

NEW YORK AMENDS REGULATIONS FOR HOMEBOUND INSTRUCTION FOR PUBLIC SCHOOL DISTRICTS

INSIGHT

New York State recently updated the Commissioner's Regulations related to providing homebound instruction for kindergarten through age 21 students. Homebound instruction is temporary education, typically provided in the form of tutoring, to students who are medically unable to attend school and are either restricted to their homes or placed in hospitals or other institutions. Students are entitled to homebound instruction from their school district of residence when it is anticipated they will be unable to attend school in person for at least ten days during a three-month period due to illness or injury. Homebound instruction must be provided by a New York State-certified teacher.

The updated regulations include new requirements for considering parent or guardian requests for homebound instruction and the provision of homebound instruction. Perhaps one of the most notable changes is the increase to the amount of homebound instruction that must be offered to students. Effective July 1, 2023, the minimum requirements for homebound instruction at the elementary level will increase from five hours to 10 hours per week, and at the secondary level, will increase from 10 hours to 15 hours per week. Districts must begin providing instruction within five days of receipt of a parent/guardian request for homebound instruction when such requests are granted. This new requirement will compound staffing challenges for school districts struggling to secure teachers for their current home instruction caseload. One potential solution to such shortages is the explicit provision in the new regulations allowing for the delivery of homebound instruction using remote modalities.

The updated regulations also provide new procedures for parent and guardian requests for homebound instruction. Such requests must be in writing and include written medical verification from the student's treating medical provider. Importantly, parents or guardians are now required to provide consent for the district's medical director to directly contact the student's treating health care provider to discuss the request for homebound instruction. Parent or guardian requests for homebound instruction may be denied if they refuse to provide such consent. Parents or guardians may appeal a denial of homebound instruction to the school district's board of education within 10 days of receiving the denial. Homebound instruction must be provided to a student during a pending appeal.

Upon a decision to grant a request for homebound instruction, the district must consult with the parent or guardian to create a written instruction delivery plan to continue the student's academic progress. The plan must include the number of hours per week and per day the student will receive services, the method the instruction will be delivered, where the instruction will be delivered, and an explanation on how the services will maintain academic progress. The parent or guardian may request less than the required amount of tutoring; however, the district must review the instruction delivery plan monthly to determine whether the amount of instruction may be increased to comply with the regulatory requirements.

Many districts have existing policies or procedures related to temporary homebound instruction. It is advisable for districts to review and update such procedures to ensure compliance with the new regulations.

Harris Beach's [K-12 Education Industry Team](#) continues to track important education issues throughout New York State. Join the team July 19 at 9 a.m. for a [webinar on the 10 most cutting-edge special education issues](#) likely to face teachers and school administrators in the 2023-2024 school year.

If you have questions about this legal alert or related education matters, please contact [Anne M. McGinnis](#), at (585) 419-8613 and amcginnis@harrisbeach.com, [Jeffrey J. Weiss](#) at (716) 200-5141 and jweiss@harrisbeach.com, or the Harris Beach attorney with whom you usually work. Summer associate Dylan Feliciano contributed to this legal alert.

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NEW YORK ISSUES LEGAL OPINION THAT SCHOOL DISTRICTS PROVIDE SPECIAL EDUCATION SERVICES UNTIL AGE 22

INSIGHT

New York's State Education Department recently issued a recommendation that school districts provide special education services to some students with disabilities through age 22: an additional year that will likely impact district budgets.

The recommendation comes after a U.S. Second Circuit Court of Appeals decision holding that Connecticut must make available a free appropriate public education (FAPE) until age 22 for students with disabilities (SWDs) who had not received a high school diploma.

The longstanding requirement in New York was that students with disabilities are entitled to special education programs and services until they either receive a Regents or local high school diploma, or upon the conclusion of the school year in which they turn 21, whichever occurs first. Case law also provided school districts the authority to provide SWDs with compensatory education and services beyond the age of 21 in circumstances in which it was determined that compensatory services were necessary to address the school district's previous failure to provide FAPE.

This general services provision was first realigned due to the COVID pandemic, when the Board of Regents advised districts to continue to provide special education services and programs to students who turned 21 during the pandemic since they may have not met the goals of their individualized education program ("IEPs") for that year. Subsequent legislation authorized districts to provide educational service in the 2021-2022 and 2022-2023 school years to SWDs who turned 21 during the 2019-2020 or 2020-2021 school year. Statutes now set forth that school districts may provide these services to eligible students, who would have previously aged out by the end of the 2021-2022 school year, until they "complete" their IEPs or turn 23, whichever occurs first.

DECISION IN CONNECTICUT SPECIAL EDUCATION CASE AFFECTS NEW YORK

The scope of a district's general obligation to provide a free appropriate public education to SWDs who have not received a high school diploma up to the age of 21 was further examined in a recent case decided by the federal Second Circuit Court of Appeals in *A.R. v. Connecticut State Bd. of Education*, 5 F.4th 155 (2d Cir. 2021). While the case was based upon Connecticut statutes and the federal Individuals with Disabilities Education Act ("IDEA"), the Second Circuit Court of Appeals also has jurisdiction over New York.

The Connecticut requirements are similar to New York in that SWDs have a right to receive FAPE until they earn a high school diploma or the conclusion of the school year in which they turn 21, whichever occurs first. Connecticut, through its adult education programs (GED high school equivalency course), provides public education to nondisabled students over the age of 21 to age 22. The Second Circuit found the state is therefore required to provide educational programming to SWDs in the same age range, i.e., up to and including age 22. For SWDs, such educational programming would be FAPE, thus extending the FAPE entitlement from the conclusion of the school year in which the student turns 21 to when they reach age 22.

The Second Circuit relied upon the phrase “3 through 21 inclusive” in the IDEA, meaning every day up and until a student’s 22nd birthday (i.e., up to 21 and 364 days). Until recently, the impact of this Second Circuit decision on New York’s longstanding requirement to provide SWDs a FAPE only until they receive a diploma, or the conclusion of the school year in which they turn 21, has been unclear

NEW YORK ISSUES OPINION: SPECIAL EDUCATION SERVICES UNTIL AGE 22

On July 6, 2023, New York State Department of Education’s Office of Counsel issued a formal opinion to districts in which it fully embraced the *A.R.* decision as applicable to New York. The legal opinion explains that New York law defining eligibility for special education is “materially indistinguishable” from Connecticut law. Additionally, New York, like Connecticut, offers publicly funded adult education programs to nondisabled students in this same age group. Therefore, Counsel concludes that the holding in *A.R.* regarding the interaction between federal law as set forth in the IDEA and state law, similar to Connecticut, requires New York public schools to provide special education and related services to resident students with disabilities at least until their 22nd birthday.

The NYSED Office of Counsel goes even further, stating that students’ 22nd birthdays may fall at any point during a school year, creating a complication not addressed in the *A.R.* decision. The Office of Counsel addresses this issue by admitting that, while not required by the applicable federal court 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.”

The movement from age 21 to 22 for the provision of services for SWDs that originated due to the circumstances of the COVID pandemic, was formalized by the Second Circuit Court in the *A.R.* decision, and now officially effectuated through the Office of Counsel’s formal opinion.

This change in eligibility of services will likely have significant impact on school districts across New York. Administrators, boards of education, and special education professionals will need to plan for increasing budget allocations to fund these additional services. It remains unclear whether the Board of Regents and NYSED program offices will provide additional funding and guidance to support districts in meeting these new special education programming and service requirements.

Harris Beach’s [Special Education attorneys](#) continue to track important education issues throughout New York State. Join the team July 19 at 9 a.m. for a [webinar on the 10 most cutting-edge special education issues](#) likely to face teachers and school administrators in the 2023-2024 school year.

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NEW YORK STATE UPDATES GUIDELINES ON TRANSGENDER AND GENDER-EXPANSIVE STUDENTS

INSIGHT

The New York State Education Department (“NYSED”) released [new guidance](#) to support transgender and gender-expansive (“TGE”) K-12 students. This much anticipated update substantially expands previous guidelines issued eight years ago. Therefore, it is critical for school districts to know the key changes contained in the new guidelines and ensure their compliance with state standards.

I. NAME AND GENDER MARKER CHANGES

Compared to 2015 guidance, NYSED’s update elaborates — in greater detail — the procedures schools must follow when a TGE student wishes to change their name and gender marker from the ones assigned to them at birth. If a school fails to amend these records, NYSED warns such failure may violate New York’s Human Rights Law. The Gender Recognition Act provides that a name change order is sufficient to change a student’s name for any student record. An amended birth certificate, updated government I.D., or court order are sufficient to update student records for current and graduated students who obtained a legal name change. Records containing the student’s former name must be maintained in a separate and confidential folder or archived data location.

NYSED provides different guidance related to *minor* students who request to change their [permanent](#) records, but do not have a legal name change, as neither state nor federal law addresses whether parental consent is required in such circumstances. Accordingly, NYSED advises schools to consult with legal counsel for such requests from minor students; however, it is permissible for schools to change [non-permanent records](#) and address a minor student by their affirmed name upon request and in the absence of parental consent or a legal name change. Schools may honor requests to change school records of *non-minor* students without completing a legal name change and without parental consent. NYSED encourages school officials to clearly advise the student that making this change could result in their parent or guardians becoming aware of their affirmed name. Each request for a name or gender marker change should be documented.

Additionally, NYSED’s new guidance outlines specific procedures for certain types of school documentation. The following briefly describes how schools may respect a student’s affirmed name for these records.

- **Working Papers:** NYSED notes these papers must reflect the minor's legal name. Therefore, the school should explain to a TGE student why their legal name must be used. The school may suggest to the student to ask their employer to use their affirmed name.
- **Diplomas:** Because a high school diploma is a ceremonial certificate, NYSED permits students to use their affirmed name on the diploma upon request. However, students should be advised that their parent or guardian may see their affirmed name. Graduates may also return to request their school reissue their diploma with their affirmed name.
- **Standardized Tests:** NYSED encourages use of a student's affirmed name on standardized tests and advises schools to work with their management system provider to associate the data with a student identifier number.
- **Health Records:** NYSED asks school health records to note the student's affirmed name and gender together with the student's legal name and sex assigned at birth. School health professionals should only use the student's legal name when required (e.g., for insurance purposes).
- **IEPs and 504 records:** NYSED requires all records to include the student's affirmed name as well as the gender identity and pronouns asserted by the student. If a district cannot amend prior documentation to reflect the student's affirmed gender, any following documentation and all prior information should be updated to reflect the student's gender.

For a student's gender marker, NYSED generally discourages including such information on student-facing or school-facing records. If the school includes this information, NYSED asks schools to have a clear process setting forth the steps necessary to update their gender marker. Moreover, for accurate reporting, NYSED requests schools to work with their management system vendor to offer an "X" or nonbinary gender marker.

II. PRIVACY, CONFIDENTIALITY AND STUDENT RECORDS

Generally, the new guidance remained similar to the previous concerning the confidentiality of student records. Whenever a TGE student uses an affirmed name, the legal name must be kept confidential by the school district, and the legal name may only be released for a legitimate educational interest among school officials. Schools are encouraged to work with TGE students to identify how and to whom this information should be shared. Because some students may not have disclosed their gender identity to their caregivers, friends, or other school staff, NYSED states that school personnel should keep this information confidential unless the student explicitly states otherwise. Students should be made aware the federal Family Educational Rights and Privacy Act ("FERPA") permits parents or guardians to review educational records, including health records. A discussion about the scope of confidentiality should also occur when the student moves to another school.

Maintaining student confidentiality can be complicated by IEPs and 504 records. Because the Individuals with Disabilities Education Act ("IDEA") and Section 504 requires historical documentation of a student's education records, NYSED cautions there is a possibility of a student's gender identity being disclosed against their will.

III. INCLUSIVE POLICIES, PRACTICES AND CURRICULA

NYSED continues the general rule that gender-based policies and practices should be eliminated unless they serve a clear pedagogical purpose. However, due to changes in the law, NYSED specifies how schools may render their policies, practices, and curricula inclusive of TGE students, including within the general curricula, physical education and athletics, and health education.

IV. SCHOOL FACILITIES

NYSED's new guidance closely reflects the previous guidelines on restrooms: TGE students are entitled to use the restroom aligning with their gender identity. However, the new guidance now adds that, pursuant the Gender Expression Nondiscrimination Act ("GENDA"), schools cannot require a TGE student to use a single-stall restroom due to another person's concerns, nor require documentation for a student to use such restrooms or other school facilities, including changing areas. To comply with the Education Law, schools must designate single occupancy restroom facilities as gender neutral. It is recommended these facilities be conveniently located so a student's school day is not disrupted. Furthermore, to be inclusive of TGE students on school trips, NYSED asks school districts to consult with their school attorney on the laws of the destination state or nation.

V. ADDED DEFINITIONS

The new NYSED guidance expands on previous definitions and adds more terminology for standard use. Some of the new terms in the 2023 guidelines include, but are not limited to, affirmed name, assigned name, agender, gender expansive, intersex traits or variations in sex characteristics, nonbinary, and queer. Additionally, previously defined terms — such as transgender, gender nonconforming, and gender identity — are now elaborated upon to cover the depth and spectrum of LGBTQ identities and ranging experiences for students.

In light of NYSED's new guidelines, school districts should review current policies and practices to comply with state standards. Harris Beach's [K-12 Education Industry Team](#) continues to track important education issues throughout New York State. If you have any questions about the matters in this legal alert or any other related legal matters, please reach out to attorney [Anne M. McGinnis](#) at (585) 419-8613 and amcginnis@harrisbeach.com, attorney [Laura M. Purcell](#) at (585) 419-8730 and lpurcell@harrisbeach.com, or the Harris Beach attorney with whom you most frequently work. *Summer Associate Max Sevor helped draft this legal alert.*

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NEW YORK ADOPTS NEW REGULATIONS ON PROHIBITION OF CORPORAL PUNISHMENT, AVERSIVE INTERVENTIONS, PRONE RESTRAINT AND SECLUSION

INSIGHT

Under New York's law and regulations, there are several well-settled guiding principles for physically interacting with students with disabilities: corporal punishment is prohibited; the use of aversive interventions has been eliminated; and emergency physical interventions are permitted, but only under very limited circumstances. Plus, schools may use time-out rooms for certain students, but only when recommended by the Committee on Special Education and in accordance with a legally mandated district policy.

Based on recent guidance from the United States Department of Education, in July 2023 the Board of Regents adopted a series of amendments to Parts 100 and 200 of the Regulations of the Commissioner of Education designed to further ensure student safety during all instances of physical intervention. The July 17, 2023 [Board of Regents Item](#) sets forth the new regulatory language, the amended regulations, and the deleted provisions for further reference. Highlights of these changes include the following:

- Expanding the prohibition against corporal punishment to also prohibit the use of seclusion and prone restraint, which is defined as a physical or mechanical restraint while the student is in the face down position.
- Physical restraints (i.e., emergency intervention) remain permissible, but only in situations in which immediate intervention involving the use of reasonable physical force is necessary to prevent imminent danger of serious physical harm to the student or others.
- In general, physical restraint may not be used to prevent property damage, except in situations where there is imminent danger of serious physical harm to the student or others and the student has not responded to positive, proactive intervention strategies.
- Increased documentation and parental-notice requirements following the use of a physical restraint or timeout, including a debriefing amongst school administrators after each incident.
- Mandatory annual training for all staff on the school's policies and procedures related to the use of timeout and physical restraint.
- Mandatory annual evidence-based training in safe and effective timeout and physical restraint procedures for any staff member who may be called upon to implement timeout or physical restraint.
- New reporting requirements related to corporal punishment, aversive interventions, seclusion, timeout and physical restraints. This reporting shall be done through SED's Student Information Reporting System (SIRS).
- Prohibition against using physical restraint as a planned intervention on a student's individualized education program, Section 504 plan or behavioral intervention plan.
- Clarifying that these rules and prohibitions also apply to school resource officers.

These new rules went into effect on August 2, 2023. Schools are encouraged to review their policies and procedures on these practices to ensure they are compliant at the start of the school year. Harris Beach's [Education Team](#) will closely monitor this and related special education legal issues. If you have any questions about the matters in this legal alert or any other related legal matters, please reach out to attorney [Jeffrey J. Weiss](#) at (716) 200-5141 and jweiss@harrisbeach.com; attorney [Anne M. McGinnis](#) at (585) 419-8613 and amcginnis@harrisbeach.com; attorney [Andrew R. Mark](#) at (716) 200-5263 and amark@harrisbeach.com, attorney [Howard J. Goldsmith](#) at (518) 701-2736 and [hgoldsmit@harrisbeach.com](mailto:hgoldsmith@harrisbeach.com); or to the Harris Beach attorney with whom you most frequently work.

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NATIONAL LABOR RELATIONS BOARD ANNOUNCES NEW STANDARD FOR EMPLOYER HANDBOOKS, POLICIES AND WORK RULES

INSIGHT

The National Labor Relations Board ruled on August 2, 2023, that employers' workplace rules — such as those found in employee handbooks — will be evaluated under a more restrictive test that will surely impact how employers draft and apply their workplace policies. The board's decision extends to all private sector employers, both union and non-union.

By a 3-1 split, the board's decision in *Stericycle, Inc.* resets the standard by which workplace rules and policies are evaluated. Under the *Stericycle* standard, the NLRB will analyze whether an employer's rule or policy has a reasonable tendency, in the eyes of an employee, to chill or inhibit employees from exercising their Section 7 rights, such as the right to engage in concerted activity related to terms and conditions of employment. If the board finds the rule or policy has such a reasonable tendency, the rule is presumed unlawful and the burden shifts to the employer to rebut the presumption by showing that the rule advances a legitimate and substantial business interest that cannot be achieved with a more narrowly tailored rule.

HISTORY OF BOARD'S RULINGS ON WORKPLACE RULES

The *Stericycle* decision is the latest chapter in the board's back-and-forth rulings on workplace rules. In large part, *Stericycle* revives the NLRB's 2004 decision in *Lutheran Heritage*, where the board held that workplace rules would be considered unlawful when employees would "reasonably construe" a rule to prohibit their ability to engage in concerted activity protected by the National Labor Relations Act.

In 2017, the board's decision in *Boeing* (and later clarified in *LA Specialty Produce Co.*) established a balancing test that evaluated the employer's legitimate reasons for a workplace rule against the potential impact the rule would have on employee rights. *Boeing* further set forth categories of workplace rules, identifying certain rules that were presumptively unlawful and presumptively lawful.

The *Stericycle* decision explicitly overrules the Board's reasoning and balancing test established in *Boeing*. Moreover, the NLRB will apply its new standard on a case-by-case basis. As such, NLRB case law that evaluates various types of employer policies will be helpful as employers work to revise their policies and satisfy the new standard.

EXPECTED IMPACT ON EMPLOYERS

The *Stericycle* decision continues the NLRB's recent trend of overruling case law precedent in a manner that subjects common employer practices and policies to closer scrutiny. The extent to which the decision requires substantial changes to employer policies and handbooks should be evaluated on a case-by-case basis. Common policies and rules – such as those that govern workplace civility and professionalism, workplace recording and social media use – may require modification to defend against potential NLRB challenges. The NLRB stated in *Stericycle* that the new standard will apply retroactively to existing cases before the board, so we may see the impact of the decision in the very near future. In any event, the NLRB's decision warrants a fresh look at handbooks and policies that could be scrutinized under the board's new analysis.

Harris Beach's [New York Labor and Employment attorneys](#) are closely following this situation and related matters. Should you have questions about this development, please reach out to attorney [Roy R. Galewski](#) at (585) 419-8661 or the Harris Beach attorney with whom you most frequently work.

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[New York Department of Labor Releases Finalized Model Sexual Harassment Policy](#)

[The NLRB's General Counsel Issues Guidance Memorandum on Severance Agreements in Light of McLaren Decision](#)

[NLRB Update: Are Confidentiality and Non-Disparagement Clauses Now Completely Prohibited in Severance Agreements?](#)

[The FTC's Proposed Prohibition of Non-Compete Clauses and its Impact on Health Care](#)

[Federal Trade Commission's Focus on Non-Compete Clauses has Health Care Implications](#)

[FTC Takes Aim at Banning Non-Compete Clauses](#)

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