

# NEW YORK STATE EXPANDS FAPE ENTITLEMENT THROUGH STUDENTS' 22ND BIRTHDAY

*Hodgson Russ Special Education Alert*  
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On July 6, 2023, the New York State Education Department (“NYSED”) issued a formal opinion of counsel, announcing its expansion of school districts’ obligation to provide a free appropriate public education (“FAPE”) in accordance with the Individuals with Disabilities Education Act (“IDEA”). The opinion formally recognizes and adopts a 2021 decision of the Second Circuit Court of Appeals, interpreting Connecticut law to require the provision of FAPE until a student’s 22nd birthday, a year longer than the previous entitlement under New York law. Importantly, NYSED has not yet provided guidance on when this opinion will begin to effect student eligibility, or whether it will create a retroactive obligation for districts to re-enroll students who previously “aged-out” of FAPE, but are currently still under the age of 22.

## **I. The Previous Standard for “Aging-out” of New York State Public Schools**

The IDEA requires that public schools throughout the United States provide FAPE to all students with disabilities residing within the state aged “3 through 21 inclusive.” Previously, the New York State Education Law interpreted this provision of the IDEA to require the provision of FAPE for students “over five and under twenty-one years of age who ha[ve] not received a high school diploma.” Thus, New York law has previously treated the phrase “21 inclusive” until age 21.

## **II. NYSED Formal Opinion of Counsel**

NYSED’s recent opinion expands the FAPE entitlement to students with disabilities until age 22 in light of a recent decision from the Second Circuit Court of Appeals. In that decision, *A.R. v. Connecticut Board of Education*, the Court determined that the phrase “21 inclusive” within the IDEA creates an obligation for Connecticut to provide FAPE to all students with disabilities who had not received their diploma until their 22nd birthdays.

Because Connecticut’s Compulsory Education Law is “materially indistinguishable” from that of New York, NYSED determined that the aforementioned Second Circuit decision equally applies to New York State school districts. Thus, it is NYSED’s position that New York State public school districts, too, expand eligibility until

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### III. Practical Considerations

The fact that students' birthdays will presumably occur during the middle of an ongoing school year is not addressed in the Second Circuit decision. However, NYSED's Office of Special Education nevertheless recommends that school districts consider providing FAPE through the end of the school year in which the student turns 22, or upon the receipt of a high school diploma, whichever occurs first. This guidance is merely a recommendation. It also remains unclear whether this opinion imposes an obligation on districts to retroactively seek out students who "aged out" under the previous New York State standard, but are still not yet age 22. Additional direction from NYSED, and future litigation over this issue, will be necessary to fully appreciate the practical effect of these significant changes.

If you have any questions or concerns about this decision's impact, please contact [Ryan L. Everhart](#) (716.848.1718), [Lindsay A. Menasco](#) (716.848.1214), or any other member of the [Hodgson Russ Special Education Practice](#).

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