



Center for Community Inclusion
& Disability Studies
Maine's University Center for
Excellence in Developmental
Disabilities Education, Research and Service
(UCEDD)



May 17, 2023

Submitted Electronically

Senator Joseph Rafferty, Chair
Representative Michael Brennan, Chair
Joint Standing Committee On Education and Cultural Affairs
c/o Legislative Information Office
100 State House Station
Augusta, ME 04333

Re: Neither For Nor Against - LD 98, An Act to Update the Special Education Laws

Dear Senator Rafferty, Representative Brennan, and members of the Joint Standing Committee On Education and Cultural Affairs:

My name is Ben Jones and I am a Managing Attorney at Disability Rights Maine, Maine's protection and advocacy agency for individuals with disabilities. Thank you for the opportunity to offer testimony neither for nor against LD 98, *An Act to Update the Special Education Laws*. The following organizations have signed onto this testimony: the Autism Society of Maine, the Center for Community Inclusion and Disability Studies, Disability Rights Maine, the Maine Developmental Disabilities Council, and the Maine Parent Federation.

While we support most of the language in LD 98, we are providing this testimony to suggest that the Committee take another look at Sections 2 and 3 of the Bill. Some brief background might be helpful prior to discussing two potential concerns with LD 98. On January 21, 2021, Maine DOE issued Administrative Letter 1 which is attached to this testimony¹, and which concluded that:

¹ It is also available here: <https://mainedoews.net/2021/01/21/administrative-letter-change-in-the-ending-age-for-special-education-eligibility-effective-immediately/>.

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MAINE'S PROTECTION AND ADVOCACY AGENCY FOR PEOPLE WITH DISABILITIES

In 2018, the Court of Appeals for the First Circuit held that students are entitled to FAPE until age 22 (the so-called “federal standard”) where the state provides public education in the form of adult education to students who are under age 22 but older than the state “age out” for pK-12 education. *K.L. v. Rhode Island Board of Education*, 907 F.3d 639 (2018). The First Circuit concluded that for purposes of the IDEA, “public education” contains three basic attributes: (1) “a significant level of state or local government funding, (2) the public administration or oversight of the educational services” and (3) the education of students “up to the level of academic proficiency associated with the completion of secondary school.” *Id.* at 642, 644.

Maine’s adult education system meets the First Circuit’s definition of “public education” as it receives significant state and local government funding, is administered by the Department of Education and local public entities (primarily school administrative units either alone or in collaboration), and provides coursework that allows students to complete and receive their high school diplomas. As such, there is little question that the same result would be reached by the First Circuit if Maine’s statutes were challenged.

After consulting with counsel, the Department has concluded that terminating eligibility to a free, appropriate public education at the end of the school year in which a student turns 20 pursuant to 20-A M.R.S. § 5201(1) years is inconsistent with the IDEA as interpreted by the First Circuit in *K.L. v. Rhode Island Board of Education*, 907 F.3d 639 (2018).

In our view, this was the correct decision. And in any event, this is the law unless and until either the First Circuit reverses itself or the Supreme Court holds otherwise. As a result, we believe the following statement is accurate, whether or not LD 98 passes as written, gets amended, or fails: In Maine, a student with a disability (as defined by the Individuals with Disabilities Education Act) who is eligible to receive special education services, is entitled to a free and appropriate public education (FAPE)² until one of two things happens: 1) they receive a

² The definition of a FAPE was most recently determined by the Supreme Court in *Endrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017). There are many good resources to aid in understanding this decision, including the following:

1. *Endrew Decision Creates Important New Opportunities for Students with Disabilities*, Bazelon Center for Mental Health Law (2017), available at: https://cdn.ymaws.com/www.copaa.org/resource/resmgr/docs/accessible_2017/Endrew_paper_LH_9-8-17-1.pdf
2. *Questions and Answers (Q&A) on U. S. Supreme Court Case Decision Endrew F. v. Douglas County School District Re-1*, United States Department of Education (2017), available at: <https://sites.ed.gov/idea/files/qa-endrewcase-12-07-2017.pdf>

“regular high school diploma” that is “fully aligned with State standards”³; or 2) they turn 22 years old, at which time they have aged out of IDEA services.

We are writing briefly to address the provisions of LD 98 that appear designed to update Maine statutes that implement the Individuals with Disabilities Act to reflect this changed interpretation of the law. Section 1 and Section 4 of LD 98 both make a simple change to the age, from 20 to 22. But Section 3 of the bill takes a different approach and is likely to create confusion regarding requirements under federal law.

We suggest that the Committee amend the bill to strike the following proposed language in Section 3: “by means of appropriate educational programming, including transitional programs. Educational programming may be full-time or part-time and must be equitable to that provided to typically developing same age peers. Transitional programs include the delivery of special education services by qualified individuals.” There is no need to do anything more than was done in Sections 1 and 4 – change the number from 20 to 22.

We are concerned that this language (“must be equitable to that provided typically developing same age peers”) is already being interpreted by schools to mean that the requirement to provide a free and appropriate public education is somehow lessened for students aged 19, 20 and 21. Families have reported that, in the time since this bill was proposed, schools are taking the position that they are only required to provide the amount of service that is provided to students without disabilities through adult basic education classes and so they are proposing removing students from full time special education programs and instead offering just a couple hours of educational experiences per week.

But there is only one standard for a free and appropriate public education (FAPE).⁴ And LD 98 cannot and will not change that⁵ since it is federally defined. The nature of the right to a FAPE does not change arbitrarily based on the age of the student. In addition, the proposed language in

³ See: 34 C.F.R. 300.102 (“the term regular high school diploma means the standard high school diploma awarded to the preponderance of students in the State that is fully aligned with State standards, or a higher diploma, except that a regular high school diploma shall not be aligned to the alternate academic achievement standards described in section 1111(b)(1)(E) of the ESEA. A regular high school diploma does not include a recognized equivalent of a diploma, such as a general equivalency diploma, certificate of completion, certificate of attendance, or similar lesser credential.”)

⁴ See Footnote 2 for more information about the FAPE standard under the IDEA. In addition, the IDEA statutory definition of a FAPE can be found at 20 U.S.C. 1401(9)(“ The term “free appropriate public education” means special education and related services that—(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.”)

⁵ Unless of course Maine wanted to raise the standard for a FAPE – Maine can exceed the federal floor but not dip below it.

Section 3 is inserted into language taken directly from federal law that outlines the requirement and legal presumption that children with disabilities receive their education “to the maximum extent appropriate” in integrated settings.⁶ This is a core federal requirement. And by inserting state language that is vague and undefined⁷ into a core requirement of the IDEA, there is a very real risk that any resulting confusion will result in compliance issues at the local level. The Committee should consider simplifying LD 98 by removing this proposed language.

Finally, Section 2 of the bill changes longstanding language addressing the requirement to provide equal educational opportunities to children with disabilities, instead proposing to use the phrase “for an appropriate education” throughout. It is not clear why this change is being proposed and little to no attention was paid to it in written testimony, but the use of the word ‘appropriate’ might cause some confusion regarding the understanding of what constitutes a “free and appropriate public education” which, as discussed above, is a term of art under federal law. We suggest that Section 2 of LD 98 be deleted.

We will be at the work session and would be happy to discuss this further if that would be helpful.

Sincerely,

Cathy Dionne, Executive Director, Autism Society of Maine
Alan Cobo-Lewis, Director, Center for Community Inclusion and Disability Studies, University of Maine
Ben Jones, Managing Attorney, Disability Rights Maine
Nancy Cronin, Executive Director, Maine Developmental Disabilities Council
Carrie Woodcock, Executive Director, Maine Parent Federation

⁶ See: 20 U.S.C. 1412(a)(5)(A)(“ To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”

⁷ The inserted language (“by means of appropriate educational programming, including transitional programs. Educational programming may be full-time or part-time and must be equitable to that provided to typically developing same age peers. Transitional programs include the delivery of special education services by qualified individuals.”) raises many questions, including: what does appropriate educational programming mean? Is this equivalent to a free and appropriate public education? What are transitional programs? Where are they defined? What is the definition of a full-time program – 40 hours/week? 30 hours? What is the definition of a part time program? And do schools get full per pupil funding for students in part time programs? If so, do they get full funding for a student in a part time program of 2hrs per week? What does it mean for programming to be equitable to same age peers without disabilities? Why is this placed in the middle of language related to the least restrictive environment? Does it change those requirements? Etc.



ADMINISTRATIVE LETTER: Change in the Ending Age for Special Education Eligibility – Effective Immediately

ADMINISTRATIVE LETTER

Administrative Letter: 1

Policy Code: IHBEA

To: Public School Administrators

From: Pender Makin, Commissioner

Date: January 21, 2021

Subject: Change in the Ending Age for Special Education Eligibility – Effective Immediately

The Individuals with Disabilities Education Act (IDEA) requires states to provide “[a] free, appropriate public education . . . to all children with disabilities residing in the State between the ages of 3 and 21 inclusive[.]” 20 U.S.C. § 1415(a)(1)(A). IDEA permits an exception to this general age range: “[t]he obligation to make a free, appropriate public education available to all children with a disabilities does not apply with respect to children . . . [aged] 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to [such] children[.]” 20 U.S.C. § 1415(a)(1)(B)(i).

Maine’s generally applicable age-eligibility statute states that students are eligible for a pK-12 public education until the end of the school year in which they turn 20 years old. 20-A M.R.S. § 5201(1). As a result, Maine has historically terminated a student with a

disability's eligibility for a free, appropriate public education (FAPE) at the end of the school year in which they turn 20.

In 2018, the Court of Appeals for the First Circuit held that students are entitled to FAPE until age 22 (the so-called "federal standard") where the state provides public education in the form of adult education to students who are under age 22 but older than the state "age out" for pK-12 education. *K.L. v. Rhode Island Board of Education*, 907 F.3d 639 (2018). The First Circuit concluded that for purposes of the IDEA, "public education" contains three basic attributes: (1) "a significant level of state or local government funding, [] (2) the public administration or oversight of the educational services" and (3) the education of students "up to the level of academic proficiency associated with the completion of secondary school." *Id.* at 642, 644.

Maine's adult education system meets the First Circuit's definition of "public education" as it receives significant state and local government funding, is administered by the Department of Education and local public entities (primarily school administrative units either alone or in collaboration), and provides coursework that allows students to complete and receive their high school diplomas. As such, there is little question that the same result would be reached by the First Circuit if Maine's statutes were challenged.

After consulting with counsel, the Department has concluded that terminating eligibility to a free, appropriate public education at the end of the school year in which a student turns 20 pursuant to 20-A M.R.S. § 5201(1) years is inconsistent with the IDEA as interpreted by the First Circuit in *K.L. v. Rhode Island Board of Education*, 907 F.3d 639 (2018).

Effective immediately, Maine will implement the "federal standard" and provide FAPE to eligible students until their 22nd birthday.

All school administrative units must notify adult students who would have previously "aged out" of special education on June 30, 2021 of their right to receive a free, public education until either they receive a regular high school diploma or their 22nd birthday, whichever comes first.

The Department will be providing technical assistance around the provision of FAPE beyond age 20. For more information, contact Erin Frazier, State Director of Special Education Birth to 22, at erin.frazier@maine.gov.

Special education counts and costs for students over 20 will be counted under Title 20 A §15681-A.2. Students 5-22 are now part of your child count and SAUs will receive state

subsidy based on this count.

Posted on **January 21, 2021**

Previous

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