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.

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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,

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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