THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT

Office of Counsel

No. 242

Formal Opinion of Counsel

The State Education Department (SED) has received multiple questions regarding the effect of the Second Circuit Court of Appeals' decision in *A.R. v. Connecticut Board of Education*[1] on the responsibility of public schools to provide special education to students over the age of 21 who have not received high school diplomas. As described herein, that decision requires that public schools in New York provide special education and related services to resident students with disabilities until age 22, or the day before the student's 22nd birthday.

In the *A.R.* decision, the Second Circuit held that Connecticut was required to provide a free appropriate public education (FAPE) to all children with disabilities who had not received high school diplomas until their 22nd birthdays. The court relied upon a previous case holding that the phrase "3 through 21 inclusive" in the Individuals with Disabilities Education Act ("IDEA") means every day up and until a student's 22nd birthday (i.e., up to 21 and 364 days).[2] It additionally held that the "public education" owed to these students includes services:

> (1) at public expense with significant state or local governmental funding;
> (2) under the administration, supervision or oversight of a state educational agencies; and
> (3) with the objective of educating students up to the level of academic proficiency associated with the completion of secondary school.

New York State law defining eligibility for special education is materially indistinguishable from the Connecticut law challenged in *A.R.* Education Law § 4402 (5) provides that eligibility for special education services lasts only until the conclusion of the school year in which a student turns 21.[3] Additionally, New York, like Connecticut, offers publicly funded adult education programs to non-disabled students in this age group. As such, the holding of *A.R.* that the interaction between federal law (IDEA) and State law (services for adults) required public schools in Connecticut to provide special education and related services to resident students with disabilities at least until their 22nd birthdays is equally applicable in New York.

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[1] *A.R. v. Connecticut State Board of Education*, 5 F.4th 155 (2d Cir 2021).
[2] *St. Johnsbury Acad. v. D.H.*, 240 F3d 163, 168 (2d Cir 2001) (emphasis added).
[3] The law additionally states that a student with a disability eligible for extended school year services who reaches age twenty-one in July or August is only entitled to special education services "until the thirty-first day of August or until the termination of the summer program, whichever shall first occur first."

The fact that students' 22nd birthdays may fall at any point during a school year, however, is a complication not addressed by the *A.R.* decision. While not required by the decision, SED's Office of Special Education recommends that school districts consider providing such services through the end of the school year in which the student turns 22 or upon receipt of a high school diploma, whichever occurs first. This issue should be part of the larger discussion between schools and families concerning students' transition "from school to post-school activities."[4]

Dated July 6, 2023

[4] 34 CFR 300.43 (a) (1); *see generally* N.Y. State Educ. Dep't Office of Special Education, "Transition from School to Post School for Students with Disabilities," https://www.nysed.gov/special-education/transition-school-post-school-students-disabilities (last accessed Jul. 6, 2023).