

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Introduced

House Bill 2321

**FISCAL
NOTE**

BY DELEGATES HIGGINBOTHAM, FOSTER, FAST, AND

MARTIN

[Introduced February 12, 2021; Referred to the
Committee on Education then Finance]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
 2 designated §18-34-1, §18-34-2, §18-34-3, §18-34-4, §18-34-5, §18-34-6, §18-34-7, §18-
 3 34-8, and §18-34-9, all relating to enacting an Educational Savings Account Program;
 4 providing a short title and definitions; providing basic elements of an educational savings
 5 account; application requirements; responsibilities of the Treasurer; establishing a Parent
 6 Review Committee; providing eligibility requirements for and rights of education service
 7 providers; including responsibilities of resident school districts; and addressing legal
 8 proceedings.

Be it enacted by the Legislature of West Virginia:

ARTICLE 34. EDUCATION SAVINGS ACCOUNT PROGRAM.

§18-34-1. Short title.

1 This article shall be known as the “Education Savings Account Act” or “ESA Act.” The
 2 program created by the ESA Act shall be known as the “Education Savings Account Program” or
 3 “ESA Program.”

§18-34-2. Definitions.

1 The following words have the meanings ascribed to them unless the context clearly
 2 indicates a different meaning:

3 “Account” or “ESA” means an education saving account, awarded pursuant to this article,
 4 to which funds are allocated by the Treasurer to the parent or parents of an ESA student in order
 5 to pay qualifying education expenses to educate the student pursuant to the requirements and
 6 conditions of this article;

7 “Treasurer” means the West Virginia State Treasurer’s Office or an organization that the
 8 Treasurer has contracted with to carry out any or all portions of this article;

9 “Curriculum” means a complete course of study for a particular content area or grade level,
 10 including any supplemental materials required by the curriculum.

11 “Education service provider” means a person or organization that receives payments from

12 education savings accounts to provide educational goods and services to ESA students.

13 “Eligible student” means an exceptional child, other than gifted, as described in §18-20-1
14 of this code;

15 “ESA student” means a student who receives an account pursuant to this article;

16 “Parent” means a biological parent, legal guardian, custodian, or other person with legal
17 authority to act on behalf of an eligible student or ESA student; and

18 “Resident school district” means the county school district in which the student resides.

§18-34-3. Basic elements of the Education Savings Account Program.

1 (a) The amount of funds deposited in an account pursuant to this article shall be an amount
2 equivalent to the percentage provided to the Mountaineer Challenge Academy in §18-2-6(g)(6) of
3 this code of the dollar amount the resident school district would have received from the Public
4 School Support Program to educate the ESA student had the student enrolled there. This
5 calculation shall include funds from state sources, but may not include any federal or local funds.

6 (b) In exchange for the parent’s agreement pursuant to §18-34-4(c)(4) of this code, the
7 Department of Education shall transfer from the moneys that would otherwise be allocated to a
8 recipient’s prior school district, or if the child is currently eligible to attend kindergarten, the moneys
9 that the department would otherwise be allocated to a recipient’s expected school district of
10 attendance, to the Treasurer for deposit into a West Virginia ESA in an amount that is equivalent
11 to the percentage provided to the Mountaineer Challenge Academy in §18-2-6(g)(6) of this code.

12 (c) The State Superintendent of Schools shall, by rule, determine how the fund transfer to
13 the Treasurer shall be accomplished.

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

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

17 (2) Tuition and/or fees for nonpublic online learning programs;

18 (3) Tutoring services provided by an individual or a tutoring facility;

19 (4) Services contracted for and provided by a public district, charter, or magnet school,
20 including without limitation, individual classes and extracurricular activities and programs;

21 (5) Textbooks, curriculum, or other instructional materials, including without limitation, any
22 supplemental materials or associated online instruction required by either a curriculum or an
23 education service provider;

24 (6) Computer hardware or other technological devices that are primarily used to help meet
25 an ESA student's educational needs;

26 (7) Educational software and applications;

27 (8) School uniforms;

28 (9) Fees for nationally standardized assessments, advanced placement examinations,
29 any examinations related to college or university admission, tuition, and fees for preparatory
30 courses for the aforementioned exams;

31 (10) Fees for summer education programs and specialized after-school education
32 programs, but not after-school child care;

33 (11) Tuition, fees, instructional materials, and examination fees at a career or technical
34 school or education provider;

35 (12) Educational services and therapies, including, but not limited to, occupational,
36 behavioral, physical, speech-language, and audiology therapies;

37 (13) Tuition and fees at an institution of higher education;

38 (14) Fees for transportation paid to a fee-for-service transportation provider for the student
39 to travel to and from an education service provider; or

40 (15) Any other educational expense approved by the Treasurer.

41 (e) The funds in an ESA may only be used for educational purposes in accordance with
42 §18-34-3(d) of this code.

43 (f) ESA funds may not be refunded, rebated, or shared with a parent or ESA student in
44 any manner. Any refund or rebate for goods or services purchased with ESA funds shall be

45 credited directly to the student's ESA.

46 (g) Parents may make payments for the costs of educational goods and services not
47 covered by the funds in their student's ESA. However, personal deposits into an ESA are not
48 permitted.

49 (h) Funds deposited in an ESA do not constitute taxable income to the parent or the ESA
50 student.

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

58 (j) Nothing in this article requires that an ESA student shall be enrolled, full- or part-time,
59 in either a private school or nonpublic online school.

§18-34-4. Application for an education savings account.

1 (a) A parent may apply to the Treasurer to establish an ESA for an eligible student.

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

4 (c) The Treasurer shall create a standard form that parents may submit to establish their
5 student's eligibility for the ESA Program and shall ensure that the application is readily available
6 and may be submitted through various sources, including the internet.

7 (d) The Treasurer shall approve an application for an ESA if:

8 (1) The parent submits an application for an ESA in accordance with any application
9 procedures established by the Treasurer;

10 (2) The student on whose behalf the parent is applying is an eligible student;

- 11 (3) Funds are available for the ESA; and
- 12 (4) The parent signs an agreement with the Treasurer, promising:
- 13 (A) To provide an education for the eligible student in at least the subjects of reading,
14 language, mathematics, science, and social studies;
- 15 (B) Not to enroll the ESA student, full-time, in a district school, an Innovation in Education
16 School, the West Virginia Virtual School, or a West Virginia School for the Deaf and Blind;
- 17 (C) To use the funds in the ESA only for qualifying expenses to educate the eligible student
18 as established by the ESA Program; and
- 19 (D) To comply with the rules and requirements of the ESA Program.
- 20 (E) To afford the ESA student with opportunities for educational enrichment such as
21 organized athletics, art, music, or literature;
- 22 (e) The signed agreement between the parent and the Treasurer shall satisfy the
23 compulsory school attendance requirements of §18-8-1 et seq. of this code.
- 24 (f) The Treasurer shall annually renew a student's ESA if funds are available.
- 25 (g) Upon notice to the Treasurer, an ESA student may choose to stop receiving ESA
26 funding and enroll full-time in a public school.
- 27 (h) Enrolling as a full-time student in a public school shall result in the immediate
28 suspension of payment of additional funds into the student's ESA; however, the ESA shall remain
29 open and active for the parent to make qualifying expenditures to educate the student from funds
30 remaining in the ESA. When or if no funds remain in the student's ESA, the Treasurer may close
31 the ESA.
- 32 (i) If an eligible student decides to return to the ESA Program, payments into the student's
33 existing ESA may resume if the ESA is still open and active or a new ESA may be established if
34 the student's ESA was closed.
- 35 (j) The Treasurer may adopt rules and policies to provide the least disruptive process for
36 ESA students who desire to stop receiving ESA payments and enroll full-time in a public school.

§18-34-5. Responsibilities of the Treasurer.

1 In addition to the Treasurer’s duties, obligations and authority stated in other parts of this
2 article, the Treasurer has the following duties, obligations, and authority:

3 (1) The Treasurer shall maintain an updated list of education service providers and shall
4 ensure that the list is publicly available through various sources, including the internet.

5 (2) The Treasurer shall provide parents with a written explanation of the allowable uses of
6 ESA funds, the responsibilities of parents, the duties of the Treasurer and the role of any private
7 financial management firms or other private organizations that the Treasurer may contract with to
8 administer the ESA Program or any aspect of the ESA Program.

9 (3) The Treasurer shall ensure that parents of students with a disability receive notice that
10 participation in the ESA Program is a parental placement under 20 U.S.C. §1412 of the Individuals
11 with Disabilities Education Act (IDEA) along with an explanation of the rights that parentally placed
12 students possess under (IDEA) and any applicable state laws and regulations.

13 (4) The Treasurer shall contract with private organizations to administer the ESA Program.
14 This includes, but is not limited to, private financial management firms to manage ESAs.

15 (5) The Treasurer may deduct an amount from education savings accounts to cover the
16 costs of administering the ESA Program, up to a maximum of five percent annually in the first two
17 years of the ESA Program and up to a maximum of three percent annually thereafter.

18 (6) The Treasurer shall implement or contract with a private organization to implement a
19 commercially viable, cost-effective, and parent-friendly system for payment for services from
20 ESAs to education service providers by electronic or online funds transfer.

21 (A) The Treasurer may not adopt a system that relies exclusively on requiring parents to
22 be reimbursed for out-of-pocket expenses, but rather shall provide maximum flexibility to parents
23 by facilitating direct payments to education service providers as well as requests for preapproval
24 of and reimbursements for qualifying expenses, including expenses pursuant to §18-34 3(b)(15)
25 of this code.

26 (B) The Treasurer may contract with private institutions to develop the payment system.

27 (7) The Treasurer shall also seek to implement a commercially viable, cost-effective, and
28 parent-friendly system for publicly rating, reviewing, and sharing information about education
29 service providers, ideally as part of the same system that facilitates the electronic or online funds
30 transfers so as to create a one-stop-shop for parents and ESA students.

31 (8) If an education service provider requires partial payment of tuition or fees prior to the
32 start of the academic year to reserve space for an ESA student admitted to the education service
33 provider, such partial payment may be paid by the Treasurer prior to the start of the school year
34 in which the ESA is awarded, and deducted in an equitable manner from subsequent ESA
35 deposits to ensure adequate funds remain available throughout the school year; but if an ESA
36 student decides not to use the education service provider, the partial reservation payment must
37 be returned to the Treasurer by such education service provider and credited to the student's
38 ESA.

39 (9) The Treasurer shall continue making deposits into a student's ESA until:

40 (A) The Treasurer determines that the ESA student is no longer an Eligible student;

41 (B) The Treasurer determines that there was substantial misuse of the funds in the ESA;

42 (C) The parent or ESA student withdraws from the ESA Program;

43 (D) The ESA student enrolls full-time in a public school; or

44 (E) The ESA student graduates from high school.

45 (10) The Treasurer may conduct or contract for the auditing of individual ESAs, and shall,
46 at a minimum, conduct random audits of ESAs on an annual basis.

47 (11) The Treasurer may make any parent or ESA student ineligible for the ESA Program
48 if there is an intentional and substantial misuse of ESA funds.

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

51 (B) The Treasurer may refer suspected cases of intentional and substantial misuse of ESA

52 funds to the Attorney General for investigation if evidence of fraudulent use of ESA funds is
53 obtained.

54 (C) A parent or ESA student may appeal the Treasurer's decision to make a parent or
55 ESA student ineligible for the ESA Program.

56 (12) The Treasurer may bar an education service provider from accepting payments from
57 ESAs if the Treasurer determines that the education service provider has:

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

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

61 (13) The Treasurer shall create procedures to ensure that a fair process exists to
62 determine whether an education service provider may be barred from receiving payment from
63 ESAs.

64 (A) If the Treasurer bars an education service provider from receiving payments from
65 ESAs, it shall notify parents and ESA students of its decision as quickly as possible.

66 (B) Education service providers may appeal the Treasurer's decision to bar them from
67 receiving payments from ESAs.

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

70 (15) The Treasurer may adopt rules and policies that are not inconsistent with this article
71 and that are necessary for the administration of this article, including:

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

74 (B) Establishing an anonymous telephone hotline for fraud reporting;

75 (C) Policies that require a surety bond for education service providers receiving more than
76 \$100,000 in ESA funds.

77 (D) Procedures for refunding payments from education service providers back to ESAs.

78 (E) Procedures for entering into reciprocal agreements with other state ESA agencies or
79 entities, whether public or private, to recognize and allow education service providers approved
80 in other states to receive payments from ESAs under this article.

81 (16) Any rules or policies adopted by the Treasurer shall avoid excessive bureaucracy and
82 overly prescriptive mandates and instead focus on easing parental involvement and encouraging
83 education service providers to provide parents and ESA students with a broad array of
84 educational options.

§18-34-6. Parent Review Committee.

1 (a) There is created the Parent Review Committee to assist the Treasurer in determining
2 whether questionable expenditures meet the requirements to be considered qualifying expenses
3 to educate the ESA student pursuant to §18-34-3(d) of this code, and to provide recommendations
4 to the Treasurer about how to implement, administer, and improve the ESA Program.

5 (b) (1) The Parent Review Committee:

6 (A) Consists of seven members who are parents of ESA students and represent no fewer
7 than four counties in the state; and

8 (B) Shall be appointed by the State Treasurer and serve at the State Treasurer's pleasure
9 for one calendar year and may be reappointed; and

10 (2) The State Treasurer, or the director's designee, serves as the nonvoting chair of the
11 committee.

12 (c) The Treasurer may request the committee to meet, in person or virtually, to determine
13 whether an expenditure of ESA funds is or was a qualifying expense to educate an ESA student
14 pursuant to §18-34-3(d) of this code. The committee may deny or approve questionable
15 expenditures by a majority vote.

16 (d) The Treasurer may also request the committee to meet, in person or virtually, to review
17 appeals of education service provider denials pursuant to §18-34-7 of this code, and to provide a
18 recommendation to the Treasurer as to whether an education service provider may be allowed to

19 receive, or continue receiving, payments from ESAs.

§18-34-7. Requirements for and rights of education service providers.

1 (a) To be eligible to accept payments from an ESA, an education service provider shall:

2 (1) Submit notice to the Treasurer that they wish to participate in the ESA Program;

3 (2) Provide parents with a receipt for all qualifying educational expenses;

4 (3) Agree not to refund, rebate, or share ESA funds with parents or ESA students in any
5 manner, except that funds may be remitted or refunded to an ESA in accordance with procedures
6 established by the Treasurer;

7 (4) Certify that it will not discriminate based on race, color, ethnicity, or national origin; and

8 (5) Agree to submit any employee who will have contact with ESA students to a criminal
9 background check.

10 (b) This article does not limit the independence or autonomy of an education service
11 provider or makes the actions of an education service provider the actions of the state
12 government.

13 (c) Education service providers shall be given maximum freedom to provide for the
14 educational needs of ESA students without governmental control.

15 (d) This article does not expand the regulatory authority of the state, its officers, or any
16 school district to impose any additional regulation of education service providers beyond those
17 necessary to enforce the requirements of the program.

§18-34-8. Responsibilities of resident school districts.

1 The resident school district shall provide an education service provider that has enrolled
2 an ESA student with a complete copy of the student's school records, while complying with the
3 Family Educational Rights and Privacy Act of 1974 (20 U.S.C. §1232 g).

§18-34-9. Legal proceedings.

1 (a) In any legal proceeding challenging the application of this article to a participating
2 entity, the state bears the burden of establishing that the challenged action, rule or requirement

3 is necessary and does not impose any undue burden on education service providers.

4 (b) No liability arises on the part of the Treasurer or the state or of any county school
5 district based on the award or use of an ESA awarded pursuant to this article.

6 (c) If any part of this article is challenged in a state court as violating either the state or
7 federal constitutions, parents of eligible and/or ESA students are permitted to intervene in the
8 lawsuit for the purposes of defending the article's constitutionality. However, for the purposes of
9 judicial administration, a court may limit the number of parents permitted to intervene or require
10 that all parents file a joint brief, so long as they are not required to join any brief filed on behalf of
11 any named state defendant.

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

NOTE: The purpose of this bill is to create an Educational Savings Account Program for students with disabilities and to provide for its administration.

Strike-throughs indicate language that would be stricken from a heading or the present law, and underscoring indicates new language that would be added.