

June 23, 2022

Jane Bergeron-Beaulieu, Executive Director
New Hampshire Association of Special Education Administrators
25 Triangle Park Drive, #103
Concord, NH 03301

RE: NH Senate Bill 394 (Laws of 2022, Chapter 230)
and House Bill 1513

Dear Jane,

On June 17, 2022, Governor Sununu signed SB 394. This new law, which became effective immediately once the Governor signed it, amends the definition of “child with a disability” in RSA 186-C:2, I. The intent of the law is to raise the upper age limit for special education to a student’s twenty-second birthday, assuming the student has not yet earned a high school diploma.

SB 394, having been signed by the Governor, is now named “N.H. Laws of 2022, Chapter 230.”

The New Hampshire House and Senate recently passed another bill, HB 1513, which is virtually identical to Chapter 230. It remains to be seen whether the Governor will see a need to sign HB 1513.

RSA 186-C:2, I (Supp.) previously defined the term “child with a disability” as including students “less than 21 years of age.” Chapter 230 and HB 1513 both redefine the term to include students “between the ages of 3 and 21, inclusive.” The clear legislative intent is to include students with disabilities *through* age 21 (i.e., until the twenty-second birthday).

School districts should consult with their attorneys before implementing Chapter 230. In the meantime, I share the following information and thoughts.

I. Temporary State Funding to Cover the New Costs

Chapter 230 offers state funding to cover the cost of providing “services to special education students over age 21 until their 22nd birthday,” but only for “the 2022-2023 school year.”

We await clarification from the New Hampshire Department of Education concerning whether “the 2022-2023 school year” includes the summer of 2022.

The reimbursement scheme set forth in Chapter 230 includes the following twists:

- A school district must apply to the N.H. Department of Education for reimbursement.¹
- Upon receiving an application, “the department shall provide reimbursement for any such costs which were not otherwise compensated through other forms of state education aid.”²
- “To qualify for reimbursement, a school district shall have utilized any unexpended federal Individuals with Disabilities Education Act (IDEA) funds for the fiscal year 2022 and any available IDEA American Rescue Plan Act funds.”³
- The State will reimburse school districts under Chapter 230 according to “the payment schedule of special education aid under 186-C:18.”⁴ In other words, school districts must front the costs and the State will reimburse them a year later.
- RSA 186-C:18 ordinarily directs the State to reimburse school districts for only 80 percent of all costs in excess of 3.5 times the state average annual per pupil cost. However, Chapter 230 compels the State to reimburse school districts for *all* costs of educating special education students between their 21st and 22nd birthdays during the 2022-23 school year, subject to the limitations described above.⁵

II. Grounds for Challenging Chapter 230

One reason why we recommend consulting with counsel is because Chapter 230 may be unconstitutional after the 2022-23 school year and perhaps for the summer of 2022.

Part 1, Article 28-a of the New Hampshire Constitution prohibits the State from imposing new unfunded mandates on school districts. Chapter 230, by expanding the population entitled to special education, arguably amounts to a *new* state mandate. It will be a new *unfunded* mandate after the 2022-23 school year. It

¹ N.H. Laws of 2022, Ch. 230, § 2, I.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*, § 2, I-II.

may also be a new unfunded mandate for the summer of 2022, depending on whether the New Hampshire Department of Education interprets “2022-23 school year” to include the summer of 2022.

Some theorize that the IDEA, a federal law, compels school districts to provide special education up to a student’s twenty-second birthday. Thus, they argue, Chapter 230 amounts to a federal mandate, not a state mandate.

Proponents of this theory rely on *K.L. v. Rhode Island Board of Education*, 907 F.3d 639 (1st Cir. 2019). The three-judge panel in that case ruled 2-1 that the IDEA compels Rhode Island to provide special education to students with disabilities up to age twenty-two, or until receipt of a high school diploma, whichever occurs first.

K.L. may not control in New Hampshire. It was a decision by the U.S. Court of Appeal for the First Circuit, which has jurisdiction over New Hampshire. However, the majority opinion relied on a complicated interplay between the IDEA and Rhode Island’s system of adult education. New Hampshire’s adult education system differs from Rhode Island’s.

Furthermore, the majority opinion in *K.L.* overlooked U.S. Supreme Court precedents holding that ambiguities in federal grant statutes such as the IDEA must be interpreted narrowly to avoid imposing unanticipated burdens on participating states.⁶ The relevant IDEA provisions are certainly ambiguous, as evidenced by the panel’s inability to reach a unanimous decision in *K.L.*

Even if the IDEA guarantees special education to a student’s twenty-second birthday, it does not compel *school districts* to pay. Any IDEA duties are the result of decisions by the *State*. The IDEA applies only to states that elect to participate. Moreover, the IDEA imposes on participating *states* the duty to provide a free appropriate public education. The IDEA allows each participating state to decide whether to shift fiscal responsibility to school districts.

III. Immediate Steps to Implement Chapter 230

Since Chapter 230 is now effective, school districts should immediately think about how to implement it.

⁶ The U.S. Supreme Court first adopted this canon of statutory interpretation in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). The Court then applied this canon to the IDEA in *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176, notes 11 and 26 (1982) and *Arlington Central School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

In order to fulfill their child find duties, school districts may want to contact students who were recently discharged from special education due to having attained age 21. Read literally, Chapter 230 allows those student to resume special education until they reach age 22.

Finding placements may be complicated. For example, until Chapter 230 was enacted, one in-state school for students with severe disabilities discharged students once they reached age 21, creating openings for younger students on its waiting list. Chapter 230 upended those plans. This school lacks the capacity to simultaneously educate both cohorts. School districts may be forced to place more students at schools in Massachusetts, where special education to age 22 is the norm.

School districts inclined to challenge Chapter 230 should consult with their attorney. Stay-put may obligate a district to provide special education while a legal challenge is pending. A school district or coalition of districts might file a lawsuit against the State *soon*, provide special education during the 2022-23 school year while awaiting a trial, collect reimbursement from the State (available only for the 2022-23 school year), and seek a court order declaring Chapter 230 invalid for subsequent school years.

Lastly, considering that Chapter 230 may be unconstitutional, school districts may wish to note in their written prior notices that they are offering special education beyond a student's twenty-first birthday "without prejudice to arguments that Chapter 230 does not guarantee special education beyond a student's twenty-first birthday." That way, the school district's willingness to comply with Chapter 230 over the short term is less likely to be viewed as a waiver of the district's right to challenge the statute.

Very truly yours,

Jerry

Gerald M. Zelin