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State of New Hampshire
Joint Legislative Committee on Administrative Rules
25 Capitol St.
State House Annex Room 219
Concord, NH 03301

Dear Committee:

Introduction

The Department of Education (the “Department”), on behalf of the State Board of Education (“Board”)¹, submits this response to the comments to the Board’s proposed Ed 800, Education Freedom Accounts (“EFA”) Program rules filed with the Joint Legislative Committee on Administrative Rules (“Committee”) on December 15, 2021 provided by the Office of Legislative Services (“OLS”) staff and by two outside stakeholder interest groups. For the reasons that follow, the Department contends that the proposed rules, with the attached modifications, are valid and proper pursuant to the enabling legislation. The Department arrives at this conclusion after considering all public comment provided at its public hearing, all submitted written comments, and after consideration of additional feedback received from particular stakeholders at the request of the Committee. The Department respectfully requests that the Committee approve the proposed rules, modified as attached, to permit the Board to proceed to final adoption.

The Department appreciates the opportunity provided by the Committee to take additional time to revise these rules in response to OLS staff and stakeholder comments to advance this important legislative initiative. As the Committee is no doubt aware, the Department brought interim rules to OLS and the Committee on July 28, 2021. The Department received OLS comments on Friday, August 13, 2021, which necessitated an immediate response on Monday, August 16, 2021 to meet the filing deadline for an interim rule conditional approval request, without requesting an extension.

The Department filed its proposed permanent rule on December 15, 2021. Given the thorough review conducted by OLS staff, the Department only received the OLS staff response to the proposed rule on January 16, 2022, just one day before conditional response requests were originally due on January 17, 2022, and the comments flagged several significant issues, including fundamental concerns about the authority of the Department vis-à-vis the Scholarship Organization. The Department concluded, in

¹ Unless otherwise noted, this letter will use the term “Department” to refer to the Department and the SBOE jointly.

consultation with OLS, that it needed to request a waiver to submit a late conditional approval request in order to have a meaningful opportunity to respond to the comments raised. Even with the brief extension, however, the Department was left with only a few days to respond to OLS comments.

The Committee's decision to move the rules to their continued agenda for February 4, 2022 allowed the Department the opportunity to connect with stakeholders who raised concerns with JLCAR on the eve of the hearing and to more fully respond to the OLS feedback.

Stakeholder Input

Before addressing the merits of the OLS comments and other feedback from stakeholders, it should be noted that the Board did receive and consider a broad array of stakeholder comments and testimony on its proposed rules prior to filing the current rules on December 15, 2022, including receiving testimony at its public hearing on the proposed rules from Attorney Gerald Zelin on behalf of the New Hampshire Association of Special Education Administrators ("NHASEA").

The Department took the concerns raised by NHASEA very seriously. For instance, the Department determined it was important to confirm the representations about the application of Individuals with Disabilities Education Act ("IDEA") to the EFA program's provisions with the U.S. Department of Education ("USDOE"). Specifically, the Department reviewed the concept of "parental placement" under the IDEA as it relates to EFA placements at public schools with USDOE. As discussed more fully below, USDOE unequivocally *rejects* NHASEA's preferred interpretation of "parental placement", and maintains that any child attending a public school is entitled to a free and appropriate public education ("FAPE") pursuant to IDEA.

On the other matters on which the Board received compelling stakeholder input, it made appropriate amendments to its proposed rules in response thereto. It is important to note that the Board heard from other stakeholder groups as well, and not just the two organizations that reached out to the Committee and are addressed in this letter. The Board incorporated input from an array of commenters and made every effort to balance those inputs reasonably while working toward rules consistent with the law.

To ensure that the Board provided NHASEA ample opportunity to provide input on the draft rule, the Board Chair and the Commissioner, based on the Committee's feedback from the January 21, 2022 meeting, met with Attorney Zelin, again, on January 27, 2022 to allow him to elaborate further on his public testimony. The Chair and the Commissioner also met with Gilles Bissonnette from ACLU-NH to address the letter he submitted to the Committee on the eve of the January 21, 2022 hearing.

The Department provides below an overview of the revised proposed rule and a detailed response to the concerns raised in all of these various efforts.

The Board's Proposed Rule

The rule proposed by the Board, attached hereto with recent amendments based on the stakeholder input meetings noted above and discussed more fully below, constitutes the Board's best effort to implement the EFA program enacted by the legislature and consistent with the statutory language.

The purpose of the EFA program is to provide eligible students educational alternatives to attending their default assigned public school. Specifically, the program provides eligible families the opportunity to direct state adequacy funding that their child's assigned public school would have received had he or she

enrolled there instead of enrolling in the EFA program, and to use that funding to pay for an array of educational services that the family determines would be appropriate for their child. For example, tuition to attend a nonpublic school or a public school other than their school of residence, tutoring, online learning programs, and educational supplies, can all be purchased with EFA funds consistent with the statutory requirement that the funds advance the student's education "in the core knowledge domains that 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." See RSA 194-F:3, III(d)(1).

The Department also considered carefully the legislature's directive that the Commissioner direct to an enrolled student's EFA account those differentiated aid funds that "would have been" provided to a student's school if the EFA student had enrolled in his/her resident public school. See RSA 194-F:2, I ("The commissioner of the department of education shall transfer to the scholarship organization the per pupil adequate education grant amount under RSA 198:40-a, plus any differentiated aid that would have been provided to a public school for that eligible student."). The Board was charged with balancing the statutory standards for determining differentiated aid—which determinations, in the case of differentiated aid for students receiving special education services, are *de facto* made by the public schools themselves—with the overall intent of the program which is to provide students educational opportunities that do not run through the traditional public schools. The Department believes the Board's rules—after making modifications based on stakeholder and OLS feedback—properly enacts the legislative vision for the program by creating a mechanism for accurately identifying those students who "would have" received differentiated aid for special education if they had attended their assigned public schools without requiring those families to go through their public school as a "gate-keeper" to access the program and without burdening the public schools with the performance of such a gate-keeping function.

Regarding the privacy of student information, the Department notes that the SO would not be covered by either FERPA or HIPAA, despite the fact that the information it receives on EFA applications would be considered student records under FERPA if received by a school and the medical information it may receive on some students (those seeking differentiated aid because they "would have" received special education services in their district) would constitute HIPAA information if received by a HIPAA covered-entity. Thus, the Board's proposed rule requires the scholarship organization to treat such information as a school would—namely, that they not disclose it to third parties without parental consent.

Finally, the Department, aware of feedback received regarding student safety while recognizing that it lacks any statutory authority to create or enforce safety rules on education providers, requires the scholarship organization to post the background check policies of all approved education providers. The Department believes that this sort of transparency is appropriate for this parent-driven program, as it enables families to have relevant information to make informed decisions about their EFA options.

Department's Response to Specific Comments

The Department acknowledges that, despite its careful work on the rules, OLS staff and certain stakeholder groups still have reservations about some of the provisions therein. The Department addresses those concerns as follows:

a. EFA students in public schools are entitled to a FAPE

At the Committee hearing on the interim rules, NHASEA's attorney Gerald Zelin testified that if an EFA student elected to receive an education at a public school other than the district school of assignment, such

a placement would constitute a “parental placement” under IDEA, which would effectively remove the resident district of the obligation to provide a FAPE. NHASEA thus maintained that the rules would need to clarify this, and state explicitly that an EFA student enrolled in a public school is “parentally placed” for purposes of IDEA.

During the development of the proposed rule, the Department informed NHASEA that it would confirm this understanding with the USDOE. Upon doing so, the USDOE warned Department staff that if New Hampshire takes this approach, it would be a violation of federal law. In direct contradiction to Attorney Zelin’s interpretation, officials from USDOE informed Department staff on a telephone call that it is their long-standing interpretation that every child enrolled in a public school is entitled to a FAPE (the Department still awaits a promised “Dear Colleague” letter formally memorializing this guidance, but does have email correspondence confirming it). USDOE noted that many states have choice programs that allow students to elect to attend a public school other than their assigned school of residence, and that in all such programs, USDOE has been consistent that such children are entitled to a FAPE. The USDOE officials clarified that “parental placement” is a concept that is applied to a parental decision to place a child in a private school only—not to a parent-direct placement in another public school.

b. The Obligation to Provide a FAPE can properly remain with the resident school district

Now that USDOE has definitively rejected NHASEA’s interpretation as being incompatible with federal law, NHASEA has taken a different tack—asserting that in purporting to require the resident district to pay for a FAPE provided at a different public school, the rules create an unconstitutional “unfunded mandate” on the resident school to pay for the FAPE. As stated in NHASEA’s January 20, 2022 letter: “By imposing on the district residence new costs not required by federal law, proposed Ed 805.01(c)(2) amounts to a new unfunded state mandate. The proposed rule thus runs afoul of RSA 541-A:25 and :26 and Part 1, Article 28-a of the New Hampshire Constitution.”

Ed 805.01(c)(2) does not create any new mandate. In the absence of the EFA law and the Department’s rules enacting it, the district of residence is, by default under existing state and federal law, *already* responsible for the provision of a FAPE. Hence, there is no new financial obligation here.

Nor is the concept of a child being placed in a different public school than her school of residence while the district school of residence remains responsible for FAPE new or novel in New Hampshire, as NHASEA is no doubt aware. Already, when a child attends a public charter school, her school of residence remains responsible for the provision of FAPE and for required special education services. Similarly, children in the foster care system, judicially placed students, and students adjudicated by the Board to have a manifest educational hardship pursuant to RSA 193:3 frequently attend a school outside their resident district while their district of residence remains responsible for a FAPE. In those situations, as here, the district of residence is part of the IEP team, and thus not without representation regarding costs.

Thus, as there are no new funding obligations created by the proposed rules, there is no issue with an unfunded mandate. The provision of a FAPE to these students will follow the already-established protocols in New Hampshire for students receiving their FAPE in a public school other than the district of residence.²

² Notably, when the Department administers federal IDEA funds to schools, a child receiving a FAPE in a public school other than his school of residence is counted in the resident district (the district financially responsible for the FAPE) for allocation purposes.

c. Treatment of confidential information. OLS made the following comment regarding proposed Ed 803.01(g) and 803.01(g)(1):

RSA 194-F does not define or address the protection of confidential student information, either health care data or educational data. The Board has inserted a definition for confidential student information that includes medical and educational records. The Department in its cover letter to the conditional approval request states that the organization will have access to confidential information because parents will be providing that information on the organization's application to the EFA program which is not addressed in the rule at all. The rule does not affirmatively require that parents submit the information for an eligibility determination for the program. It is unclear whether parents have an option to opt out of sharing some or all of the confidential information or if nondisclosure will impact eligibility. Does the organization know what procedures the LEAs use to protect PII? What oversight will be done to ensure that?

OLS Comments – January 18, 2022 – Page 9.

There are various state and federal statutes that protect the privacy of student information in the possession of schools and State Educational Agencies (such as the Department). At the federal level, such information is subject to the Family Educational Rights and Privacy Act (“FERPA”), which generally governs how and to whom educational records can be disclosed. In prior correspondence, OLS had suggested FERPA as a possible issue with the rule.

The point that the Department was making in the cover letter referenced in the comment is simply that the SO is not a covered entity under FERPA. *See* 20 USC 1232g(b) (noting that FERPA applies to any public or private elementary, secondary, or post-secondary school and any state or local education agency that receives funds under an applicable program of the US Department of Education). Nor would the SO be covered by HIPAA, which, along with FERPA, had been suggested by some commentators as a possible source of privacy rights for EFA students. *See* 45 C.F.R. § 160.103 (defining “covered entities” as health plans, health care clearinghouses, health care provider, and business associates of the same). Nor would any data in a school's possession that was provided to the SO *by the parent* create any FERPA issues, as FERPA only governs disclosures made by schools, not by parents.

To be clear, the information received by the SO to enroll in an EFA is information *that would constitute FERPA information if it were received by a school*. For example, date of birth, address, and other personally identifying information (“PII”) are all “student records” under FERPA. *See* 34 CFR 99.3. As defined within FERPA's regulations, “personally identifiable information” includes “information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty[.]” *Id.*

As the age, residency, and identity of the child *must be* ascertained in order to meet eligibility requirements for an EFA, there is no possible way to “opt out” of providing this information while participating in the program as the OLS comment suggests. The Department assumes that the OLS staff might have thought the Department meant to address other types of educational records such as transcripts, report cards, etc. To be clear, the Department does not believe that such records will be needed by the SO to administer the EFA program.

The purpose of Ed 803.01(g), then, is just to provide *some* protection for the enrolled students' PII, given the inapplicability of FERPA to the SO. In tying in schools' practices in Ed 803.01(g)(1), the Department

intends merely to require that the SO not release to any third party any information it maintains about a student without parent authorization. While the enabling legislation does not address confidentiality, the Department believes it is implied that in administering the program on behalf of the State, the SO can be required not to disclose information collected for that purpose to third parties.

d. Unconstitutional Delegation. NHASEA expresses significant concern that the “catch-all” provision at RSA 194-F:2, II(o) constitutes an unconstitutional delegation of discretion to the SO, a concern that the OLS staff appears to share, at least in part.

RSA 194-F:2 (II) provides that “Parents of an EFA student shall agree to use the funds deposited in their student’s EFA only for the following qualifying expenses to educate the EFA student.” RSA 194-F:2, II (a)-(n) are an enumerated list of such permissible expenses. The final item on the list, RSA 194-F:2, II(o) is as follows: “Any other educational expense approved by the scholarship organization.” NHASEA believes that this “catch-all” provision could be used by the SO to smuggle in unconstitutional or at least unintended authorizations of expenses, such as religious instruction or hate group advocacy. The Department disagrees.

The Department does not believe this grant of discretion is as unlimited as it might appear from reading RSA 194-F:2, II in isolation or as NHASEA suggests. First, other sections of the law serve to narrow the scope of services. For example, RSA 194-F:3, III(d)(1) requires the parent to sign an agreement with the SO

To provide an education for the eligible student in the core knowledge domains that 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.

Thus, any “educational expense” approved under RSA 194-F:2(II)(o) would need to meet these specified ends to be compliant with the statute.

Moreover, New Hampshire courts follow the common-sense canon of statutory construction known as *ejusdem generis*. “Under [*ejusdem generis*] general words are construed to apply only to persons or things that are similar to specific words in a statute.” *See, e.g., Anderson v. Robitaille*, 172 N.H. 20, 25, (2019). *See also Dolbear v. City of Laconia*, 168 N.H. 52, 55 (2015)(“The principle of *ejusdem generis* provides that, when specific words in a statute follow general ones, the general words are construed to embrace only objects similar in nature to those enumerated by the specific words”); *State v. Hodgkiss*, 132 N.H. 376, 379, (1989)(“Although, on its face, ‘other things’ is broad language, there is a common rule that a general statutory term is to be understood to cover further instances comparable to any specific examples listed with it . . .”).

Applying the *ejusdem generis* doctrine to the EFA statute, the parade of horrors proposed by the NHASEA are simply not plausible. “Any other educational expenses” listed in RSA 194-F:2, II(o), “although on its face . . . broad language” would necessarily be read as permitting only “further instances comparable to [the] specific examples listed with it.” *Hodgkiss*, 132 N.H. at 379. As nothing in the RSA 194-F:2, II list implies, for example, approved uses for any religious training or the teaching of any discriminatory concepts, the Department does not believe it has compelling need to further narrow the delegation of authority the legislature made to the SO.

While NHASEA characterizes the proposed rules as a “missed opportunity” to “correct” what they view as a failing of the statute, it appears OLS agrees with the Department that it is not clear the Department has any legislative authority to put “guardrails” on this SO function. From the OLS comments provided to the Department on January 18, 2022:

The statute does not address the role of the Board of Education, and oversight by the Department of Education is minimal. For example, the Board does not provide any criteria to the scholarship organization for RSA 194-F:2, II(o) which allows the organization to approve any other educational expenses. The roles of the Board, the Department, and the scholarship organization may need to be clarified, and *if the Legislature wants the Board or Department to perform oversight it may need to affirmatively state the scope of the oversight. See generally RSA 194-F:4.*

OLS Comments – January 18, 2022 – Page 16 (emphasis added).

The Department understands that the legislature delegated this discretion to the SO, and not to the Department or the Board. Elsewhere in the statute, the legislature was clear when the Department had a role, *see, e.g.* RSA 194-F:4, IV (“The scholarship organization shall, *in cooperation with the department*, determine eligibility for differentiated aid subject to any applicable state and federal laws.”)(emphasis added). In RSA 194-F:2(II)(o), in contrast, the delegated authority appears to be directly to the SO: “Any other educational expense approved by the scholarship organization.” RSA 194-F:2(II)(o).

For reasons above—namely the application of *ejusdem generis* as well as limiting language that appears elsewhere in the statute—the Department believes concerns about unconstitutionally broad delegation are misplaced.

e. Background checks.

The January 18, 2022 OLS comments on the conditional approval request states:

194-F does not grant the scholarship organization the ability to require criminal background checks. The rule does not actually require the scholarship organization to have the education service providers get criminal background checks, rather the rule requires the organization to publish any procedures the service providers happen to use to ensure background checks take place for their providers who have direct access to children. The Department in its cover letter to the conditional approval request states that the intent of the language is to merely to have the providers post their procedures for background checks if they have them. To affirmatively require criminal background checks for any provider having contact with a child will require further legislation.

OLS Comments – January 18, 2022 – Page 10.

The Department does not disagree with anything in this comment. It is correct that the SO cannot require criminal background checks. It is also correct that the purpose of the rule is not to *require* such checks, but simply to require the SO to post procedures for any approved service provider that has such procedures so that parents can weigh that information in assessing which providers to utilize. Finally, the Department agrees that, if criminal background checks were to be required, it would require further legislation.

f. Differentiated Aid for Special Education.

NHASEA strongly objected to proposed rule Ed 804.01(c)(2), which the Board designed to identify students that “would have been” eligible for differentiated aid had they enrolled in their resident public school within the meaning of RSA 194-F:2, I. The OLS staff appears to share this concern. The OLS comment:

Ed 804.01(c) above conflicts with RSA 198:40-a, II(d) because it permits a student to receive differentiated aid for a “disabling condition” which is not a term that appears in that statute and which is not a qualification for differentiated aid under the statute. (There are 2 ways an EFA student can be eligible for the differentiated aid specified in RSA 198:40-a, II(d) and having a medical profession determine “disabling condition” is not a method included in the statute.) RSA 194-F:2, I requires the Commissioner to transfer any differentiated funds under RSA 198:40-a, II(d) “that would have been provided to a public school for that eligible student.” However, a public school would only receive differentiated aid for students who meet the criteria in (c)(1) the determination by an IEP team of disability, not (c)(2) the determination of a “disabling condition” by a medical professional, and so this administrative rule violates RSA 198:40-a, II(d). Under RSA 198:40-a, II(d), the differentiated aid is only disbursed for students who are receiving special ed services as determined by an IEP team.

OLS Comments – January 18, 2022 – Page 11.

OLS/NHASEA’s position is that a school only “would have” received differentiated aid under RSA 198:40-a, II(d) for a child who *is* receiving special education services, and that, to determine whether said student is entitled to services, such a student would have to submit to an IEP meeting or otherwise undergo a formal evaluation *conducted by the public school*.

The Board’s original concern was that this reading would turn the logic of the EFA program entirely on its head. The entire purpose of the program is to permit parents the opportunity to direct the state-level funding for their child’s education to educational resources other than the public school. The Board originally reasoned that it would be perverse indeed, if the public schools—the very institutions that the law is created to permit parents to opt out of—become, effectively, the gatekeeper for students’ meaningful access to the program and to the funding they would have received if they had enrolled in the public school.

Nevertheless, after further discussion with NHASEA, the Department appreciates the concern that the mechanism proposed by the rule for identifying those students who “would have” received differentiated aid may have been too broad, and might have permitted students that would not have been identified as needing special education services to ultimately receive the differentiated aid.

As such, the Board now puts forth the following alternative language to replace the Ed 804.01(c)(2) language in its original proposal (this language is attached to this letter in the modified proposal as well):

(c) A pupil shall be eligible for the differentiated aid amount set forth in RSA 198:40-a, II(d) for EFAs under RSA 194-F if there has been a determination of eligibility for special education by a qualified examiner for each assessment, as defined and enumerated in ED 1107.04 Table 1100.1, in accordance with 34 CFR 300.300-300.311.

(d) Such determination of eligibility for special education in (c) above may be completed:

(1) At the expense of the parent or guardian, such expense shall constitute a qualifying EFA expense; or

(2) At no expense to the parent or guardian by the student's resident district, pursuant to ED 1105.02.

(e) The student's resident district shall notify the parent or guardian in writing of determinations made under (d)(2) above.

The proposed revision more closely aligns the determination process with the process that public schools currently utilize to determine eligibility for differentiated aid.

The Department anticipates NHASEA's objection that this is still insufficient, however, as it does not precisely mirror the standard process for determining special education eligibility. The Department does not agree that the process for an EFA student must exactly follow the process schools currently utilize. The legislature's directive was for the Department to identify students that "would have" received differentiated aid if they had enrolled in their public school. RSA 194-F:2, I. Since EFA children will *not* enroll in their public school, this directive requires the Department to engage in some degree of forecasting: *If* the student had attended the public school, "would" they have been eligible for services?

The Department submits that its rule as modified is a reasonable proxy to identify those students that "would have" received differentiated aid for special education had they enrolled in their public school, in accordance with the legislative language in RSA 194-F:2, I. The Department submits that, if the legislature had intended schools to be the sole arbiter of EFA student's eligibility for differentiated aid, it would have specified such a requirement much more directly.

g. The statute and the rules do not permit funding for religious instruction.

The day before the January 21, 2022 Committee meeting the ACLU-NH submitted a letter making allegations that the law is unconstitutional under the NH Constitution because, as drafted, the rules would permit the use of tax payer dollars on religious instruction. At the Committee's urging, the Department and the Chair of the Board met with Gilles Bissonnette of the ACLU-NH on January 27, 2022.

As a threshold matter, the Department notes that the question of whether a duly enacted act of the legislature is unconstitutional is not a question for the Department or the Board. However, the Department has read the ACLU-NH's letter and, in the Department's understanding, the constitutional concerns are misplaced.

The Department disagrees with the ACLU-NH's reading of *Carson v. Makin*, 979 F. 3d 21 (1st. Cir. 2020) which is readily distinguishable from our EFA law. In *Carson*, the State of Maine was attempting to "recreate" the experience of a public education in districts where there was no public school. The state's interest in mimicking that experience factored heavily in the court's reasoning, and in distinguishing it from *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020).

Here, the purpose of the EFA law is not to serve as a stand-in for a resident public school experience, but rather to afford parents multiple options, including private school options. That puts this program much more squarely within the facts of *Espinoza*, where the Supreme Court held that: "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Espinoza*, 140 S. Ct at 2261.

The Department also disagrees that there is a problem with a potential religious *use* of funds as asserted by the ACLU-NH. As set forth above, the Department believes that, as enacted, the EFA law does not permit the use of EFA funds for religious instruction. To receive EFA funds, a parent must agree “To provide an education for the eligible student in the core knowledge domains that 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.” RSA 194-F:3, III(d)(1).

Nor does the Department think a “religious use” could be approved for the funds under RSA 194-F:2, II(o), for the reasons noted above in Section (d).

The Department is therefore confident that the program and the proposed rules are valid under the US and NH Constitutions, as they do not permit program funds to be used for religious instruction while simultaneously allowing parents to direct funds to religiously affiliated institutions.

For the foregoing reasons, the Department requests that the Committee approve the Department’s rules, as amended.

Regards,



Frank Edelblut
Commissioner of Education

Readopt with amendment and renumber Ed 324, effective 8-27-21 (Document #13824, Interim), as Ed 800 to read as follows:

PART Ed 324 EDUCATION FREEDOM ACCOUNTS PROGRAM

~~Ed 324.01 Purpose. The purpose of these rules is to ensure uniform application of RSA 194 F in the establishment and administration of the education freedom accounts (EFA) program.~~

~~Ed 324.02 Scope. Ed 324 shall apply to the scholarship organization, education service providers, and eligible participating students and parents to allow the scholarship organization to provide the option for a parent or guardian to better meet the individual educational needs of his or her eligible student by establishing an education freedom account, for the funding of qualifying education expenses provided by education service providers.~~

~~Ed 324.03 Definitions. The following definitions shall apply to Ed 324:~~

- ~~(a) “Board” shall mean the New Hampshire state board of education;~~
- ~~(b) “Commissioner” shall mean the commissioner of the department of education;~~
- ~~(c) “Curriculum” means “curriculum” as defined in RSA 194 F:1, II;~~
- ~~(d) “Days” shall mean calendar days;~~
- ~~(e) “Department” means “department” as defined in RSA 194 F:1, III;~~
- ~~(f) “Education freedom account (EFA)” means “education freedom account (EFA) as defined in RSA 194 F:1, IV;~~
- ~~(g) “Education service provider” means “education service provider” as defined in RSA 194 F:1, V;~~
- ~~(h) “EFA program” means “program” as defined in RSA 194 F:1, XI;~~
- ~~(i) “Eligible student” means “eligible student” as defined in RSA 194 F:1, VI;~~
- ~~(j) “EFA student” means “EFA student” as defined in RSA 194 F:1, VII;~~
- ~~(k) “Full time” means “full time” as defined in RSA 194 F:1, VIII;~~
- ~~(l) “Parent” means “parent” as defined in RSA 194 F:1, X;~~
- ~~(m) “Qualifying differentiated aid eligibility” means “qualifying differentiated aid eligibility” as defined in RSA 198:40 a. A pupil with a qualifying disability as defined under 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);~~
- ~~(n) “Remote or hybrid” means “remote or hybrid” as defined in RSA 194 F:1, IX;~~
- ~~(o) “Scholarship program” means “scholarship program” as defined in RSA 194 F:1, XI; and~~

(p) “State fiscal year” shall mean the period from July 1 to June 30 of every calendar year.

Ed 324.04 Applications:

(a) The scholarship organization shall develop an application for potential participants in the program, which, at a minimum, satisfies the requirements enumerated in RSA 194 F:3.

(b) The scholarship organization shall develop an application for signature by the parent or guardian, and the student, if the student is in a secondary education program, to include, at a minimum the required disclosures enumerated in RSA 194 F, including:

(1) A written explanation of allowable uses of EFA funds, the responsibilities of parents or guardians, the duties of the scholarship organization, and the role of any financial management firms that the scholarship organization contracts with to administer any aspect of the EFA program; and

(2) Notice that participation in the EFA program is a parental placement under 20 USC section 1412, Individuals with Disabilities Education Act (IDEA), along with an explanation of the rights that parentally placed students possess under IDEA and any applicable state laws;

Ed 324.05 Program Requirements:

(a) The scholarship organization shall accept rolling admissions into the program.

(b) Within 30 days of receipt of a completed student application, the scholarship organization shall confirm with the parent or guardian in writing that the application is complete in accordance with the approval criteria set forth in RSA 194 F:3.

Ed 324.06 EFA Disbursement

(a) For the first year of the program funding shall be disbursed 4 times during state fiscal year 2022, pursuant to the adjusted amounts determined using RSA 198:40 a, II based on an enrollment count of the verified student applications received by the department from the scholarship organization no later than the date indicated in Table 324-1, and in accordance with the state fiscal year 2022 EFA disbursement schedule in Table 324-1 below:

Table 324-1 State Fiscal Year 2022 EFA Disbursement Schedule

EFA Funds Available	Allocated funds to be disbursed per state fiscal year	Student Application Verified and Reported to the Department by:
September 1	20%	October 2
November 1	20%	October 2
January 1	30%	December 2
April 1	30%	March 2

(b) ~~Beginning in state fiscal year 2023 and every year after, funding shall be disbursed 4 times per state fiscal year, in accordance with RSA 198:40 a in accordance with the EFA disbursement schedule in Table 324.2 below:~~

Table 324.2 EFA Disbursement Schedule

EFA Funds Available	Allocated funds to be disbursed per state fiscal year	Student Application Verified and Reported to the Department by:
September 1	20%	August 2
November 1	20%	October 2
January 1	30%	December 2
April 1	30%	March 2

(c) ~~Applications in Ed 324.04(b) may be submitted to the scholarship organization throughout the year on a rolling basis, but shall be confirmed complete by the scholarship organization before a parent, guardian, or EFA student shall have access to EFA account funds.~~

Ed 324.07 Qualifying EFA Expenses. The following shall apply to EFA expenses enumerated in RSA 194 F:2, II:

(a) ~~Internet connectivity shall not include any additional cost for media streaming or cable media options that are not part of an online learning program or online instructional materials;~~

(b) ~~Internet and technology purchased with EFA funds shall be primarily used, meaning 51% of the time or more, to help meet the EFA student’s education needs;~~

(c) ~~Computer hardware shall be limited to a single computer device per student every 3 years, unless otherwise approved by the scholarship organization, in accordance with the scholarship organization’s approval process, as a necessary educational resource including assistive devices and accessible educational hardware and materials; and~~

(d) ~~The scholarship organization shall publish on its website a policy for pre-approval of qualifying educational expenses consistent with RSA 194 F:2, II(o) and this section.~~

Ed 324.08 Education Service Providers.

(a) ~~The scholarship organization shall publish on its website:~~

~~a. A standard application form; and~~

~~b. Procedures for review and approval of education service providers including, but not limited to, any procedures used by education service providers to background check employees.~~

(b) ~~Online and paper applications for education service providers shall be accepted by the scholarship organization for review on a rolling basis throughout the year.~~

~~(c) The scholarship organization shall determine only whether curricular materials selected by parents and guardians are qualifying materials pursuant to RSA 194 F:2, II(e) and whether the materials fall within the core knowledge domains described in RSA 194 F:3, III(d)(1).~~

~~(d) Education service providers shall not refund, rebate, or share EFA funds directly with parents or guardians. EFA funds shall only be returned to an eligible student's EFA account. Nothing in these rules shall prohibit education service providers from refunding, rebating, or sharing parent, guardian, and eligible student personal non-EFA funds to the parent or guardian.~~

~~(e) A list of all approved education service providers shall be posted on the scholarship organization's website, reported to the department, and made easily accessible to the public to include education service provider name, eligible services, fee amounts received for services, and number of EFA students served.~~

~~(f) A directory of all education service providers approved by the scholarship organization shall be available on the department's website.~~

~~(g) Approval by the scholarship organization of an education service provider shall serve as statewide approval of such provider for purposes of the program.~~

~~Ed 324.09 Scholarship Organizations.~~

~~(a) The scholarship organization shall have been approved pursuant to RSA 77 G:5, II(a) by the department of revenue administration as a scholarship organization.~~

~~(b) The scholarship organization shall provide all types of qualifying educational expenses enumerated in RSA 194 F:2, II(a) (e).~~

~~(d) The scholarship organization shall electronically file with the department completed student data at least 30 days prior to the funding date, as described in Table 324-1 and Table 324-2. Failure to meet the application deadline shall result in delayed or unavailable funding if such failure prevents the department from processing the payment.~~

~~(e) The scholarship organization shall verify, at a minimum, that completed applications meet the following:~~

~~(1) The eligible student meets all eligibility criteria as described in RSA 194 F:1, IV;~~

~~(2) The EFA application was verified complete only after signature by the parent or guardian, and the student, if the student is in a secondary education program; and~~

~~(3) The student, parent, guardian, or both have not been disqualified from participation in the program due to funds misuse or are otherwise not eligible pursuant to RSA 194 F:1, VI.~~

~~(f) The scholarship organization shall submit a roster of approved EFA students which shall include the student's:~~

~~(1) Information on the student's school of attendance, if applicable;~~

~~(2) Eligibility information;~~

- ~~(3) Qualifying differentiated aid eligibility;~~
- ~~(4) Whether the student is a current or new participant in program;~~
- ~~(5) The amount of EFA funds received for each student and the amount of EFA funds remaining in each student's account; and~~
- ~~(6) Total EFA funds requested.~~

~~(g) The scholarship organization shall make EFA student account balances readily accessible, through a technology interface with real-time or near real-time balance information, transaction history, including transaction date, amount deposited or withdrawn, and the name of the education service provider.~~

~~(h) The scholarship organization shall create a parent and education service provider advisory commission pursuant to RSA 194 F:5, responsible for appeals of education service provider denials and other educational expenses approved by the scholarship organization pursuant to RSA 194 F:2 (II)(e).~~

~~(i) The scholarship organization shall contract with an unaffiliated auditor to conduct a risk-based audit of EFA accounts with the department on, at a minimum, an annual basis.~~

~~(j) The department shall receive copies of all subcontracts and assignment agreements and the department shall not be bound by any provisions contained in a subcontract or an assignment agreement to which the department is not a party.~~

~~(k) The scholarship organization shall withhold from deposits or deduct throughout the year from EFAs an amount to cover the cost of administering the EFA program, up to a maximum total of 10% annually. All remaining funds shall be available to eligible students for allowable uses.~~

~~(l) The scholarship organization shall develop a records retention policy.~~

~~Ed 324.10 Responsibilities of Public Schools and School Districts. The public school or public school district in which an eligible student was most recently enrolled shall provide to the parent their child's state assigned student identification (SASID) as required under RSA 193 E:5.~~

~~Ed 324.11 Termination of EFA.~~

~~(a) An EFA account shall only be dissolved with written consent of the parent or guardian, unless an EFA student graduates high school or there is a determination by the scholarship organization that there is an intentional and substantial misuse of funds.~~

~~(b) Unless otherwise noticed in writing by the parent that roll-over EFA account funds are forfeited, written consent of dissolution shall document the parent's understanding that the rolled-over EFA account funds may continue to be utilized pursuant to RSA 194 F:3, VI.(a), even if the student is attending a public school and no longer participating in the program, or until the former EFA student graduates high school.~~

~~(c) The scholarship organization shall develop and make publicly available on its website, the process for the determination of a parent, guardian, or EFA student's intentional and substantial misuse of EFA funds.~~

~~(d) The department shall be notified within 5 days any time an EFA account is suspended, or if a student is otherwise deemed ineligible.~~

~~(e) Within 5 days, suspected cases of intentional and substantial misuse of EFA funds shall be reported by the scholarship organization to the department, the board, the attorney general, and, for cases exceeding the amount of a class B felony, the local or state law enforcement agency.~~

~~(f) A parent, guardian, or EFA student may appeal decisions by the scholarship organization pursuant to Ed 200 relative to application completeness and termination of participation.~~

~~(g) The scholarship organization shall notify the department by August 1 of each calendar year of any existing EFA student that has not provided an annual record of educational attainment, pursuant to RSA 194 F:3, III.(d)(3).~~

~~(h) The scholarship organization shall develop a process for the determination of disqualification of an education service provider.~~

~~(i) The process shall include, at a minimum, how the following shall be determined when deciding disqualification:~~

~~(1) Intentional and substantial misrepresentation of information;~~

~~(2) Failure to refund any overpayments within 30 days or the failure to process a request for a refund; and~~

~~(3) Failure to provide students with promised educational goods or services.~~

~~(j) A list of all disqualified education service providers shall be available on the scholarship organization's websites or in paper format upon request.~~

~~(k) Within 5 days of disqualification, the scholarship organizations shall notify parents, guardians, EFA students, and the department in writing or electronically of an education service provider disqualification.~~

~~(l) Education service providers disqualified by the scholarship organization shall be disqualified from participation in the EFA program and a list of disqualified providers shall be posted on the Department's website.~~

~~(m) An education service provider may appeal the scholarship organization's decision to the department pursuant to Ed 200.~~

~~(n) When the scholarship organization is no longer approved under RSA 77-G, the commissioner shall:~~

~~(1) Issue a written notice of noncompliance that shall provide the scholarship organization with an opportunity to meet the requirements; and~~

~~(2) If the scholarship organization fails to meet the requirements specified in a notice of noncompliance pursuant to (1) above, remove the scholarship organization from eligibility.~~

~~(o) The commissioner shall immediately suspend the scholarship organization's eligibility where the health, safety, or welfare of students is at risk.~~

~~(p) The scholarship organization suspended or removed pursuant to (n)(2) or (n) above shall have 15 days from receipt of the notice of proposed action to file with the department's governance unit a request for a proceeding pursuant to Ed 200. All resulting proceedings shall be conducted in accordance with Ed 200.~~

~~Ed 324.12 Legislative Oversight Committee Established.~~

~~(a) The commissioner and the director of the scholarship organization or designee shall attend committee meetings and provide requested information.~~

~~(b) Pursuant to RSA 194-F:12, the first named senate member may convene the committee.~~

CHAPTER Ed 800 EDUCATION FREEDOM ACCOUNTS PROGRAM

PART Ed 801 PURPOSE AND SCOPE

Ed 801.01 Purpose. The purpose of these rules is to ensure uniform application of RSA 194-F in the establishment and administration of the education freedom accounts (EFA) program.

Ed 801.02 Scope. Ed 800 shall apply to the scholarship organization, education service providers, and eligible participating students and parents to allow the scholarship organization to provide the option for a parent or guardian to better meet the individual educational needs of his or her eligible student by establishing an EFA, for the funding of qualifying education expenses provided by education service providers.

PART Ed 802 DEFINITIONS

Ed 802.01 Definitions.

(a) "Adequate education" means "adequate education" as defined in RSA 194-F:1, I.

(b) "Board" means the New Hampshire state board of education.

(c) "Commissioner" means the commissioner of the department of education.

(d) "Confidential student information" means educational records, student medical information, and student personally identifiable information.

(e) "Curriculum" means "curriculum" as defined in RSA 194-F:1, II.

(f) "Days" means calendar days.

(g) "Department" means "department" as defined in RSA 194-F:1, III.

(h) "Differentiated aid" means the aid categories enumerated in RSA 198:40-a, II (b) - (e).

(i) "Education freedom account (EFA)" means "education freedom account" as defined in RSA 194-F:1, IV.

Edit. Insert a space before "as".

(j) “Education service provider” means “education service provider” as defined in RSA 194-F:1, V.

(k) “Eligible student” means “eligible student” as defined in RSA 194-F:1, VI.

(l) “EFA student” means “EFA student” as defined in RSA 194-F:1, VII.

(m) “Full time” means “full time” as defined in RSA 194-F:1, VIII.

(n) “Intentional and substantial” shall be defined as follows:

(a) Intentional shall mean knowingly and willfully; and

(b) Substantial shall mean \$250 or more.

Edit. “means that: (a) Intentional means...(b) Substantial means...” Requirements do not belong in the definitions. Avoid the use of “shall” so that a requirement is not in the definition. **See 3.7 of Chapter 4.** (Note that RSA 541-A:8 requires adherence to the *Manual*.)

(o) “Parent” means “parent” as defined in RSA 194-F:1, X.

(p) “Program” means “program” as defined in RSA 194-F:1, XI.

(q) “Pupil with a disabling condition” means a child having autism, deaf-blindness, deafness, developmental delay, emotional disturbance, hearing impairment, intellectual disability, multiple disabilities, orthopedic impairment, other health impaired, specific learning disability, speech-language impairment, traumatic brain injury, acquired brain injury, or visual impairment or blindness.

(r) “Remote or hybrid” means “remote or hybrid” as defined in RSA 194-F:1, IX.

(s) “Scholarship organization” means “scholarship organization” as defined in RSA 194-F:1, XII.

(t) “State fiscal year” means a one-year period from July 1 to June 30.

PART Ed 803 PROGRAM ADMINISTRATION

Edit.
“be”

Edit. “the”

Ed 803.01 Scholarship Organization. In addition to the requirements under RSA 194-F:4, the following shall apply to the authority and responsibilities of the scholarship organization under **this** program:

(a) The scholarship organization shall **have been** approved pursuant to RSA 77-G:5, II(a) by the department of revenue administration as a scholarship organization;

(b) The scholarship organization shall provide access to all types of qualifying educational expenses enumerated in RSA 194-F:2, II(a-o);

(c) Failure by a scholarship organization to provide access to every qualifying expense described in RSA 194-F:2, II(a-o) shall disqualify a scholarship organization from participation in the program:

Unclear. RSA 194-F:2, II(o) is a broad catch all category that needs to have established criteria either by the Board or by the scholarship organization: “Any other educational expense approved by the scholarship organization.” Without any criteria, an EFA student whose service request has been denied may be able to successfully show that the organization has failed to provide access. In its cover letter to the amended conditional approval request, the Department’s position is that the statute does not need to be clarified via administrative rule even though the language is broad. The Dept. states that it is not broad when read in the context of the expense/service categories enumerated in the statute, but this ignores the fact that the organization must determine the criteria for this category as not every request will be approved, and that the Board has not provided any direction to the organization via the rule on how to determine whether a request will be granted or denied. The Department’s position is also that the Legislature has chosen to delegate this authority to the scholarship organization, but this ignores the fact that the organization is a vendor of the state and as such the state has an obligation to administer the program by fleshing out the statute via administrative rule where it is needed as part of its administration of the program. *See* RSA 194-F:4, XV as well as the comments regarding delegation on page 17. Additionally, the lack of criteria could mean that EFA funds could be used for religious instruction in violation of the NH Constitution. See the NH ACLU’s concerns, not about funding going to religious institutions, but rather to religious instruction, and the ACLU’s proposed language that would prevent such a violation of the NH Constitution.

(d) The scholarship organization shall electronically file with the department completed student data at least 30 days prior to the funding date, as described in Table 804-1. Failure to meet the application deadline shall result in delayed or unavailable funding if such failure prevents the department from processing the payment;

(e) The scholarship organization shall verify, at a minimum, that completed applications meet the following:

- (1) The eligible student meets all eligibility criteria as described in RSA 194-F:1, IV;
- (2) The EFA application was verified complete only after signature by the parent or guardian, and the student, if the student is in a secondary education program; and
- (3) The student, parent, guardian, or both have not been disqualified from participation in the program due to funds misuse or are otherwise not eligible pursuant to RSA 194-F:1, VI;

(f) The scholarship organization shall submit to the department a roster of approved EFA students including each student’s:

- (1) Information on school of attendance, if applicable;
- (2) Eligibility information;
- (3) Qualifying differentiated aid eligibility;
- (4) Status as a current or new participant in program;
- (5) Amount of EFA funds received and amount of EFA funds remaining; and
- (6) Total EFA funds requested;

Unclear. RSA 194-F does not define or address the protection of confidential student information, either health care data or educational data. The Board has inserted a definition for confidential student information that includes medical and educational records. The Department in its cover letter to the conditional approval request states that the organization will have access to confidential information because parents will be providing that information on the organization's application to the EFA program which is not addressed in the rule at all. The intro to (g) simply says that the organization will have access to the information, and it does not specify that this will come from the parent during the application process. The rule does not affirmatively require that parents submit the information for an eligibility determination for the program, and there is no opt out option in the rule or any ramifications for refusing to provide the information. As written, the rule would allow the organization to require that a LEA turn over the information or require the parent to provide it. Further, it is unclear whether the scholarship organization knows what procedures the LEAs use to protect PII or what procedures will be instituted by the Board to ensure the organization's compliance as part of the administration of this program. In its cover letter to the amended conditional approval request, the Department states that even though the information the organization will receive is considered protected under FERPA, the scholarship organization is not covered under FERPA and thus, the rule at a minimum requires the organization to treat the information as a covered entity (school) would. However, the Department does not provide any information in the rule or in its cover letter on how that will be enforced or even monitored, and the Department is required to administer this program. *See* RSA 194-F:4, XV. The Department also states that in requiring the organization to adhere to the same standards as schools in maintaining the confidentiality of student records, it is requiring that the organization not release any confidential information without a parent's authorization to third parties, and notes that RSA 194-F does not address confidentiality of student's information. While that is the Board's intent, all the rule actually says is that the records be maintained in a manner consistent with the LEAs procedures.

(g) The scholarship organization shall have access to confidential student information under the following conditions:

(1) Confidential student information shall be maintained in a manner consistent with the procedures LEAs follow to manage confidential student information; and

(2) The scholarship organization shall verify a student SASID number for any student applying for an EFA prior to requesting a new SASID.

(h) The scholarship organization shall make EFA student account balances readily accessible, through a technology interface with real-time or near real time balance information, transaction history, including transaction date, amount deposited or withdrawn, and the name of the education service provider;

Edit. "and for appeals of denials of other educational expenses requested pursuant to RSA 194-F:2 (II)(o);"

Edit.
"RSA"

(i) The scholarship organization's director shall appoint members to the parent and education service provider advisory commission pursuant to RSA 194-F:5 and which shall be responsible for appeals of education service provider denials and other educational expenses approved by the scholarship organization pursuant to 194-F:2 (II)(o);

(j) The scholarship organization shall contract with an unaffiliated auditor to conduct a risk-based audit of EFA accounts on, at a minimum, an annual basis. The scholarship organization shall submit a copy of such plan and all associated audit reports to the department;

Edit. "from EFA deposits"

Edit. Insert a comma.

(k) The department shall receive copies of all subcontracts and assignment agreements and the department shall not be bound by any provisions contained in a subcontract or an assignment agreement to which the department is not a party;

(l) The scholarship organization shall withhold from deposits from EFAs an amount to cover the cost of administering the EFA program, up to a maximum total of 10% of each deposit. All remaining funds shall be available to eligible students for allowable uses; and

(m) The scholarship organization shall develop and implement a records retention policy.

Ed 803.02 Education Service Providers. In addition to the requirements under RSA 194-F:4 and RSA 194-F:6-7, the following shall apply to education service providers approved by the scholarship organization:

Note to JLCAR. See the comment on page 9 regarding the need for the agency as administrator of the program to develop criteria, and the NH ALCU's concern that a potential exists for violations of the NH Constitution's requirement that state funds not pay for religious instruction. *See also* Attorney Zelin's comments in the attachments regarding the broad scope of RSA 194-F:2,(II)(o) and the need for guardrails and oversight by the Board.

Edit. "10% of each deposit annually pursuant to RSA 194-F:4, V."

Unclear/Need for Legis. Fix. See also the comment on page 17 regarding the need for legislation. RSA 194-F does not grant the scholarship organization the ability to require criminal background checks. The rule does not actually require the scholarship organization to have the education service providers get criminal background checks, rather the rule requires the organization to publish any procedures the service providers happen to use to ensure background checks take place for their providers who have direct access to children. The Department in its cover letter to the conditional approval request states that the intent of the language is to merely to have the providers post their procedures for background checks if they have them. To affirmatively require criminal background checks for any provider having contact with a child will require further legislation. The Department in its cover letter to the amended conditional approval request notes that it lacks authority to create or enforce safety rules on education providers and that further legislation is required.

(a) The scholarship organization shall publish on its website a standard application form, and procedures for review and approval of education service providers including, but not limited to procedures, if any, used by education service providers to ensure background check of employees who have direct contact with students;

(b) Online and paper applications for education service providers shall be accepted by the scholarship organization for review on a rolling basis throughout the year;

(c) The EFA program shall utilize a wide variety of curricular materials to meet the educational needs of the students;

(d) The scholarship organization shall determine whether the materials selected fall within the core knowledge domains described in RSA 194-F:3, III(d)(1);

(e) Education service providers shall not refund, rebate, or share EFA funds directly with parents or guardians. EFA funds shall only be returned to an eligible student's EFA account;

(f) A list of all approved education service providers shall be posted on the scholarship organization's websites, reported to the department, and made easily accessible to the public to include education service provider name, eligible services, fee amounts received for services, and number of EFA students served;

(g) A directory of all education service providers approved by the scholarship organization shall be available on the department's website; and

(h) Approval by the scholarship organization of an education service provider shall serve as statewide approval of such provider for purposes of the program.

Ed 803.03 Responsibilities of Public Schools and School Districts.

Edit. "LEAs in districts where private elementary schools and secondary schools are also located shall ensure..."

(a) The public school or public school district in which an eligible student was most recently enrolled shall provide to the parent the child's state assigned student identification (SASID) upon request as required under RSA 193-E:5.

(b) Local education agencies (LEAs), where private elementary schools and secondary schools are located, shall ensure that children with disabilities, placed by their parents in private, non-profit schools participating in state-funded EFA programs, shall be included in the group of parentally-placed private school children with disabilities who are eligible for equitable services, including special education and related services from the LEA where private schools are located.

Note to Committee/Agency. The correction of this misspelled word (“eligible”) was not annotated. Please be sure to annotate all changes so that a word for word comparison is not required. The Committee might request that the Board provide assurance that no other amendments have been made in this proposal that are not annotated.

Edit. Insert a comma.

PART Ed 804 EFA FUNDS AND DISBURSEMENT

Ed 804.01 Funds; Generally. In addition to the requirements under RSA 194-F:2, I and RSA 194-F:4, ~~VII~~ the following shall apply to EFA funds:

(a) Pursuant to RSA 194-F:2, EFAs shall be equivalent to the per pupil adequate education grant amount under RSA 198:40-a, plus any differentiated aid that would have been provided to a public school for that eligible student;

(b) Fund transfers shall be made to the scholarship organization in accordance with the distribution of adequate education grants under RSA 198:42 and Ed 804.03; and

(c) A pupil shall be eligible for the differentiated aid amount set forth in RSA 198:40-a, II(d) for EFAs under RSA 194-F if there has been a determination of eligibility for special education by a qualified examiner for each assessment, as defined and enumerated in ED 1107.04 Table 1100.1, in accordance with 34 CFR 300.300-300.311.:

(d) Such determination of eligibility for special education in (c) above may be completed:

Edit. “guardian, and such expense shall be a qualifying EFA expense; or”

(1) At the expense of the parent or guardian, such expense representing a qualifying EFA expense; or

(2) At no expense to the parent or guardian by the student’s resident district, pursuant to ED 1105.02.

(e) The student’s resident distract shall notify the parent or guardian in writing of determinations made under (d)(2) above.

Legis. Intent/Unclear/Potentially Inadequate FIS. Paragraphs (c) and (d) are problematic and may increase the program’s costs which was not identified in the FIS and is attributable to the rule. RSA 198:40-a II. (d) requires differentiated aid for pupils receiving special education services, and RSA 194-F:2, I requires the Commissioner to transfer “any differentiated aid that *would have been provided* to a public school for that eligible student.” (Emphasis added) RSA 186-C:2 defines a child with a disability as being evaluated by a school district, and RSA 186-C:7 says that the school district develops the IEP plan. Currently, only students who have been evaluated by an IEP team qualify for special education services and thus qualify for differentiated aid pursuant to RSA 198:40-a, II (d). Here, in paragraph (c) the rule permits the determination for special education services by a “qualified examiner” which violates RSA 186-C:2 & 7. Additionally, under Ed 1104.07, there is no provision for the determination of eligibility for special ed services. Rather that rule is addressing the making of a diagnostic assessment to determine whether there is a disability. Simply having a disability does not mean the student is eligible for special education services, which is actually determined by a school district’s IEP team. This rule appears to allow a parent to obtain a disability or special ed services determination outside of the process established in the special education statute and thus, violates that statute and may increase program costs which should have been identified in the FIS and should be identified as being attributable to the rule.

Unclear. Ed 804.01(d)(2) no longer talks about medical professionals diagnosing pupils with a disabling condition.

(f) A pupil with a disabling condition, as determined by a medical professional licensed in any state in the United States in accordance with Ed 804.01(d)(2), shall not be considered a child with a disability, through an appropriate evaluation, in accordance with 34 CFR 300.304-300.311 and as such, does not qualify for the equitable services funds pursuant to 34 CFR 300.138.

Ed 804.02 Qualifying EFA Expenses. The following shall apply to qualifying EFA expenses enumerated in RSA 194-F:2, II:

(a) Internet connectivity shall not include any additional cost for media streaming or cable media options that are not part of an online learning program or online instructional materials;

(b) Internet and technology purchased with EFA funds shall be primarily used, meaning 51% of the time or more, to help meet the EFA student’s education needs;

(c) Computer hardware shall be limited to a single computer device per student every 3 years, unless otherwise approved by the scholarship organization, in accordance with the scholarship organization’s approval process, as a necessary educational resource including assistive devices and accessible educational hardware and materials;

(d) An evaluation for determination of eligibility for differentiated aid under Ed 804.01(d)(1); and

(e) The scholarship organization shall publish on its website a policy for pre-approval of qualifying educational expenses consistent with RSA 194-F:2, II(o) and this section.

Legis. Intent/Unclear.
See the comment on page 12.

Ed 804.03 EFA Disbursement. In addition to the requirements under RSA 194-F:4, VIII, the following shall apply to EFA disbursement:

(a) Beginning in state fiscal year 2023 and every year after, funding shall be disbursed 4-times per state fiscal year, in accordance with RSA 198:40-a and the EFA disbursement schedule in Table 804-2 below:

Table 804-1 EFA Disbursement Schedule

Unclear. It is unclear what section is intended. Is Ed 805.01 meant?

EFA Funds Available	Allocated funds to be disbursed per state fiscal year	Student Application Verified and Reported to the Department by:
September 1	20%	August 2
November 1	20%	October 2
January 1	30%	December 2
April 1	30%	March 2

(b) Applications in Ed 804 may be submitted to the scholarship organization throughout the year on a rolling basis, but shall be confirmed complete by the scholarship organization before a parent, guardian, or EFA student shall have access to EFA account funds.

PART Ed 805 APPLICATION AND ENROLLMENT

Ed 805.01 Application Development, Agreement, and Notification Requirements.

(a) The scholarship organization shall develop an application for potential participants in the program, which, at a minimum, satisfies the requirements enumerated in RSA 194-F:3.

(b) The scholarship organization shall develop an application which it shall provide for signature to the parent or guardian, and the student, if the student is in a secondary education program.

(c) The application shall contain the following:

(1) An explanation of allowable uses of EFA funds, the responsibilities of parents or guardians, the duties of the scholarship organization, and the role of any financial management firms that the scholarship organization may contract with to administer any aspect of the EFA program;

(2) Notice as follows:

Note to the JLCAR. See Attorney Zelin’s comments regarding the constitutionality of this notice in the attachments, and the Department’s rebuttal in its cover letter to the amended conditional approval request.

Edit. “shall be entitled”

“Participation in the EFA program is a parental placement under 20 USC section 1412, Individuals with Disabilities Education Act (IDEA) if a child with a disability is enrolled in a non-public school. A child with a disability participating in an EFA program and enrolled in a public school under RSA 194-F:2, II(d) is not a parental placement under IDEA and **is entitled** to FAPE. Parentally-placed private school children with disabilities shall not be entitled to a FAPE in connection with their enrollment by their parents in a private school, in accordance with 34 C.F.R. 300.148(a) and pursuant to 34 C.F.R. 300.137(a), while participating in the state-funded EFA program. The school district in which the child with a disability participating in the EFA program enrolled in a public school under RSA 194-F:2,II(d) resides is responsible for the provision of FAPE.”

(d) A signed application as described in (b) above, shall constitute an agreement by the signatory as described in RSA 194-F:3, III.(d), RSA 194-F:3, IV, and RSA 194-F:4, II and III.

Ed 805.02 Enrollment.

(a) The scholarship organization shall approve applications, as described in Ed 805.01, in accordance with RSA 194-F:3, III.

(b) The scholarship organization shall accept rolling admissions into the program.

(c) Within 30 days of receipt of a completed student application, the scholarship organization shall confirm with the parent or guardian in writing that the application is complete in accordance with the approval criteria set forth in RSA 194-F:3.

(d) If the scholarship organization receives an incomplete application, the applicant shall be notified in writing by the scholarship organization within 15 days of receipt which shall include instructions for completing the application.

PART Ed 806 TERMINATION OF EDUCATION FREEDOM ACCOUNTS

Ed 806.01 Termination of EFAs. In addition to the requirements under RSA 194-F:3, VI and RSA 194-F:4, IX through XIII, the following shall apply to the termination of EFAs:

(a) An EFA shall only be dissolved with written consent of the parent or guardian, unless an EFA student graduates high school or there is a determination by the scholarship organization that there is an intentional and substantial misuse of funds;

(b) Unless otherwise noticed in writing by the parent that roll-over EFA account funds are forfeited, written consent of dissolution shall document the parent's understanding that the rolled-over EFA account funds may continue to be utilized pursuant to RSA 194-F:3, VI.(a), even if the student is attending a public school and no longer participating in the program, or until the former EFA student graduates high school;

(c) The scholarship organization shall develop and make publicly available on its website, the process for the determination of a parent, guardian, or EFA student's intentional and substantial misuse of EFA funds;

(d) The department shall be notified within 5 days any time an EFA account is suspended, or if a student is otherwise deemed ineligible;

(e) Within 5 days, suspected cases of intentional and substantial misuse of EFA funds shall be reported by the scholarship organization to the department, the board, the attorney general, and, for cases exceeding the amount of a class B felony, the local or state law enforcement agency;

(f) A parent, guardian, or EFA student may appeal decisions by the scholarship organization pursuant to Ed 200 relative to:

- (1) Application completeness and termination of participation; or
- (2) Denial of services.

(g) The scholarship organization shall notify the department by August 1 of each calendar year of any existing EFA student that has not provided an annual record of educational attainment, pursuant to RSA 194-F:3, III(d)(3);

(h) The scholarship organization shall develop a process for the determination of disqualification of an education service provider;

← Edit. Replace period with a semicolon.

(i) The process shall include, at a minimum, how the following are determined when deciding disqualification:

- (1) Knowing and willful misrepresentation of information;
- (2) Failure to refund any overpayments within 30 days or the failure to process a request for a refund; and
- (3) Routine failure, meaning 3 or more times, to provide students with promised educational goods or services;

(j) A list of all disqualified education service providers shall be available on the scholarship organization's websites or in paper format upon request;

Edit/Unclear "it shall no longer be"

(k) Within 5 days of disqualification, the scholarship organization shall notify parents, guardians, EFA students, and the department in writing or electronically of an education service provider disqualification;

(l) Education service providers disqualified by the scholarship organization shall be disqualified from participation in the EFA program and a list of disqualified providers shall be posted on the department's website;

(m) An education service provider may appeal the scholarship organization's decision to the department pursuant to Ed 200;

(n) ~~When the scholarship organization does not meet the duties, obligations, and authorities in RSA 194-F:4, it is no longer eligible~~ to participate in the EFA program, and the commissioner shall:

(1) Issue a written notice of ineligibility for participation in the EFA program that shall provide the scholarship organization with an opportunity to meet the requirements for eligibility as described in RSA 194-F:4; and

(2) If the scholarship organization fails to meet the requirements specified in a notice of ineligibility pursuant to (1) above, remove the scholarship organization from eligibility;

(o) ~~When the scholarship organization is no longer approved under RSA 77:G, the commissioner shall notify the scholarship organization as described in (m)(1) and (2) above;~~

(p) The commissioner shall immediately suspend the scholarship organization's eligibility where the health, safety, or welfare of students is at risk;

(q) The scholarship organization suspended or removed from the EFA program pursuant to (m)(2) above shall have 15 days from receipt of the notice of proposed action to file with the department's governance unit a request for a proceeding pursuant to Ed 200. All resulting proceedings shall be conducted in accordance with Ed 200; and

(r) Within 10 days of suspension or removal of a scholarship organization pursuant to (n) above, the department shall commence an adjudicative proceeding in accordance with Ed 200.

PART Ed 807 LEGISLATIVE OVERSIGHT COMMITTEE

Ed 807. 01 Legislative Oversight Committee Established. In addition to the requirements under RSA 194-F:12, the following shall apply to the establishment, administration, and responsibilities of the education freedom savings account oversight committee:

(a) The commissioner and the director of the scholarship organization or designee shall attend committee meetings and provide requested information; and

(b) Pursuant to RSA 194-F:12, the first-named senate member may convene the committee.

Unclear. "(n)". There are no subparagraphs to (m).

Note to the JLCAR on potential need for Legislation. The JLCAR may want to pursue legislation to address ambiguities in RSA 194-F. (There are at least 20 bills impacting the EFA program.) The ambiguities in RSA 194-F are as follows:

- RSA 194-F:1, XII and throughout. “Scholarship organization” is defined as singular not plural, and the statute is written as if there is one organization. Additionally, the parent and education service provider advisory commission appears to be one commission, not multiple commissions established for each organization.
 - It is also unclear whether the provisions of RSA 91-A apply to the meetings of the Commission because it has been established by statute in RSA 194-F:5, I. and so, clarification in the statutes maybe needed.
- RSA 194-F:2, VI. The statute states EFA funds shall not constitute taxable income and may conflict with federal tax law;
- RSA 194-F:3, II. Requires the organization to develop a standard application; however, if there is more than one organization, it is not clear whether the standardized form is the same across the organizations;
- The statute permits subcontracting for certain services and does not require approval to do so. *See* RSA 194-F:4, II., RSA 194-F:4, VI. (b), and RSA 194-F:4, X. If the contracts need Governor and Executive council approval, the statute may need to be clarified;
- Potential delegation issues:
 - The statute does not address the role of the Board of Education, and oversight by the Department of Education is minimal. For example, the Board does not provide any criteria to the scholarship organization for RSA 194-F:2, II(0) which allows the organization to approve any other educational expenses. The public comment submitted indicates that potential violations of the NH Constitution may result if funding is provided for religious instruction.
 - The roles of the Board, the Department, and the scholarship organization may need to be clarified, and if the Legislature wants the Board or Department to perform oversight it may need to affirmatively state the scope of the oversight. *See* generally RSA 194-F:4. *See* also, the Department’s cover letter to the amended conditional approval request in which it seems to presume that the Legislature has delegated much of the implementation of the program to the vendor when RSA 194-F:4, XV requires the Department to have administrative rules in order to administer the program. Some details on how this program will be administered along with oversight of the vendor have not been fleshed out in the rule proposal and the Department’s position appears to be that it is not needed.
 - The statute grants to the scholarship organization authority that is typically given to the executive agency and may represent an impermissible delegation of authority. RSA 541-A:22 states that an agency shall not by rule delegate its rulemaking authority to anyone other than the agency named in the statute. RSA 194-F:4, XV only grants the Department rulemaking authority necessary for the administration of the statute. The policies and procedures developed by the organization will not have the legal effect of administrative rules, and so, the scope of oversight by the Board or Department may need to be affirmatively stated.
- There is no provision in the statute to require the education service providers get a criminal background check or that a negative background check will result in a bar from participation in the EFA program.
- The statute does not address the protections needed to protect personal student information including health care information the scholarship organization may have or obtain. While the rules do not affirmatively state that parents are required to provide the information for eligibility, they state that the organization shall have access to confidential student information and that it will be protected as LEAs protect the same information. The statute may need to affirmatively outline protections of student confidential information.

Appendix

Rule	State or Federal Statute or Federal Regulation Implemented
Ed 801	RSA 194-F:2, I
Ed 802	RSA 194-F:1
Ed 803	RSA 194-F:2, IV & V; RSA 194-F:4, V, VI, VII, & XVI-XVII; RSA 194-F:5
Ed 804	RSA 194-F:4, IV & VIII
Ed 805	RSA 194-F:4, III
Ed 806	RSA 194-F:4, IX-XIV
Ed 807	RSA 194-F:5