

## **KDE GUIDANCE ON HOUSE BILL 563 (2021 REGULAR SESSION):**

The Kentucky General Assembly passed House Bill 563 (HB 563), during the 2021 Regular Session and it became law on June 29, 2021. HB 563, now codified into Kentucky Revised Statutes, generally addresses two educational choice issues. Sections 1-3 provide amendments to KRS 157.350, 158.120, 156.070, and specify the way local boards of education shall adopt a nonresident pupil policy under which the district shall allow enrollment of nonresident pupils and the funding associated therewith. Section 4 provides for reporting requirements of the KDE to the Legislative Research Commission and Interim Joint Committee on Education on options for equitable transfer of education funds. Sections 5-19 of the Act is cited as the Education Opportunity Account Act or EOA Act. This nonregulatory guidance document provides important updates to support schools and districts as they implement the provisions of HB 563, Sections 1-4 only, related to the enrollment of nonresident pupils in school districts.

### **WRITTEN AGREEMENTS TRANSITION TO POLICIES:**

Until July 1, 2022, nonresident pupils listed under a written agreement between a resident district and a non-resident district may be included in the non-resident district's average daily attendance and the non-resident district is eligible to receive funds from the support education excellence in Kentucky (SEEK) fund for the non-resident pupil.

Commencing on July 1, 2022, per KRS 157.350(4)(b), nonresident pupils admitted pursuant to district nonresident pupil policies adopted under KRS 158.120 may be included in average daily attendance (ADA) for SEEK eligibility without a written agreement with the pupils' resident districts.

### **DISTRICT POLICIES:**

KRS 158.120 Section 1 provides:

“By July 1, 2022, a local board of education shall adopt a nonresident pupil policy to govern the terms under which the district shall allow enrollment of nonresident pupils. Upon allowing nonresident pupil enrollment, the policy shall allow nonresident children to be eligible to enroll in any public school located within the district. The policy shall not discriminate between nonresident pupils, but may recognize enrollment capacity, as determined by the local school district. The nonresident pupil policy and any subsequent changes adopted by a board of education shall be filed with the Kentucky Department of Education no later than thirty (30) days following their adoption.”

This language makes clear that school districts must adopt a policy related to enrollment of nonresident pupils. What is confusing, however, is whether the policy must permit enrollment of nonresidents, or if the district can adopt a policy that it will not permit enrollment of nonresident pupils. That is, the phrase “a nonresident pupil policy to govern the terms under which the

district **shall allow enrollment** of nonresident pupils” indicates districts must permit enrollment of nonresidents. But the following phrase “**upon allowing** nonresident pupil enrollment” may suggest districts have discretion in permitting such enrollment. While the Kentucky Department of Education (KDE) advised this language lacked clarity, the General Assembly did not make changes to this language during the 2022 legislative session. Upon detailed review of the language provided in KRS 158.120, KDE concludes that school district policies must permit enrollment of nonresident pupils. While the phrase “upon allowing” may suggest local school district discretion in the matter, the phrase “shall allow enrollment of nonresident pupils” indicates districts have no discretion in whether or not to allow enrollment of nonresidents.

With that said, school districts do have discretion in the details to be included in their policies allowing nonresident pupils to enroll. As local school districts consider the adoption of a nonresident pupil policy, districts are encouraged to include in their policy provisions which address the following:

1. The annual method the district will utilize to determine capacity for enrollment of nonresident pupils at each school within the district, and the date and method by which such capacity will be publicly announced;
2. The annual method the district will utilize for accepting applications of nonresident pupils for enrollment, including the opening and closing dates for application;
3. The criteria the district will utilize for enrolling nonresident pupils and assignment to schools within the district. As the policy “shall not discriminate between nonresident pupils,” districts should adopt criteria which is no more stringent than criteria applied to resident pupils.
4. The method the district will utilize to determine enrollment of nonresident pupils if capacity is insufficient to enroll all nonresident students who apply to attend;
5. The term of enrollment for nonresidents, which shall be no less than one full school year, absent expulsion pursuant to KRS 158.150;<sup>1</sup>
6. Any transportation services the school district will provide to nonresident pupils enrolled in the district; and
7. The method the district will utilize annually to notify districts of residence of each student enrolled pursuant to this subsection prior to the school year of attendance at the nonresident district. Nonresident districts receiving students are encouraged to provide notice to each resident district for students enrolled in the nonresident district no later than thirty days after the closing dates for applications.

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<sup>1</sup> In *G.C. v. Owensboro Pub. Sch.*, 711 F.3d 623, 2013, the United States Court of Appeals for the Sixth Circuit held that nonresident pupils are entitled to the due process provisions of KRS 158.150 prior to removal from the school district once the academic year has commenced. Furthermore, the Kentucky Attorney General explained in OAG 79-327 that “[o]nce a student is permitted to enroll in a nonresident school for a school year, we believe the law applicable to student conduct and the possibility of suspension and/or expulsion under KRS 158.150 comes into play.” OAG 79-327 goes on to state that “[t]ermination of the privilege of attending a nonresident school during the course of a school year is in fact an expulsion and must be so handled and affected only after a hearing before the [district of attendance] board of education.”

The adopted nonresident policy and any amendments to the policy are to be submitted to the Kentucky Department of Education (KDE) no later than (30) thirty days after their adoption to the Office of Finance and Operations, Division of District Support Services. Policies should be submitted to the Division of District Support via email to [nonresidentpolicy@education.ky.gov](mailto:nonresidentpolicy@education.ky.gov). Nonresident policies will be kept on file for informational purposes by KDE.

### **DISTRICT CODING OF NONRESIDENT STUDENTS:**

Current processes for coding nonresident students will remain relatively unchanged. Local School Districts of enrollment will record the nonresident student status of enrolled students in Infinite Campus, the statewide student information system. The nonresident students' records will be required to document the "Resident District". Once the nonresident student is enrolled in the school district, in accordance with the provisions of KRS 157.350, nonresident students are accounted for the same as resident students for purposes of SEEK funding and any other funding opportunities that utilize ADA, including state grants and federal grants. KDE will continue to include nonresident student review in student attendance audits on a rolling sampling basis each year within selected districts.

### **INTERSCHOLASTIC ATHLETICS:**

KRS 157.070(2) provides that the Kentucky Board of Education may designate an organization or agency to manage interscholastic athletics in the common schools. The KBE has designated the Kentucky High School Athletics Association (KHSAA) for this purpose. KRS 156.070(2)(h) states that any student who transfers enrollment from a district of residence to a nonresident district under KRS 157.350(4)(b) shall be ineligible to participate in interscholastic athletics for one (1) calendar year from the date of the transfer. For questions surrounding the implementation of this provision, districts should contact the KHSAA.

### **REPORT ON EQUITABLE TRANSFER OF EDUCATION FUNDS:**

HB 563 required the KDE to submit by November 1, 2021, a report to the Legislative Research Commission and the Interim Joint Committee on Education with options on how to ensure the equitable transfer of education funds so that funds follow a nonresident student to a school district of enrollment from a school district of residence. The report was to include recommendations on how the amount should be calculated and what mechanisms should be used to conduct the transfer.

The KDE submitted the required report which can be found [here](#).

The KDE presented four options for the General Assembly's consideration relative to the transfer of local tax revenue from a resident district to a nonresident district for students enrolled in the nonresident district. These four options all had potential barriers to implementation and

concerns with possible statutory and/or constitutional challenges to the transfer of local tax revenues. As of the date of this guidance, the General Assembly has not passed legislation requiring the transfer or distribution of local tax revenue between local school districts for nonresident students.

### **TUITION:**

Districts have questioned whether they are able to charge tuition for nonresident pupils who enroll under new nonresident pupil attendance policies required by KRS 158.120. KRS 158.120(2) states:

“Any board of education may charge a reasonable tuition fee per month for each child attending its schools whose parent, guardian, or other legal custodian is not a bona fide resident of the district.[...] The fee shall be paid by the board of education of the school district in which the pupil resides, except in cases where the board makes provision for the child’s education within his or her district.”

This statutory provision was unchanged by HB 563. However, Section 183 of the Kentucky Constitution requires the General Assembly to provide for an efficient system of common schools. Through HB 563, the General Assembly has provided a mechanism for students to enroll in any common school in the Commonwealth and for common school funds (i.e. SEEK funds) to follow that student to the district of enrollment, irrespective of any agreement with the student’s district of residence. In *Rose v. Council for Better Education*, the Kentucky Supreme Court interpreted Section 183 of the Kentucky Constitution, holding that “common schools shall be free to all.” Furthermore, Section 184 of the Constitution provides for appropriation of the common school fund to common schools and for no other purpose.

Given this interpretation of Section 183 of the Kentucky Constitution by the Commonwealth’s highest court, it is KDE’s position that districts may not charge tuition to students/parents for students included in the district’s ADA calculation for participation in the SEEK fund. If the state’s system of common schools are not “free to all” as required by the Kentucky Supreme Court’s decision in *Rose*, they fail the constitutional test of being an “efficient system of common schools” set forth in Section 183 of the Kentucky Constitution.

The inability of school districts to charge tuition to students/parents is further supported by the plain language contained in HB 563 which states districts “shall not discriminate between nonresident pupils.” Charging tuition to nonresident pupils/parents effectively discriminates against any pupil whose family is unable to pay tuition.

Districts are encouraged to consult with their local board attorneys for legal advice relative to tuition charges.