

July 18, 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 (Laws of 2022, Chapter 264)

Dear Jane,

This is to supplement my June 23, 2022 letter regarding SB 394, which purports to raise the upper age limit for special education in New Hampshire from a student's twenty-first birthday to the twenty-second birthday.

Please share the following new information with members of the NHASEA.

First, the Governor signed HB 1513 on June 24, 2022. This legislation, now codified as N.H. Laws of 2022, Chapter 264, took effect once the Governor signed it. It is identical to SB 394 (Chapter 230), which the Governor signed on June 17, 2022.

Second, the New Hampshire Department of Education recently informed you that it interprets "the 2022-23 school year" to include the summer of 2022. This is important because SB 394 and HB 1513 direct the New Hampshire Department of Education to fully reimburse school districts for the cost of providing special education services to twenty-one year old students, but only "for the 2022-23 school year."¹

Third, it is unclear whether SB 394 and HB 1513 successfully raise the age limit for special education. Both bills amend RSA 186-C:2, I, which defines "child with a disability." However, neither bill amends RSA 186-C:9, which describes a child with disability's rights.

¹This duty to fully reimburse school district is subject to some twists, the consequences of which remain to be seen. Both bills provide as follow: "For the 2022-2023 school year, department of education shall be liable for all school district costs related to providing services to special education students over age 21 until their 22nd birthday. Upon application by a school district, the department shall provide reimbursement for any such costs, which were not otherwise compensated for through other forms of state education aid. 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. Payments shall be made to school districts under the payment schedule of special education aid under RSA 186-C:18."

RSA 186-C:9 still provides as follows:

Each child who is determined by the local school district, or special school district established under RSA 194:60, as having a disability in accordance with RSA 186-C:2 and in need of special education or special education and related services shall be entitled to attend an approved program which can implement the child's individualized education program. Such child shall be entitled to continue in an approved program until such time as the child has acquired a regular high school diploma ***or has attained the age of 21***, whichever occurs first, or until the child's individualized education program team determines that the child no longer requires special education in accordance with the provisions of this chapter.

(Emphasis added.) The italicized clause, read literally, still cuts off the right to special education once a student reaches age twenty-one.

In sum, there are three separate reasons why New Hampshire school districts may have no legal duty to provide special education beyond a student's twenty-first birthday.

- The legislature neglected to amend RSA 186-C:9.
- As my June 23, 2022 letter explains, it is debatable whether the IDEA compels New Hampshire to provide special education beyond a student's twenty-first birthday.
- Assuming that the IDEA or state law confers a right to special education beyond a student's twenty-first birthday, this expansion of the population eligible for special education implicates Part 1, Article 28-a of the New Hampshire Constitution. Article 28-a prohibits the State from imposing new unfunded mandates on school districts. My June 23, 2022 letter explains why raising the upper age limit for special education is a state mandate, not a federal mandate. SB 394 and HB 1513 offer full state funding, but only for the 2022-23 school year.

I urge school districts to consult with their attorneys regarding those potential defenses.

We are waiting to see whether the New Hampshire Department Health and Human Services (NH DHHS) and its area agencies will now deny adult services

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under RSA 171-A to clients with autism or intellectual disabilities younger than age 22. Those agencies have heretofore denied adult services, such as community-based residential placements, to students under age 21 who were still receiving special education. Raising the *maximum* age for special education may consequently have the effect of raising the *minimum* age for adult services under RSA 171-A.²

I am not suggesting that raising the upper age limit for special education is a bad idea. The question is whether the State employed proper means to achieve that end. The NHASEA supported HB 1513 and SB 394, subject to two conditions: (a) that the State pay the increased costs; and (b) that the legislature direct NH DHHS and its area agencies to offer community-based residential placements to young adults still receiving special education. Sadly, the legislature ignored those pleas.

Very truly yours,

Jerry

Gerald M. Zelin

² A case pending before the New Hampshire Supreme Court, *Verrill v. New Hampshire Department of Health and Human Services*, challenges NH DHHS's policy of denying adult services to clients with autism or intellectual disabilities who are still receiving special education.