

MEMORANDUM

TO: Joint Standing Committee on Education and Cultural Affairs
FROM: Eric Herlan, Esq. Drummond Woodsum
RE: LD 98
DATE: January 31, 2023

Senator Rafferty, Representative Brennan, and esteemed members of the Joint Standing Committee on Education and Cultural Affairs, my name is Eric Herlan and I am an attorney working for the law firm of Drummond Woodsum in Portland, Maine.

I have represented public schools in Maine for 35 years with a focus on disability law and special education. I am providing testimony neither for nor against LD 98, but instead to call issues of importance to the attention of the Committee.

Point One: The First Circuit May have Gotten it Wrong on age eligibility.

The Supreme Court has ruled that duties must be clearly stated in federal laws that are passed pursuant to Congress's spending power authority -- those laws are like a contract between the federal government and the state, and the contractual duties must be clear. This is called the Rule of Clear Statement. See *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). The Supreme Court has applied the Rule of Clear Statement to IDEA cases. See *Arlington Central School Board v. Murphy*, 548 U.S. 291, 292-96 (2006); *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176, nn. 11, 26 (1982).

LD 98 is proposing to increase the age of student eligibility up to 22, and only for students with disabilities, not for anyone else. The reason for this is a belief that this outcome is required by a ruling of the First Circuit Court of Appeals in 2019. See *K.L. v. Rhode Island Board of Education*, 907 F.3d 639 (1st Cir. 2019). The First Circuit ruled that because Rhode Island offers public education to adult students up through and beyond age 22, then the State must offer a FAPE to disabled students beyond that age.

But no one argued to the First Circuit the "Rule of Clear Statement" in *K.L. v. Rhode Island Board of Education*, nor did that Court address that Rule. Clearly the law is ambiguous on whether the availability of adult education should be a factor in determining the age of eligibility, as seen in that Court's 2-1 vote on the issue.

Point Two: LD 98 will apply to far more students that are being discussed.

The dialogue around LD 98 assumes that this law covers a small number of students with serious disabilities. But this is not accurate. The law will extend eligibility for any student with a disability who has not yet earned a high school diploma. Schools will continue to have to serve, or attempt to serve, any student who may have stopped attending school regularly, but has not dropped out. The new age eligibility would expand the school's special education "child find" obligation to include students without diplomas who may assert that they have not received a diploma because of an unrecognized disability.

Point Three: If the Legislature Enacts LD 98, Give the IEP team the authority to decide.

If the Legislature is going to approve the age change, the Legislature should leave it fully up to the IEP team what programming would look like for students between the ages of 20 and 22. In that age range, there is no comparison available for length of school day and quantity of service that those students should receive. The best comparison is adult education, and in adult education there is huge variability, depending on the student.

This should be the model here, if a change is to be made. The IEP team can make those decisions, rather than the State Legislature, and then the decisions will be made based on the individual student.

On this point, the current language in LD 98 is strong. It permits full or part time programming. Because programming has to be decided by IEP teams and set forth in student IEPs, this means that programming for these older students could be completely individualized in length and structure.

Point Four: Don't Let Adult Services Kick the Can Down the Road

There is nothing in LD 98 that makes clear that adult services in DHHS must continue to serve persons with disabilities between the ages of 20 and 22. Without any mandate for DHHS, the worry is that they will simply defer support for these people until the latest possible time, which would then be 22 rather than 20. Simply deferring the support system that will apply to adults with disabilities for two more years is not good preparation for the rest of their lives.