

APPENDIX II-G

COVER SHEET FOR FINAL PROPOSAL

Notice Number 21-106 Rule Number Ed 800

<p>1. Agency Name & Address: State Board of Education c/o Department of Education 101 Pleasant Street Concord, NH 03301</p>	<p>2. RSA Authority: <u>RSA 194-F:4, XV</u> 3. Federal Authority: _____ 4. Type of Action: <input type="checkbox"/> Adopt <input type="checkbox"/> Amendment <input type="checkbox"/> Repeal <input type="checkbox"/> Readoption <input checked="" type="checkbox"/> Readoption w/amendment</p>
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5. Short Title: **Education Freedom Accounts Program**

6. Contact person for copies and questions:
 Name: **Amanda Phelps** Title: **Administrative Rules Coordinator**
 Address: **Department of Education** Phone #: **(603) 271-2718**
101 Pleasant Street
Concord, NH 03301

7. Yes No Agency requests review by Committee legal staff in the Office of Legislative Services and delayed Committee review pursuant to RSA 541-A:12, I-a.

8. The rulemaking notice appeared in the Rulemaking Register on **October 7, 2021**

SEE THE INSTRUCTIONS--PLEASE SUBMIT ONE COPY OF THIS COVER SHEET AND ONE COPY OF THE FOLLOWING: (optional to number correspondingly)

9. The "Final Proposal-Fixed Text," including the cross-reference table required by RSA 541-A:3-a, II as an appendix.
10. Yes N/A Incorporation by Reference Statement(s) because this rule incorporates a document or Internet content by reference for which an Incorporation by Reference Statement is required pursuant to RSA 541-A:12, III.
11. Yes N/A The "Final Proposal-Annotated Text," indicating how the proposed rule was changed because the text of the rule changed from the Initial Proposal pursuant to RSA 541-A:12, II(d).
12. Yes N/A The amended fiscal impact statement because the change to the text of the Initial Proposal affects the original fiscal impact statement (FIS) pursuant to RSA 541-A:5, VI.

<p>1. Agency Name & Address:</p> <p>State Board of Education c/o Department of Education 101 Pleasant St. Concord, NH 03301</p>	<p>2. RSA Authority: <u> RSA 194-F:4, XV </u></p> <p>3. Federal Authority: _____</p> <p>4. Type of Action:</p> <p>Adoption _____</p> <p>Repeal _____</p> <p>Readoption _____</p> <p>Readoption w/amendment <u> x </u></p>
<p>5. Short Title: Education Freedom Accounts Program</p>	

6. (a) Summary of what the rule says and of any proposed amendments:

Ed 800 regarding the Education Freedom Accounts (EFA) Program established by RSA 194-F, effective 8-27-21, is being proposed as a readoption with amendment and renumbering of the existing interim rule, Ed 324, regarding the Education Freedom Accounts (EFA) Program, due to expire on February 23, 2022. RSA 194-F establishes education freedom accounts which permits the transfer of an amount equal to adequate education grants, plus any differentiated aid that would have been provided to a public school, to a scholarship organization for disbursement to parents to be used for certain educational purposes. These rules provide the processes and procedures for uniform application of RSA 194-F in the establishment and administration of the EFA program.

The following substantive changes were made from Ed 324 in this proposal:

Ed 802.01 (formerly Ed 324.03) Definitions.

- **New (f) defining “differentiated aid” replacing the definition of “qualifying differentiated aid eligibility” in Ed 324.03(m).**
- **New (m) defining “intentional and substantial”.**

Ed 803.01 (formerly Ed 324.09) Scholarship Organizations.

- **New (c) regarding the failure to provide access to a variety of qualifying educational expenses.**
- **New (g) regarding confidentiality.**

Ed 803.02 (formerly Ed 324.08) Education Service Providers.

- **Amended (a) requiring background checks for any employees who have direct contact with students.**
- **New (c) regarding the curricular materials referenced in (d).**

Ed 803.03 (formerly Ed 324.10) Responsibilities of Public Schools and School Districts.

- **Added (b) regarding LEAS and parentally-placed private school children with disabilities.**

Ed 804.01 (new section) Funds; Generally.

- **Added to address fund transfers and to clarify what is considered a determination of eligibility differentiated aid.**

Ed 804.03 (formerly Ed 324.06) EFA Disbursement.

- **Removed mentions and a table referencing the state fiscal year 2022 EFA disbursement schedule and replaces them with references and a table for disbursements in the state fiscal year 2023.**

CHAPTER Ed 805 APPLICATION AND ENROLLMENT

- **This new chapter combines the former Ed 324.04 regarding applications and Ed 324.05 regarding program requirements, and clarifies that a signed application is the agreement required by RSA 194-F:3, III.**

6. (b) Brief description of the groups affected:

School districts, eligible students, eligible scholarship organizations, and eligible education service providers are affected by these rules.

6. (c) Specific section or sections of state statute or federal statute or regulation which the rule is intended to implement:

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

7. Contact person for copies and questions including requests to accommodate persons with disabilities:

Name: **Amanda Phelps**

Title: **Administrative Rules
Coordinator**

Address: **Department of Education
101 Pleasant St.
Concord, NH 03301**

Phone #: **(603) 931-9133**

Fax#:

E-mail: **Amanda.j.phelps@doe.nh.gov**

TTY/TDD Access: Relay NH 1-800-735-2964
or dial 711 (in NH)

8. Deadline for submission of materials in writing or, if practicable for the agency, in the electronic format specified: **November 18, 2021**

Fax

E-mail

Other format (specify):

9. Public hearing scheduled for:

Date and Time: **November 10, 2021 @ 10:00 a.m.**

Place: **Department of Education, Walker Building, 21 South Fruit Street,
Concord, NH 03301, Room 100**

10. Fiscal Impact Statement (Prepared by Legislative Budget Assistant)

FIS # 21:106 , dated 9/29/2021

1. Comparison of the costs of the proposed rule(s) to the existing rule(s):

When compared to the existing interim rules, the proposed rule may increase state restricted revenue and costs to certain independently owned businesses by an indeterminable amount.

2. Cite the Federal mandate. Identify the impact on state funds:

None.

3. Cost and benefits of the proposed rule(s):

The proposed rules implement a background check for employees of education service providers that have direct contact with students. To the extent independently owned businesses do not already conduct such background checks, there may be increased costs. Furthermore, should such background checks be conducted through the Division of State Police, the Criminal Records Fund established pursuant to RSA 106-B:7 may see an increase in revenue.

Any other costs or benefits are attributable to RSA 194-F and not the proposed rules.

A. To State general or State special funds:

See 3 above. No impact to state general fund.

B. To State citizens and political subdivisions:

None.

C. To independently owned businesses:

See 3 above.

11. Statement Relative to Part I, Article 28-a of the N.H. Constitution:

This proposal does not mandate any new, expanded, or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivisions, and therefore does not violate Part I, Article 28-a of the New Hampshire Constitution.

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)(o).~~

~~(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".

Unclear. Use the statutory definition.
This is not the statutory definition.

- (j) “Education service provider” means “education service provider” as defined in RSA 194-F:1, V.
- (k) “EFA program” means “program” as defined in RSA 194-F:1, XI.
- (l) “Eligible student” means “eligible student” as defined in RSA 194-F:1, VI.
- (m) “EFA student” means “EFA student” as defined in RSA 194-F:1, VII.
- (n) “Full time” means “full time” as defined in RSA 194-F:1, VIII.
- (o) “Intentional and substantial” shall be defined as follows:

Edit. “means that: (a) Intentional means...(b) Substantial means...”

Edit. If there’s a federal or state definition, please use and cite to it.

- (a) Intentional shall mean knowingly and willfully; and
- (b) Substantial shall mean \$250 or more.

Unclear. This definition is factually incorrect. The State fiscal year encompasses parts of 2 calendar years. Consider: “means a one-year period from July 1 to June 30.”

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

(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” shall mean the period from July 1 to June 30 of every calendar year.

PART Ed 803 PROGRAM ADMINISTRATION

Edit. Say “means” not “shall mean”.

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:

Edit. “be”

- (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;
- (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
- (6) Total EFA funds requested;

Unclear/Legis. Intent. RSA 194-F does not address the protection of confidential student information, either health care data or educational data. In this final proposal the Board has inserted a definition for confidential student information that includes medical and educational records. It is unclear whether parents will be told that the organization will have access to student confidential information or whether they have an option to opt out of sharing some or all of the confidential information. The Department in its cover letter to the FP states that HIPAA or FERPA do not apply to the scholarship organization. However, it is also unclear whether the LEAs will be violating FERPA by providing the organization access to the confidential student information.

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

(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. “up to a maximum total of 10% of each deposit annually pursuant to RSA 194-F:4, V.”

Edit. “from EFA deposits”

(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;

Edit. Insert a comma.

(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:

Authority/Unclear. See also the comment on page 15. 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 which is not a requirement. It is unclear what the intent is with this language.

(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.

(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.

Edit. “(LEAs) in districts where private elementary schools and secondary schools are also located shall ensure...”

(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.

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, **VIII** the following shall apply to EFA funds:

Edit.
Insert a comma.

(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;

Edit. Insert a space.

(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 either:

(1) A determination of eligibility for special education, by an IEP team, in accordance with 34 CFR 300.300-300.311; or

(2) A determination of a disabling condition by a medical professional listed under Ed 1107.04 Table 1100.1, as a qualified examiner for the particular condition, and who is licensed to practice in any state in the United States.

Edit. “condition, as determined pursuant to (c)(2) above, shall”

(e) 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.

Edit. (d)

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; 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.

Unclear/Legis. Intent. In Ed 804.01(c) above, there are 2 ways an EFA student can be eligible for the differentiated aid specified in RSA 198:40-a, II(d). In (c)(2), a student is eligible if a medical professional determines the student has a specified disabling condition. This method appears to conflict with 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), not (c)(2). Additionally, under RSA 198:40-a, II(d), the differentiated aid in question is only disbursed for students who are receiving special ed services.

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

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:

“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.”

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

Edit. “shall be entitled”

(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 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);

Unclear/Legis. Intent. This language indicates the only grounds for appeal for parents/guardians/students is the completeness of their applications and the termination of participation. It appears that the rules should include the ability to appeal denial of services.

Edit. Replace period with a semicolon.

(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 are determined when deciding disqualification:

Unclear. The Board has defined “intentional and substantial” in Ed 802.01(o) and which was used here previously.

- (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;

(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;

Edit/Unclear “it shall no longer be”

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

Edit. Insert a space after comma.

(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:

Edit. “(n)”.
Note to Board: rule citations should be checked as rule sections have been removed.

- (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.

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

Note to the JLCAR on potential need for Legislation. The JLCAR may want to pursue legislation to address ambiguities in RSA 194-F. They 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.
- 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;
- The statute does not address the role of the Board of Education, and oversight by the Department of Education is minimal. The roles of the two may need to be clarified. See generally RSA 194-F:4. Additionally, 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.
- 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.



Frank Edelblut
Commissioner

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December 15, 2021

Michael Morrell
Sr. Committee Attorney
Office of Legislative Services, Admin. Rules
State House Annex, Room 219
Concord, NH 03301

Dear Attorney Morrell,

Attached please find the final proposal for Notice #2021-102, Education Freedom Accounts Program. The State Board of Education (Board) approved this proposal at its meeting held on December 9, 2021. The paragraphs below explain the substantive comments that were not addressed by amendments to the rule.

On page 8 you state "Unclear/Legis. Intent. RSA 194-F appears to contemplate one scholarship organization. It looks as if the "s" here was meant to be deleted."

- While the Board and Department of Education (Department) staff do not agree with your office's understanding that the current statute contemplates only a single scholarship organization, the rules will proceed at this time with one scholarship organization given the Board's understanding that pending legislation is proposed to further clarify this point.

On page 9 you state "Unclear/Legis. Intent. RSA 194-F does not address the protection of personal and confidential student information, either health care data or other data. It is not clear how the protections of HIPAA and FERPA apply to the organization. Also, it is unclear if there are uniform standards and whether scholarship organizations would understand what is required in practice."

- FERPA and HIPAA do not apply to the scholarship organization under RSA 77-G or RSA 194-F. HIPAA only applies to medical providers and health care billers/insurers, and does not currently apply to the Department, school districts, or schools in New Hampshire. FERPA applies only to "educational agencies or institutions that receive funds from programs administered by the U.S. Department of Education" and, thus, does not apply to the scholarship organization.

All on page 11:

- Regarding 803.03(b) "Unclear what is intended, generally. As drafted, it implies the private schools are at the LEAs. What occurs if there are no private schools in a district?"
 - The rule as drafted appropriately reflects IDEA. See USED FAQs (p.34-35) here: [Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools \(PDF\)](#). The proportionate share of an LEA's IDEA funds to support equitable services and the corresponding equitable services provided are based on the location of the private school that the child with a disability attends. If there are no

private schools located within an LEA, no proportionate share would be calculated and thus no equitable services would be provided by that LEA. To further clarify, pupils with disabilities who are not parentally placed in a private school are not entitled to equitable services.

- Regarding Ed 804.01(c) you state “Unclear/Legis. Intent. This conflicts with the cited CFR. While the CFR lists disabling conditions, it says that to be a “child with a disability” the child must: (1) Be evaluated pursuant to 34 CFR 300.304 through 300.311 as having a disabling condition; and (2) Be determined, because of the disabling condition, to need special education and related services. Further, the CFR states that even if the child is determined to have a disability, if the child only needs related services, and not special education, then the child is not a “child with a disability under 34 CFR 300.”
 - A “child with a disability” and a “child/pupil with a disabling condition” are distinct and separate terms. A “child/pupil with a disabling condition” is a term being used for the purposes of EFA differentiated aid only.
- Regarding Ed 804.01(d) you state “Unclear/Legis. Intent. Even if a disability is determined under (c) and (d), this does not automatically trigger eligibility for differentiated aid. RSA 198:40-a, II(d) says differentiated aid is only available if the child is already receiving special ed.”
 - These rules are drafted in accordance with RSA 194-F:2, I to ensure that a child who has never been evaluated through the special education process receives the differentiated aid the child would have received had the child been enrolled in a 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.”) (emphasis added) Therefore, a child who has never attended public school and has not been evaluated for an IEP, but has a disabling condition, should be given the opportunity to receive the differentiated aid amount that would have been provided to the public school for that student had the student enrolled in public school.
- Regarding Ed 804.01 (e) you state “Unclear. Except for the portion regarding determination by a medical professional, this would be a correct statement of law, but it appears to conflict with the rest of the section.”
 - A child with a disability for purposes of IDEA is entitled to equitable services, but a pupil with a disabling condition is not necessarily entitled to equitable services, unless such student is identified through the IDEA process.

Please let me know if you have any further questions.

Sincerely,

Amanda Phelps
Administrative Rules Coordinator

Regarding not having been evaluated or not having an IEP because of never attending a public school, that should never occur as state and federal “child find” laws require both the district of residence and district where the private school is located to search for children that may have disabilities so that they can receive appropriate services.

Regarding an opportunity to receive differentiated aid if the child has a disabling condition, under RSA 192-F:2, I, differentiated aid is only disbursed if it would have been provided to a public school for that child. Also, RSA 198:40-a, II(d) authorizes such differentiated aid if the pupil is receiving special education. (See comment at the bottom of p. 11 of the FP text).