



John Rau

## *Bill Analysis*

*Legislative Service Commission*

### **H.B. 348**

127th General Assembly  
(As Introduced)

**Rep. Peterson**

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#### **BILL SUMMARY**

- Creates the Special Education Scholarship Pilot Program to provide scholarships for disabled children in grades K through 12 to attend alternative public or private special education programs in fiscal years 2009 through 2014.
- Requires the Department of Education to develop a document that compares rights under state and federal special education law and rights under the Special Education Scholarship Pilot Program, and requires school districts to distribute that document to the parents of all special education students.
- Requires the Department of Education to conduct a "formative evaluation" of the Special Education Scholarship Pilot Program by December 31, 2010.

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#### **CONTENT AND OPERATION**

##### **Background**

Under the federal Individuals with Disabilities Education Act (IDEA), children identified as disabled are entitled to a "free appropriate public education" that provides special education and related services to enable them to benefit from educational instruction.<sup>1</sup> Under both the IDEA and state law, an "individualized education program" (IEP) must be developed for each child identified as disabled.

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<sup>1</sup> See 20 U.S.C. 1400 et seq. Related services include transportation and support services such as speech-language pathology and audiology services, psychological services, physical and occupational therapy, counseling services, and diagnostic medical services (20 U.S.C. 1401(26)).

The IEP specifies the services to which the child is entitled and are therefore guaranteed by law.<sup>2</sup> A child's school district may provide the services specified in the IEP, or it may enter into an agreement with another district or entity to provide those services.

Under Ohio law, school districts and community ("charter") schools receive additional per-pupil funding on top of the base-cost formula amount for each special education student because of the extra expenses associated with providing educational services. Special education students are assigned to one of six possible categories according to the severity of their disabilities. Each category has a corresponding weight, which is expressed as a percentage of the base-cost formula amount. The additional funds generated by the special education weights are shared by the school district and the state in the same percentage as the base-cost funding.<sup>3</sup>

### **Special Education Scholarship Pilot Program overview**

(R.C. 3310.52, 3310.53, 3310.55, and 3310.57)

The bill establishes the Special Education Scholarship Pilot Program, to begin operating in fiscal year 2009 and to operate through fiscal year 2014. The program is to provide scholarships on behalf of children with disabilities to attend special education programs other than those offered by their school districts. The program applies to any identified disabled child in grades K through 12. A scholarship may be used to pay the expenses of a public or private provider of special education programs for implementation of the child's IEP. While a child is using a scholarship, the school district in which the child would otherwise be enrolled has no obligation to provide the child with a free appropriate public education. But the bill also specifies that if that district has agreed to provide some services for the child, or if the district is required by separate law to provide some services, including transportation services, the district may not discontinue them pending completion of any administrative proceedings regarding those services. (See "**Continuation of some school district services**" below.) The district also has a continuing obligation to develop the child's IEP. Each

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<sup>2</sup> See 20 U.S.C. 1414 and R.C. 3323.01 and 3323.011, neither section in the bill. The IEP is developed by a team including representatives of the child's resident school district (or community school) and the child's parent or the parent's counsel.

<sup>3</sup> See R.C. 3317.022, not in the bill. School districts may receive an additional "catastrophic cost" subsidy for some special education students if the district's costs to serve the students exceed a statutorily specified threshold (R.C. 3317.022(C)(3)).

scholarship is funded by a deduction of the scholarship amount from the state aid account of the child's resident school district.

### **Eligibility**

#### **"Qualified special education child"**

(R.C. 3310.51(H), 3310.61, and 3310.62)

Under the bill, a child is eligible, or "qualified," for a special education scholarship if the child's resident school district has identified the child as disabled and developed an IEP for the child. In addition, the child must either (1) have been enrolled in the district in which the child is entitled to attend school in any grade from K through 12 in the school year prior to the year in which the scholarship would first be used or (2) be eligible to enroll for services from that district in the school year in which the scholarship would first be used. The bill explicitly specifies that a child attending a public special education program under an agreement between the child's school district and the program provider or a child attending a community school may apply for a scholarship.<sup>4</sup>

A child is not eligible for a scholarship for the first time while the child's IEP is being developed or while any administrative or judicial proceedings regarding the content of that IEP are pending. On the other hand, the bill also specifies that, in the case of a child for whom a scholarship already has been awarded, development of subsequent IEPs and the prosecuting of administrative or judicial mediation or proceedings with respect to any of those subsequent IEPs do not affect continued eligibility for scholarship payments. In other words, a scholarship will not be awarded and paid until the child's IEP is in place and it is clear that there are no challenges to that IEP. But *future* challenges to *subsequent* IEPs will not disqualify the child for a scholarship.

#### **"Eligible applicant"**

(R.C. 3310.51(D), 3310.52, 3310.53, 3310.57, 3310.61, and 3310.62)

The bill permits the following individuals to apply for and accept a scholarship for a qualified special education child:

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<sup>4</sup> Under the bill, a community school is not considered a child's school district of residence (R.C. 3310.51(K)). Therefore, any IEP developed by the community school would not qualify the child to receive a scholarship. It is not clear under the bill whether a community school student would need to enroll in a district school to receive a new district-developed IEP prior to receiving a scholarship.

(1) The child's custodial natural or adoptive parent or parents. The bill specifically excludes a parent whose custodial rights have been terminated.

(2) The child's guardian;

(3) The child's custodian other than the parent;

(4) The child's grandparent if the grandparent is an attorney-in-fact under a power of attorney or if the grandparent has executed a caregiver affidavit (both under continuing law);<sup>5</sup>

(5) The child's "surrogate parent" appointed under state and federal special education law;<sup>6</sup> or

(6) The child, if the child does not have a custodian or guardian and is at least 18 years old.

### **Annual limit on the number of scholarships**

(R.C. 3310.52(B))

The bill limits the number of scholarships that may be awarded each year under the Special Education Scholarship Pilot Program to not more than 3% of the number of identified disabled students residing in the state during the previous fiscal year.

### **Alternative providers of special education programs**

Scholarships may be used to pay for special education programs provided by alternative public providers or by private entities registered with the Superintendent of Public Instruction.

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<sup>5</sup> Current law, not changed by the bill, permits a grandparent to be named the attorney-in-fact in a power of attorney executed by a child's parent or permits a grandparent to execute a caregiver affidavit, if the child's parents cannot be located after reasonable attempts to do so. Either instrument authorizes the grandparent, with whom the child lives, to register the child in school and to seek medical care for the child. (See R.C. 3109.51 to 3109.80, none in the bill.)

<sup>6</sup> Under state and federal law, a public agency responsible for the care of a child with a disability must appoint a surrogate parent if it determines that no parent of the child can be found, the child is "a ward of the state," or the child is a "homeless youth." That surrogate parent then is responsible to make decisions regarding the child's education that otherwise would be the responsibility of the child's parent. (See R.C. 3323.05(B) and 3323.051 (neither section in the bill) and 34 C.F.R. 300.519.)

### **Alternative public providers**

(R.C. 3310.51(A))

An alternative public provider must be either (1) a school district other than the district obligated to educate the disabled child (or the child's resident school district, if different) or (2) another public entity that agrees to enroll the child and implement the child's IEP. In addition, the alternative public provider must be an entity to which the eligible applicant, rather than a school district or other public entity, owes fees for the services provided to the child. In other words, an eligible applicant cannot use a scholarship to enroll a child in a school district or other public entity to which the child's school district would send the child for special education services because, in that case, the child's district would be required to pay the receiving district or entity for the services provided to the child. Neither may an eligible applicant use a scholarship to enroll the child in a community school because the community school, as a public school, would receive funds to educate the child even without the scholarship. The eligible applicant must use the scholarship to pay for special education and related services provided by a school district or public entity from which the eligible applicant otherwise would not receive those services for the child free of charge.

### **Registered private providers**

(R.C. 3310.58 and 3310.59)

Nonpublic schools and other private entities may accept scholarship children under the bill, but first they must register with the Superintendent of Public Instruction. To be registered by the Superintendent, the private school or entity must meet the following requirements:

(1) Its special education program meets the minimum education standards established by the State Board of Education;<sup>7</sup>

(2) It must comply with the antidiscrimination provisions of the federal Civil Rights Act of 1964,<sup>8</sup> which prohibits discrimination on the basis of *race, color, or national origin* in the administration of benefits assisted with federal

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<sup>7</sup> The State Board must prescribe minimum standards for public and private elementary and secondary schools. These standards cover teacher certification, administrative organization, graduation requirements, curriculum, assessments, health and safety issues, length of the school day, and other topics. (See R.C. 3301.07(D), not in the bill, and Ohio Administrative Code Chapter 3301-35.)

<sup>8</sup> The bill refers to 42 U.S.C. 2000d.

funds. The bill specifies that this antidiscrimination statement applies to a registered private provider regardless of whether the provider receives federal financial assistance. A student's scholarship under the program is not funded with federal money.

(3) It agrees to conduct criminal records checks of applicants for employment positions that are responsible for the care, custody, or control of a child, if it is not already required to do so pursuant to law;<sup>9</sup>

(4) Its teaching and nonteaching professionals, or those employed by a subcontractor providing special education services on its behalf, hold credentials determined by the State Board to be appropriate for working with the scholarship children enrolled in the program;

(5) It meets applicable health and safety standards for school buildings;

(6) It agrees to retain any documentation required by the Department of Education;

(7) It demonstrates fiscal soundness to the Department's satisfaction; and

(8) It agrees to meet any other requirements for registration specified by the State Board.

If the Superintendent of Public Instruction determines that a private school or entity no longer meets these criteria, the Superintendent must revoke its registration. The school or entity must be allowed a hearing prior to revocation.

### **Scholarship amount**

(R.C. 3310.56)

Each scholarship is worth the smallest of the following amounts:

(1) \$20,000;

(2) The total fees charged by the provider; or

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<sup>9</sup> Under the bill, private entities must conduct criminal records checks in the same manner as must chartered nonpublic schools under continuing law. While the bill requires a private school or entity to conduct criminal records checks of future applicants prior to hiring, it does not mandate that the school or entity request records checks of current employees. (R.C. 109.57 and 109.572 and future version R.C. 109.57, amended in Sections 5, 6, and 7.)

(3) The amount that otherwise would be calculated for state and local funding for the school district's provision of special education and related services to the child. This last amount comprises the base-cost (formula amount plus base funding supplements) and special education weighted funding (both state and local shares) that would be calculated for the student under the state formulas.

**Payment of scholarships**

(R.C. 3310.52, 3310.54, 3310.55, 3310.57, and 3317.03(A) and (B))

The Department of Education must make periodic payments throughout the school year directly to an alternative provider on behalf of the eligible applicant for services provided to a qualified special education child, until the full amount of the scholarship has been paid. The amount of the scholarship is deducted from the state aid account of the school district in which the child is entitled to attend school. That district is authorized to count the child in its formula ADM and special education ADM so that the district is credited with state funds for the student prior to the deduction of the scholarship.

The scholarship may be used only to pay fees charged by the alternative special education program for implementation of the child's IEP. The Department must prorate a child's scholarship amount if the child withdraws from the alternative program before the end of the school year.

**Application deadlines**

(R.C. 3310.52(C))

In order to qualify for a scholarship, either for the first time or to renew a scholarship, an eligible applicant must submit an application in the manner prescribed by the Department of Education by April 15 prior to the school year for which the scholarship or renewal is sought. In addition, by April 15, the eligible applicant must notify the child's school district that the applicant has applied for a scholarship or renewal.

**Transportation of scholarship children**

(R.C. 3310.60)

Under the bill, scholarship children are entitled to transportation to and from the alternative special education programs they attend in the same manner as disabled students attending nonpublic schools.

Continuing law requires school districts to provide transportation to nonpublic school students in grades K to 8 who reside in the district and live more

than two miles from the school they attend. Districts may also transport high school students to and from their nonpublic schools. A district, however, is not required to transport students of any age to and from a nonpublic school if the direct travel time by school bus from the district school the student would otherwise attend to the nonpublic school is more than 30 minutes.<sup>10</sup> In the case of some special education students, transportation might be mandated by their IEPs, regardless of travel time or practicality.

**Continuation of some school district services**

(R.C. 3310.60 and 3310.62(C))

The bill provides that, if the resident school district of a child awarded a scholarship has agreed to provide some services for the child or, if the district is required by law to provide some services for the child, including transportation services as described above, the district may not discontinue the services pending completion of any administrative proceedings regarding those services. It also specifies that the prosecuting, by the eligible applicant on behalf of the child, of administrative proceedings regarding those services does not affect the applicant's and the child's continued eligibility for scholarship payments.

**Written notice of rights and informed consent**

(R.C. 3310.53(C) and 3323.052)

The bill requires the Department of Education to develop by January 31, 2008, and subsequently to revise as necessary, a document that compares a parent's and child's rights under state and federal special education law with their rights under the Special Education Scholarship Pilot Program, including the scholarship program's statutory application deadlines (see above). It also requires the Department and each school district to distribute the document to parents of disabled children as a part of, appended to, or in conjunction with the procedural safeguards notice required under federal law. It then specifies that an eligible applicant's receipt of the comparison document, as acknowledged in a format prescribed by the Department, constitutes notice that the eligible applicant has been informed of those rights. It further provides that acceptance of a scholarship constitutes the eligible applicant's informed consent to the provisions of the Special Education Scholarship Pilot Program.

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<sup>10</sup> R.C. 3327.01, not in the bill. Aside from the 30-minute exception, these are the same requirements that apply to the transportation of students to and from public schools. When transportation by the district is impractical, the district may offer payment to a student's parent instead of providing the transportation.

## **Background**

Federal special education law requires that the parents of disabled children be given notice of the procedural safeguards available to them regarding their children's special education and related services. Specifically, both the state and each school district are obligated to provide a "full explanation" of those safeguards "written in the native language of the parents (unless it clearly is not feasible to do so) and written in an easily understandable manner."<sup>11</sup> That document must be provided once each year and upon referral or request for the child's evaluation, upon the first filing of an administrative complaint, or upon parental request.<sup>12</sup> The federal statute and rules provide an extensive list of items that must be included in the document.

In compliance with this federal requirement, the Ohio Department of Education has developed a document entitled "Whose IDEA is This? A Resource Guide to Parents," written in English, Spanish, and French. School districts must distribute it to parents in accordance with federal law, and it also is available on the Department's web site.<sup>13</sup>

## **State Board rules**

(R.C. 3310.63; Section 3)

The State Board of Education must adopt rules for the Special Education Scholarship Pilot Program in accordance with the Administrative Procedure Act so that they are in effect by January 31, 2008. Those rules must include application procedures and standards and procedures for the registration of private providers of special education programs.

## **Formative evaluation**

(Section 4)

The bill requires the Department of Education to conduct a "formative evaluation" of the Special Education Scholarship Pilot Program and to report its findings to the General Assembly by December 31, 2010. In doing so, the Department is required to the extent possible to gather comments from parents

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<sup>11</sup> 20 U.S.C. 1415(d) and 34 C.F.R. 300.503 and 300.504.

<sup>12</sup> Federal law specifies that the document also may be posted on a district's web site.

<sup>13</sup> See <http://www.ode.state.oh.us/GD/Templates/Pages/ODE/ODEDetail.aspx?Page=3&TopicRelationID=1159&Content=16275>.

who have been awarded scholarships under the program, school district officials, and representatives of registered private providers, educators, and representatives of educational organizations. The Department also is required to use quantitative and qualitative analyses in conducting its evaluation.

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## COMMENT

### *No effect on the Autism Scholarship Program*

Under continuing law, the Autism Scholarship Program pays scholarships to the parents of certain autistic children in grades *pre-kindergarten* to 12 (R.C. 3310.41, not in the bill). The bill's proposed Special Education Scholarship Pilot Program contains many of the same concepts of the smaller Autism Scholarship Program (including its \$20,000 limit on the scholarship amount) and applies those concepts to children of all categories of disability. It does not, however, apply to pre-kindergarten students.

The bill does not affect the Autism Scholarship Program. In fact, neither program changes or conflicts with the provisions of the other. Thus, it appears that the two programs could coexist. Children with autism who are in grades K through 12 would be eligible for either program. Presumably their parents could choose either (but not both) of the two programs. For example, if a parent of a child with autism could not participate in the new program because its 3% cap had been reached, the parent likely could turn to the Autism Scholarship Program, which has no cap. However, the due process provisions between the two programs are somewhat different. Under the Autism Scholarship Program, a parent may not be awarded a scholarship if there is any pending dispute over the child's IEP. Under the Special Education Scholarship Pilot Program, the prohibition on award and payment of a scholarship applies only until the child's first IEP is developed under the program.

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## HISTORY

ACTION	DATE
Introduced	10-09-07

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