Supplemental Testimony by Gilles Bissonnette, Legal Director of the ACLU-NH
Public Hearing Before the Joint Legislative Committee on Administrative Rules (JLCAR)
Proposed Rules Ed 800 Education Freedom Account Program
February 18, 2022 [CORRECTED VERSION]

I am the Legal Director of the American Civil Liberties Union of New Hampshire (ACLU-NH)—a non-profit organization working to protect civil liberties throughout New Hampshire for over fifty years.

We write to respond to the Department of Education's ("DOE") February 15, 2022 letter. As we indicated in our January 21, 2022 letter and in our January 27, 2022 meeting with the DOE, we do not object on constitutional grounds to the principle of private religious schools obtaining Education Freedom Account ("EFA") funds. Rather, our objection is that there is no express limitation in the rules making clear that such funds cannot be used for religious instruction by such private religious schools. We believe that such a limitation—which would require only a minor rule change—is necessary under the New Hampshire Constitution.

Thus, we are asking that JLCAR only conditionally approve these rules if the following language is added: "***Funds received by a school under this program shall not be used by the school for religious instruction***."[1] Indeed, the DOE notes in its letter its belief that "[t]he statute and the rules do not permit funding for religious instruction." *See* Page 9. If the DOE believes this to be case, then the rules should say so explicitly and clearly.

A. JLCAR's Authority to Address Constitutional Questions.

As a threshold matter, the DOE states that "the question of whether a duly enacted act of the legislature is unconstitutional is not a question for the Department or the Board." *See* Page 9. However, it is within the purview of JLCAR to ensure through the rule-approval process that a statutory regime is implemented in a way that is constitutionally permissible. The JLCAR Rules explicitly provide such authority. *See* JLCAR Rule 401.04 (noting that JLCAR "may object to a proposed rule as being beyond an agency's authority if the Committee determines that the rule violates a provision of the New Hampshire Constitution or the Constitution of the United States"). Therefore, JLCAR can address the legal issue we are raising.

B. The DOE's Response is Confusing.

The substantive response from the DOE to our rule request seems to be two-fold. First, the DOE contends that "[t]he statute and the rules do not permit funding for religious instruction." *See* Page 9. Second, the DOE notes that it "disagrees that there is a problem with a potential religious use of funds as asserted by the ACLU-NH." *See* Page 10.

Both of these positions seem to be in conflict, and are confusing when read together. If the DOE does not believe that such funds can be used for religious instruction, then why indicate disagreement with the state constitutional legal position that such funds cannot be used for religious usage? Indeed, the DOE's indication of such disagreement seems to suggest that the DOE actually believes (despite its prior concession) that the usage of such funds for religious instruction is, in fact, acceptable under the program. This confusion is all the more reason for clarity in the rules—clarity which the DOE apparently declines to agree to.

[1] By reference, RSA 189:49 lists many child benefit services that may be funded that are nonreligious (though, as explained below, we believe that textbooks and instructional materials should be excluded because they could contain religious instruction).

C. If the DOE Believes that EFA Funds Cannot Be Used for Religious Instruction, Then Why Not Say So Explicitly in the Rules?

Relatedly, if the DOE believes that "[t]he statute and the rules do not permit funding for religious instruction," *see* Page 9, then why not say so explicitly in the very rules that are designed to administer this program? Rules should be clear and precise, especially where the DOE is required to administer the program pursuant to RSA 194-F:4, XV through administrative rules. *See* RSA 194-F:4, XV ("The department shall adopt rules that are necessary for the administration of this chapter."). The failure to provide this clarity—along with the DOE's apparent rejection of the state constitutional position that such funds cannot be used for religious purposes—only creates an environment where private religious schools <u>will</u> feel that EFA funds can, in fact, be used for religious instruction.

The need for clarity is important because the two provisions the DOE relies on to contend that "the EFA law does not permit the use of EFA funds for religious instruction," *see* Page 10, are far from clear.

First, RSA 194-F:3, III(d)(1) contains no such limitation. This provision merely says that a parent must agree, in receiving EFA funds, to provide an education in certain core knowledge domains. Nothing states that EFA funds cannot be used for religious instruction either inside or outside these core domains. It should also go without saying that religious instruction can particularly seep into some of the core domains referenced in this statute, including in "science" and "health."

Second, the DOE contends that "nothing in the RSA 194-F:2, II list implies, for example, approved uses for any religious training." *See* Pages 6, 10. We do not agree. For example, RSA 194-F:2, II(a) allows as a qualifying expense "[t]uition and fees at a private school," which can include religious course instruction. RSA 194-F:2, II(e) also includes "[t]extbooks, curriculum, or other instructional materials," which, again, can include religious instructional materials. And, even if JLCAR were to agree with the DOE's position that nothing in this approved list "implies … approved uses for any religious training," it is equally true that nothing in RSA 194-F:2, II's approved list implies that EFA funds <u>*cannot*</u> be used for religious instruction subsumed within the list's categories. At best, the statute is silent. This lack of clarity is all the more reason why a rule is necessary to make clear to everyone that religious schools cannot use EFA funds for religious instruction.

D. The DOE's Letter Ignores the New Hampshire Constitution.

As to our position under the New Hampshire Constitution that such funds cannot be used for religious purposes, nowhere in the DOE's letter is there discussion of the relevant state constitutional provisions, including Part I, Article 6 and Part II, Article 83 of the New Hampshire Constitution. For example, there is no effort in the DOE's letter to justify how allowing such funds to be used for religious instruction would comply with these provisions.

E. The DOE's Examination of U.S. Supreme Court Precedent is Wrong.

Lastly and relatedly, the DOE's reliance on *Espinoza* is inapposite. As *Espinoza* notes: "A State need not subsidize private education. But once a State decides to do so, <u>*it cannot disqualify some private schools solely because they are religious*</u>." *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) (emphasis added). In other words, *Espinoza* bars discrimination against religious schools based on their affiliation with a religious organization *per se* (but explicitly stops short of requiring that a school choice program offer public funding for religious instruction). Here, once again, we are not asserting that schools should be disqualified from receiving EFA funds because they are religious (which was the case in *Espinoza*). Rather, our objection is to the school's use of such funds for religious instruction after they receive the funds. This is a different question altogether.

We also do not agree with the DOE's attempt to distinguish *Carson v. Makin*, 979 F.3d 21 (1st Cir. 2020). Just as the constitutional Maine regime was creating an alternative education regime for students (there, for those in

districts where there was no public school), here the EFA program creates a similar alternative education regime for students.

Conclusion

In short, we do not find the DOE's February 15, 2022 letter persuasive. Instead, we find it confusing and contradictory. If the DOE believes that "[t]he statute and the rules do not permit funding for religious instruction," *see* Page 9, then the rules should clearly say so. The DOE's apparent refusal to provide this clarity in the rules will only create an environment where religious schools will feel that the usage of such for funds for religious instruction is allowed. We ask that JLCAR provide this clarity.

Thank you for your consideration.

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February 17, 2022

Via email

Joint Legislative Committee on Administrative Rules
State House
Concord, N.H. 03301-3680

RE: Proposed Ed 800 (Education Freedom Accounts)

Dear Members of the Joint Legislative Committee on Administrative Rules,

I regret that I will be unable to attend your February 18, 2022 hearing on proposed Ed 800. I am away on a vacation planned long ago. Julia Pothen will attend this hearing in my place to represent the New Hampshire Association of Special Education Administrators.

In preparation for your January 21, 2022 hearing, which I did attend, I sent you a January 20, 2022 letter critiquing the then-current version of the proposed rules. Another copy of that letter is enclosed.

On the afternoon of February 15, 2022, the State Department of Education submitted revised proposed rules, prompting this hastily written letter.

I. The Proposed Rules

What I wrote in my January 20, 2022 letter applies with equal force to the February 15, 2022 proposed rules, with the following exception.

The February 15, 2022 proposal removes the provision allowing parents to bypass the IEP team process by obtaining a disability diagnosis from a medical professional. In place of that, proposed Ed 804.01(c)-(d) creates a new process to bloat the voucher, by stating that a student qualifies for differentiated special education aid based solely on evaluations.

This new technique violates both RSA 194-F and the special education laws, because it bypasses the school district's IEP team. Please see pages 4-10 of my January 20, 2022 letter for an explanation of why bypassing the IEP team is unnecessary and illegal.

I am attaching, as Appendices A through D, information to help you assess the wisdom of proposed 804.01(c)-(d).

- Appendix A describes the percentage of IDEA-eligible children falling into each disability category.
- Appendix B copies the State Board of Education's special education rules specifying the requisite evaluations for each disability category.
- Appendix C is the State Board of Education rule defining the term "professional licensed to provide a health evaluation," which is still relevant because Appendix B employs that term.
- Appendix D is a 2009 memo by the New Hampshire Department of Education regarding the purpose of a health evaluation.

The final paragraph of Appendix D nicely sums up why proposed Ed 804.01(c)-(d) is misguided. As that memo explains, evaluations are just one essential element of the process for determining whether a student qualifies for special education. It is the IEP team, not individual evaluators, who determine whether a student has a disability and whether that disability creates a need for special education.

Incidentally, given the February 15, 2022 revisions to proposed Ed 804.01(c)-(d), proposed 804.01(f) needs to be revised in order to achieve its purpose. That purpose is to clarify that bypassing the IEP team merely increases the voucher and does not make the child eligible for services under the special education laws.

II. Commissioner Edelblut's February 15, 2022 letter

The State Board's February 15, 2022 proposed rules were accompanied by a February 15, 2022 letter by Frank Edelblut, New Hampshire's Commissioner of Education.

I submit the following in rebuttal to the Commissioner's letter.

A. At the bottom of page 2, Commissioner Edelblut writes that RSA 194-F "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." I agree with that statement. It supports my contention that proposed Ed 804.01(c)-(d), which bloats the voucher by offering special education differentiated aid to *a child who would not qualify for special education from a school district,* violates RSA 194-F.

B. At pages 3-4, when discussing whether an EFA student attending a public school is entitled to a FAPE, the Commissioner mischaracterizes my testimony on the interim

EFA rules. I did not argue that an EFA student who attends a public school is "a 'parental placement' under the IDEA." I pointed to RSA 194-F:4, III, which unequivocally commands that such students shall be *treated* as parental placements under the IDEA.

C. The Commissioner then argues that we must disregard RSA 194-F:4, III because some unnamed bureaucrat at the U.S. Department of Education warned that "this approach … would be a violation of federal law." As my January 20, 2022 letter explains at pages 10-12, courts have resoundingly rejected the U.S. Department of Education's position on that point. We are a nation of laws, not men. A telephone call with an unnamed employee at the U.S. Department of Education does not justify overturning or ignoring RSA 194-F:4, III.

D. Furthermore, the U.S. Department of Education did not insist on the solution embodied in proposed 805.01(c)(2), which states that *the district of residence* must provide a FAPE to a student who uses EFA funds to pay tuition to attend some other district's public schools. According to a December 14, 2021 email from Laura Duos, Fiscal Accountability Facilitator at the U.S. Department of Education, to Rebecca Fredette, the N.H. Department of Education's State Director of Special Education, "Ultimately the State must determine whether the responsibility for providing FAPE to these children with disabilities should be transferred from the district of the child's residence to the non-resident school district of parental choice."

E. In the middle of page 4 of his letter, the Commissioner accuses the NHASEA of changing its "tack" by belatedly raising the unfunded mandate issue. Elsewhere in his letter, he implies that the NHASEA first raised an issue on the "eve" of a hearing. In fact, throughout this process, the NHASEA has critiqued each version of the proposed rules within days after each version was disclosed, by addressing what was new in each version. For example, my January 20, 2022 letter to JLCAR raised the unfunded mandate issue just two days after the State Board filed proposed new rules that for the first time identified the district of residence as the entity responsible for providing a FAPE to EFA students attending public schools. Had the rules imposed this duty on the district where the EFA student attends school, that would not be an unfunded *mandate*, because each district may choose whether to accept nonresident students.

F. The Commissioner next argues at page 4 that two other state laws -- one for special education children placed by courts and one for charter schools -- already impose responsibility on the resident district to provide a FAPE outside its own public schools. He concludes that, since this arrangement is not "new or novel," it does not violate RSA 541-A:25 or Part 1, Article 28-a of the State Constitution, which both prohibit the State Board of Education from imposing new unfunded mandates on school districts. He overlooks that, while proposed Ed 805.01(c)(2) may be *analogous* to those existing laws, it nevertheless creates a *new* unfunded state mandate.

G. Near the bottom of page 4 of his letter, the Commissioner insists that "the district of residence is part of the IEP team, and thus not without representation regarding costs." However, cites no law or proposed rule guaranteeing that the IEP team for an EFA student attending a public school must include a representative from the district of residence.

H. At the very bottom of page 4 of his letter, in footnote 2, the Commissioner mentions that the district of residence will continue to receive federal IDEA funds. He overlooks that these federal funds – typically about $1,400 annually per IDEA-eligible student – defray only a tiny fraction of a student's special education costs. According to many studies, the average annual per pupil cost to educate an IDEA-eligible student is approximately $35,000, twice the cost of educating a regular education student. The Commissioner also glosses over the RSA 194-F strips the resident district of all state funding tied to a student.

I. The Commissioner's letter dismisses the NHASEA's proposal to insert guard rails ensuring that EFA money is not used to teach hate, bigotry, or divisive concepts. One has to wonder why he opposes such modest restrictions. He insists that RSA 194-F:3, III(d)(1) already erects guard rails by requiring that parents of EFA students sign an agreement "[t]o provide an education to the eligible student" in certain "core" subjects. However, such an agreement does not bar parents from *also* spending EFA funds for more abhorrent purposes. To pose an extreme example, RSA 194-F:3, III(d)(1) would not prohibit a parent from spending EFA funds to pay tuition to a "Nazi school of advanced mathematics and rocket science."

Lastly, I note what the Commissioner's letter and the February 15, 2022 proposed rules omit.

First, they include no fiscal impact statement for imposing on the district of residence the duty to provide a FAPE at some other district's public schools. Nor do I see a fiscal impact statement concerning how much the Education Trust Fund will be drained by allowing bloated vouchers for students who do not truly qualify for special education. Both omissions violate RSA 541-A:13, IV.

Second, the Commissioner's letter and the proposed rules fail to cite any specific federal law guaranteeing a FAPE to a nonresident tuition student attending a public school when a FAPE is available in the district of residence's schools. They likewise fail to cite any specific federal law pining that FAPE duty on the resident district rather than the public school the student actually attends. Those omissions violate RSA 541-A:27 and RSA 186-C:16-c.

Thank you for considering these comments and for your public service.

Very truly yours,
/s/ *Gerald M. Zelin*
Gerald M. Zelin

cc: Jane Bergeron, Exec. Dir., NHASEA

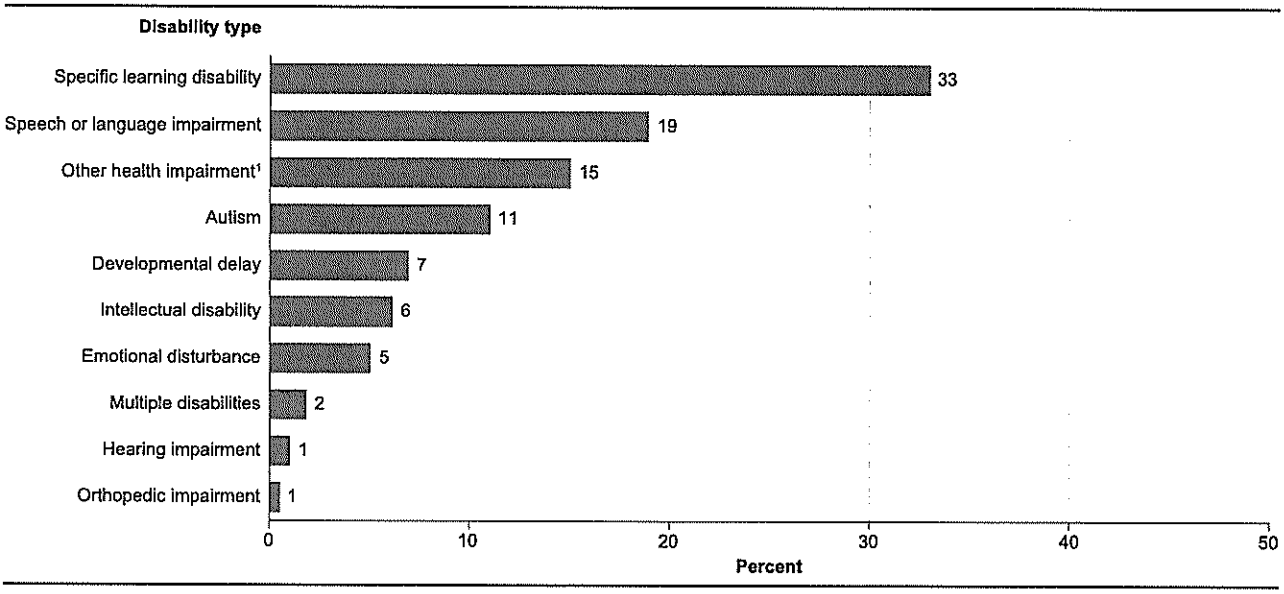
Appendix A

Students With Disabilities

In 2019–20, the number of students ages 3–21 who received special education services under the Individuals with Disabilities Education Act (IDEA) was 7.3 million, or 14 percent of all public school students. Among students receiving special education services, the most common category of disability (33 percent) was specific learning disabilities.

Enacted in 1975, the Individuals with Disabilities Education Act (IDEA), formerly known as the Education for All Handicapped Children Act, mandates the provision of a free and appropriate public school education for eligible students ages 3-21. Eligible students are those identified by a team of professionals as having a disability that adversely affects academic performance and as being in need of special education and related services. Data collection activities to monitor compliance with IDEA began in 1976. From school year 2009-10 through 2019-20, the number of students ages 3-21 who received special education services under IDEA increased from 6.5 million, or 13 percent of total public school enrollment, to 7.3 million, or 14 percent of total public school enrollment.[1]

Figure 1. Percentage distribution of students ages 3–21 served under the Individuals with Disabilities Education Act (IDEA), by disability type: School year 2019–20



[1] Other health impairments include having limited strength, vitality, or alertness due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes.
NOTE: Data are for the 50 states and the District of Columbia only. Visual impairment, traumatic brain injury, and deaf-blindness are not shown because they each account for less than 0.5 percent of students served under IDEA. Due to categories not shown, detail does not sum to 100 percent. Although rounded numbers are displayed, the figures are based on unrounded data.
SOURCE: U.S. Department of Education, Office of Special Education Programs, Individuals with Disabilities Education Act (IDEA) database, retrieved February 2, 2021, from https://www2.ed.gov/programs/osepidea/618-data/state-level-data-files/index.html#bcc. See *Digest of Education Statistics 2020*, table 204.30.

Appendix B

Ed 1107.04 Qualified Examiners.

(a) Formal diagnostic assessments shall be administered by qualified examiners.

(b) Qualified examiners for specific disabilities shall be as set forth in Table 1100.1, "Required Assessments and Qualified Examiners by Type of Disability" as follows:

Table 1100.1 Required Assessments and Qualified Examiners

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Disability	Assessments Required	Qualified Examiners
AUTISM	Academic Performance	Associate School Psychologist Certified Educator Guidance Counselor Psychologist S.A.I.F.** School Psychologist
	Adaptive Behavior	Associate School Psychologist Certified Educator Guidance Counselor Psychiatrist Psychologist S.A.I.F.** School Psychologist Licensed Social Worker
	Communicative Skills	Speech-Language Pathologist Speech-Language Specialist
	Health	Professional Licensed to provide a Health Evaluation
DEAF-BLINDNESS	Academic Performance	Associate School Psychologist Certified Educator Guidance Counselor Psychologist S.A.I.F.** School Psychologist
	Hearing	Audiologist Otolaryngologist

		Otologist
	Vision	Ophthalmologist Optometrist
DEAFNESS	Academic Performance	Associate School Psychologist Certified Educator Guidance Counselor Psychologist S.A.I.F.** School Psychologist
	Hearing	Audiologist Otolaryngologist Otologist
DEVELOPMENTAL DELAY – In order to identify a child as educationally disabled as the result of a developmental delay the IEP Team must determine the child is experiencing developmental delays in one or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development.	Varies based on the suspected disability	Varies based on the suspected disability
EMOTIONAL DISTURBANCE	Academic Performance	Associate School Psychologist Certified Educator Guidance Counselor Psychologist S.A.I.F.** School Psychologist
	Social/Emotional Status	Associate School Psychologist Psychiatrist Psychologist School Psychologist
HEARING IMPAIRMENT	Academic Performance	Associate School Psychologist Certified Educator Guidance Counselor Psychologist S.A.I.F.** School Psychologist
	Hearing	Audiologist Otolaryngologist Otologist
INTELLECTUAL DISABILITY	Academic Performance	Associate School Psychologist Certified Educator Guidance Counselor Psychologist S.A.I.F.** School Psychologist
	Adaptive Behavior	Associate School Psychologist Certified Educator

		Guidance Counselor Psychiatrist Psychologist S.A.I.F.** School Psychologist Licensed Social Worker
	Intelligence	Associate School Psychologist Psychologist S.A.I.F.** School Psychologist
MULTIPLE DISABILITIES – Requires at least two concomitant disabilities which are evaluated and documented in the student's evaluation record. This primary disability refers to concomitant impairments which cause severe educational problems	Varies based on the two or more disabilities suspected	Varies based on the assessment administered
ORTHOPEDIC IMPAIRMENT	Academic Performance	Associate School Psychologist Certified Educator Guidance Counselor Psychologist S.A.I.F.** School Psychologist
	Health	Professional Licensed to provide a Health Evaluation
	Motor Ability	Licensed Physician Neurologist Occupational Therapist Physical Therapist
OTHER HEALTH IMPAIRED	Academic Performance	Associate School Psychologist Certified Educator Guidance Counselor Psychologist S.A.I.F.** School Psychologist
	Health	Professional Licensed to provide a Health Evaluation
SPECIFIC LEARNING DISABILITY	Academic Performance	Associate School Psychologist Certified Educator Guidance Counselor Psychologist S.A.I.F.** School Psychologist
	Intelligence	Associate School Psychologist Psychologist S.A.I.F.** School Psychologist
	Observation	Associate School Psychologist Certified Educator Guidance Counselor Psychologist

		S.A.I.F.** School Psychologist
	Hearing Or Hearing Screening	Audiologist Otolaryngologist Otologist School Nurse
	Vision Or Vision Screening	Ophthalmologist Optometrist School Nurse
SPEECH-LANGUAGE IMPAIRMENT	Academic Performance	Associate School Psychologist Certified Educator Guidance Counselor Psychologist S.A.I.F.** School Psychologist
	Communicative Skills	Speech-Language Pathologist Speech-Language Specialist
TRAUMATIC BRAIN INJURY/ACQUIRED BRAIN INJURY	Academic Performance	Associate School Psychologist Certified Educator Guidance Counselor Psychologist S.A.I.F.** School Psychologist
	Health	Professional Licensed to provide a Health Evaluation
A minimum of 2 of the following assessments must also be completed: Adaptive Behavior Communicative Skills Intelligence Social/Emotional Status	Adaptive Behavior	Associate School Psychologist Certified Educator Guidance Counselor Psychiatrist Psychologist S.A.I.F.** School Psychologist Licensed Social Worker
	Communicative Skills	Speech-Language Pathologist Speech-Language Specialist
	Intelligence	Associate School Psychologist Psychologist S.A.I.F.** School Psychologist
	Social/Emotional Status	Associate School Psychologist Psychiatrist Psychologist School Psychologist
VISUAL IMPAIRMENT/ BLINDNESS	Academic Performance	Associate School Psychologist Certified Educator Guidance Counselor Psychologist S.A.I.F.** School Psychologist

Ed 1102.04
Appendix C

(b) "National Instructional Materials Accessibility Standard" (NIMAS) means the standards defined in 34 CFR 300.172.

(c) "Native language" means "native language" as defined in 20 U.S.C. 7011(11).

(d) "New Hampshire Special Education Information System" (NHSEIS) means a computer-based special education database and retrieval system that confidentially maintains personally identifiable data used for program development, monitoring, compliance, and reporting to the state board of education, the New Hampshire legislative bodies, and the U.S. Department of Education.

(e) "Neutral conference" means "neutral conference" as defined in RSA 186-C:23-b.

(f) "Nonacademic services" means those services and activities set forth in 34 CFR 300.117.

(g) "Paraprofessional personnel" means personnel who do not meet the requirements of 34 CFR 300.156, and who work only under the direct supervision of qualified personnel.

(h) "Parent" means a biological or adoptive parent, surrogate parent, or a guardian pursuant to 34 CFR 300.30. Parent does not mean the state when the state has legal guardianship.

(i) "Personally identifiable" means "personally identifiable" as defined in 34 CFR 300.32.

(j) "Preschoolers" means children 3 years of age or older but less than 6 years of age who have not been enrolled in public kindergarten.

(k) "Private provider of special education" means a private or non-district special education program that provides the educational component of a child's IEP and is subject to program approval under Ed 1114. Private provider of special education does not mean a chartered public school or a public academy.

(l) "Private school" means any school that meets the provisions of a non-public school as defined in Ed 401.01(c) and is not a chartered public school.

(m) "Professional licensed to provide a health evaluation" means anyone who, under their specific licensing, is qualified to provide a health evaluation. This may include, but is not limited to: a school nurse, a registered nurse, physician, psychiatrist, and naturopathic doctors.

(n) "Public academy" means a public academy as defined in RSA 194:23, II.

(o) "Public agency" means "public agency" as defined in 34 CFR 300.33.

(p) Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with 34 CFR 300.103.

(q) "Qualified examiner" means a person licensed or certified in the state in which the evaluation is performed, who performs a formal diagnostic assessment in the area of disability in which the person is qualified to perform the assessment as set forth Ed 1107.04, Qualified Examiners.

(r) "Receiving district" means "receiving district" as defined in RSA 193:27,V.

(s) "Related services" means "related services" as defined in 34CFR 300.34(a).

(t) "Response to scientific, research-based intervention" (RTI) means the process by which individual student instruction and student academic performance is evaluated using research based models of instruction prior to identifying a child with a learning disability as detailed in Ed 1107.02.

Source. (see Revision Note at chapter heading for Ed 1100) #9197, eff 6-28-08; ss by #12141, eff 3-24-17; amd by #13026, eff 4-10-20

(g) "Individualized education program (IEP)" means "individualized education program" as defined in 34 CFR 300.22 and which meets the requirements in Ed 1109.

(h) "Individualized education program team (IEP team)" means "individualized education program team" as defined in 34 CFR 300.23 and which meets the requirements in Ed 1103.01(b) and (c).

(i) "Individualized family service plan or (IFSP)" means "individualized family service plan" as detailed in 34 CFR 300.323. The term includes individualized family support plans.

(j) "Individuals with Disabilities Education Act (IDEA) and Individuals with Disabilities Education Improvement Act (IDEIA)" each mean the Individuals with Disabilities Education Act, 20 U.S.C. 1400, et seq., as amended by the Individuals with Disabilities Education Improvement Act of 2004, and as implemented by the U.S. Department of Education's regulations, 34 CFR 300 et seq.

(k) "Interim alternative educational setting" means the setting, as determined by the IEP team pursuant to 34 CFR 300.530(g) through 34 CFR 300.532, in which a child with a disability receives services when removed from placement for disciplinary reasons.

(l) "Interpreter services" means interpreting services provided by an interpreter for the deaf and hard of hearing who is licensed in accordance with Int 300 and RSA 326-I:2,IV that are necessary for a parent, surrogate parent, guardian, or adult student to participate in the special education process.

(m) "Interpreting services for a child with a disability" means "interpreting services for a child with a disability" as defined in 34 CFR 300.34(c)(4) and 300.322(e).

(n) "Local education agency (LEA)" means "local education agency" as defined in 34 CFR 300.28.

(o) "Local school board" means the elected governing body of the LEA which is responsible for providing elementary and secondary education to all children who reside in the district.

(p) "Local school district" means the political subdivisions of the state as defined in RSA 194:1, RSA 195:1, and RSA 195-A:1,I.

(q) "Local school board officials" means the administrators of the local school district.

(r) "Manifestation determination" means the process by which the IEP team determines whether the behavior that violated a student code of conduct is a manifestation of a student's disability pursuant to 34 CFR 300.530(e).

(s) "Mediation" means an alternative dispute resolution process in which an impartial mediator assists the parties in resolving issues in dispute pursuant to RSA 186-C:24.

(t) "Migratory child with disabilities" means a "migratory child" as defined in 20 U.S.C. 6399(2) who has been identified as a child with a disability.

(u) "Modification" means any change in instruction or evaluation determined necessary by the IEP team that impacts the rigor, validity or both, of the subject matter being taught or assessed.

Source. (see Revision Note at chapter heading for Ed 1100) #9197, eff 6-28-08; ss by #12141, eff 3-24-17; ss by #12547, eff 6-14-18

Ed 1102.04 Definitions N-R.

(a) "National Instructional Materials Access Center (NIMAC) means the center established pursuant to 34 CFR 300.172.

Appendix D

Virginia M. Barry, Ph.D
Commissioner of Education
Tel. 603-271-3144

STATE OF NEW HAMPSHIRE
DEPARTMENT OF EDUCATION
101 Pleasant Street
Concord, N.H. 03301
FAX 603-271-1953
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Bureau of Special Education FY'10 Memo #20

Date: December 16, 2009

To: Superintendents
Special Education Directors

From: Office of the Commissioner

Division of Instruction
Bureau of Special Education

RE: Health Evaluation and Eligibility Determination

The New Hampshire Department of Education (NHDOE), Bureau of Special Education is offering guidance regarding the special education eligibility process when a health evaluation is required.

Ed 1107.04, Table 1100.1 outlines the required assessments and qualified examiners by type of educational disability category. The school district is responsible to evaluate in all areas of suspected disability at no cost to the parent. A health evaluation is required when a child is suspected of having an educational disability under autism, orthopedic impairment, other health impaired, and traumatic brain injury. This evaluation provides the IEP team with information on the child's physical condition and may include, but is not limited to, a physical assessment and/or health screening, a review of a child's medical history (if parent consents), classroom observations of the child with health related concerns, identification of health barriers to learning, etc., as determined by the IEP team. A qualified professional licensed to provide a health evaluation is anyone, who under their specific licensing is qualified to provide a health evaluation as described above. This may include, but is not limited to: a school nurse, a registered nurse, physician, psychiatrist, naturopathic doctors.

The health evaluation is not intended to provide a medical diagnosis; nor is a medical diagnosis required in the NH Rules for the Education of Children with Disabilities to determine the eligibility of a child for special education. As defined by Ed 1108, the IEP team determines whether a child is a child with a disability by considering information from a variety of sources such as, evaluations and assessments, parent input and teacher input and recommendations, as well as information about the child's physical condition, social and cultural background, adaptive behavior, and functional performance.

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January 20, 2022

Via email

Joint Legislative Committee on Administrative Rules
State House
Concord, N.H. 03301-3680

RE: Proposed Ed 800 (Education Freedom Accounts)

Dear Members of the Joint Legislative Committee on Administrative Rules:

I represent the New Hampshire Association of Special Education Administrators (NHASEA). The organization's 200 plus members include the special education directors of nearly every school district in New Hampshire. The NHASEA's membership also includes the special education directors of most New Hampshire private schools that are state-approved to provide publicly financed special education.

Executive Summary

The NHASEA urges JLCAR to object to two provisions in the State Board of Education's Conditional Approval Request dated January 18, 2022.

The first provision, Ed 804.01(c)(2), allows "a medical professional" licensed to practice in any state to determine that a child has a "disabling condition," in which case the student's voucher increases to include differentiated aid ordinarily available only to students who qualify for special education. In response to protests that this rule allowed medical professionals to diagnose disabilities outside their expertise, such as permitting dermatologists to diagnose epilepsy, the State Board recently added a proviso stating that the "medical professional" must be "listed under Ed 1107.04 Table 1100.1, as a qualified examiner for the particular condition."

The proposed rule is a masquerade. It allows a student who in fact does not qualify for special education to receive an increased voucher as if he or she truly qualified. The rule bypasses the process the special education laws require for identifying a student as eligible for special education. The rule also omits one of the essential eligibility criteria the special education laws establish. The State Board of Education's expressed rationale for the proposed rule is fallacious. The recently-added proviso is hollow, because Ed 1107.04 Table 1100.1 contains no limitations.

Ed 804.01(c)(2) is simply a raid on the public treasury to increase the size of a voucher beyond what RSA 194-F allows. Adding insult to injury, none of the voucher money must be spent on special education.

The second provision, Ed 805.01(c)(2), requires that the notice parents receive when applying to participate in the EFA program include the following statement:

> A child with a disability participating in an EFA program and enrolled in a public school under RSA 194-F:2, II (d) … is entitled to a FAPE…. 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.

This is a back-handed way of directing the school district in which a student resides to somehow provide special education at a distant public school over which the district of residence has no control.

In addition to being impractical, this rule contradicts the plain language of RSA 194-F:4, III. The rule also exceeds what the special education laws demand and imposes a new unfunded state mandate on the district of residence.

Proposed Ed 805.01(c)(2) is outrageous because it compels the district of residence to pay for special education after being stripped of all state aid tied to the student, including differentiated aid for special education.

Aside from those two specific provisions related to special education, the NHASEA notes that the proposed rules squander the opportunity to remedy a constitutional flaw in the enabling statute. Specifically, RSA 194-F:2, II lists the categories of expenses that can be paid with EFA funds. The list concludes with RSA 194-F:2, II(o), a "kitchen sink" provision that allows spending EFA funds on "[a]ny other educational expense approved by the scholarship organization."

As the U.S. Supreme Court reiterated last week when striking down OSHA's compulsory vaccination rules, a basic principle of constitutional law prohibits the legislature from enacting laws that delegate open-ended discretion. *National Business Federation of Independent Businesses v. Department of Labor,* 595 U.S. __ (January 13, 2022) (Gorsuch, concurring, slip op. at 5). Similar constitutional principles prohibit executive branch agencies from adopting rules without standards. Objective standards confining discretion discourage arbitrariness, favoritism, and corruption.

RSA 194-F:2, II(o), by delegating open-ended discretion to the Children's Scholarship

Fund, violates those constitutional principles to an extreme degree. The statute delegates broad discretion to a private entity doling out public money, without any public control over how that private entity exercises its discretion. [1]

The proposed rules could correct that flaw by adding some guard rails, such as prohibiting the expenditure of vouchers on "educational" programs that teach hate, bigotry, or divisive concepts.

The Standards for JLCAR Review

RSA 194-F:4, XV authorizes the State Board of Education to "adopt rules that are *necessary* for the administration of this chapter." (Emphasis added.)

In ordinary cases JLCAR may object to a proposed rule only if the proposal is:

(a) beyond the authority of the agency;

(b) contrary to the intent of the legislature;

(c) not in the public interest; or

(d) deemed to have a substantial economic impact not recognized in the fiscal impact statement.

RSA 541-A:13, IV.

However, since these proposed rules will impact school districts, the State Board must also comply with the following additional statutes:

- RSA 541-A:25, like Part 1, Article 28-a of the New Hampshire Constitution, prohibits rules that "mandate or assign any new expanded, or modified programs or responsibilities to any political subdivision in such a way as to necessitate further expenditures by the political subdivision."

- RSA 541-A:26 bars the State Board from imposing new costs on school districts under the pretense of administering a federal mandate when the proposed state rule in fact exceeds what federal law demands.

- RSA 541-A:27 compels the State Board, when proposing a rule that purports

[1] For example, the *Manchester Union Leader* has reported that the Children's Scholarship Fund denies it must comply with New Hampshire's Right to Know Law, RSA 91-A. On November 30, 2021, I wrote to the Director of the Children's Scholarship Fund of New Hampshire asking whether that was true and also seeking a copy of any written criteria it follows when approving vendors and expenses other than the criteria already published in the Provider Handbook posted on the Fund's website. I received no response.

to enforce a federal mandate, to cite the specific federal law compelling that result.

- RSA 186-C:3-a, I-a directs the State Department of Education, when regulating special education, to refrain from imposing duties on school districts that "exceed what is necessary for compliance with this chapter and with state and federal law regarding the education of children with disabilities."

- RSA 186-C:16-c instructs the State Board, when proposing a "special education rule which exceeds the minimum requirements of state or federal law," to identify the state and federal laws being exceeded and to explain the reasons for exceeding those minimum requirements.

Proposed Ed 804.01(c)(2) and Ed 805.01(c)(2) violate those statutes, as I will explain below.

1. Proposed Ed 804.01(c)(2), increasing the voucher if a medical professional unilaterally identifies an EFA student as disabled.

If an EFA student qualifies for special education, the size of the voucher rises. This is because RSA 194-F takes whatever state aid the resident school district would ordinarily receive for the student and transfers that money to the voucher.[2] This state aid includes two components: (a) basic "adequacy aid," which the state pays for all students;[3] and (b) "differentiated aid," which the state pays for certain categories of students over and above basic adequacy aid.[4] Differentiated aid currently totals $2,037.11 annually for each special education student.[5]

For brevity, I will call this differentiated aid a "special education bonus."

Proposed Ed 804.01 offers two alternative paths to qualify for a special education bonus. The proposed rule reads as follows:

> (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

[2] RSA 194-F:2, I; proposed Ed 804.01(c).

[3] RSA 198:40-a, II(a).

[4] RSA 198:40-a, II(b)-(e).

[5] RSA 198:40-a, I, II(d), :40-d; https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/sonh/fy2022-explained.pdf.

> education, by an IEP team, in accordance with 34 C.F.R. 300.300-300.311; *or*
>
> (2) *A determination by 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.*

(Emphasis added.)

The NHASEA objects to that second path, set forth in proposed Ed 804.01(c)(2), on the following grounds.

First, as I will elaborate below, proposed Ed 804.01(c)(2) illegally circumvents the controlling statutes. It creates counterfeit eligibility. It allows a child who in fact does not qualify for special education to receive the special education bonus.

Second, the State Board's rationale for creating this scheme falsely assumes that no school district is responsible for deciding whether an EFA child qualifies for special education. In fact, the IDEA compels both the district of residence and the district in which the private school is located to evaluate and determine whether an EFA student qualifies for special education.

Third, the term "medical professional," which the rules do not define, is unduly vague. It sweeps in providers who have no expertise in the relevant disability.

Fourth, proposed Ed 804.01(c)(2) is susceptible to abuse and fraud.

I will now expand on each of those four grounds.

Proposed Ed 804.01(c)(2) circumvents many important eligibility requirements in the state and federal special education laws. For example:

- The special education laws clearly state that the mere existence of a disability does not trigger eligibility for special education. To be eligible, a student must also, as a result of the disability, "need" special education. [6] The term "special education" means "specialized instruction." [7] Most medical professionals lack the expertise to determine whether a student requires specialized instruction.
- The special education laws require a "comprehensive evaluation" before a student can be deemed eligible for special education. [8] In New Hampshire, that comprehensive evaluation must always include tests that assess "academic

[6] 20 U.S.C. § 1401(3)(A(ii)); RSA 186-C:2, I.

[7] 20 U.S.C. § 1401(29).

[8] 34 C.F.R. §§ 300.301-300.306.

performance." [9] If a "specific learning disability" such as dyslexia is suspected, the evaluation must also include a classroom observation. [10] Few medical professionals conduct academic testing or classroom observations.

- Only an IEP team convened by a school district has authority to decide whether a student qualifies for special education (unless a hearing officer overrules the team's decision). [11] The team reaches its decision by reviewing the evaluation results [12] and then determining whether the student has a disability and "needs" special education. [13]
- Proposed Ed 804.01(c)(2) naively assumes eligibility criteria are uniform from district to district and state to state. In fact, the IDEA allows variability between jurisdictions. For instance, the U.S. Department of Education's rules list three alternative criteria for identifying a specific learning disability and allow each state to select which ones apply. [14] The New Hampshire Board of Education's special education rules in turn allow each school district to decide which criteria to use. [15]

Proposed Ed 804.01(c)(2) invites parents to bypass all those processes by simply obtaining a "determination" from a "medical professional" that the student "has a disabling condition."[16]

Ironically, while Ed 804.01(c)(2) offers special education bonuses to children who do not truly qualify for special education, RSA 194-F do not demand that parents spend any voucher dollars on special education.

Proposed 804.01(c)(2) is illegal because it contradicts the two statutes it pretends to implement.

- The EFA statute allows the voucher to include "differentiated aid *that would have been provided to a public school* for that eligible student." RSA 194-F:2, I. (Emphasis added.)

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[9] N.H. Code Admin. Rules Ed 1107.04(b).

[10] 34 C.F.R. § 300.310(b)(2).

[11] 34 C.F.R. §§ 300.305(a), 300.306(a); RSA 186-C:9; N.H. Code Admin. Rules Ed 1102.03(i), 1107.05, 1108.

[12] *Id.* (all).

[13] 34 C.F.R. § 300.305(a)(2)(iii)(A).

[14] 34 C.F.R. 300.307(a).

[15] Ed 1107.02.

[16] The form the College Scholarship Fund created for medical professionals to complete is no better than the proposed rule. The form asks whether the student has a disability and lists the qualifying disabilities recited in the special education laws, but does not ask whether the student requires special education. Nor does the form include the IDEA's special definitions for these disabilities, which in some instances differ from the standard medical definitions. The form appears at pages 21-22 of CFS's Parent Handbook for New Hampshire's EFA program, https://nh.scholarshipfund.org/wp-content/uploads/2021/10/Parent-Handbook-2021-DRAFT.pdf.

- The differentiated aid statute offers a special education bonus only if the pupil "is receiving special education services." RSA 198:40-a, II(d).

In other words, under these statutes, a student who does not qualify to receive special education *from a school district* has no claim to the special education bonus. Furthermore, as explained above, a student who bypasses the evaluation process set forth in the special education laws cannot qualify for special education *from a school district*.

What is the State Board's response to those arguments? The Board falsely contends that once a child enrolls in an EFA program no school district is responsible for determining eligibility for special education.

As I explained to the State Board -- at the November 10, 2021 public hearing and in a follow-up letter -- that contention is incorrect. Quoting from my November 17 letter,

> When a student attends a private school, two school districts share responsibility to evaluate and identify: (a) the district in which the student resides, Ed 1105.01(b); and (b) the district in which the private school is located, Ed 1105.02(d). See U.S. Dept. Educ., *Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools* (Revised April 2011), Question B-4. [17]
>
> If the district where a private school student *resides* identifies the child as eligible for special education, it must write an IEP offering a FAPE and a placement that can implement the IEP. The student's parents then have three options: (i) accept the IEP and placement their school district offered; (ii) keep the child in a private school at their own expense; or (iii) seek reimbursement from the district of residence for the cost of private schooling, if attendance at the private school is necessary for the student to receive a FAPE. 20 U.S.C. § 1412(a)(10)(A), (C).
>
> If the district *in which the private school is located* identifies the student as eligible for special education, it must include that child when calculating the pro rata share of IDEA funds it must spend on IDEA-eligible children attending the private school. 20 U.S.C. § 1412(a)(10)(A). This school district has discretion to spend a portion of those funds by providing special education and related services to the child through a "services plan," though the intensity of services need not rise to the level

[17] https://sites.ed.gov/idea/files/Private_School_QA_April_2011.pdf

required for a FAPE. 34 C.F.R. §§ 300.137, 300.138.

My November 17, 2021 letter to the State Board cited the U.S. Department of Education's official advice. To be precise, here is what the U.S. Department of Education advised in that guidance memorandum:

- When parents unilaterally place their child at a private school, the district in which the private school is located is obligated to find, evaluate and identify IDEA-eligible children attending the private school. U.S. Dept. of Education, *Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools* (Revised April 2011), p. 4, Question B-1.
- Parents may also ask the district in which they reside to evaluate and identify their child as eligible for special education. *Id.,* p. 5, Question B-4. [18]

The State Board of Education's rationale for proposed Ed 804.01(c)(2) ignores all that.

My next concern is that proposed RSA 804.01(c)(2) allows any "medical professional" licensed in any state to diagnose a "disabling condition," regardless of whether the professional has expertise in that condition or in special education.

In response to such concerns, the State Board belatedly added to proposed Ed 804.01(c)(2) that the "determination of a disabling condition" must be made by a medical professional "listed under Ed 1107.04 Table 1100.1, as a qualified examiner for the particular condition."

That addition is worthless, for the following reasons:

- No relevant law defines the term "disabling condition."
- Ed 804.01(c)(2) still fails to recognize that the special education laws establish two eligibility hurdles: (a) the student must have one of the "disabilities" listed in the IDEA; and (b) the disability must create a need for specially designed instruction.
- Most importantly, Ed 1107.04 Table 1100.1 says nothing about which medical providers have sufficient expertise to identify which disabilities. Nor does that table require that the medical provider assess whether the student requires special education.

Lastly, proposed Ed 804.01(c)(2) includes no safeguards to prevent abuse. One can easily imagine a physician or nurse diagnosing a disability in order to please a parent. One can also imagine the Children's Scholarship Fund, which pockets up to 10 percent of every

[18] https://sites.ed.gov/idea/files/Private_School_QA_April_2011.pdf

student's voucher, [19] casually honoring suspect diagnoses. One can even imagine medical professionals in distant states making diagnoses without knowing the patient, as recently happened with the National Basketball Association's health insurance program.[20]

In conclusion, proposed Ed 804.01(c)(2) violates the following statutes.

- Because the rule contradicts RSA 194-F:2, I and 198:40-a, II(d), it is beyond the agency's authority and contrary to the intent of the legislature. RSA 541-A:13, IV(a), (b).
- The proposed rule violates the public interest and thereby violates RSA 541-A:13, IV(c). The rule violates the public interest by allowing students who do not qualify for special education to draw vouchers from the public treasury as if they qualified for special education, while not requiring that any of the money be spent on special education. Furthermore, the rule includes no checks and balances to discourage bogus disability diagnoses.
- The proposed rule violates RSA 541-A:13, IV(d), because it will have a substantial economic impact not recognized in the fiscal impact statement. The impact will be in the Education Trust Fund, which is funded with taxpayer dollars, and the potential impact is approximately $2,000 per EFA student.
- The State Board claims that the rule implements federal law by ensuring that all EFA students who potentially qualify for special education are evaluated and identified. When proposing a rule that purports to enforce a federal mandate, the State Board must "*specifically state* the federal statute and regulation requiring such new, expanded, or modified programs or responsibilities." RSA 541-A:27 (emphasis added). The State Board has not so. The Appendix to the State Board's December 9, 2021 Final Proposal cites no federal law whatsoever. In fact, the proposed rule does not implement federal law; it contradicts federal law regarding how to identify a student as eligible for special education.
- Since proposed Ed 804.01(c)(2) exceeds what is necessary to comply with federal law, it violates RSA 186-C:3-a, I-a.
- The proposed rule also violates RSA 186-C:16-c, by failing to include in the Appendix any reasons to exceed federal law. While the State Board has provided reasons outside of the Appendix, those reasons are based on the false premise that no school district is responsible for evaluating and

[19] RSA 194-F:4, V allows the scholarship organization that administers the EFA program to pocket *up to* 10% of any voucher. The College Scholarship Fund is reportedly keeping that full 10%.

[20] E.g., https://www.npr.org/2021/10/07/1044052168/nba-former-players-charged-health-care-fraud.

identifying EFA students who qualify for special education.

As a solution, the NHASEA urges you to strike proposed 804.01(c)(2).

2. Proposed Ed 805.01(c)(2) regarding children with disabilities attending *public schools* as nonresident tuition students.

RSA 194-F:4, III directs the scholarship organization to notify parents of students with disabilities "that participation in the EFA program is a parental placement under 20 U.S.C. section 1412." Section 1412 of the IDEA allows parents to decline a free appropriate public education (FAPE) by unilaterally placing their children in private schools. [21]

Proposed Ed 805.01(c)(2) impermissibly narrows the broad sweep of the EFA statute. RSA 194-F:4, III treats *all* EFA children as children placed by parents in private schools, thereby forfeiting the right to a FAPE. Proposed Ed 805.01(c)(2), in contrast, creates two categories:

(1) The proposed rule states that EFA children attending private schools forfeit the right to a FAPE.

(2) The proposed rule states that EFA children attending public schools retain the right to a FAPE. The proposed rule adds that the district of residence, not the public school the student attends, is responsible for providing a FAPE.

There is a myth that the right to a FAPE is portable. The myth pretends that federal law guarantees a FAPE when a *nonresident* student attends a public school under a state school choice program even though a FAPE is available *in the district where the student resides.*

The U.S. Department of Education has fed that myth in a few letters over the years.[22] However, Congress has declared that such opinion letters carry no legal weight, as they are not the product of formal rulemaking. 20 U.S.C. § 1406(d), (e)(1).

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[21] The federal Individuals with Disabilities Education Act (IDEA) requires that participating states make a free appropriate public education (FAPE) "available" to every disabled student who requires special education. 20 U.S.C. §§ 1401(3), 1412(a)(1)(A). The IDEA defines "free appropriate public education" as "special education and related services" that: (a) are provided at public expense and under public supervision; (b) meet the standards of the State education agency; (c) include appropriate education; and (d) are provided in conformity with an individualized education program (IEP). 20 U.S.C. § 1401(9). Courts have elaborated that, in order for an IEP to be "appropriate," it must be reasonably calculated to confer meaningful educational benefits. E.g., *C.D. v Natick Public School District***,** 924 F.3d 621 (1st Cir. 2019), cert. denied, 140 S.Ct. 1264 (2020).

[22] E.g., *Letter Lutjeharms*, 16 IDELR 554, 16 LRP 937 (U.S. Dept. Educ., Office of Special Education and Related Services, 1990). The precise issue in that letter was whether a student enrolled in a state school choice program was entitled to transportation from the district of residence to a distant public school when the resident district offered appropriate special education in its own public schools. Under the IDEA, a child's entitlement to a FAPE includes the right to transportation as a related service when necessary for the student to access appropriate special education. 20 U.S.C. § 1401(9), (26)(A).

Moreover, courts have resoundingly rejected the conclusions reached in those letters. E.g, *Osseo Area Schools v. M.N.B.*, 970 F.3d 917, 922-23 (8th Cir. 2020) (an IDEA case); *Timothy H. v. Cedar Rapids Community School District*, 178 F.3d 968, 973 and n. 5 (8th Cir. 1999) (a Section 504 case).

As one court explained, the IDEA merely requires that participating states make a FAPE "available" to all children with disabilities who require special education. 20 U.S.C. § 1412(a)(1)(A). If a FAPE is available in the district of residence's public schools, the State has fulfilled its duty. *Osseo,* 970 F.3d at 922-23.

Refuting the portability myth, federal courts have also upheld state school choice statutes that erect special barriers for IDEA-eligible children. These decisions conclude that such discrimination is reasonable because special education is *special,* entailing unique costs, rights, and duties. *P.F. v. Taylor*, 914 F.3d 467 (7th Cir. 2019) (excluding nonresident special education students from a school of choice if that public school lacks the space or resources to meet the student's special needs); *Clark v. Banks*, 193 F.Appx. 510 (6th Cir. 2006) (excluding nonresident special education students from a school of choice if that public school and the district of residence cannot agree on how to fund special education) .

Even if the right to a FAPE is "portable," following the child to any public school, the IDEA does not require that the *district of residence* provide a FAPE. The IDEA imposes ultimate responsibility on the *State,* not any specific school district, to make a FAPE available. 20 U.S.C. § 1412(a)(1)(A). The State may provide and fund a FAPE. Or the State may delegate responsibility to any school district.

Why not impose responsibility on the district that chooses to accept nonresident tuitions students, rather than dragooning the district in which the student resides? Why not impose responsibility on the district that receives the voucher money, rather than the district stripped of all state aid tied to the student?

Requiring the district of residence to provide a FAPE to a student attending some other district's public school is impractical. New Hampshire has seen the consequences of such schemes, having already compelled the district of residence to provide a FAPE to any IDEA-eligible child attending a charter school. Problems arise when the district of residence must provide a FAPE at a school over which it has no managerial control.

If the district of residence can provide a FAPE in its own public schools, with its own personnel, it will be more costly to provide a FAPE at some out-of-district school. The duty to provide a FAPE also includes the duty to transport the student to school. Transportation can be expensive and logistically difficult if the student attends a faraway school operated by another district.

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.

The unfunded state mandate argument applies *even if the right to a FAPE is portable*. There are two reasons why. First, the right to a FAPE is a state mandate, not a federal mandate; the IDEA applies only to states that elect to participate. Second, as noted above, the IDEA does not compel the State to delegate responsibility to the district of residence.

In conclusion, proposed Ed 805.01(c)(2) violates the following statutes.

- Since it contradicts RSA 194-F:4, III, it is beyond the agency's authority and contrary to the intent of the legislature. RSA 541-A:13, IV(a), (b).
- The proposed rule violates RSA 541-A:13, IV(c) because it is contrary to the public interest and for similar reasons violates RSA 541-A:13, IV(d) because it will have a substantial economic impact not recognized in the fiscal impact statement. Special education is costly. [23] The proposed rule needlessly dragoons the district of residence into providing a FAPE at a school over which it has no control, after stripping the resident district of all state aid tied to the student.
- The State Board claims that the rule implements federal law. When proposing a rule that purports to enforce a federal mandate, the State Board must "*specifically state* the federal statute and regulation requiring such new, expanded, or modified programs or responsibilities." RSA 541-A:27 (emphasis added). The State Board has not done that. The Appendix to the State Board's December 9, 2021 Final Proposal cites no federal law whatsoever.
- Since proposed Ed 805.01(c)(2) exceeds what is necessary to comply with federal law, it violates RSA 186-C:3-a, I-a.
- The proposed rule also violates RSA 186-C:16-c, by failing to include reasons to exceed federal law.

As a solution, the NHASEA urges you to amend proposed Ed 805.01(c)(2) by rewording the notice to state as follows:

> "Participation in the EFA program is a parental placement under 20 USC section 1412, Individuals with Disabilities Education Act (IDEA). Pursuant to RSA 194-F:4, III, parentally-placed children with disabilities are not entitled to a FAPE while participating in the State-Funded EFA program."

[23] Many national studies over the years have concluded that the average annual pupil cost for educating special education students is approximately twice the average annual per pupil cost for educating students who do not qualify for special education. In New Hampshire, the average annual per pupil cost for regular education students is approximately $17,000.

The rule will then track, rather than contradict, what RSA 194-F:4, III says.

Thank you for considering these comments and for your public service.

Very truly yours,

/s/ Gerald M. Zelin

Gerald M. Zelin

cc: Jane Bergeron, Exec. Dir., NHASEA

ACLU New Hampshire

Testimony by Gilles Bissonnette, Legal Director of the ACLU-NH
Public Hearing Before Joint Legislative Committee on Administrative Rules (JLCAR)
Proposed Rules Ed 800 Education Freedom Account Program
January 21, 2022

I am the Legal Director of the American Civil Liberties Union of New Hampshire (ACLU-NH)—a non-profit organization working to protect civil liberties throughout New Hampshire for over fifty years. We write to ask that the Joint Legislative Committee on Administrative Rules ("JLCAR") amend the proposed rules at Ed 800 concerning Education Freedom Accounts to explicitly exclude public funds from being used for religious instruction. Currently, the proposed rules appear to allow for public funds to be used for religious instruction. As a result, these proposed rules violate Part I, Article 6 and Part II, Article 83 of the New Hampshire Constitution. Indeed, both this Board and the Joint Legislative Committee on Administrative Rules ("JLCAR") have the authority, regardless of any legislative enactment, to amend rules in such a way as to avoid a constitutional violation. *See* JLCAR Rule 401.04 (noting that JLCAR "may object to a proposed rule as being beyond an agency's authority if the Committee determines that the rule violates a provision of the New Hampshire Constitution or the Constitution of the United States"). The concerns raised below were raised before the Board of Education.

The New Hampshire Constitution mandates strict separation of church and state, and includes explicit prohibitions on using taxpayer dollars to support religious educational activities. Part I, Article 6 of the New Hampshire Constitution states, "[N]o person shall ever be compelled to pay towards the support of the schools of any sect or denomination." Part II, Article 83 also states, in part, "Provided, nevertheless, that no money raised by taxation shall ever be granted or applied for the use of the schools of institutions of any religious sect or denomination." This language could not be clearer in barring the proposed rules' transfer of state funds for religious uses. Indeed, these provisions were specifically crafted to preserve our freedom to live in a state where the government is not entangled with matters of faith—including religious education—which are properly reserved for individuals, families, and religious communities.

Given the clarity of these Constitutional provisions, the New Hampshire Supreme Court has interpreted these provisions as strictly prohibiting any diversion of tax funds that could be used to support religious instruction. The Court has even gone so far as to conclude that the government cannot circumvent these prohibitions by "do[ing] indirectly that which it cannot do directly." *See Burrows v. City of Keene*, 121 N.H. 590, 597 (1981). Thus, not only are direct disbursements from the State for the purpose of religious education barred, but the government is prohibited from enacting creative programs that indirectly do so.

Several cases analyzing these provisions under the New Hampshire Constitution are instructive:

- ***Opinion of the Justices (Choice in Education)*, 136 N.H. 357 (1992)**: In this case, the New Hampshire Supreme Court invalidated a proposed school-voucher program. That program would have allowed parents dissatisfied with their child's education to enroll the child in "any other state approved school," including a religious school. The school district where the child resided would then have been required to pay part of the new school's tuition.

  The Court pronounced, "[o]ur constitution . . . recognizes the fundamental separation between church and state." The Court then ruled that the proposed voucher program "violate[d] the plain meaning of part I, article 6" of the State Constitution. The Court emphasized that, under the proposed program, "[n]o safeguards exist[ed] to prevent the application of public funds to sectarian uses." Payments by school districts under the voucher program would have "constitute[d] an unrestricted application of public money to sectarian schools." The Court also noted that "sectarian schools" are "a class appearing to predominate among the nonpublic schools."

- ***Opinion of the Justices*, 109 N.H. 578 (1969)**: In this case, the New Hampshire Supreme Court struck down legislation that would have authorized local governments to "grant a tax exemption of $50.00 per year on the residential real estate of any person having at least one child attending a nonpublic school." As the Court explained, the program violated Part II, Article 83 because "[i]t would make available to the parents funds which they could contribute directly to the nonpublic school, including parochial schools, without restricting the aid to secular education." The Court added: "[T]he amount of $50.00 may seem small, yet if the principle were upheld, the amount could be increased to a point whereby it could be used as a means of fully supporting such schools."

The unmistakable takeaway from these two opinions is that the New Hampshire Supreme Court has interpreted these specific state constitutional provisions robustly separate and apart from whatever independent protections the federal constitutional may provide.

The U.S. Supreme Court's 2017 decision in *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012 (2017), does not change this result as to the proposed rules' constitutionality as drafted. *Trinity Lutheran* was narrow and limited to far different circumstances. There, the Court held that a state violated the federal Free Exercise Clause by denying a church-operated preschool—solely because of its religious status—a grant to purchase a rubber surface for its playground. The record in *Trinity Lutheran* contained no evidence that the playground was used for religious activity. Thus, the Court strictly limited the scope of its holding: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination. Here, unlike *Trinity Lutheran*, the funds allocated under the proposed rules could go directly to religious uses."[1]

The U.S. Supreme Court's 2020 decision in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), also does not change this analysis as to the proposed rules' constitutionality as drafted. In *Espinoza*, the Court held that it violated the Free Exercise Clause for a state to disqualify sectarian schools from receiving the benefit of a scholarship. But, here, modifying the proposed rules to ensure that scholarship funds are not put to religious uses would not, unlike *Espinoza*, deprive a student of a scholarship in violation of the Free Exercise Clause; rather, such a change would merely restrict how the funds are used and serve New Hampshire's longstanding interest in avoiding state funding of religious educational activities.

Indeed, the First Circuit Court of Appeals—including Justice David Souter formerly of the United States Supreme Court—recently agreed with this analysis in *Carson v. Makin*, 979 F.3d 21, 40 (1st Cir. 2020), where that Court held that the requirement in Maine's tuition assistance program that a private school had to be a nonsectarian school to receive tuition assistance payments did not infringe on parents' First Amendment free exercise of religion rights because the Court understood the statutory restriction to bar funding for such schools "based on the religious use that they would make of it in instructing children in the tuition assistance program."[2]

For these reasons, the ACLU-NH respectfully urges JLCAR to amend the proposed rules to ensure that public funds are not used for religious instruction, as such a change is necessary to be consistent with the New Hampshire Constitution.

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[1] Indeed, in *Locke v. Davey*, 540 U.S. 712 (2004), the U.S. Supreme Court held that a state regulation prohibiting use of state scholarship funds to pursue a degree in theology did not violate the federal Free Exercise or Equal Protection Clauses. Following *Locke*, the *Trinity Lutheran* Court emphasized that, on the specific facts of the case before it concerning a playground, the state had "expressly den[ied] a qualified religious entity a public benefit solely because of its religious character." *Locke* was different, explained the *Trinity Lutheran* Court, because the scholarship applicant there "was not denied a scholarship because of who he was; *he was denied a scholarship because of what he proposed to do —use the funds to prepare for the ministry*." Here, like *Locke* and unlike *Trinity Lutheran*, if the proposed rules were to contain provisions ensuring that public funds were not put to religious uses, it would not violate federal Free Exercise principles because it would restrict simply how funds are to be expended.

[2] The Supreme Court is now considering this case, with oral argument having occurred on December 8, 2021.

NEA • NEW HAMPSHIRE
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November 10, 2021

Dear Chairman Cline and Members of the State Board of Education,

I am writing to detail our concerns with the initial proposal made by the Board with regard to Education Freedom Accounts(EFAs). While much of our opposition to this program lies with its numerous statutory shortcomings, so much so that the NH House never passed this program through the regular committee process, we would still like to highlight a few areas where we feel the regular rule proposal put forward ought to be revised, since RSA 194 is current law and requires that the rulemaking process occur:

1) Qualifying EFA Expenses – Proposed Ed 804.02 remains thin at best on putting guardrails around the types of qualifying expenses that may be deemed educational by the scholarship organization. While the proposal puts some limits on specific expenses already outlined in statute, it fails to properly narrow RSA 194-F:2, II(o) which allows a 3rd party (the scholarship organization) to approve "any other educational expense approved by the scholarship organization". Our concern lies in the fact that the scholarship organization, without approval of the NH State Board of Education or the Department, can approve any expense it considers educational and deems proper. The proposed rules do not put guidelines forward on this fact other than subsection (d), which merely says "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." This could leave precious public money being spent on educational expenses that would never pass scrutiny by local officials, voters or even the state legislature.

2) Ed 804.01 makes some clarification about certain types of differentiated aid payments but not with respect to Free and Reduced Lunch (FRL). This is concerning because in the statute there is no income limitation beyond the initial entry period into the program. As we know from the debate held in Senate Finance, a family could income qualify the first year, then have a substantial increase in their income level, and still qualify to receive EFA funds. We think it should be spelled out clearly in the rules that under RSA 194-F:2, I, any differentiated aid that would require income-based verification in a traditional public school, such as FRL, ought to be

verified annually in order to continue to make such additional aid payments into an EFA.

3) Rules around student safety seem to be absent from the rules laid out in this proposal. While it appears that background checks are now required for an education service provider to demonstrate takes place, there is still "no stipulation that a negative background check will result in a bar from participation in the EFA program" as the JLCAR attorneys observed from the Board's Interim rule proposal earlier this year for EFAs. There are also other types of safety concerns not addressed in these proposed rules. For example, the rules also do not spell out facility requirements if an education service provider is using a brick-and-mortar facility to conduct instruction, such as fire, ADA, and other such safety codes.

4) The proposed rules also omit clearly outlined protections for students from discriminatory admissions policies by education service providers. The State Board should be making it crystal clear that an EFA student cannot be discriminated against for any of the reasons outlined in New Hampshire's antidiscrimination laws by clarifying the apparent confusion between RSA 194-F:6 Requirements for Education Service Providers and RSA 194-F:7 Independence of Education Service Providers.

In addition to these points, we hope that the Commissioner and the State Board will urge the JLCAR to file legislation to address the myriad of recommended statutory policies outlined by JLCAR attorneys during the interim rule making process that can only be addressed through the legislative process.

Sincerely,

Megan Tuttle
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January 20, 2022

Via email

Joint Legislative Committee on Administrative Rules
State House
Concord, N.H. 03301-3680

RE: Proposed Ed 800 (Education Freedom Accounts)

Dear Members of the Joint Legislative Committee on Administrative Rules:

I represent the New Hampshire Association of Special Education Administrators (NHASEA). The organization's 200 plus members include the special education directors of nearly every school district in New Hampshire. The NHASEA's membership also includes the special education directors of most New Hampshire private schools that are state-approved to provide publicly financed special education.

Executive Summary

The NHASEA urges JLCAR to object to two provisions in the State Board of Education's Conditional Approval Request dated January 18, 2022.

The first provision, Ed 804.01(c)(2), allows "a medical professional" licensed to practice in any state to determine that a child has a "disabling condition," in which case the student's voucher increases to include differentiated aid ordinarily available only to students who qualify for special education. In response to protests that this rule allowed medical professionals to diagnose disabilities outside their expertise, such as permitting dermatologists to diagnose epilepsy, the State Board recently added a proviso stating that the "medical professional" must be "listed under Ed 1107.04 Table 1100.1, as a qualified examiner for the particular condition."

The proposed rule is a masquerade. It allows a student who in fact does not qualify for special education to receive an increased voucher as if he or she truly qualified. The rule bypasses the process the special education laws require for identifying a student as eligible for special education. The rule also omits one of the essential eligibility criteria the special education laws establish. The State Board of Education's expressed rationale for the proposed rule is fallacious. The recently-added proviso is hollow, because Ed 1107.04 Table 1100.1 contains no limitations.

Ed 804.01(c)(2) is simply a raid on the public treasury to increase the size of a voucher beyond what RSA 194-F allows. Adding insult to injury, none of the voucher money must be spent on special education.

The second provision, Ed 805.01(c)(2), requires that the notice parents receive when applying to participate in the EFA program include the following statement:

> A child with a disability participating in an EFA program and enrolled in a public school under RSA 194-F:2, II (d) … is entitled to a FAPE…. 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.

This is a back-handed way of directing the school district in which a student resides to somehow provide special education at a distant public school over which the district of residence has no control.

In addition to being impractical, this rule contradicts the plain language of RSA 194-F:4, III. The rule also exceeds what the special education laws demand and imposes a new unfunded state mandate on the district of residence.

Proposed Ed 805.01(c)(2) is outrageous because it compels the district of residence to pay for special education after being stripped of all state aid tied to the student, including differentiated aid for special education.

Aside from those two specific provisions related to special education, the NHASEA notes that the proposed rules squander the opportunity to remedy a constitutional flaw in the enabling statute. Specifically, RSA 194-F:2, II lists the categories of expenses that can be paid with EFA funds. The list concludes with RSA 194-F:2, II(o), a "kitchen sink" provision that allows spending EFA funds on "[a]ny other educational expense approved by the scholarship organization."

As the U.S. Supreme Court reiterated last week when striking down OSHA's compulsory vaccination rules, a basic principle of constitutional law prohibits the legislature from enacting laws that delegate open-ended discretion. *National Business Federation of Independent Businesses v. Department of Labor,* 595 U.S. __ (January 13, 2022) (Gorsuch, concurring, slip op. at 5). Similar constitutional principles prohibit executive branch agencies from adopting rules without standards. Objective standards confining discretion discourage arbitrariness, favoritism, and corruption.

RSA 194-F:2, II(o), by delegating open-ended discretion to the Children's Scholarship

Fund, violates those constitutional principles to an extreme degree. The statute delegates broad discretion to a private entity doling out public money, without any public control over how that private entity exercises its discretion. [1]

The proposed rules could correct that flaw by adding some guard rails, such as prohibiting the expenditure of vouchers on "educational" programs that teach hate, bigotry, or divisive concepts.

The Standards for JLCAR Review

RSA 194-F:4, XV authorizes the State Board of Education to "adopt rules that are *necessary* for the administration of this chapter." (Emphasis added.)

In ordinary cases JLCAR may object to a proposed rule only if the proposal is:

(a) beyond the authority of the agency;

(b) contrary to the intent of the legislature;

(c) not in the public interest; or

(d) deemed to have a substantial economic impact not recognized in the fiscal impact statement.

RSA 541-A:13, IV.

However, since these proposed rules will impact school districts, the State Board must also comply with the following additional statutes:

- RSA 541-A:25, like Part 1, Article 28-a of the New Hampshire Constitution, prohibits rules that "mandate or assign any new expanded, or modified programs or responsibilities to any political subdivision in such a way as to necessitate further expenditures by the political subdivision."

- RSA 541-A:26 bars the State Board from imposing new costs on school districts under the pretense of administering a federal mandate when the proposed state rule in fact exceeds what federal law demands.

- RSA 541-A:27 compels the State Board, when proposing a rule that purports

[1] For example, the *Manchester Union Leader* has reported that the Children's Scholarship Fund denies it must comply with New Hampshire's Right to Know Law, RSA 91-A. On November 30, 2021, I wrote to the Director of the Children's Scholarship Fund of New Hampshire asking whether that was true and also seeking a copy of any written criteria it follows when approving vendors and expenses other than the criteria already published in the Provider Handbook posted on the Fund's website. I received no response.

to enforce a federal mandate, to cite the specific federal law compelling that result.

- RSA 186-C:3-a, I-a directs the State Department of Education, when regulating special education, to refrain from imposing duties on school districts that "exceed what is necessary for compliance with this chapter and with state and federal law regarding the education of children with disabilities."

- RSA 186-C:16-c instructs the State Board, when proposing a "special education rule which exceeds the minimum requirements of state or federal law," to identify the state and federal laws being exceeded and to explain the reasons for exceeding those minimum requirements.

Proposed Ed 804.01(c)(2) and Ed 805.01(c)(2) violate those statutes, as I will explain below.

1. Proposed Ed 804.01(c)(2), increasing the voucher if a medical professional unilaterally identifies an EFA student as disabled.

If an EFA student qualifies for special education, the size of the voucher rises. This is because RSA 194-F takes whatever state aid the resident school district would ordinarily receive for the student and transfers that money to the voucher.[2] This state aid includes two components: (a) basic "adequacy aid," which the state pays for all students;[3] and (b) "differentiated aid," which the state pays for certain categories of students over and above basic adequacy aid.[4] Differentiated aid currently totals $2,037.11 annually for each special education student.[5]

For brevity, I will call this differentiated aid a "special education bonus."

Proposed Ed 804.01 offers two alternative paths to qualify for a special education bonus. The proposed rule reads as follows:

> (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

[2] RSA 194-F:2, I; proposed Ed 804.01(c).

[3] RSA 198:40-a, II(a).

[4] RSA 198:40-a, II(b)-(e).

[5] RSA 198:40-a, I, II(d), :40-d; https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/sonh/fy2022-explained.pdf.

> education, by an IEP team, in accordance with 34 C.F.R. 300.300-300.311; *or*
>
> (2) *A determination by 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.*

(Emphasis added.)

The NHASEA objects to that second path, set forth in proposed Ed 804.01(c)(2), on the following grounds.

First, as I will elaborate below, proposed Ed 804.01(c)(2) illegally circumvents the controlling statutes. It creates counterfeit eligibility. It allows a child who in fact does not qualify for special education to receive the special education bonus.

Second, the State Board's rationale for creating this scheme falsely assumes that no school district is responsible for deciding whether an EFA child qualifies for special education. In fact, the IDEA compels both the district of residence and the district in which the private school is located to evaluate and determine whether an EFA student qualifies for special education.

Third, the term "medical professional," which the rules do not define, is unduly vague. It sweeps in providers who have no expertise in the relevant disability.

Fourth, proposed Ed 804.01(c)(2) is susceptible to abuse and fraud.

I will now expand on each of those four grounds.

Proposed Ed 804.01(c)(2) circumvents many important eligibility requirements in the state and federal special education laws. For example:

- The special education laws clearly state that the mere existence of a disability does not trigger eligibility for special education. To be eligible, a student must also, as a result of the disability, "need" special education. [6] The term "special education" means "specialized instruction." [7] Most medical professionals lack the expertise to determine whether a student requires specialized instruction.
- The special education laws require a "comprehensive evaluation" before a student can be deemed eligible for special education. [8] In New Hampshire, that comprehensive evaluation must always include tests that assess "academic

[6] 20 U.S.C. § 1401(3)(A(ii)); RSA 186-C:2, I.

[7] 20 U.S.C. § 1401(29).

[8] 34 C.F.R. §§ 300.301-300.306.

performance." [9] If a "specific learning disability" such as dyslexia is suspected, the evaluation must also include a classroom observation. [10] Few medical professionals conduct academic testing or classroom observations.

- Only an IEP team convened by a school district has authority to decide whether a student qualifies for special education (unless a hearing officer overrules the team's decision). [11] The team reaches its decision by reviewing the evaluation results [12] and then determining whether the student has a disability and "needs" special education. [13]
- Proposed Ed 804.01(c)(2) naively assumes eligibility criteria are uniform from district to district and state to state. In fact, the IDEA allows variability between jurisdictions. For instance, the U.S. Department of Education's rules list three alternative criteria for identifying a specific learning disability and allow each state to select which ones apply. [14] The New Hampshire Board of Education's special education rules in turn allow each school district to decide which criteria to use. [15]

Proposed Ed 804.01(c)(2) invites parents to bypass all those processes by simply obtaining a "determination" from a "medical professional" that the student "has a disabling condition."[16]

Ironically, while Ed 804.01(c)(2) offers special education bonuses to children who do not truly qualify for special education, RSA 194-F do not demand that parents spend any voucher dollars on special education.

Proposed 804.01(c)(2) is illegal because it contradicts the two statutes it pretends to implement.

- The EFA statute allows the voucher to include "differentiated aid *that would have been provided to a public school* for that eligible student." RSA 194-F:2, I. (Emphasis added.)

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[9] N.H. Code Admin. Rules Ed 1107.04(b).

[10] 34 C.F.R. § 300.310(b)(2).

[11] 34 C.F.R. §§ 300.305(a), 300.306(a); RSA 186-C:9; N.H. Code Admin. Rules Ed 1102.03(i), 1107.05, 1108.

[12] *Id.* (all).

[13] 34 C.F.R. § 300.305(a)(2)(iii)(A).

[14] 34 C.F.R. 300.307(a).

[15] Ed 1107.02.

[16] The form the College Scholarship Fund created for medical professionals to complete is no better than the proposed rule. The form asks whether the student has a disability and lists the qualifying disabilities recited in the special education laws, but does not ask whether the student requires special education. Nor does the form include the IDEA's special definitions for these disabilities, which in some instances differ from the standard medical definitions. The form appears at pages 21-22 of CFS's Parent Handbook for New Hampshire's EFA program, https://nh.scholarshipfund.org/wp-content/uploads/2021/10/Parent-Handbook-2021-DRAFT.pdf.

- The differentiated aid statute offers a special education bonus only if the pupil "is receiving special education services." RSA 198:40-a, II(d).

In other words, under these statutes, a student who does not qualify to receive special education *from a school district* has no claim to the special education bonus. Furthermore, as explained above, a student who bypasses the evaluation process set forth in the special education laws cannot qualify for special education *from a school district*.

What is the State Board's response to those arguments? The Board falsely contends that once a child enrolls in an EFA program no school district is responsible for determining eligibility for special education.

As I explained to the State Board -- at the November 10, 2021 public hearing and in a follow-up letter -- that contention is incorrect. Quoting from my November 17 letter,

> When a student attends a private school, two school districts share responsibility to evaluate and identify: (a) the district in which the student resides, Ed 1105.01(b); and (b) the district in which the private school is located, Ed 1105.02(d). See U.S. Dept. Educ., *Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools* (Revised April 2011), Question B-4. [17]
>
> If the district where a private school student *resides* identifies the child as eligible for special education, it must write an IEP offering a FAPE and a placement that can implement the IEP. The student's parents then have three options: (i) accept the IEP and placement their school district offered; (ii) keep the child in a private school at their own expense; or (iii) seek reimbursement from the district of residence for the cost of private schooling, if attendance at the private school is necessary for the student to receive a FAPE. 20 U.S.C. § 1412(a)(10)(A), (C).
>
> If the district *in which the private school is located* identifies the student as eligible for special education, it must include that child when calculating the pro rata share of IDEA funds it must spend on IDEA-eligible children attending the private school. 20 U.S.C. § 1412(a)(10)(A). This school district has discretion to spend a portion of those funds by providing special education and related services to the child through a "services plan," though the intensity of services need not rise to the level

[17] https://sites.ed.gov/idea/files/Private_School_QA_April_2011.pdf

required for a FAPE. 34 C.F.R. §§ 300.137, 300.138.

My November 17, 2021 letter to the State Board cited the U.S. Department of Education's official advice. To be precise, here is what the U.S. Department of Education advised in that guidance memorandum:

- When parents unilaterally place their child at a private school, the district in which the private school is located is obligated to find, evaluate and identify IDEA-eligible children attending the private school. U.S. Dept. of Education, *Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools* (Revised April 2011), p. 4, Question B-1.
- Parents may also ask the district in which they reside to evaluate and identify their child as eligible for special education. *Id.,* p. 5, Question B-4. [18]

The State Board of Education's rationale for proposed Ed 804.01(c)(2) ignores all that.

My next concern is that proposed RSA 804.01(c)(2) allows any "medical professional" licensed in any state to diagnose a "disabling condition," regardless of whether the professional has expertise in that condition or in special education.

In response to such concerns, the State Board belatedly added to proposed Ed 804.01(c)(2) that the "determination of a disabling condition" must be made by a medical professional "listed under Ed 1107.04 Table 1100.1, as a qualified examiner for the particular condition."

That addition is worthless, for the following reasons:

- No relevant law defines the term "disabling condition."
- Ed 804.01(c)(2) still fails to recognize that the special education laws establish two eligibility hurdles: (a) the student must have one of the "disabilities" listed in the IDEA; and (b) the disability must create a need for specially designed instruction.
- Most importantly, Ed 1107.04 Table 1100.1 says nothing about which medical providers have sufficient expertise to identify which disabilities. Nor does that table require that the medical provider assess whether the student requires special education.

Lastly, proposed Ed 804.01(c)(2) includes no safeguards to prevent abuse. One can easily imagine a physician or nurse diagnosing a disability in order to please a parent. One can also imagine the Children's Scholarship Fund, which pockets up to 10 percent of every

[18] https://sites.ed.gov/idea/files/Private_School_QA_April_2011.pdf

student's voucher, [19] casually honoring suspect diagnoses. One can even imagine medical professionals in distant states making diagnoses without knowing the patient, as recently happened with the National Basketball Association's health insurance program.[20]

In conclusion, proposed Ed 804.01(c)(2) violates the following statutes.

- Because the rule contradicts RSA 194-F:2, I and 198:40-a, II(d), it is beyond the agency's authority and contrary to the intent of the legislature. RSA 541-A:13, IV(a), (b).
- The proposed rule violates the public interest and thereby violates RSA 541-A:13, IV(c). The rule violates the public interest by allowing students who do not qualify for special education to draw vouchers from the public treasury as if they qualified for special education, while not requiring that any of the money be spent on special education. Furthermore, the rule includes no checks and balances to discourage bogus disability diagnoses.
- The proposed rule violates RSA 541-A:13, IV(d), because it will have a substantial economic impact not recognized in the fiscal impact statement. The impact will be in the Education Trust Fund, which is funded with taxpayer dollars, and the potential impact is approximately $2,000 per EFA student.
- The State Board claims that the rule implements federal law by ensuring that all EFA students who potentially qualify for special education are evaluated and identified. When proposing a rule that purports to enforce a federal mandate, the State Board must "*specifically state* the federal statute and regulation requiring such new, expanded, or modified programs or responsibilities." RSA 541-A:27 (emphasis added). The State Board has not so. The Appendix to the State Board's December 9, 2021 Final Proposal cites no federal law whatsoever. In fact, the proposed rule does not implement federal law; it contradicts federal law regarding how to identify a student as eligible for special education.
- Since proposed Ed 804.01(c)(2) exceeds what is necessary to comply with federal law, it violates RSA 186-C:3-a, I-a.
- The proposed rule also violates RSA 186-C:16-c, by failing to include in the Appendix any reasons to exceed federal law. While the State Board has provided reasons outside of the Appendix, those reasons are based on the false premise that no school district is responsible for evaluating and

[19] RSA 194-F:4, V allows the scholarship organization that administers the EFA program to pocket *up to* 10% of any voucher. The College Scholarship Fund is reportedly keeping that full 10%.

[20] E.g., https://www.npr.org/2021/10/07/1044052168/nba-former-players-charged-health-care-fraud.

identifying EFA students who qualify for special education.

As a solution, the NHASEA urges you to strike proposed 804.01(c)(2).

2. Proposed Ed 805.01(c)(2) regarding children with disabilities attending *public schools* as nonresident tuition students.

RSA 194-F:4, III directs the scholarship organization to notify parents of students with disabilities "that participation in the EFA program is a parental placement under 20 U.S.C. section 1412." Section 1412 of the IDEA allows parents to decline a free appropriate public education (FAPE) by unilaterally placing their children in private schools. [21]

Proposed Ed 805.01(c)(2) impermissibly narrows the broad sweep of the EFA statute. RSA 194-F:4, III treats *all* EFA children as children placed by parents in private schools, thereby forfeiting the right to a FAPE. Proposed Ed 805.01(c)(2), in contrast, creates two categories:

(1) The proposed rule states that EFA children attending private schools forfeit the right to a FAPE.

(2) The proposed rule states that EFA children attending public schools retain the right to a FAPE. The proposed rule adds that the district of residence, not the public school the student attends, is responsible for providing a FAPE.

There is a myth that the right to a FAPE is portable. The myth pretends that federal law guarantees a FAPE when a *nonresident* student attends a public school under a state school choice program even though a FAPE is available *in the district where the student resides.*

The U.S. Department of Education has fed that myth in a few letters over the years.[22] However, Congress has declared that such opinion letters carry no legal weight, as they are not the product of formal rulemaking. 20 U.S.C. § 1406(d), (e)(1).

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[21] The federal Individuals with Disabilities Education Act (IDEA) requires that participating states make a free appropriate public education (FAPE) "available" to every disabled student who requires special education. 20 U.S.C. §§ 1401(3), 1412(a)(1)(A). The IDEA defines "free appropriate public education" as "special education and related services" that: (a) are provided at public expense and under public supervision; (b) meet the standards of the State education agency; (c) include appropriate education; and (d) are provided in conformity with an individualized education program (IEP). 20 U.S.C. § 1401(9). Courts have elaborated that, in order for an IEP to be "appropriate," it must be reasonably calculated to confer meaningful educational benefits. E.g., *C.D. v Natick Public School District***,** 924 F.3d 621 (1st Cir. 2019), cert. denied, 140 S.Ct. 1264 (2020).

[22] E.g., *Letter Lutjeharms*, 16 IDELR 554, 16 LRP 937 (U.S. Dept. Educ., Office of Special Education and Related Services, 1990). The precise issue in that letter was whether a student enrolled in a state school choice program was entitled to transportation from the district of residence to a distant public school when the resident district offered appropriate special education in its own public schools. Under the IDEA, a child's entitlement to a FAPE includes the right to transportation as a related service when necessary for the student to access appropriate special education. 20 U.S.C. § 1401(9), (26)(A).

Moreover, courts have resoundingly rejected the conclusions reached in those letters. E.g, *Osseo Area Schools v. M.N.B.*, 970 F.3d 917, 922-23 (8th Cir. 2020) (an IDEA case); *Timothy H. v. Cedar Rapids Community School District*, 178 F.3d 968, 973 and n. 5 (8th Cir. 1999) (a Section 504 case).

As one court explained, the IDEA merely requires that participating states make a FAPE "available" to all children with disabilities who require special education. 20 U.S.C. § 1412(a)(1)(A). If a FAPE is available in the district of residence's public schools, the State has fulfilled its duty. *Osseo,* 970 F.3d at 922-23.

Refuting the portability myth, federal courts have also upheld state school choice statutes that erect special barriers for IDEA-eligible children. These decisions conclude that such discrimination is reasonable because special education is *special,* entailing unique costs, rights, and duties. *P.F. v. Taylor*, 914 F.3d 467 (7th Cir. 2019) (excluding nonresident special education students from a school of choice if that public school lacks the space or resources to meet the student's special needs); *Clark v. Banks*, 193 F.Appx. 510 (6th Cir. 2006) (excluding nonresident special education students from a school of choice if that public school and the district of residence cannot agree on how to fund special education) .

Even if the right to a FAPE is "portable," following the child to any public school, the IDEA does not require that the *district of residence* provide a FAPE. The IDEA imposes ultimate responsibility on the *State,* not any specific school district, to make a FAPE available. 20 U.S.C. § 1412(a)(1)(A). The State may provide and fund a FAPE. Or the State may delegate responsibility to any school district.

Why not impose responsibility on the district that chooses to accept nonresident tuitions students, rather than dragooning the district in which the student resides? Why not impose responsibility on the district that receives the voucher money, rather than the district stripped of all state aid tied to the student?

Requiring the district of residence to provide a FAPE to a student attending some other district's public school is impractical. New Hampshire has seen the consequences of such schemes, having already compelled the district of residence to provide a FAPE to any IDEA-eligible child attending a charter school. Problems arise when the district of residence must provide a FAPE at a school over which it has no managerial control.

If the district of residence can provide a FAPE in its own public schools, with its own personnel, it will be more costly to provide a FAPE at some out-of-district school. The duty to provide a FAPE also includes the duty to transport the student to school. Transportation can be expensive and logistically difficult if the student attends a faraway school operated by another district.

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.

The unfunded state mandate argument applies *even if the right to a FAPE is portable*. There are two reasons why. First, the right to a FAPE is a state mandate, not a federal mandate; the IDEA applies only to states that elect to participate. Second, as noted above, the IDEA does not compel the State to delegate responsibility to the district of residence.

In conclusion, proposed Ed 805.01(c)(2) violates the following statutes.

- Since it contradicts RSA 194-F:4, III, it is beyond the agency's authority and contrary to the intent of the legislature. RSA 541-A:13, IV(a), (b).
- The proposed rule violates RSA 541-A:13, IV(c) because it is contrary to the public interest and for similar reasons violates RSA 541-A:13, IV(d) because it will have a substantial economic impact not recognized in the fiscal impact statement. Special education is costly. [23] The proposed rule needlessly dragoons the district of residence into providing a FAPE at a school over which it has no control, after stripping the resident district of all state aid tied to the student.
- The State Board claims that the rule implements federal law. When proposing a rule that purports to enforce a federal mandate, the State Board must "*specifically state* the federal statute and regulation requiring such new, expanded, or modified programs or responsibilities." RSA 541-A:27 (emphasis added). The State Board has not done that. The Appendix to the State Board's December 9, 2021 Final Proposal cites no federal law whatsoever.
- Since proposed Ed 805.01(c)(2) exceeds what is necessary to comply with federal law, it violates RSA 186-C:3-a, I-a.
- The proposed rule also violates RSA 186-C:16-c, by failing to include reasons to exceed federal law.

As a solution, the NHASEA urges you to amend proposed Ed 805.01(c)(2) by rewording the notice to state as follows:

> "Participation in the EFA program is a parental placement under 20 USC section 1412, Individuals with Disabilities Education Act (IDEA). Pursuant to RSA 194-F:4, III, parentally-placed children with disabilities are not entitled to a FAPE while participating in the State-Funded EFA program."

[23] Many national studies over the years have concluded that the average annual pupil cost for educating special education students is approximately twice the average annual per pupil cost for educating students who do not qualify for special education. In New Hampshire, the average annual per pupil cost for regular education students is approximately $17,000.

The rule will then track, rather than contradict, what RSA 194-F:4, III says.

Thank you for considering these comments and for your public service.

Very truly yours,

/s/ Gerald M. Zelin

Gerald M. Zelin

cc: Jane Bergeron, Exec. Dir., NHASEA