

The Education Savings Account Act

(Publicly Funded)

August 16, 2021

Section 1. Short Title. This Act shall be known as the “Education Savings Account Act” or “ESA Act.” The program created by it shall be known as the “Education Savings Account Program” or “ESA Program.”

Section 2. Definitions.

(a) “Agency” means the [relevant state agency] or an organization that the Agency has contracted with to carry out any or all portions of the ESA Act pursuant to section 5(d).

(b) “Curriculum” means a complete course of study for a particular content area or grade level.

(c) “Education Savings Account” or “ESA” means the account to which funds are allocated by the Agency to the Parent of an ESA Student to pay for qualifying education expenses to educate the ESA Student pursuant to the requirements and conditions of this Act.

(d) “Education Service Provider” means a person or organization that receives payments from Education Savings Accounts to provide educational goods and services to ESA Students.

(e) “Eligible Student” means a resident of this state who is eligible to enroll in a public elementary or secondary school.¹

(f) “ESA Student” means an Eligible Student who is participating in the ESA Program.

(g) “Parent” means a biological or adoptive parent, legal guardian, custodian, or other person with legal authority to act on behalf of an Eligible or ESA Student.

Section 3. Basic Elements of the Education Savings Account Program.

(a) The total amount the Agency shall deposit into an ESA, in quarterly installments, shall be equal to the average amount spent by the state and local school districts on public school students, except that for Eligible Students with disabilities, English language learners, homeless students, and low-income students the amount shall include any weighted funding that would have been provided to a public school for that Eligible Student.²

(b) Parents of an ESA Student shall agree to use the funds deposited in their student’s ESA only for the following qualifying expenses to educate the ESA Student:

- (1) Tuition and/or fees at a private school;

- (2) Tuition and/or fees for non-public online learning programs;
- (3) Tutoring services provided by an individual or a tutoring facility;
- (4) Services contracted for and provided by a public district, charter, or magnet school, including, but not limited to, individual classes and extracurricular activities and programs;
- (5) Textbooks, Curriculum, or other instructional materials, including, but not limited to, any supplemental materials or associated online instruction required by either a Curriculum or an Education Service Provider;
- (6) Computer hardware or other technological devices that are primarily used to help meet an ESA Student's educational needs;
- (7) Educational software and applications;
- (8) School uniforms;
- (9) Fees for nationally standardized assessments, Advanced Placement examinations, examinations related to college or university admission, and tuition and/or fees for preparatory courses for the exams;
- (10) Tuition and/or fees for summer education programs and specialized after-school education programs, but not after-school childcare;
- (11) Tuition, fees, instructional materials, and examination fees at a career or technical school;
- (12) Educational services and therapies, including, but not limited to, occupational, behavioral, physical, speech-language, and audiology therapies;
- (13) Tuition and fees at an institution of higher education;
- (14) Fees for transportation paid to a fee-for-service transportation provider for the student to travel to and from an Education Service Provider; or
- (15) Any other educational expense approved by the Agency.

(c) The funds in an ESA may only be used for educational purposes in accordance with subsection (b) of this section.

(d) ESA funds shall not be refunded, rebated, or shared with a Parent or ESA Student in any manner. Any refund or rebate for goods or services purchased with ESA funds shall be credited directly to the student's ESA.

(e) Parents will be allowed to make payments for the costs of educational goods and services not covered by the funds in their student's ESA. However, personal deposits into an ESA shall not be permitted.

(f) Funds deposited in an ESA do not constitute taxable income to the Parent or the ESA Student.

(g) An ESA shall remain in force, and any unused funds shall roll over from quarter-to-quarter and from year-to-year until the Parent withdraws the ESA Student from the ESA Program or until the ESA Student graduates from college with a bachelor's degree, unless the ESA is closed because of a substantial misuse of funds. However, if an ESA Student has not enrolled in a postsecondary institution within four years after graduating from high school, or if an ESA Student turns 26 years of age, whichever occurs first, the ESA shall be closed, and any unused funds shall revert to the Agency and be allocated to fund other ESAs.

(h) Nothing in this Act shall be construed to require that an ESA Student must be enrolled, full- or part-time, in either a private school or nonpublic online school.

Section 4. Application for an Education Savings Account.

(a) A Parent may apply to the Agency to establish an ESA for an Eligible Student.

(1) The Agency shall accept and approve applications year-round and shall establish procedures for approving applications in an expeditious manner.³

(b) The Agency shall create a standard form that Parents can submit to establish their student's eligibility for the ESA Program and shall ensure that the application is publicly available and may be submitted through various sources, including the Internet.

(c) The Agency shall approve an application for an ESA if:

(1) The Parent submits an application for an ESA in accordance with any application procedures established by the Agency;

(2) The student on whose behalf the Parent is applying is an Eligible Student;

(3) Funds are available for the ESA; and

(4) The Parent signs an agreement with the Agency promising:

(A) To provide an education for the Eligible Student in at least the subjects of reading, language, mathematics, science, and social studies;

(B) Not to enroll the Eligible Student as a full-time student in a public school while participating in the ESA Program;

(C) To use the funds in the ESA only for qualifying expenses to educate the Eligible Student as established by the ESA Program; and

(D) To comply with the rules and requirements of the ESA Program.

(d) The signed agreement between the Parent and the Agency shall satisfy the compulsory school attendance requirements of [cite appropriate state statute].⁴

(e) The Agency shall annually renew a Student's ESA if funds are available.

(f) Upon notice to the Agency, an ESA Student may choose to stop receiving ESA funding and enroll full-time in a public school.

(1) Enrolling as a full-time student in a public school shall result in the immediate suspension of payment of additional funds into the student's ESA. However, for ESAs that have been open for at least one full school year, the ESA shall remain open and active for the Parent to make qualifying expenditures to educate the student from funds remaining in the ESA. When no funds remain in the student's ESA, the Agency may close the ESA.

(2) If an Eligible Student decides to return to the ESA Program, payments into the student's existing ESA may resume if the ESA is still open and active. A new ESA may be established if the student's ESA was closed.

(3) The Agency may adopt rules and policies to provide the least disruptive process for ESA Students who desire to stop receiving ESA payments and enroll full-time in a public school.

Section 5. Authority and Responsibilities of the Agency. In addition to the Agency's duties, obligations, and authority stated in other parts of this Act, the Agency shall have the following additional duties, obligations, and authority:

(a) The Agency shall maintain an updated list of Education Service Providers and shall ensure that the list is publicly available through various sources, including the Internet.

(b) The Agency shall provide Parents with a written explanation of the allowable uses of ESA funds, the responsibilities of Parents, and the duties of the Agency and the role of any private financial management firms or other private organizations that the Agency may contract with to administer the ESA Program or any aspect of the ESA Program.

(c) The Agency shall ensure that Parents of students with disabilities receive notice that participation in the ESA Program is a parental placement under 20 U.S.C. § 1412, Individuals with Disabilities Education Act (IDEA), along with an explanation of the rights that parentally placed students possess under IDEA and any applicable state laws and regulations.

(d) The Agency may contract with private organizations to administer the ESA Program and/or specific functions of the ESA Program. This includes, but is not limited to, contracting with private financial management firms to manage ESAs.

(e) The Agency may withhold from deposits or deduct from ESAs an amount to cover the costs of administering the ESA Program, up to a maximum of five percent annually in the first two years of the ESA Program and up to a maximum of three percent annually thereafter.

(f) The Agency shall implement a commercially viable, cost-effective, and parent-friendly system for payment of services from ESAs to Education Service Providers by electronic or online funds transfer.

(1) The Agency shall not adopt a system that relies exclusively on requiring Parents to be reimbursed for out-of-pocket expenses, but rather shall provide maximum flexibility to Parents by facilitating direct payments to Education Service Providers as well as requests for pre-approval of and reimbursements for qualifying expenses, including expenses pursuant to section 3(b)(15) of this Act.

(2) The Agency shall contract with private institutions to develop the payment system.

(g) The Agency shall also seek to implement a commercially viable, cost-effective, and parent-friendly system for parents to publicly rate, review, and share information about Education Service Providers, ideally as part of the same system that facilitates the electronic or online funds transfers to create a one-stop-shop for Parents and ESA Students.

(h) If an Education Service Provider requires partial payment of tuition or fees prior to the start of the academic year to reserve space for an ESA Student admitted to the Education Service Provider, such partial payment may be paid by the Agency prior to the start of the school year in which the ESA is awarded and deducted in an equitable manner from subsequent quarterly ESA deposits to ensure adequate funds remain available throughout the school year; but if an ESA Student decides not to use the Education Service Provider, the partial reservation payment must be returned to the Agency by such Education Service Provider and credited to the student's ESA.

(i) The Agency shall continue making deposits into a student's ESA until:

(1) The Agency determines that the ESA Student is no longer an Eligible Student;

(2) The Agency determines that there was substantial misuse of the funds in the ESA;

(3) The Parent or ESA Student withdraws from the ESA Program;

(4) The ESA Student enrolls full-time in a public school; or

(5) The ESA Student graduates from high school.

(j) The Agency shall have the authority to conduct or contract for the auditing of individual ESAs and shall at a minimum conduct random audits of ESAs on an annual basis.

(k) The Agency shall have the authority to make any Parent or ESA Student ineligible for the ESA Program in the event of intentional and substantial misuse of ESA funds.

(1) The Agency shall create procedures to ensure that a fair process exists to determine whether an intentional and substantial misuse of ESA funds has occurred.

(A) If an ESA Student is free from personal misconduct, that student shall be eligible for an ESA in the future if placed with a new guardian or other person with the legal authority to act on behalf of the student.

(2) The Agency shall have the authority to refer suspected cases of intentional and substantial misuse of ESA funds to the Attorney General for investigation if evidence of fraudulent use of ESA funds is obtained.

(3) A Parent or ESA Student may appeal the Agency's decision to make a Parent or ESA Student ineligible for the ESA Program.⁵

(l) The Agency may bar an Education Service Provider from accepting payments from ESAs if the Agency determines that the Education Service Provider has:

(1) Intentionally and substantially misrepresented information or failed to refund any overpayments in a timely manner; or

(2) Routinely failed to provide students with promised educational goods or services.

(m) The Agency shall create procedures to ensure that a fair process exists to determine whether an Education Service Provider may be barred from receiving payments from ESAs.

(1) If the Agency bars an Education Service Provider from receiving payments from ESAs, it shall notify Parents and ESA Students of its decision as quickly as possible.

(2) Education Service Providers may appeal the Agency's decision to bar them from receiving payments from ESAs.⁶

(n) The Agency may accept gifts and grants from any source to cover administrative costs, to inform the public about the ESA Program, or to fund additional ESAs.

(o) The Agency may adopt rules, policies, or procedures that are not inconsistent with this Act and that are necessary for the administration of this Act. This may include rules, policies, or procedures:

(1) Establishing or contracting for the establishment of an online anonymous fraud reporting service;

(2) Establishing an anonymous telephone hotline for fraud reporting;

(3) Requiring a surety bond for Education Service Providers receiving more than \$100,000 in ESA funds; and/or

(4) Refunding payments from Education Service Providers back to ESAs.

(p) Any rules, policies, or procedures adopted by the Agency should avoid excessive bureaucracy and overly prescriptive mandates and instead focus on easing parental involvement and encouraging Educational Service Providers to provide Parents and ESA Students with a broad array of educational options.

Section 6. Parent Review Commission.

(a) There is hereby created the Parent Review Commission to assist the Agency in determining whether questionable expenditures meet the requirements to be considered qualifying expenses to educate the ESA Student pursuant to section 3(b) and to provide recommendations to the Agency about how to implement, administer, and improve the ESA Program.

(b) The Parent Review Commission shall meet the following requirements:

(1) The Commission shall consist of seven members;

(2) The seven members shall be Parents of ESA Students and represent no fewer than four counties in the state;

(3) The seven members shall be appointed by the director of the Agency;

(4) The seven members serve at the director of the Agency's pleasure for one calendar year and may be reappointed; and

(5) The director of the Agency, or the director's designee, shall serve as the non-voting chair of the Commission.

(c) The Agency may request the Commission to meet, in person or virtually, to determine whether an expenditure of ESA funds is or was a qualifying expense to educate an ESA Student pursuant to section 3(b). If the Agency requests the Commission to determine the validity of an ESA expenditure, the Commission may vote to recommend to the Agency that the questionable expenditure be denied or approved by a majority vote.

(d) The Agency may also request the Commission to meet, in person or virtually, to review appeals of Education Service Provider denials pursuant to section 5(m)(2) and to provide a recommendation to the Agency as to whether an Education Service Provider should be allowed to receive, or continue receiving, payments from ESAs.

Section 7. Requirements for Education Service Providers.

(a) The Agency may approve Education Service Providers on its own initiative, at the request of Parents, or by notice to the Agency provided by prospective Education Service Providers.

(b) A prospective Education Service Provider that wishes to receive payments from ESAs shall:

(1) Submit notice to the Agency that it wishes to receive payments from ESAs;

(2) Agree not to refund, rebate, or share ESA funds with Parents or ESA Students in any manner, except that funds may be remitted or refunded to an ESA in accordance with procedures established by the Agency.

Section 8. Independence of Education Service Providers.

(a) Nothing in the provisions of this Act shall be deemed to limit the independence or autonomy of an Education Service Provider or to make the actions of an Education Service Provider the actions of the state government.

(b) Education Service Providers shall be given maximum freedom to provide for the educational needs of ESA Students without governmental control.

(c) Nothing in this Act shall be construed to expand the regulatory authority of the state, its officers, or any school district to impose any additional regulation of Education Service Providers beyond those necessary to enforce the requirements of the ESA Program.

(d) An Education Service Provider that accepts payment from an ESA pursuant to this Act is not an agent of the state or federal government.

(e) An Education Service Provider shall not be required to alter its creed, practices, admissions policy or Curriculum to accept payments from an ESA.

Section 9. Responsibilities of Public Schools and School Districts. A public school, or school district, that previously enrolled an ESA Student shall provide a private school that is also an Education Service Provider and that has enrolled an ESA Student with a complete copy of the ESA Student’s school records, while complying with 20 U.S.C. § 1232g, the Family Educational Rights and Privacy Act of 1974.

Section 10. Legal Proceedings.

(a) In any legal proceeding challenging the application of this Act to an Education Service Provider, the state bears the burden of establishing that the law is necessary and does not impose any undue burden on the Education Service Provider.

(b) No liability shall arise on the part of the Agency or the state or of any public school or school district based on the award of or use of an ESA pursuant to this Act.

(c) If any part of this Act is challenged in a state court as violating either the state or federal constitutions, Parents of Eligible and/or ESA Students shall be permitted to intervene as of right in such lawsuit for the purposes of defending the ESA Program’s constitutionality. However, for the purposes of judicial administration, a court may require that all Parents file a joint brief, so long as they are not required to join any brief filed on behalf of any named state defendant.

(d) If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, such invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Section 11. Effective Date. The ESA Program will be in effect upon becoming law.

¹ This language is intended to be universal in scope. For various policy reasons, state legislators may decide to limit eligibility to specific sub-categories of students. If different eligibility language is chosen, drafters should be careful to ensure that students with disabilities shall remain eligible to participate in the program for as long as they remain eligible to stay enrolled in a public school. Below is language that policymakers may add to limit eligibility.

<p>PRIOR PUBLIC SCHOOL ENROLLMENT</p>	<p>...and who attended a public school in the prior school year. ...and who attended a public school in the prior school year or is starting kindergarten for the first time.</p>
<p>SPECIAL NEEDS</p>	<p>...and who has been determined by the student’s school district to be eligible for special education and related services.</p>

FAMILY INCOME	...and who is a member of a household whose total annual income does not exceed an amount equal to [#] times the income standard used to qualify for a free or reduced-price lunch under the national free or reduced-price lunch program established under 42 U.S.C. §§ 1751, <i>et seq.</i>
UNIQUE NEEDS	<p>...and who is...</p> <p>...a child of a parent who is a member of the armed forces of the United States and who is on active duty or was killed in the line of duty; or</p> <p>...a child who is a ward of the juvenile court and who is residing with a prospective permanent placement pursuant to state law and the case plan is adoption or permanent guardianship; or</p> <p>...a child who was a ward of the juvenile court and who has achieved permanency through adoption or permanent guardianship.</p>
SIBLINGS	...and who is a child who is the sibling of a current ESA Program participant.

² The language in section 3(a) does not identify the funding source for the ESA Program because, by necessity, the mechanism for funding ESAs will differ in each state. No attempt is made here to craft model language to govern precisely how the ESA Program is funded.

³ At the very least, the Agency should be required to accept applications twice a year to allow Eligible Students to enter the ESA Program before the start of the school year each fall and to transfer into the ESA Program at the start of the spring semester.

⁴ In some states, this provision may be considered an impermissible amendment by reference. In such a case, it may be necessary to amend the state’s compulsory education statute to explicitly say that participation in the ESA Program satisfies the state’s compulsory education requirement. This type of language is necessary because some ESA Students may not be enrolled full-time in a private or nonpublic online school and may instead be educated by a unique combination of the qualifying expenses laid out in section 3(b) and such ESA Students should not be considered truant.

⁵ This appeal may be pursuant to either: (1) procedures developed by the Agency for the purposes of this Act; or (2) pursuant to the state’s administrative procedures act. Policymakers should examine the difficulties of navigating the state’s administrative procedures act without legal counsel before designating the administrative procedures act as the appropriate venue for pursuing an appeal. However, at some point in the appeals procedures, appellants should have the opportunity to appeal to the state courts.

⁶ See endnote 5.

Contact Information

David Hodges
Educational Choice Attorney
Institute for Justice
901 N Glebe Rd, Ste 900
Arlington, VA 22203
(703) 682-9320
dhodges@ij.org

www.ij.org