

# **The Education Savings Account Act**

## **(Tax Credit Funded)**

August 17, 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) “Account-Granting Organization” or “AGO” means a private, nonprofit organization that complies with the requirements of this Act, receives contributions to fund ESAs, and administers and allocates funds to ESAs.

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

(c) “Department” means the State Department of Revenue.

(d) “Education Savings Account” or “ESA” means the account to which funds are allocated by an AGO 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.

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

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

(g) “Eligible Taxpayer” means an individual or business, including, but not limited to, a corporation, S corporation, partnership, limited liability company, or sole proprietorship.

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

(i) “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 amount an AGO may deposit into an ESA shall not exceed 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 not exceed the average amount plus any weighted funding that would have been provided to a public school for that Eligible Student.

(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 an AGO.

(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 AGO that granted the ESA and be allocated by that AGO 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 a private school or nonpublic online school.

**Section 4. Application for an Education Savings Account.**

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

(b) An AGO may approve an application for an ESA if:

(1) The AGO verifies that the student on whose behalf the Parent is applying is an Eligible Student;

(2) Funds are available for the ESA; and

(3) The Parent signs an agreement with the AGO 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;

(D) Not to establish any other ESA for the Eligible Student with any other AGO; and

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

(c) The signed agreement between the Parent and an AGO shall satisfy the compulsory school attendance requirements of [cite appropriate state statute].<sup>2</sup>

(d) An AGO shall annually renew a Student's ESA if funds are available.

(e) Upon notice to the AGO that granted the ESA, 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 AGO may close the ESA.

(2) If an Eligible Student re-applies to the AGO and signs a new written agreement, 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) AGOs shall adopt policies to provide the least disruptive process possible for ESA Students desiring to stop receiving ESA payments and enroll full-time in a public school.

**Section 5. Receiving a Tax Credit for Contributing to an Account-Granting Organization.**

(a) An Eligible Taxpayer who is an individual and who files a state income tax return and who is not a dependent of another taxpayer may claim a credit for the aggregate amount of a contribution made to an AGO, not to exceed the taxpayers' tax liability, up to [insert dollar amount] or [insert dollar amount] for taxpayers filing a joint return.

(b) An Eligible Taxpayer that is a business may claim a credit for the aggregate amount of a contribution made to an AGO up to [insert percentage] of the business's total state income tax liability.

(c) An Eligible Taxpayer may carry forward any unused tax credits under the ESA Program for up to three years.

(d) An Eligible Taxpayer may not also claim a tax deduction against the taxpayer's state tax liability for the same contribution for which the taxpayer claims a credit.

**Section 6. Application to be Certified as an Account-Granting Organization.**

(a) An organization that seeks to become an AGO shall apply for initial certification or renewal of certification from the Department by March 1 before the academic year for which the AGO intends to fund ESAs.

(b) An application for initial certification as an AGO shall include:

(1) A copy of the AGO's incorporation documents;

(2) A copy of the AGO's Internal Revenue Service determination letter as a Section 501(c)(3) not-for-profit organization;

(3) A description of the methodology the AGO will use to evaluate whether a student is eligible to establish an ESA;

(4) A description of the application process the AGO will use for Parents and Eligible Students;

(5) A description of the methodology the AGO will use to establish, fund, and manage ESAs;

(6) A description of the process the AGO will use to approve Education Service Providers;

(7) A description of how the AGO will inform parents of approved Education Service Providers;

(8) A description of the AGO's procedures for crediting refunds from an Education Service Provider back to a student's ESA; and

(9) An acknowledgement that federal civil rights laws prohibit the AGO from discriminating based on race, color, ethnicity, or national origin in the awarding of ESAs.

(c) An application for renewal of certification as an AGO shall include:

(1) The AGO's completed Internal Revenue Service Form 990, submitted no later than November 30 of the year before the academic year that the AGO intends to fund ESAs;

(2) A copy of any audit that may be required by the Department according to section 8 of this Act;

(3) An annual report that includes:

(A) The number of applications the AGO received during the previous academic year, by county and by grade level;

(B) The name and address of all students that received ESA funds from the AGO during the previous academic year;

(C) The total number of ESAs the AGO maintains;

(D) The amount of funds the AGO:

(i) Received to fund ESAs during the last fiscal year;

(ii) Distributed into ESAs during the last fiscal year;

(iii) Has remaining after the distribution into ESAs and any obligations to fund ESAs in the future;

(iv) Spent on administrative expenses and an accounting thereof during the last fiscal year; and

(v) Spent on fees to private institutions to manage or administer the ESAs;

(E) A list of the AGO's approved Education Service Providers;

(F) A description of how the AGO has complied with the operational requirements and responsibilities under section 7 of this Act.

(4) The annual report shall also:

(A) Comply with uniform financial accounting standards established by the Department;

(B) Be certified by a certified public accountant; and

(C) Be free of material misstatements or exceptions.

(d) The Department shall certify an AGO or renew an AGO's certification if the organization meets the requirements established by this Act.

(1) The Department shall issue initial certifications within sixty (60) days of receiving an application that complies with this Act.

(2) The Department shall renew certifications within thirty (30) days of receiving an application that complies with this Act.

## **Section 7. Responsibilities of Account-Granting Organizations.**

(a) AGOs shall ensure that at least 90 percent of their revenue from tax-credit-eligible contributions is allocated to ESAs. AGOs shall maintain separate accounts for ESA funds and operating/administrative funds. Any interest that accrues from tax-credit-eligible contributions shall be allocated by the AGO to fund ESAs.

(b) AGOs shall create a standard application process for Parents to establish their student's eligibility for an ESA. AGOs shall ensure that the application is publicly available to interested families and may be submitted through various sources, including the Internet.

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

(d) AGOs shall ensure that Parents of students with disabilities receive notice that participation in the ESA Program is a parental placement of the eligible student 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.

(e) With prior notification to the Department, an AGO may transfer funds to another AGO if additional funds are required to meet ESA demands at the receiving AGO, or if the transferring AGO determines it cannot continue to operate due to any reason.

(1) All transferred funds shall be deposited by the receiving AGO into its account for ESAs.

(2) All transferred amounts received by an AGO shall be separately disclosed in the receiving AGO's annual report for certification renewal pursuant to section 6 of this Act.

(3) An AGO that receives a transfer of funds from an AGO that has determined it will not continue to operate shall agree to fund the ESAs established by the transferring AGO to the extent funds are available. The receiving AGO will also prioritize the funding of transferred ESAs before funding new ESA applicants.

(f) An AGO may bar an Education Service Provider from receiving payments from ESAs established by that AGO if the AGO 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 ESA Students with promised educational goods or services.

(A) There is no right to appeal an AGO's decision to bar an Educational Service Provider from receiving payments from ESAs established by that AGO.

(g) AGOs may accept non-tax-credit-eligible donations, gifts, and grants to cover administrative costs, to inform the public about the ESA Program, or to fund additional ESAs.

## **Section 8. Responsibilities of the Department.**

(a) The Department may adopt rules, policies, and 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; and/or

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

(b) Any Department rules, policies, or procedures should avoid excessive bureaucracy and overly prescriptive mandates and instead focus on easing parental involvement and encouraging Education Service Providers to provide Parents with a broad array of educational options.

(c) The Department shall maintain a list of currently certified AGOs on its website.

(d) The Department will have the authority to conduct or contract for the auditing of AGOs.

(e) The Department will have the authority to conduct or contract for the auditing of the ESAs maintained by AGOs and will at minimum conduct random audits of ESAs at each AGO on an annual basis.

(f) The Department 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 Department 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 Department 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 Department's decision to make a Parent or ESA Student ineligible for the ESA Program.<sup>3</sup>

(g) The Department may bar an Education Service Provider from the ESA Program if the Department 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.

(h) The Department shall create procedures to ensure that a fair process exists to determine whether an Education Service Provider may be barred from participating in the ESA Program.

(1) If the Department bars an Education Service Provider from the ESA Program, it shall notify AGOs of this decision as quickly as possible so that AGOs may, in turn, notify Parents as quickly as possible.

(2) Education Service Providers may appeal the Department's decision to bar them from the ESA Program.<sup>4</sup>

(i) If the Department determines that there has been a violation of this Act by an AGO, the Department shall send written notice to the AGO.

(1) An AGO that receives written notice of a violation will have 60 days from receipt of notice to correct the violation identified by the Department.

(2) If an AGO fails or refuses to comply after sixty (60) days, the Department may revoke the AGO's certification to participate in the ESA Program.

(3) An AGO may appeal the Department's decision revoking its certification.<sup>5</sup>

(4) An AGO whose certification has been revoked under this section shall not accept any further contributions for the purpose of funding ESAs, including during the pendency of any appeal, but it shall continue administering ESAs with previously donated funds during the pendency of the appeal.

(A) If an AGO whose certification has been revoked received any contributions for the purpose of funding ESAs after the date of notice of the revocation of its certification, the AGO shall refund the contributions.

**Section 9. Administration of the Education Savings Account Act.**

(a) AGOs 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 AGO 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) AGOs may contract with private institutions to develop the payment system.

(b) The AGO shall also seek to implement a commercially viable, cost-effective, and parent-friendly system for Parents to 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.

(c) AGOs may contract with private financial institutions to manage ESAs.

(d) An AGO shall continue making payments into an ESA until:

(1) The Parent does not renew the ESA;

(2) The AGO determines that the ESA Student is no longer an Eligible Student;

(3) The AGO determines that there was substantial misuse of the funds in the ESA;

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

(5) The ESA Student graduates from high school.

(e) Each AGO shall establish a process for approving Education Service Providers.

(f) AGOs may approve Education Service Providers on their own initiative, at the request of Parents, or upon request from prospective Education Service Providers.

**Section 10. Annual Report.** The Department shall produce an annual report that is available to the public and accessible via a state website that aggregates the data obtained from the annual reports for AGO certification renewal pursuant to section 6 of this Act, except that it shall not include the names or addresses of students who receive ESAs.

**Section 11. 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 the 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 county 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 12. 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 student's school records, while complying with 20 U.S.C. § 1232g, the Family Educational Rights and Privacy Act of 1974.

**Section 13. 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 Department 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 state court as violating either the state or federal constitutions, Parents of Eligible and 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 14. Effective Date.** The ESA Program will be in effect upon becoming law.

<sup>1</sup> 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>
<p>FAMILY INCOME</p>	<p>...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></p>
<p>UNIQUE NEEDS</p>	<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>
<p>SIBLINGS</p>	<p>...and who is a child who is the sibling of a current ESA Program participant.</p>

<sup>2</sup> 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.

---

<sup>3</sup> This appeal may be pursuant to either: (1) procedures developed by the Department 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.

<sup>4</sup> See endnote 3.

<sup>5</sup> See endnote 3.

### **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](mailto:dhodges@ij.org)  
  
[www.ij.org](http://www.ij.org)