

## THE SPECIAL NEEDS SCHOLARSHIP PROGRAM ACT

**Summary:** The Special Needs Scholarship Program provides special needs students with the option to attend the public or non-public school of their choice.

**Section 1:** (Title) The Special Needs Scholarship Program

**Section 2:** (Definitions)

- A) “Program” means the Special Needs Scholarship Program.
- B) “Eligible Student” means any elementary or secondary student attending public school in our state with an individual education plan, including but not limited to students who are mentally handicapped, speech and language impaired, deaf or hard of hearing, visually impaired, dual sensory impaired, physically impaired, emotionally handicapped, specific learning disabled, autistic, or hospitalized or homebound due to illness or disability. <sup>1</sup>
- C) “Parent” includes a guardian, custodian or other person with authority to act on behalf of the child.
- D) “Resident school district” means the public school district in which the student resides.
- E) “Department” means the state Department of Public Instruction. <sup>2</sup>
- F) “Participating school” means either a public school outside of the resident school district or any non-public school that provides education to elementary and/or secondary students that has notified the department of their intention to participate in the program and comply with its requirements. <sup>3</sup>

**Section 3:** (Basic Elements Of The Special Needs Scholarship Program)

- A) Any parent of a public school special needs student who is dissatisfied with the student’s progress shall qualify for a scholarship from the state for the child to enroll in and attend a non-public school if:
  - 1) the special needs student has had an individual education plan written in accordance with the rules of the department; and
  - 2) the student has been accepted for admission at a participating school; and
  - 3) the parent has requested a scholarship from the state before the deadline established by the department.<sup>4</sup>
- B) The department shall inform the resident school district that a special needs student has requested a special needs scholarship. The resident school district shall within three business days provide the department with a copy of the student’s most current individual education plan.
- C) Upon receipt of the special needs student’s request for a scholarship, the department shall review the individual education plan drafted by the student’s public school to determine the amount of the scholarship. The department shall provide the student’s parent with a timely written explanation of their determination for the amount of the scholarship.
- D) The maximum scholarship granted an eligible student shall be an amount equivalent to the cost of the educational program that would have been provided for the student in the resident school district. Although the scholarship amount is a function of a student’s individual education plan, the participating school is not required to abide by the individual education plan. The parent and the participating school will mutually determine the best services and educational plan for the student. <sup>5,6</sup>
- E) The amount of the special needs scholarship shall be the lesser of the amount calculated above [in Section 3(C) and (D)] or the amount of the participating school’s estimated costs for serving the student. The costs of any assessment by the participating school of the student’s special needs may be included in the scholarship amount.

- F) Participating students shall be counted in the enrollment of their resident school district. The funds needed to provide a scholarship shall be subtracted from the state school aid payable to the student's resident school district. <sup>7</sup>
- G) The Special Needs Scholarship shall remain in force until the student returns to a public school or graduates from high school or reaches their 21<sup>st</sup> birthday, whichever comes first.
- H) At any time, the student's parent may remove the student from the participating school and place the student in another participating school or in a public school.

**Section 4: (Responsibilities of the Resident School District)**

- A) A resident school district shall annually notify the parents of a special needs student of the special needs scholarship program and offer that student's parent an opportunity to enroll the student in a participating school of their choice.
- B) The resident school district shall provide a participating school that has admitted an eligible student with a complete copy of the student's school records while complying with the Family Educational Rights and Privacy Act of 1974 (20 USC 1232g).
- C) The resident school district shall provide transportation for an eligible student to and from the participating school under the same conditions as the resident school district is required to provide transportation for other resident students to non-public schools as per current law. The resident school district will qualify for state transportation aid for each student so transported.
- D) If the parent of an eligible student participating in this program requests that the student take the statewide assessments, the resident school district shall provide locations and times for the student to take all statewide assessments if they are not offered at the student's participating school. <sup>8</sup>

**Section 5: (Responsibilities of the Department of Public Instruction)**

- A) The department shall adopt rules and procedures regarding:
  - 1) the eligibility and participation of non-public schools, including timelines that will maximize student and public and non-public school participation;
  - 2) the calculation and distribution of scholarships to eligible students and participating schools; and<sup>9</sup>
  - 3) the application and approval procedures for eligible students and participating schools.
- B) No liability shall arise on the part of the department or the state based on the award or use of a special needs scholarship.
- C) The department may bar a school from participation in the program if the department establishes that the participating school has:
  - 1) intentionally and substantially misrepresented information required under Section 6; or
  - 2) failed to refund to the state any scholarship overpayments in a timely manner.
- D) If the department decides to bar a participating school from the program, it shall notify eligible students and their parents of this decision as quickly as possible.

**Section 6: (Accountability for Participating Schools)**

- A) To be eligible to participate in the special needs scholarship program, a non-public school must operate in this state and demonstrate:
  - 1) Administrative Accountability. To ensure that students are treated fairly and kept safe, all participating schools shall:
    - a. comply with all health and safety laws or codes that apply to non-public schools; and
    - b. hold a valid occupancy permit if required by their municipality; and
    - c. certify that they will not discriminate in admissions on the basis of race, color, national origin, or religion; and <sup>10</sup>
    - d. comply with all state laws that apply to non-public schools regarding criminal background checks for employees and exclude from employment any people not permitted by state law to work in a non-public school. <sup>11</sup>

- 2) Financial Accountability. To ensure that public funds are spent appropriately, all participating schools shall:
  - a. demonstrate their financial accountability by:
    1. submitting a financial information report for the school that complies with uniform financial accounting standards established by the department and conducted by a certified public accountant; and <sup>12</sup>
    2. having the auditor certify the report is free of material misstatements. The auditor's report shall be limited in scope to those records that are necessary for the department to make payments to schools for scholarships.
  - b. demonstrate their financial viability by showing they can pay any funds owed the state, if they are to receive \$50,000 or more during the school year, by: <sup>13</sup>
    1. filing with the department prior to the start of the school year a surety bond payable to the state in an amount equal to the aggregate amount of the Special Needs Scholarships expected to be paid during the school year to students admitted to the participating school; or
    2. filing with the department prior to the start of the school year financial information that demonstrates the school has the ability to pay an aggregate amount equal to the amount of the Special Needs Scholarships expected to be paid during the school year to students admitted to the participating school.
- 3) Academic Accountability. To ensure that schools provide academic accountability to parents of the students in the program, all participating schools shall regularly report to the parent on the student's progress. <sup>14</sup>
- 4) Participating School Autonomy. A participating school is autonomous and not an agent of the state or federal government therefore:
  - a. the department or any other state agency may not in any way regulate the educational program of a participating school that accepts a special needs scholarship; and
  - b. the creation of the special needs scholarship program does not expand the regulatory authority of the state, its officers or any school district to impose any additional regulation of non-public schools beyond those reasonably necessary to enforce the requirements of the program; and
  - c. participating schools shall be given the maximum freedom to provide for the educational needs of their students without governmental control.

**Section 7:** (Responsibilities of the Scholarship Students and Their Parents)

- A) It shall be the responsibility of a parent to select their child's school, apply for admission, and apply for a special needs scholarship.
- B) Any student participating in the program must comply fully with a participating school's written code of conduct and shall remain in attendance throughout the school year, unless excused by the school for illness or other good cause. However, a parent may transfer an eligible student to another participating school at any time. The scholarship amount shall be prorated between participating schools according to the period of attendance at each school.
- C) A parent's decision for their student to participate in the program constitutes a non-public placement for purposes of the Individuals with Disabilities Education Act.

**Section 8:** (Evaluation of Special Needs Scholarship Program) <sup>15</sup>

- A) The Legislative Service Agency may contract with one or more qualified researchers who have previous experience evaluating school choice programs to conduct a study of the program with funds other than state funds.
- B) The study shall assess:
  - 1) the level of participating student's satisfaction with the program;
  - 2) the level of parental satisfaction with the program;
  - 3) the percentage of participating students who were victimized because of their special needs status at their resident school district compared to the percentage so victimized at their participating school;

- 4) the percentage of participating students who exhibited behavioral problems at their resident school district compared to the percentage exhibiting behavioral problems at their participating school;
  - 5) the class size experienced by participating students at their resident school district and at their participating school; and
  - 6) the fiscal impact to the state and resident school districts of the program.
- C) The researchers who conduct the study shall apply appropriate analytical and behavioral sciences methodologies to ensure public confidence in the study.
  - D) The researchers who conduct the study shall provide the legislature with a final copy of the evaluation of the program.
  - E) The public and non-public participating schools from which students transfer to participate in the program shall cooperate with the research effort by providing student assessment instrument scores and any other data necessary to complete this study.
  - F) The Legislative Service Agency may accept grants to assist in funding this study.
  - G) The legislature may require periodic reports from the researchers. The researchers must make their data and methodology available for public review while complying with the requirements of FERPA.

**Section 9:** (Effective Date) The Special Needs Scholarship Program will be in effect beginning with the fall semester of the next school year.

#### **ENDNOTES FOR SPECIAL NEEDS SCHOLARSHIP PROGRAM**

These notes are intended to provide guidance to legislators on some of the key policy questions they will encounter in drafting and debating school choice legislation.

Please note: All of the states that have passed a special needs scholarship program have chosen to name the program after a child with special needs or an advocate for such children.

1. The definition for an eligible student in this model legislation includes all special needs students living in the state and initially enrolled in a public school regardless of their household income. Because the scholarship amount is based upon the cost of the individual education plan developed at the resident public school, the authors chose not to make students presently attending non-public schools eligible for the program. As a result, there may be a savings for the taxpayers when eligibility is so limited because a scholarship covering non-public school costs will often be less than the costs of state and local support provided to special needs students attending a public school. Given the likely savings, legislators could extend scholarships to some special needs students already attending non-public schools without increasing state spending. States may also want to consider whether or not to include gifted students in the program.

2. This bill designates the Department of Public Instruction as the agency regulating the Parental Choice Scholarship Program. The intent was to name the existing agency in the state that is responsible for public school finances and non-public school regulation. Alternatively, legislators may choose to create a new small agency to oversee the program if they are concerned about the hostility the program would face from the existing state education department.

3. This model legislation allows special needs students to use a scholarship to attend a public school outside their district as well as a non-public school. The authors support giving parents the widest possible array of choices so that they can choose the school that best meets their child's special needs. Making sure parents can choose either a public or non-public school is not only the right policy but also the best legal strategy. The US Supreme Court and various state courts have all cited this broad array of choices as an important part of the reason they have found school choice programs constitutional. The courts have reasoned that these scholarship programs are not an inappropriate subsidy of religious institutions because the purpose was secular (the education of children) and the parents were given many options including public schools, charter schools, non-public secular schools and non-public religious schools. If a state already has some form of public school choice for special needs students, then this legislation should be made compatible with the existing program. In fact, if a state already has a broad array of school choice options available to parents of special needs children, then a state may be able to add an option for just non-public schools without encountering constitutional questions.

4. This model legislation empowers parents solely to determine whether their child's needs are being met by his or her existing public school and whether their child should be transferred to another public or non-public school. The authors believe deeply that this determination should reside with the parents and not the department, the school district or some panel of educators. These government agencies have a financial stake in the decision and will be reluctant to approve the transfer of a special needs student to another public or non-public school. By placing the determination in the hands of the parent, this approach ensures that the person making the decision is the one with the greatest interest in the child's progress, avoids expensive and unproductive legal battles, and forces the resident public schools to meet the needs of these children or lose them to another public or non-public school.

5. This model legislation is silent about whether schools can charge special needs students tuition and fees in excess of the scholarship amount. Allowing this would encourage greater participation by schools where costs exceed the scholarship amount. Some also believe direct payments from parents would encourage stronger ownership and involvement in their children's education. However, legislators may wish to place a cap on the tuition and fees that a poor student might be charged to ensure that all families can afford to participate in the program. Regardless, legislators should make sure that the amount of the scholarship plus the tuition and fees charged to the student do not exceed the school's costs for educating a student. Any payments above cost to a religious non-public school would be considered an impermissible subsidy of religion.

6. This model legislation bases the scholarship amount on the amount that would have been spent on the student under their individual education plan at the resident school district. It is important that the new public or non-public school selected by the parents not be required to follow the individual education plan crafted at the resident public school since that school disappointed the parent. The new school should be free to craft a better plan to meet the student's special needs, even though the scholarship amount will be based upon the old plan.

7. Optimally, a scholarship should equal the federal, state and local dollars that would have been available for the child at his resident public school. Unfortunately, tapping federal dollars will bring some unwanted federal regulations to choice schools. As a result, few non-public schools would be willing to participate in the program. Similarly, legislators should be aware that using local dollars may violate the state constitution in some places (such as Colorado) and may be politically unviable in other states. Therefore, this legislation draws the funds for scholarships solely from state funds and then subtracts the costs from the state aid paid to the resident school district that has not met the student's needs. This will have the helpful side effect of reducing the financial incentive for resident school districts to over-identify or overspend on special needs students.

8. The model legislation allows a parent to request that their child be given the statewide assessments so that they can mark their child's progress. The legislation does not require testing of special needs students.

9. It is important that the department calculate the scholarship in strict accordance with the definitions in the legislation. If the department cannot be trusted to do this objectively, a more detailed description for determining the size of the scholarship should be written into the law.

10. Private schools are already required to comply with nondiscrimination policies under federal law with respect to race, color, and national origin (42 USC 1981). In addition, if private schools are recipients of federal funds they are subject to nondiscrimination requirements under 42 USC 2000d (race, color, national origin) and 29 USC 794 (disability). The value of including a state prohibition based on religion and disability in this legislation is to head off arguments from school choice opponents that the private schools will "cream off" the best students or discriminate against students who don't share their religious faith in admissions. These provisions may or may not be acceptable to some religious schools in a given state. Legislators may also wish to include language banning discrimination in hiring on the basis of race, color, national origin or disability. In doing so, however, legislators should take care not to interfere with the ability of religious institutions to hire individuals who share their religious beliefs.

11. We believe participating schools should be required to meet the same legal requirements as other non-public schools to ensure the safety of their students. Alternatively, schools could be required to conduct criminal background checks on existing and potential employees and then be given the flexibility to exclude from employment any people that might reasonably pose a threat to the safety of students. This alternative language would be valuable in two cases: 1) a small number of states prohibit discriminating against felons in hiring even for sensitive positions in schools, and this alternative language would give these schools clear authority to dismiss or not hire individuals who pose a risk to student safety; and 2) some religious schools see rehabilitation as part of their mission. In this case, the schools could hire someone with a criminal background who they believe is no longer a threat to students, such as someone who committed nonviolent crimes or has decades-old violations followed by a clean record. This alternative language would give schools the responsibility to do background checks, the power to exclude potential risks from the school, and the liability for their employment decisions.

12. The purpose of the financial information report is to make sure that the department can ascertain the costs of educating a student at the school and to ensure public funds are used appropriately. The legislation does not call for an independent audit because this would be unnecessarily expensive and invasive for many non-public schools.

13. The model legislation provides for two methods for schools to demonstrate financial viability to ensure that public funds are secure. The first method employs a market-based means of demonstrating viability. Non-public companies that issue surety bonds have a financial interest in making sure that the schools can repay any funds that might be owed the state. They will therefore conduct the checks necessary to protect their financial interest as well as the taxpayers' financial interests. Surety bonds can be expensive (one to three percent of the amount covered) or invasive for some institutions so the legislation allows schools to demonstrate by some other means that they have the financial wherewithal to pay back any amount they might owe the state. This might include things like personal guarantees, reserve accounts or escrow accounts.

14. The model legislation does not require that special needs students take standardized assessments because of the special educational challenges these students face. Instead, the legislation requires the school to regularly report to the parents on the student's progress and it gives the parents the option of having their children take the statewide assessments given to other students.

15. It is crucial that the legislature give this study oversight responsibility to a trusted objective nonpartisan source like a legislative service agency. A longitudinal study can be quite expensive. Accordingly, the legislation allows the legislature (or a legislative service agency) to accept private grants to completely fund such a study. In some, states, the legislature is not allowed to accept such grants and another trusted agency will have to be selected. It will be tempting for legislators to further define the details of the study but they should take care not to dictate the methodology or the results in order to maintain the credibility of the research.

Additional Note: It is fairly common for legislators to consider including severability clauses in new legislation. Legislators should make sure that if such clauses are included and exercised, the remaining legislation produces a program that is workable and achieves the original intent of the bill.