



# Ohio Legislative Service Commission

## Bill Analysis

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### S.B. 6

128th General Assembly  
(As Introduced)

**Sens.** Coughlin, Buehrer, Gibbs, Wagoner, Seitz

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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 2012 through 2017.
- Requires the Department of Education to develop a document that compares rights under state and federal special education law and rights under the 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 pilot program by December 31, 2013.

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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. 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, community ("charter") schools, and STEM 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.<sup>3</sup> 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>4</sup>

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<sup>1</sup> See 20 United States Code (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)).

<sup>2</sup> See 20 U.S.C. 1414 and R.C. 3323.011, not 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> R.C. 3317.013, not in the bill. The special education weights currently are being phased in over an indefinite period. In FY 2009, the weights are paid at 90% of their full amounts. Current law does not specify whether any phase-in percentage will be applied after FY 2009.

<sup>4</sup> See R.C. 3317.022. A local share for special education funding is not applied to either community schools or STEM schools. School districts, community schools, and STEM schools

## Special Education Scholarship Pilot Program

(R.C. 3310.52, 3310.53, and 3310.62(C))

The bill establishes the Special Education Scholarship Pilot Program, to begin operating in fiscal year 2012 and to operate through fiscal year 2017. The program is to provide scholarships for disabled children 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 and other services that are not in the IEP but are associated with educating the child. The bill also permits the "eligible applicant" (generally the child's parent, see below) and the provider to agree to alter the services provided to the child.

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.

### 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 is from 5 to 21 years old and 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

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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. 3314.08(E), 3317.022(C)(3), and 3326.34).



attending a community school may apply for a scholarship.<sup>5</sup> A child is not eligible for a scholarship in any school year in which the child has been awarded a scholarship under the Autism Scholarship Program (see **COMMENT**).

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(E))

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

(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>6</sup>

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<sup>5</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.

<sup>6</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.

(5) The child's "surrogate parent" appointed under state and federal special education law;<sup>7</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.

#### **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

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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>7</sup> Under state and federal law, a public agency responsible for the care of a disabled child 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 Code of Federal Regulations (C.F.R.) 300.519.)

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>8</sup>

(2) It must comply with the antidiscrimination provisions of the federal Civil Rights Act of 1964,<sup>9</sup> which prohibits discrimination on the basis of *race, color, or national origin* in the administration of benefits assisted with federal 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, if it is not already required to do so pursuant to law;<sup>10</sup>

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<sup>8</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>9</sup> The bill refers to 42 U.S.C. 2000d.

<sup>10</sup> Under the bill, private entities must conduct criminal records checks in the same manner as must chartered nonpublic schools under continuing law (see R.C. 3319.39, not in the bill). 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. (See also R.C. 109.57 and 109.572.)

(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;

(8) It agrees to provide to the child's resident school district a record of the implementation of the child's IEP, including evaluation of the child's progress;

(9) It agrees that if it declines to enroll a particular child under the program, it will notify the eligible applicant in writing of its reasons for declining to enroll that child; and

(10) 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

(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), (B), and (F)(5))

The Department of Education must make periodic payments throughout the school year to 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 under the bill to count the child in its formula ADM and special education ADM. If the child is not included in the formula ADM of that district, the Department must adjust the district's ADM to include the child and recalculate the district's state aid payments for the entire fiscal year accordingly.

The scholarship may be used only to pay fees charged by the alternative special education program for implementation of the child's IEP and other services agreed to by the provider and the eligible applicant that are not in the IEP but are associated with educating the child. 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>11</sup> In the case of some special education students, transportation might be mandated by their IEPs.

### **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, 2011, 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.

### **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

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<sup>11</sup> R.C. 3327.01, not in the bill. When transportation by the district is impractical, the district may offer payment to a student's parent instead of providing the transportation.

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>12</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>13</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 for Parents," written in English, Spanish, and French. School districts must distribute it to parents in accordance with the law, and it also is available on the Department's web site.<sup>14</sup>

## **Provider profile**

(R.C. 3310.521)

Each alternative public provider and each registered private provider that enrolls a child under the program must submit a written "profile" of the provider's services to the eligible applicant. The profile must be in a form prescribed by the Department of Education and must contain all of the following:

- (1) Information related to the provider's financial status;
- (2) Methods of instruction that will be used in providing services to the child;
- (3) Qualifications of teachers, instructors, and other persons who will provide services to the child;
- (4) Results of the evaluation of the provider's academic program; and
- (5) Any other information required by the Department.

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<sup>12</sup> 20 U.S.C. 1415(d) and 34 C.F.R. 300.503 and 300.504.

<sup>13</sup> The statute specifies that the document also may be posted on a district's web site.

<sup>14</sup> See <http://www.ode.state.oh.us/GD/Templates/Pages/ODE/ODEDetail.aspx?page=3&TopicRelationID=967&ContentID=11128&Content=62785>.

As a condition of receiving scholarship payments under the program, an eligible applicant must attest, in a form and manner prescribed by the Department, to having received the profile.

### **Access to student data verification codes**

(R.C. 3301.0714(D) and 3310.63)

Each school district or community school in which a student initially enrolls must assign that student a unique data verification code for purposes of reporting individual student performance data to the Education Management Information System (EMIS).<sup>15</sup> The bill grants the Department access to these codes for the purpose of administering the Special Education Scholarship Pilot Program. Access to the codes will allow the Department to match a qualified special education child's name with the child's data verification code. Therefore, these provisions are an exception to the general prohibition in continuing law against the Department having access to information that would enable a data verification code to be matched to personally identifiable student data.

The bill permits the Department to have access to data verification codes in the same manner it currently does for the Educational Choice Scholarship Pilot Program.<sup>16</sup> Specifically, the Department may request a qualified special education child's data verification code from (1) the school district in which the child is entitled to attend school, (2) the community school in which the child is enrolled, if applicable, or (3) the independent contractor hired by the Department to create and maintain data verification codes.

Districts and community schools must provide the child's data verification code to the Department.<sup>17</sup> If a child has not yet been assigned a code because the child will be entering kindergarten, the district in which the child is entitled to attend school must assign a code to the child prior to submission. If the district does not assign the code by

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<sup>15</sup> EMIS is a statewide electronic database of demographic, fiscal, and academic information on school districts and buildings. The Department of Education uses EMIS data to calculate state payments for districts and schools and to monitor their performance.

<sup>16</sup> The Educational Choice Scholarship Pilot Program provides scholarships to pay tuition at chartered nonpublic schools for students who do not reside in the Cleveland Municipal School District and who are assigned to certain underperforming districts or schools (R.C. 3310.02 and 3310.03, neither section in the bill).

<sup>17</sup> They also must provide the code to the eligible applicant for the child, upon request.

a date specified by the Department, the Department must assign the code. Each year, the Department must provide school districts with the name and data verification code of each scholarship child residing in the district for whom the Department has assigned a data verification code.

The Department may not release a child's data verification code to any person, unless such release is otherwise authorized by law. Furthermore, documents held by the Department relating to the scholarship program are not public records if they contain both a child's name or other personally identifiable information and the child's data verification code.

### **State Board rules**

(R.C. 3310.64; 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, 2011. Those rules must include application procedures and standards and procedures for the registration of private providers of special education programs.

### **Formative evaluation of Special Education Scholarship Pilot Program**

(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, 2013. In doing so, the Department is required to the extent possible to gather comments from parents who have been awarded scholarships under the program, school district officials, 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**

### **Autism Scholarship Program**

The Autism Scholarship Program pays scholarships to the parents of certain autistic children in grades *pre-kindergarten* to 12.<sup>18</sup> The bill's proposed Special Education

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<sup>18</sup> R.C. 3310.41, not in the bill.

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. The bill's larger program does not 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, and it appears that the two programs could coexist. However, the bill excludes a student from simultaneously participating in both programs. Nevertheless, children with autism who are in grades K through 12 would be eligible for and their parents could choose either 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. On the other hand, 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**

<b>ACTION</b>	<b>DATE</b>
Introduced	02-10-09

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