

# Child Support Beyond the Age of 21—Breaking Down New York’s New Law Extending Child Support Obligations to Age 26 for Individuals With Disabilities

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We, as practitioners, are often asked by clients whether the parent of a child can be compelled to pay child support beyond the age of 21, most commonly surrounding college expenses, graduate school expenses, or for the health care or special needs expenses for their developmentally disabled child. Until now, the answer was simple. Historically, a parent has only been chargeable for the support of a child up to the age of 21.<sup>1</sup> The age 21 limitation applies to education expenses.<sup>2</sup> This age 21 limitation also held true even if a child was disabled.<sup>3</sup>

Previously, the only exception to this limitation was when there is a voluntary, “express agreement in unmistakable terms” to extend the support obligation beyond the age of 21.<sup>4</sup> The court will enforce such an agreement but in the absence of such an agreement the court is without the authority to direct child support of any kind beyond the age of 21. That has now been changed, in limited circumstances.

On February 5, 2021, the Domestic Relations Law and the Family Court Act were amended to extend the obligation to pay child support beyond the age of 21 under certain circumstances. More specifically, DRL section 240-d and FCA section 413-b have been amended to provide that a person chargeable under the law with support of a minor child is now chargeable with the support of that child until the age of 26 “when it shall appear to the satisfaction of the court that such person is developmentally defined as defined in subdivision twenty-two of section 1.03 of the mental hygiene law . . . .”

## Why seek this additional child support?

Oftentimes a parent of a child with special needs bears the responsibility for not only additional costs for the care of that child, but also the care of that individual when they are an adult. These additional costs and expenses that are involved might not be known or anticipated at the time of a divorce. Examples of potential expenditures include:

- Medical equipment (wheelchairs, bath chairs, adaptive walkers).
- Specialists (neurologists, pediatric neurologists, developmental pediatricians, hearing specialists, orthopedics, and psychiatrists).
- Independent evaluations, which can cost a few thousand dollars, and a school district or insurance company might only pay for a portion, if at all.
- Private therapies (counseling, music therapy, applied behavior analysis (ABA) for individuals with autism

and behavioral issues, speech-language therapy, occupational therapy which can also address sensory needs, feeding therapy, physical therapy, equine therapy/animal therapy, art therapy).

- Technology needs, such as assistive technology devices.
- Additional medical or sensory tools or equipment (noise cancelling headphones, compression vests, mini trampolines).
- Prescription medications.
- Additional nutritional needs, such as a gluten-free diet.
- Transportation needs:

The family might need to consider if this is an individual who might not be able to travel independently. If not, the individual will need access to Paratransit, and there are additional costs if the individual is not covered by government benefits. In addition, if the individual cannot travel independently, potentially paying someone to travel with the individual.

- Social needs and programs for the individual to engage with peers and have a rich social life.
- Adult care: When the individual cannot be alone or can only be left alone for short durations of time, someone needs to be with them.

## What is a developmental disability for these purposes?

In order to be eligible for child support through age 26, the individual in question needs to be found developmentally disabled under Mental Hygiene Law § 1.03. Mental Hygiene Law 1.03 has four requirements:<sup>5</sup>

- 1) The individual must have a developmental disability, such as (or “attributable to”) “intellectual disability, cerebral palsy, epilepsy, neurological impairment, familial dysautonomia, Prader-Willi syndrome or autism.”<sup>6</sup>
- 2) The disability must be indefinite.
- 3) The disability must “originate”<sup>7</sup> before the individual is 22.
- 4) The disability “constitutes a substantial handicap to such person’s ability to function normally in society.”<sup>8</sup>



This last factor, the “substantial handicap to function in society,” is a crucial piece. This entails looking at whether the individual’s daily living skills are impacted to the extent and degree that the individual cannot function in society; can they travel safely independently? Can they communicate and express themselves if there is an issue or they are in pain or danger? Can they independently dress appropriately for the weather or tend to their hygiene needs? Can the individual cook and clean and take care of their living space? Can the individual live alone?

These are not black and white questions, but the core of the question is whether this individual can or cannot function in society independently because of their disability. A diagnosis alone is not sufficient, as some high functioning individuals with disabilities can function in society without a “substantial handicap.” Therefore, a family wants to make sure that not only is the diagnosis established by the time the individual is 22, but it is clear the individual has severe daily living skills issues.

As the statute states, the way a family does this is by providing the judge with a report from a physician, a psychologist, or others enumerated. This can be a neuropsychological report, a psychological report, or it is unclear whether a written report analyzing information from previous such reports will suffice. What a client will want to have detailed in their report is a diagnosis, and it might be prudent to have a cognitive assessment, but the critical component is an adaptive skills assessment such as a Vineland or Adaptive Behavior Assessment Scale (ABAS). These assessments quantitatively detail and describe how severely deficient the individual’s daily living skills are across several domains, such as independent living, communication, and socialization.

The Office for People with Developmental Disabilities (OPWDD) uses the exact same disability criteria to determine eligibility for their services. This is the agency in New York that provides funding for services for individuals (including residential placements) who have developmental disabilities, to continue to gain skills and services and lead rich and full lives. Therefore, if an individual *has* been found eligible by OPWDD, that determination letter is something a parent should also submit to further bolster the individual’s established need. For comparison, OPWDD deems a person to have a “substantial handicap” if their scores on a Vineland or ABAS fall in around the second percentile or lower, or with a standard score of 70.<sup>9</sup>

If the individual receives SSI (Supplemental Security Income) or has a 17-A Guardianship in place, those are also pieces of information the judge should know. However, the disability criteria<sup>10</sup> for 17-A Guardianships and SSI are different than the MHL definition this law and OPWDD use.

Therefore, a family seeking additional years of child support under this new law needs a report—likely an evaluation but it is unclear if a report summarizing information will also be accepted—that details and confirms the individual’s diagnosis, that the disability is indefinite, that it is or was present before the individual became 22, and that the disability impacts the individual’s ability to substantially function in society. For this last piece the person writing the report really should be saying and giving examples versus a mere conclusory statement. The parent here is requesting additional child support for their child, and this goes not only toward that need, but potentially the amount necessary, and these details matter.

## What about individuals living at school or adult residential placements?

In addition to the individual having a developmental disability, the individual must, per the new law, “reside[] with the person seeking such support, and is principally dependent on such person for maintenance.”<sup>11</sup> That is, the individual with a disability lives with the parent seeking the additional years of support and cannot live independently or support themselves (the report and adaptive living assessment scores will help show this latter part as well).

Therefore, the individual in question must be actually living with the parent who is seeking this support. That is an important piece that cannot be overlooked. Some individuals who have such severe needs that they are “severely and permanently” disabled and are “unable to live independently” might be living and residing at a residential school until they age out of school; they might then go on to live in an adult residential placement through OPWDD, and never return to live at home. These individuals, then, would not be eligible for this child support under this law. Similarly, an individual might, at age 24, leave his or her parent’s home to go live in an adult placement through OPWDD. While the individual would still be considered developmentally disabled and dependent on the parent, he or she would no longer actually reside with the parent. Therefore, for the individual who is living in a residential placement, *and is not coming home*, it appears they will not meet this statute’s requirement and the non-custodial spouse will likely not need to provide support. However, *if* the individual does come home on weekends, breaks, or any holidays, that is crucial to note for the court because the parent with whom individual lives with during those breaks should ask for support during those times.

If a family has a child with severe disabilities, and that individual could eventually live in a residential placement before he or she turns 26, the family can always agree in a settlement agreement to keep child support payments through the time the child turns 26. That is even if the child does eventually reside in residential placement, or if he or she moves to a group home after he or she graduates. This is to continue to prepare for and support the individual, and, the agreement can state in that instance, that money can go into a special needs trust for the individual.

It is unclear if this will be an issue that needs to be litigated—that is, if an individual does only come home on weekends and holidays to one custodial parent, can that parent obtain additional support. Families and parents should think about this question when entering into divorce agreements, and try and resolve issues and plan ahead, if possible.

## Special Needs Trusts and Additional Child Support

As stated above, parents can put money for a child with a disability into a special needs trust (SNT). An SNT is New York’s mechanism for families to be able to place money in a trust specifically for individuals with a disability, without

this money impacting or interfering with the individual’s ability to receive government benefits<sup>12</sup> such as SSI (Supplemental Security Income), which has an asset cap. An SNT is a great way to life plan for an individual with special needs and to prepare for their future. It can also be crucial to ensure the individual can receive SSI, which is a means-based program, because once the individual turns 18, the individual’s assets are looked at to determine to whether they meet the eligibility criteria for SSI. In addition, with SSI comes Medicaid, a government health insurance program. While an unmarried individual with a disability can remain on their parent’s private insurance indefinitely,<sup>13</sup> if something happens, or when their parent passes away, this is a great back up option and should be taken advantage of if the individual is eligible to be covered under Medicaid.

An issue can arise, however, because child support payments can impact an individual’s SSI status after a child turns 18, through when a parent has a legal responsibility to support the child. In New York that has been through 21, but now that might be through 26 for certain individuals. Therefore, if child support payments are going to be taking place after a child is 18, whether through the time the child is 21 or 26, we strongly encourage families and parents to speak with an elder law and special needs planning attorney who practices in this area, in order to discuss putting these payments into an SNT for the individual, and the type of SNT that is appropriate (a First Party SNT, a third party SNT, the differences, and which is appropriate given the specific child support circumstances). This way, the payments do not impact the individual’s government benefits, and the payments are still being made to improve the individual’s life, including being put into the SNT, which can be used for the benefit of the individual.<sup>14</sup>

The new law itself also states:

THE COURT SHALL HAVE DISCRETION TO ORDER THE PAYOR PARTY TO MAKE SUPPORT PAYMENTS EITHER TO THE PETITIONER OR TO THE TRUSTEE OF AN “EXCEPTION TRUST” AS DEFINED IN . . . 7-1.12 OF THE ESTATES, POWERS AND TRUSTS LAW [“EPTL”] IF SUCH DIRECTION WOULD ASSIST IN MAXIMIZING ASSISTANCE TO THE CHILD<sup>15</sup>

The “exception trust” found in section 7-1.12 of the EPTL are SNTs. However, before asking the court to order payments into any of the enumerated “exception trusts” listed in the statute, we strongly recommend the family or parent speak with an *experienced* estate planning and special needs attorney.

## When To Petition the Court for This Type of Child Support

The court has jurisdiction to determine proceedings brought by petition and Order to Show Cause in Supreme Court pursuant to DRL § 241 (1-b) or in Family Court pursuant to FCA § 413. More commonly known as the Child

Support Standards, we will continue to address how to apply the statute and deviations thereto. The amended statute is, however, silent as to when the petition and Order to Show Cause is to be filed. Must a parent/caregiver wait until the child turns 18 or 21 or can it be filed in advance of those ages?

It is unclear if a court will decide this question (does the child need support through the individual's 26th birthday when the individual is 18 or younger, or if the court will wait to decide this question until the individual turns 21. Between 16, 18, and 21, the landscape might change, and a judge might not want to preemptively order support that might not be necessary.

If a judge does not order the support until the individual is 18, or 21, once the individual reaches that age, the parent with whom the individual resides should submit another petition to the court with all the necessary support to show the individual meets the criteria and request a modification in the support order to extend support through 26. There is no downside to requesting the order go through to the age of 26, if a parent can show the court the individual meets the criteria; the worst case is the court says not at that time, and the parent then makes another petition in a few years showing the need is still present; the best case scenario is the court does include in the order that child support must continue through 26.

If a judge does order this type of support and the situation changes (for instance, the individual no longer resides at home), a parent can always request the court modify the order to terminate support. In addition, the parents can also agree *not* to modify the order and continue support payments even though the individual no longer meets the statutes criteria and place the funds into an SNT. Parents are

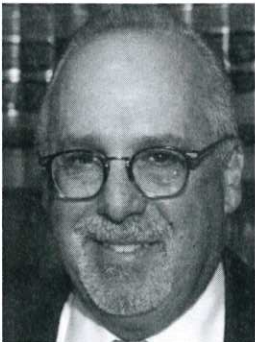
always free to enter into agreements for support past 21 (or 26), and courts have routinely enforced support agreements for individuals that go past 21.

## Conclusion

In conclusion, this new law is an important expansion of the obligation to pay child support, and a great tool for parents of children with special needs. However, before jumping in with a support application, both practitioners and families need to be fully familiar with the pros and cons that might result. Moreover, it is paramount that families consult with an attorney familiar with and who has significant experience with adults with developmental disabilities, special needs trusts, and the myriad of intersecting state and federal laws if this new law impacts them and their family.

## Endnotes

1. See DRL section 323; FCA § 413.
2. *Powers v. Wilson*, 56 A.D.3d 642, 868 N.Y.S.2d 241 (2nd Dep't 2008); *Calvello v. Calvello*, 20 A.D.3d 525, 800 N.Y.S.2d 429 (2nd Dep't 2005); *Poli v. Poli*, 286 A.D.2d 720, 730 N.Y.S.2d 168 (2nd Dep't 2001).
3. See *Beiter v. Beiter*, 142 Misc 2d 954.
4. *Genther v. Genther*, 180 A.D.2d 662, 579 N.Y.S.2d 707 (2nd Dep't 1992). See also *Sinnott v. Sinnott*, 194 A.D. 3d 868, 149 N.Y.S.3d 441 (2nd Dep't 2021); *Miller v. Miller*, 299 A.D.2d 463, 750 N.Y.S.2d 112 (2nd Dep't 2002).
5. N.Y. Mental Hyg. Law 1.03(22).
6. *Id.* It can also be "attributable to any other condition of a person found to be closely related to intellectual disability because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of intellectually disabled persons or requires treatment and services similar to those required for such person" or "is attributable to dyslexia resulting from a disability described in subparagraph one or two of this paragraph."
7. *Id.*
8. *Id.*
9. Thomas A. Maul, *OMRDD Advisory Guideline—Determining Eligibility for Services: Substantial Handicap and Developmental Disability*, Aug. 10. 2001.
10. SCPA 1750-a (1); 20 CFR 404.1505.
11. N.Y. Legis. Assemb. A898. Reg. Sess. 2021-2022 (2021) <https://www.nysenate.gov/legislation/bills/2021/S4467>.
12. N.Y. Est. Powers & Trusts Law 7-1.12.
13. N.Y. Ins. Law § 3216(a)(4).
14. See, e.g., *Barlow v. Barlow*, 112 A.D.3d 817, 976 N.Y.S.2d 573 (2013); *Lew v. Sobel*, 172 A.D.3d 1208, 1209, 102 N.Y.S.3d 619, 621 (2019) ("It is fundamental public policy in New York that parents are responsible for their children's support until age 21.") (internal citations omitted); N.Y. Est. Powers & Trusts Law 7-1.12; and SI 01120.200 Information on Trusts, Including Trusts Established Prior to January 01, 2000, Tru, SSA POMS SI 01120.200 ("A legally assignable payment that is assigned to a trust or trustee is income for SSI purposes, to the individual entitled or eligible to receive the payment, unless the assignment is irrevocable. We consider assignment of payment by court orders to be irrevocable.")
15. N.Y. Legis. Assemb. A898. Reg. Sess. 2021-2022 (2021) <https://www.nysenate.gov/legislation/bills/2021/S4467>.



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