 2021, the State Board of Education proposed permanent rules for the EFA program.<sup>20</sup> The Board expects to hold a public hearing on these proposed rules on November 10, 2021, and will also accept written comments. JLCAR will eventually review those proposed rules, too.

### 3. Special Education under the EFA Program.

RSA 194-F addresses special education only indirectly. It says:

The scholarship organization shall ensure that parents of students with disabilities receive notice

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<sup>19</sup> State Board of Education records, Board packet for September 9, 2021 meeting, Section VI-A, proposing Ed 800.

<sup>20</sup> *Id.*

that participation in the EFA program is a *parental placement* under 20 U.S.C. section 1412, Individuals with Disabilities Education Act (IDEA), along with an explanation of the rights the parentally placed students possess under IDEA and any applicable state laws.<sup>21</sup>

What does that mean?

In fact, Section 1412 of the IDEA recognizes two categories of students attending private schools and not placed there by school districts.

- The first category, addressed by 20 U.S.C. § 1412(a)(10)(A), consists of students whose parents do not contest that the district of residence offered a free appropriate public education. Those students forfeit most rights under the IDEA while attending a private school. However, they are entitled to “equitable services,” which means that the school district in which the private school is located must spend a pro rata share of its federal IDEA funds to provide special education and related services to the population of IDEA-eligible students attending the private school. In addition, both the district of residence and the district in which the private school is located have a “child find” obligation, which means they must identify students who qualify under the IDEA and conduct evaluations necessary to determine who qualifies.
- The second category, addressed in 20 U.S.C. § 1412(a)(10)(C), consists of IDEA-eligible children whose parents contend that the district of residence failed to offer a FAPE. Section 1412(a)(10)(C) describes how those parents may file for a “due process hearing” seeking reimbursement from the district of residence for the full cost of private schooling.

RSA 194-F:4, III, by referencing “20 U.S.C. section 1412” in general, glosses over the important distinctions between sections 1412(a)(10)(A) and (C).

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<sup>21</sup> RSA 194-F:4, III (emphasis added).

## NOTES

Our position is that *all* EFA children fall into the first category. This is because RSA 194-F:4, III employs the term “parental placement.” The IDEA refers to only the first category as “parentally placed private school children.” 20 U.S.C. § 1412(a)(10)(A)(iii). The IDEA refers to the second category as children removed by their parents from public schools and enrolled in private schools, without using the term “parentally placed.”

The State Board of Education agrees that EFA students attending *private* schools forfeit the right to a FAPE, but is awaiting guidance from the U.S. Department of Education concerning EFA children who attend *public* schools as nonresident tuition students.<sup>22</sup>

Of course, if an EFA student attending a nonresident public school is entitled to a FAPE, that begs the question of *which* school district is responsible.

Some argue that the IDEA compels school districts to provide a FAPE to all students attending their public schools, including nonresident students enrolled by parents who pay tuition. We disagree with that argument, because it mistakenly assumes the right to a FAPE is “portable.”<sup>23</sup>

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<sup>22</sup> The interim rules, as originally proposed, asserted that EFA students attending public schools full-time as nonresident tuition students “shall retain a FAPE.” Ed 324.05(b)(4) (July 15, 2021 draft). The final version of the interim rules, adopted on August 17, 2021, simply directs the scholarship organization to notify parents “that participation in the EFA program is a parental placement under 20 USC section 1412 ... along with an explanation of the rights that parentally placed students possess under IDEA and any applicable state laws.” Ed 324.04(b)(2) (Aug. 16, 2021 draft). The proposed permanent rules assert that children attending *private* schools with EFA funds forfeit the right to a FAPE, but do not address EFA students attending *public* schools as nonresident tuition students. Proposed Ed 805.01(b)(2) (Sept. 9, 2021 draft).

<sup>23</sup> Recognizing that special education is *special* and extraordinarily expensive, courts have held that excluding special education from publicly funded school choice programs does not constitute illegal discrimination on the basis of disability. *P.F. v. Taylor*, 914 F.3d 467 (7th Cir. 2019); *Clark v. Banks*, 93 Fed.Appx. 510 (6th Cir. 2006). See also *Osseo Area Schools v. M.N.B.*, 917 F.3d 917, 922 (8th Cir. 2020) (holding that the state “met its obligation under federal law” by offering a FAPE in the district of residence’s public schools, and that the student’s parents consequently were not entitled to transportation as a related service upon enrolling their child in a distant school district under a school choice program); *Timothy H. v. Cedar Rapids Community School District*, 178 F.3d 968 (8th Cir. 1999) (holding that Section 504 does not compel a school district to provide transportation to a distant school under a school choice program).

## NOTES

Federal law merely directs participating states to make a FAPE “available” to every IDEA-eligible child.<sup>24</sup> Federal law does not require that every IDEA-eligible child *receive* a FAPE. If the district of residence offers a FAPE in its public schools, the State has fulfilled its duty.<sup>25</sup>

Others argue that two state laws enacted in 2010 – RSA 186:13, IV and 193:3, IV – together compel the district of residence to pay for special education whenever parents unilaterally enroll their child at a public school outside the district where they reside.

We disagree with that argument, too. We interpret those statutes as follows: (a) they relieve the nonresident district of the duty to provide special education; and (b) they require the district of residence to provide special education only at a school selected by its own IEP team. The legislative history of those statutes supports our interpretation.<sup>26</sup> Moreover, forcing the district of residence to pay tuition when it can provide a FAPE in its own public schools would violate Part 1, Article 28-a of the New Hampshire Constitution, which prohibits new unfunded state mandates.

Finally, no matter how one interprets RSA 186-C:13, IV and 193:3, IV regarding nonresident tuition students in general, RSA 194-F – the more recent and specific statute – controls for EFA students. RSA 194-F:4, III clearly states that “participation in the EFA program is a parental placement under 20 U.S.C. section 1412.” Since section 1412 of the IDEA addresses children unilaterally enrolled by parents in private schools, RSA 194-F:4, III implies that *all* EFA children shall be treated as private school students, including nonresident tuition students at public schools.

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<sup>24</sup> 20 U.S.C. § 1412(a)(1)(A).

<sup>25</sup> *Osseo Area Schools v. M.N.B.*, 917 F.3d at 922.

<sup>26</sup> Senator Bragdon, who sponsored those amendments, explained his intent during debate on the Senate floor. “I just want to clarify the intent of the bill, that this legislation clarifies that if a dispute arises between school districts, in cases of a unilateral placement, *the resident district has the final say* on the determination of the provision of special education services.” Senate Journal, May 25, 2010 (emphasis added).

#### 4. Increasing the Voucher by Claiming a Disability.

As noted at page 2, the size of an EFA voucher rises if the student qualifies for special education. This is because status as a special education student triggers an additional \$2,037.11 annually in differentiated aid.

The State Board of Education's interim rules add a twist, allowing an EFA student to receive differentiated aid for special education even if no school district ever identified the student as IDEA-eligible. The interim rules state:

A pupil with a qualifying disability as defined in 34 CFR 300.8 as determined by a medical professional licensed to practice in any state in the United States shall be eligible for qualifying differentiated aid under RSA 198:40-a, II(d).<sup>27</sup>

The rule does not define “medical professional.”

This rule circumvents many provisions in the state and federal special education laws. *First*, according to the IDEA and RSA 186-C, the mere existence of a disability does not trigger eligibility for special education. To be eligible, the student must also require specially designed instruction. *Second*, federal and state administrative rules implementing the IDEA require comprehensive evaluations, including academic achievement testing (and often a classroom observation) before a student may be identified as IDEA-eligible. *Third*, according to New Hampshire's special education laws, an IEP team convened by a school district decides whether a student qualifies for special education, after reviewing the evaluation results.

In short, the interim EFA rules allow students who in fact do not qualify for special education to receive increased vouchers as if they qualified. The proposed permanent rules do the same.<sup>28</sup>

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<sup>27</sup> Ed 324.03(m) (Aug. 16, 2021 draft).

<sup>28</sup> Proposed Ed 804.01(c), (d)(2) (Sept. 9, 2021 draft). However, the proposed permanent rules clarify that such children – identified by medical professionals, but not by IEP teams – have no right to “equitable services funds pursuant to 34 CFR 300.138.” *Id.* In other words, the school district in

Ironically, while RSA 194-F increases the size of a voucher if the student has been determined to require special education, the statute does not demand that schooling financed with the voucher *provide* special education.

## 5. Dual Enrollment.

The EFA statute overlooks RSA 193:1-c, which allows students enrolled in private schools to attend their district of residence's public schools part-time for "curricular courses and cocurricular programs."

Thus, while the EFA statute strips the district of residence of *all* state aid tied to a student – both adequacy aid and differentiated aid – the district of residence may still incur costs educating the student part of the day.

Those costs may be especially high if the student qualifies as disabled under Section 504 of the Rehabilitation Act, 20 U.S.C. § 794. A Section 504 student may be entitled to expensive accommodations and modifications while attending the public school.<sup>29</sup>

## 6. Religious Education.

The EFA statute potentially allows public funding for religious education.

Three provisions in the statute open that door. The first, RSA 194-F:4, XVII, states:

The scholarship organization shall not exclude, discriminate against, or otherwise disadvantage any education provider with respect to programs or

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which the private school is located need not count such children when calculating the pro rata share of IDEA flow-through funds it must spend on IDEA-eligible children attending the private school.

<sup>29</sup> The EFA statute includes a "phase-out provision that provides some relief to school districts in the short term. Specifically, during a student's first year in an EFA program, the district of residence will lose only 50 percent of the state aid tied to that student, and during the second year the district will lose only 75 percent. However, these phase out grants to school districts terminate "for new EFA students receiving an EFA effective July 1, 2026." RSA 194-F:10.

services under this section based in whole or in part on the provider's religious character or affiliation, including religiously based or mission-based policies or practices.

The second provision, RSA 194-F:7, V, states:

An education service provider shall not be required to alter its creed, practices, admissions policy, or curriculum in order to accept payments from an EFA.

The third provision, RSA 194-F:2, II(o), allows the expenditure of EFA funds for:

[a]ny ... educational expense approved by the scholarship organization.

The State Board of Education's rules erect no guard rails confining that broad discretion.

If the statute indeed leads to public funding for religious education, it will collide with two provisions of the New Hampshire Constitution that protect every taxpayer from subsidizing another person's religion.<sup>30</sup>

The U.S. Supreme Court recently ruled that publicly funded voucher programs encompassing private schools may not discriminate solely on the basis of a school's *affiliation* with a religious organization. This decision relied on the U.S. Constitution, which trumps state constitutions. However, the Court explicitly stopped short of holding that a taxpayer-funded school choice program must include *religious education*.<sup>31</sup>

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<sup>30</sup> N.H. Constitution, Part 1, Article 6, adopted in 1784 ("no person shall ever be compelled to pay towards the support of the schools of any sect or denomination"); Part 2, Article 83, added in 1877 ("no money raised by taxation shall ever be granted or applied for the use of the schools of institutions of any religious sect or denomination").

<sup>31</sup> *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246 (2020).