

# **WEST VIRGINIA LEGISLATURE**

## **2017 REGULAR SESSION**

**Introduced**

### **House Bill 2689**

BY DELEGATES ESPINOSA, STATLER, WILSON,

HIGGINBOTHAM, BLAIR AND UPSON

[Introduced February 24, 2017; 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 §18-31-1, §18-31-2, §18-31-3, §18-31-4, §18-31-5, §18-31-6, §18-31-7 and  
 3 §18-31-8, all relating to enacting an Educational Savings Account Program; providing a  
 4 short title and definitions; qualifying for an educational savings account; amount of the  
 5 account; responsibilities of the Treasurer; eligibility requirements for participating entities;  
 6 responsibilities of resident school districts; and legal proceedings.

*Be it enacted by the Legislature of West Virginia:*

1 That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new  
 2 article, designated §18-31-1, §18-31-2, §18-31-3, §18-31-4, §18-31-5, §18-31-6, §18-31-7 and  
 3 §18-31-8, all to read as follows:

**ARTICLE 31. EDUCATION SAVINGS ACCOUNT PROGRAM.**

**§18-31-1. Short title.**

1 This article shall be known as the “Education Savings Account Program” or “ESA  
 2 Program.”

**§18-31-2. Definitions.**

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

3 (a) “Account” means an Education Saving Account awarded pursuant to this article;

4 (b) “Treasurer” means the West Virginia State Treasurer’s Office;

5 (c) “Curriculum” means the lessons and or other academic content required to teach a  
 6 specific course or program;

7 (d) “Education service provider” means a person or organization who receives payments  
 8 from an account in exchange for authorized expenditures, including, but not limited to:

9 (1) A private, parochial, or church school, or school of a religious order operating in  
 10 compliance with article twenty-eight of this chapter;

11 (2) A nonpublic online learning program or course;

12 (3) A state institution of higher education operating in compliance with chapter eighteen-b  
13 of this code;

14 (4) A community college operating in compliance with article three-c, chapter eighteen-b  
15 of this code;

16 (5) A technical college operating in compliance with article three-c, chapter eighteen-b of  
17 this code;

18 (6) A private tutor; or

19 (7) A provider of educational therapies or services;

20 (e) “Educational therapies and services” means the individualized, unique, and various  
21 interventions used to remediate learning problems for individuals with learning differences,  
22 disabilities, and challenges, and includes, but is not limited to, occupational, behavioral, equine,  
23 music, physical, and speech-language therapies;

24 (f) “Eligible student” means any elementary or secondary student who is a resident of this  
25 state;

26 (g) “ESA student” means a student who receives an account pursuant to this article;

27 (h) “Parent” means a biological parent, legal guardian, custodian, or other person with  
28 legal authority to act on behalf of an eligible student or ESA student;

29 (i) “Participating entity” means an education service provider that qualifies and complies  
30 with the Treasurer’s guidelines;

31 (j) “Private tutor” means a certified or licensed teacher in this state or a person or institution  
32 accredited as teacher, a tutor or tutoring facility by a state, regional, or national accrediting  
33 organization;

34 (k) “Program” or “ESA” or “ESA program” means the education savings account program  
35 established pursuant to this article;

36 (l) “Resident school district” means the county school district in which the student resides;

37 (m) “Student with a disability” means an exceptional child, other than gifted, pursuant to  
38 section one, article twenty of this chapter; and

39 (n) “Supplemental materials” means the books, workbooks, papers, supplies, videos,  
40 digital media, presentations, readings, tests, or other assessments or apparatuses required by a  
41 curriculum to teach a specific course or program.

**§18-31-3. Qualifying for an education savings account.**

1 (a) An eligible student shall qualify for an account under this article if:

2 (1) The parent submits an application for an account in accordance with any application  
3 procedures and deadlines established by the Treasurer;

4 (2) The parent signs an agreement promising:

5 (A) To provide an education for the ESA student in at least the subjects of reading, English  
6 language arts, mathematics, science, and social studies;

7 (B) To afford the ESA student with opportunities for educational enrichment such as  
8 organized athletics, art, music, or literature;

9 (C) Not to enroll the ESA student, full time, in a district school, an Innovation in Education  
10 school, the West Virginia Virtual School, or a West Virginia School for the Deaf and Blind;

11 (D) To use account funds only for the following authorized expenses to educate the ESA  
12 student:

13 (i) Payment of tuition and or fees at a participating entity;

14 (ii) Payment for textbooks required by a participating entity;

15 (iii) Payment for a dual credit or dual enrollment course offered by a state institution of  
16 higher education, a community college, or a technical college;

17 (iv) Payment to a private tutor;

18 (v) Payment for the purchase of curriculum, including any supplemental materials required  
19 by the curriculum;

20 (vi) Payment of no more than \$750 per year to a fee-for-service transportation provider for  
21 transportation to or from a participating entity;

22 (vii) Payment for educational therapies or services;

23 (viii) Payment for educational services provided by a district school, including individual  
24 classes, extracurricular programs or other services;

25 (ix) Payment of fees for the management of account funds by an approved private financial  
26 management firm;

27 (x) Payment of fees for national norm-referenced examinations, Advanced Placement  
28 examinations or similar courses, and any examinations related to college or university admission;

29 (xi) Payment for computer hardware or other technological devices approved in advance  
30 by the Treasurer, in accordance with any rules promulgated by the Treasurer to govern such  
31 approval;

32 (xii) Contributions to a Coverdell education savings account established under 26 U.S.C.  
33 §530 for the benefit of the ESA student, except that funds used for elementary or secondary  
34 education expenses shall be for expenses otherwise allowed under this section;

35 (xiii) Payment for school supplies.

36 (E) To ensure that the ESA student is annually administered a nationally norm-referenced  
37 test, the Treasurer shall identify a multitude of qualifying tests which shall, at a minimum, measure  
38 learning in mathematics and English language arts. Students with disabilities for whom  
39 standardized testing is not appropriate shall be exempt from this requirement;

40 (F) To use account funds only for educational purposes for the ESA student;

41 (G) To comply with the rules and requirements of the program; and

42 (H) Not to deposit personal funds into an account.

43 (3) The student is currently enrolled in the public school system, otherwise, the student  
44 must wait two years to be eligible.

45 (b) A parent of a student with a disability shall acknowledge, in writing, that acceptance of  
46 an account by a student with a disability has the same effect as a parental placement under 20  
47 U.S.C. § 1412(10)(a) of the Individuals with Disabilities Education Act (IDEA).

48 (c) The account shall remain in force, and any unused funds shall roll over from quarter-  
49 to-quarter and from year-to-year, until the ESA student returns, full time, to a district school or  
50 graduates from college with a bachelor's degree, whichever occurs first, unless the account is  
51 revoked for misuse of funds. However, after four consecutive years after high school graduation  
52 if the ESA student has not enrolled in a post-secondary institution, or if the ESA student turns  
53 twenty-five years of age, the account shall be closed and any unused funds returned to the State  
54 Treasury: *Provided*, That the expiration period shall toll for any individual who enlists full time in  
55 a branch of the Armed Forces of the United States for the United States for up to four additional  
56 years.

57 (d) An ESA student may return to a district school at any time after enrolling in the program.  
58 The Treasurer shall promulgate rules to allow ESA students to return to a district school at any  
59 time.

60 (e) Any parent or ESA student who fails to comply with the provisions of this article or with  
61 any rules promulgated by the Treasurer relating to the program shall forfeit the account and all  
62 account funds therein will be returned to the State Treasury.

63 (f) ESA students whose parents have signed an agreement pursuant to this article shall  
64 be exempt from the compulsory school attendance requirements of article eight, chapter eighteen  
65 of this code.

66 (g) Account funds received pursuant to this article shall not constitute taxable income of  
67 the parent or the ESA student.

68 (h) Nothing in this article shall be deemed to prohibit a parent from making a payment for  
69 any tuition, fee, service, or product described in this article to a participating entity or educational  
70 service provider from a source other than the account.

71 (i) The parent, guardian or other person responsible for educating a child who does not  
72 apply for, and receive, an ESA account is eligible to apply for a tax credit in the amount of \$2,500  
73 per child against their state income tax liability for funds expended in accordance with this section.

**§18-31-4. Amount of account.**

1 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 subdivision six,  
3 subsection (g), section six, article two, of this chapter of the dollar amount the resident school  
4 district would have received from the Public School Support Program to educate the ESA student  
5 had the student enrolled there. This calculation shall include funds from state and local sources,  
6 but shall not include any federal funds.

7 In exchange for the parent's agreement pursuant to subdivision (2), subsection (a), section  
8 three of this article, the department shall transfer from the moneys that would otherwise be  
9 allocated to a recipient's prior school district, or if the child is currently eligible to attend  
10 kindergarten, the moneys that the department would otherwise be allocated to a recipient's  
11 expected school district of attendance, to the Treasurer for deposit into a West Virginia  
12 empowerment scholarship account in an amount that is equivalent to the percentage provided to  
13 the Mountaineer Challenge Academy in subdivision six, subsection (g), section six, article two of  
14 this chapter.

15 The State Superintendent of Schools shall, by rule, determine how the fund transfer to the  
16 Treasurer shall be accomplished.

**18-31-5. Responsibilities of the Treasurer.**

1 The Treasurer shall have the following duties, obligations, and authority:

2 (a) The Treasurer shall create a standard form that parents of eligible students can submit  
3 to establish their student's eligibility for the program and shall ensure that the application is readily  
4 available through various sources, including the Internet;

5           (b) The Treasurer may qualify private financial management firms to manage accounts. If  
6 the Treasurer does qualify private financial management firms to manage accounts, the Treasurer  
7 shall establish and provide reasonable fees for such private financial management firms based  
8 upon market rates;

9           (c) The Treasurer may contract with qualified organizations to administer the program or  
10 specific functions of the program;

11           (d) The Treasurer may conduct or contract for the auditing of accounts, and shall at a  
12 minimum conduct random audits of accounts on an annual basis;

13           (e) The Treasurer may make any parent of an eligible student ineligible for the program in  
14 the event of substantial misuse of the funds in the account;

15           (f) The Treasurer may refer cases of substantial misuse of funds to the Attorney General  
16 for investigation if evidence of fraudulent use of an account is obtained;

17           (g) The Treasurer may deduct an amount from accounts to cover the costs of  
18 administering the program, up to a maximum of three percent annually;

19           (h) The Treasurer shall provide parents of ESA students with a written explanation of the  
20 allowable uses of account funds, the responsibilities of parents, and the duties of the Treasurer  
21 and any private financial management firms or other qualified organizations that may be  
22 administering the program or any aspect of the program;

23           (i) The Treasurer shall maintain a list of participating entities and shall ensure that the list  
24 of participating entities is readily available through various sources, including the Internet;

25           (j) The Treasurer shall adopt rules, regulations and procedures necessary for the  
26 administration of the program;

27           (k) The Treasurer shall, upon approval of a proper application and receipt of a signed  
28 agreement from the parent, make quarterly deposits into the account of ESA students during each  
29 academic year in which an account is in operation;

30 (l) The Treasurer shall develop a system for parents to use account funds to pay  
31 participating entities and education service providers by electronic funds transfer or by individual  
32 warrant;

33 (1) This system shall be a commercially viable, cost-effective, and parent friendly system;

34 (2) The system shall not rely solely on reimbursements for purchases made by parents  
35 out-of-pocket;

36 (3) Private financial management firms or other qualified organizations may manage the  
37 payment system;

38 (4) The system may include individually funded accounts or notional accounts funded  
39 through a single state omnibus account;

40 (5) If a participating entity requires partial payment of tuition or fees prior to the start of the  
41 academic year to reserve space for ESA students admitted to the participating entity, such partial  
42 payment may be paid by the Treasurer prior to the first quarterly payment of the year in which the  
43 account is awarded, up to a maximum of \$1,000, and deducted from subsequent account  
44 payments, but if an ESA student decides not to attend the participating entity, the partial  
45 reservation payment must be returned to the Treasurer by such participating entity.

46 Only one reservation payment per student may be made per year;

47 (m) The Treasurer shall provide the Legislature, not later than December 1, of each year,  
48 with a report regarding the program for the previous fiscal year;

49 (1) The Treasurer may choose a qualified organization to produce the report;

50 (2) The report shall protect the identity of ESA students and participating entities,  
51 including, but not limited to, by keeping anonymous all disaggregated data and maintaining state  
52 and federal guidelines for student privacy;

53 (3) The report shall also be posted on the Treasurer's website;

54 (4) The report shall include:

55 (A) The number and demographic data of ESA students;

56 (B) The number and types of participating entities;  
 57 (C) Parental satisfaction with the program, via a survey that shall ask parents to express:  
 58 (i) Their satisfaction with the program; and  
 59 (ii) The number of years the ESA student has participated in the program;  
 60 (D) The percentage of funds used for each authorized expense included in subparagraph  
 61 [[XX]] of this article.

62 (n) The Treasurer may propose rules for legislative approval in accordance with the  
 63 provisions of article three, chapter twenty-nine-a of this code to designate technical education or  
 64 certifications eligible to participate under this article, to determine qualified purchases and to  
 65 provide a method for disqualification of private schools, vendors or suppliers who violate the  
 66 provisions of this article or the rules of this program.

**§18-31-6. Eligibility requirements for participating entities.**

1 (a) To be eligible to accept payments from an account, a participating entity shall:  
 2 (1) Provide parents with a receipt for all qualifying expenses at the school; and  
 3 (2) Agree not to refund, rebate, or share account funds with parents or ESA students in  
 4 any manner, except that funds may be remitted or refunded to an account in accordance with  
 5 procedures established by the Treasurer;

6 (b) The Treasurer shall provide a participating entity with eligibility requirements of this  
 7 article upon request and make the guidelines available online;

8 (c) The Treasurer may bar a participating entity from the program if the participating entity  
 9 has:

10 (1) Routinely failed to comply with the requirements of this article or with any rules or  
 11 regulations governing the program;

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

14 (3) Failed to provide ESA students with the educational services funded by accounts.

15 (d) If the Treasurer bars a participating entity from the program, it shall notify parents and  
16 ESA students of this decision as quickly as possible;

17 (e) Nothing in the provisions of this article shall be deemed to limit the independence or  
18 autonomy of a participating entity or to make the actions of a participating entity the actions of the  
19 state government;

20 (f) Neither the Treasurer nor any other state agency may in any way regulate the  
21 educational program of a participating entity that accepts funds from an account;

22 (g) Participating entities shall be given the maximum freedom to provide for the  
23 educational needs of ESA students without governmental control; and

24 (h) Nothing in this article shall be construed to expand the regulatory authority of the state,  
25 its officers, or any county school district to impose any additional regulation of participating entities  
26 beyond those necessary to enforce the requirements of the program.

**§18-31-7. Responsibilities of resident school districts.**

1 The resident school district shall provide a participating entity that has enrolled an ESA  
2 student with a complete copy of the student's school records, while complying with the Family  
3 Educational Rights and Privacy Act of 1974 (20 USC Section 1232 g).

**§18-31-8. Legal proceedings.**

1 (a) In any legal proceeding challenging the application of this chapter 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 participating entities;

4 (b) No liability shall arise on the part of the Treasurer or the state or of any county school  
5 district based on the award or use of an account 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 shall be permitted to intervene in such lawsuit for the purposes of  
8 defending the act's constitutionality. However, for the purposes of judicial administration, a court  
9 may limit the number of parents permitted to intervene or require that all parents file a joint brief,

10 so long as they are not required to join any brief filed on behalf of any named state defendant;  
11 and  
12 (d) If any provision of this article, or the application thereof to any person or circumstances,  
13 is held invalid, such invalidity shall 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 enact an educational savings account program; providing a short title and definitions; qualifying for an educational savings account; amount of the account; responsibilities of the Treasurer; eligibility requirements for participating entities; responsibilities of resident school districts; and legal proceedings.

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