

Developments in New Hampshire Education Law – State Statutes

Monday, October 18, 2021
2021 Bradley F. Kidder Law Conference

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DEVELOPMENTS IN NEW HAMPSHIRE EDUCATION LAW: STATE STATUTES

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September 15, 2021

I. Introduction

The 2021 legislative session was once again a busy one with over 225 new bills enacted into law. The legislature made numerous changes in the statutes that impact New Hampshire public schools, such as a revisions to the school assignment laws, new training requirements on criminal history record checks, and increased reporting requirements.

This legislative session also produced the budget for the state. This means that the legislature set the budget that would govern state funding and spending for the next two years. House Bill 2 accompanies the budget and produces numerous additional changes to state statutes, many of which seem not to be related to the state budget. This 139 page bill was signed into law by Governor Sununu on June 25, 2021, and includes Education Freedom Accounts, the so-called “divisive concepts” law limiting school district trainings and teachings, and the closure of the Sununu Youth Services Center.

This handout discusses many of the changes to the law which impact New Hampshire’s public schools; it does not attempt to analyze the impact that the state budget has on school funding for the upcoming fiscal years.

II. Limits on School District Trainings, Programming, and Instruction

The bill commonly referred to as the “divisive concepts” law was embedded in House Bill 2, despite having no relation to the state budget.¹ With the passage of House Bill 2, this new statute limits what school districts can teach students and how school districts can train personnel regarding race, gender, disability, and other protected characteristics.² The law also applies to any employee training, including training conducted by an outside contractor.³

¹ N.H. Laws of 2021, Chapter 91, Sections 297 and 298 (enacting RSA 354-A:29 - :34 and RSA 193:40).

² *Id.*

³ *Id.*

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Specifically, the law prohibits training, teaching, instructing, inculcating, advocating, or compelling one to express belief in or support for the following ideas:

- That people of one age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin, are inherently superior or inferior to people of another age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin;
- That an individual, by virtue of his or her age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
- That an individual should be discriminated against or receive adverse treatment solely or partly because of his or her age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin; or
- That people of one age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin cannot and should not attempt to treat others equally and/or without regard to age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin.

This new statute applies the above restrictions to three areas: employee trainings, programming to the public, and classroom instruction.

With regard to employee training, the law prohibits public employers from teaching, advocating, instructing, or training any of the above concepts. There is an exemption for “sensitivity training” that is “based on the inherent humanity and equality of all persons and the ideal that all persons are entitled to be treated with equality, dignity, and respect.”⁴ Unfortunately, this carve-out does not address many of the concerns that districts are likely to face in attempting to comply with this law.

An employee who refuses to participate in a program or training that violates this law may not be subject to any adverse employment action, warning, or “discipline of any kind” for their refusal.⁵ Furthermore, “any person aggrieved” by an act made unlawful under this law, may pursue all remedies available under the State Commission for Human Rights Statute (RSA 354-A), available through the New Hampshire Superior Court (RSA 491), the Whistleblower’s Protection Act (RSA 275-E), the Public Employee Freedom of Expression Law (RSA 98-E), as well as

⁴ N.H. Laws of 2021, Chapter 91, Section 197 (enacting RSA 354-A:29, II).

⁵ *Id.* (enacting RSA 354-A: 33).

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“any other applicable common law or statutory cause of action.”⁶

With regard to instruction to students, the law added a new section to the anti-discrimination portions of RSA 193. The new section, RSA 193:40, states that no student shall be “taught, instructed, inculcated, or compelled to express belief in, or support for” one of the above prohibited concepts.⁷ There is a carve-out exception for “discussing” as a part of a larger course of academic instruction, the “historical existence” of the ideas and subjects addressed in the law.⁸ If an educator, including a school administrator, violates this portion of RSA 193:40, the violation shall be considered a violation of the educator code of conduct.⁹ In addition, any person claiming to be aggrieved by this law may sue the responsible school or school district in the New Hampshire Superior Courts, or with the New Hampshire Commission for Human Rights.

Significant questions remain regarding the meaning of many of the terms included in this new law. As a result, districts are faced with questions regarding their ability to hold implicit bias training, discuss current events, and even their ability to conduct trainings on federal nondiscrimination laws. For example, a training on Section 504 of the Rehabilitation Act or the Americans with Disabilities Act will inevitably involve training employees about their legal obligation to treat certain students differently (i.e., to provide accommodations or other services) on the basis of the student’s disability; it’s unclear whether this discussion is prohibited by the divisive concepts law. In addition, it is unclear whether a training on the concept of implicit bias, which has become a popular tool in Diversity and Inclusion curricula, would violate this law.

With respect to teaching students, it remains unclear as to whether teachers are permitted to let students express a prohibited concept in the course of a class discussion, or if doing so constitutes “inculcating” the other students in the class.

This bill was highly controversial throughout the legislative session.

It remains to be seen how the law will be interpreted. The New Hampshire Attorney General recently issued a memorandum on what the statute allows and prohibits, but that memorandum is only advisory and does not have the force of law. School districts should engage in a review of their current trainings and curricula, and consult with legal counsel regarding compliance with the statute, as this law is already in effect.¹⁰

⁶ *Id.* (enacting RSA 354-A:34).

⁷ N.H. Laws of 2021, Chapter 91, Section 198 (enacting RSA 193:40).

⁸ *Id.*

⁹ *Id.* (defining “educator” as “a professional employee of any school district whose position requires certification by the state board pursuant to RSA 189:39. Administrators, specialists, and teachers are included within the definition of this term.”).

¹⁰ N.H. Laws of 2021, Chapter 91, Section 300.

III. School Choice Laws

The legislature made school choice laws a priority this legislative session. The most talked about bill, the Education Freedom Account bill, creates a new voucher program for New Hampshire students. However, there were other laws, which received little attention or fanfare during the legislative session which expand school choice, most frequently by allowing students and families to pursue enrollment in schools or programs other than New Hampshire's traditional public schools.

A. Best Interest Reassignments

A parent or guardian may apply for a best interest reassignment from the superintendent of the school district where their child resides.¹¹ In 2020, the legislature amended the best interest reassignment process. The 2020 amendments also made clear that, under the best interest reassignment, a student could only be reassigned to another public school or public academy.

This year, as a result of House Bill 388, the legislature amended the best interest reassignment law to include reassignments to "approved private schools."¹² If the student is reassigned to an approved private school as a result of a best interest determination, "the private school may charge tuition to the parent or may enter into an agreement for payment of tuition with the school district in which the child resides."¹³

B. Manifest Educational Hardship Reassignments

Any parent or guardian may request a manifest educational hardship hearing before the local school board if he or she thinks that attending school where the child is assigned will result in a "manifest educational hardship" to the child.¹⁴ In 2020, the legislature revised the definition of manifest educational hardship and revised the definition process for a parent to obtain a manifest educational hardship reassignment. Under the 2020 changes, a parent or guardian was limited to requesting that their child be reassigned to another public school or public academy.¹⁵

This year, the legislature again revised the manifest educational hardship law.¹⁶ The change arising out of House Bill 388 allows parents to request that their child be reassigned to an "approved private school."¹⁷ If the school board grants a manifest educational hardship reassignment to an approved private school, the private school "may charge tuition to the parent or may enter into an agreement for payment

¹¹RSA 193:3, I.

¹² N.H. Laws of 2021, Chapter 84, Section 1 (amending RSA 193:3, I(c), (d)(3)).

¹³ N.H. Laws of 2021, Chapter 84, Section 1 (amending RSA 193:3, I(h)).

¹⁴See RSA 193:3, II.

¹⁵ RSA 193:3, II(d), (f).

¹⁶ N.H. Laws of 2021, Chapter 84, Section 1 (amending RSA 193:3, II(d),(f)).

¹⁷ *Id.*

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of tuition with the district in which the child resides.”¹⁸ Thus, unlike the public placement options under the reassignment statute, the district is not obligated to pay private school tuition for a reassigned student.

C. Approved School Tuition Programs

If there is no public school for the child's grade in the child's resident district, the school board may contract with a public school in another district or with a private school that has been “approved as a school tuition program by the school board.”¹⁹

Historically, “approved school tuition programs” have been limited to “nonsectarian” schools. House Bill 282 removes that requirement, meaning that approved school tuition programs may include sectarian or religious schools.²⁰ The proponents of this bill believe that the nonsectarian restriction is not required due to a 2020 U.S. Supreme Court ruling, which held that public funds may not be denied to a private school based on religious control and/or affiliation.²¹

House Bill 282 also amends RSA 193:3, VI to state that a district may “either assign all children to schools that have been approved as a school tuition program, or allow each child's parent to choose a school from among schools that have been approved as a school tuition program.”²²

This law became effective August 5, 2021.²³

D. Parent Enrollment in Another District

Some districts allow for non-resident students to enroll in their district. In such circumstances, RSA 193:3, IV allows the non-resident school district to enroll the child and to charge tuition to the parent or enter into a tuition agreement with the student's resident district.

When a nonresident student is enrolled in another district's schools, the “district in which the child resides shall retain all responsibility for the provision of special education and related services pursuant to RSA 186-C.”²⁴ The law has long stated that the decision by a school district or public academy to enroll a nonresident

¹⁸ N.H. Laws of 2021, Chapter 84, Section 1 (amending RSA 193:3, VIII).

¹⁹ RSA 193:3, VI, VII.

²⁰ N.H. Laws of 2021, Chapter 106, Section 1 (amending RSA 193:3 VI and VII). House Bill 282 also amends a number of other statutes (RSA 193:1, I(d); RSA 193:4; RSA 198:4; RSA 194:27) to remove the nonsectarian requirement.

²¹ See *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020). However, that decision merely prohibits discrimination against private schools based on their *affiliation* with a religious organization and does not compel a publicly funded school choice program to include private schools that *teach* religion.

²² N.H. Laws of 2021, Chapter 106, Section 1 (amending RSA 193:3, VI).

²³ N.H. Laws of 2021, Chapter 106, Section 6.

²⁴ RSA 193:3, IV(c).

student “shall not be based, in whole or in part, on whether such pupil is a child with a disability...”²⁵ Now, House Bill 388 creates an appeal mechanism for parents who believe that a school district or public academy declined to enroll their reassigned student due to the student’s disability.²⁶ The parent may either appeal the local school board’s decision to the state Board of Education, or file a complaint with the state commission for human rights under RSA 354-A:28.²⁷ Notably, this provision does not apply to chartered public schools.²⁸

This amendment went into effect on August 17, 2021.²⁹

E. Dual and Concurrent Enrollment Programs

1. Community College System of New Hampshire Responsible for Dual and Concurrent Enrollment Programs

House Bill 2 amends the Dual and Concurrent Enrollment Program in the Community College System of New Hampshire (CCSNH).³⁰ This program permits students in grade 10-12 to earn STEM-related college credits through courses taught by either high school teachers or instructors from the CCSNH.³¹ “Concurrent enrollment” means courses taught at the high school by high school teachers approved by CCSNH, while “dual enrollment” means college courses taught by instructors from CCSNH.³²

Historically, the New Hampshire Department of Education (NH DOE) established and maintained the dual and concurrent enrollment programs. As a result of Section 311 of House Bill 2, this program is now being established by the CCSNH. Similarly, the NHDOE previously had the obligation to submit expenditure requests for this program; that obligation now falls to the chancellor of CCSNH or designee.³³ In the event expenditures for the dual and concurrent enrollment program exceed the amount appropriated by the state, Chapter 311 permits the chancellor of CCSNH to request additional funding from the Fiscal Committee of the General Court.³⁴

2. Expansion of Dual and Concurrent Enrollment Programs

House Bill 2 amends the Dual and Concurrent Enrollment Program in the

²⁵ RSA 193:3, IV(d).

²⁶ N.H. Laws of 2021, Chapter 84, Section 1 (amending RSA 193:3, III-a(d)).

²⁷ *Id.*

²⁸ *Id.*

²⁹ N.H. Laws of 2021, Chapter 84, Section 3.

³⁰ N.H. Laws of 2021, Chapter 91, Section 311 (amending RSA 188-E:25-29).

³¹ RSA 188-E:25-29.

³² N.H. Laws of 2021, Chapter 91, Section 311 (amending RSA 188-E:25).

³³ N.H. Laws of 2021, Chapter 91, Section 311 (amending RSA 188-E:29).

³⁴ N.H. Laws of 2021, Chapter 91, Section 311 (amending RSA 188-E:29).

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Community College System of New Hampshire (CCSNH).³⁵ This program permits students in grade 10-12 to earn STEM-related college credits through courses taught by either high school teachers or instructors from the CCSNH.³⁶ “Concurrent enrollment” means courses taught at the high school by high school teachers approved by CCSNH, while “dual enrollment” means college courses taught by instructors from CCSNH.³⁷

F. Credit for Coursework Completed at Other Approved Schools

House Bill 182 requires public high school principals or other high school administrators to grant credit for courses and programs that have been satisfactorily completed at other approved schools.³⁸ If a public high school denies the award of credit, the school must provide “reasonable justification for such denial.”³⁹ The bill defines “approved schools” as “all New Hampshire public schools, including chartered public schools, public academies, approved public or private tuition program schools, and all schools in Vermont and Maine that are members of an interstate school district with schools in New Hampshire.”⁴⁰

According to Senator Erin Hennessey for the Senate Education Committee, House Bill 182 “mirrors current law used to approve and deny credits from students of military families. The bill’s intent is to allow students to advance their education without having to unnecessarily repeat courses of which they have already met the competencies.”⁴¹ This law went into effect on August 17, 2021.⁴²

G. Education Freedom Accounts

The Education Freedom Accounts (EFA) bill was embedded in House Bill 2.⁴³ This creates a school-choice program by which parents of eligible students may elect to receive the amount of their student’s adequate education grant, in addition to any differentiated aid that the school would have received, for the purpose of obtaining educational “goods or services” outside of the public school.⁴⁴ The law authorizes a scholarship organization approved under “RSA 77:G”⁴⁵ to administer the program.⁴⁶ To qualify for the EFA program, a student must be:

³⁵ N.H. Laws of 2021, Chapter 91, Section 311 (amending RSA 188-E:25-29).

³⁶ RSA 188-E:25-29.

³⁷ N.H. Laws of 2021, Chapter 91, Section 311 (amending RSA 188-E:25).

³⁸ N.H. Laws of 2021, Chapter 82, Section 1 (adding RSA 193-E:3-f).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Senate Journal No. 15, pg. 444 (May 13, 2021).

⁴² N.H. Laws of 2021, Chapter 82, Section 2.

⁴³ N.H. Laws of 2021, Chapter 91, Section 431 (enacting RSA Chapter 194-F).

⁴⁴ *Id.* (adopting RSA 194-F:2, I).

⁴⁵ The legislature meant to cite “RSA 77-G.”

⁴⁶ *Id.* (adopting RSA 194-F:1, XII).

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a resident of this state eligible to enroll in a public elementary or secondary school and whose annual household income at the time the student applies to the program is less than or equal to 300 percent of the federal poverty guidelines as updated annually in the Federal Register by the United States Department of Health and Human Services under 42 U.S.C. section 9902(2).⁴⁷

This bill was initially introduced without any income restrictions, and also allowed for homeschooled students to opt-in to the program. The law, as it was enacted, restricts eligibility based on household income, and enrollment in an EFA program now automatically terminates a student's home education program.⁴⁸ However, students participating in an EFA program are not required to enroll, either full- or part-time, in a private school or nonpublic online school.⁴⁹ In fact, students enrolled in an EFA program are exempt from New Hampshire's compulsory school attendance law.⁵⁰

The parent must sign an agreement with the scholarship organization stating that the parent will provide an education for the eligible student in the core knowledge domains that include science, mathematics, language, government, history, health, reading, writing, spelling, the history of the constitutions of New Hampshire and the United States, and an exposure to and appreciation of art and music.⁵¹ The parent must also agree not to enroll the student "as a full-time student" in a public school while participating in the EFA program, to only use the funds in the EFA for qualifying expenses, to provide an annual record of "educational attainment," and to comply with the rules and requirements of the EFA program.⁵²

Qualifying expenses are limited to:

- (a) Tuition and fees at a private school.
- (b) Tuition and fees for non-public online learning programs.
- (c) Tutoring services provided by an individual or a tutoring facility.
- (d) Services contracted for and provided by a district public school, chartered public school, public academy, or independent school, including, but not limited to, individual classes and curricular activities and programs.
- (e) Textbooks, curriculum, or other instructional materials, including,

⁴⁷ *Id.* (adopting RSA 194-F:1, VI). For instance, as of July 2021, 300 percent of the Federal poverty guidelines was \$65,880 for a household of 3 and \$106,750 for a household of 6. Median family income in New Hampshire was \$97,112 in 2019, which is the most current available information for that statistic.

⁴⁸ *Id.* (adopting RSA 194-F:2, IX).

⁴⁹ *Id.* (adopting RSA 194-F:2, VIII).

⁵⁰ N.H. Laws of 2021, Chapter 91, Section 432 (amending RSA 193:1, I(g) and (h)).

⁵¹ *Id.* (adopting RSA 194-F:3, III(d)(1)).

⁵² *Id.* (enacting RSA 194-F:3, III).

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but not limited to, any supplemental materials or associated online instruction required by either a curriculum or an education service provider.

(f) Computer hardware, internet connectivity, or other technological services and devices that are primarily used to help meet an EFA student's educational needs.

(g) Educational software and applications.

(h) School uniforms.

(i) Fees for nationally standardized assessments, advanced placement examinations, examinations related to college or university admission or awarding of credits and tuition and/or fees for preparatory courses for such exams.

(j) Tuition and fees for summer education programs and specialized education programs.

(k) Tuition, fees, instructional materials, and examination fees at a career or technical school.

(l) Educational services and therapies, including, but not limited to, occupational, behavioral, physical, speech-language, and audiology therapies.

(m) Tuition and fees at an institution of higher education.

(n) Fees for transportation paid to a fee-for-service transportation provider for the student to travel to and from an education service provider.

(o) Any other educational expense approved by the scholarship organization.⁵³

The statute says that special education students who elect to participate in an EFA program shall be considered to be parentally placed students under 20 U.S.C. section 1412 of the Individuals with Disabilities Education Act.⁵⁴ The scholarship

⁵³ *Id.* (enacting RSA 194-F:2, II).

⁵⁴ *Id.* (enacting RSA 194-F:4, III). Section 1412 of the IDEA recognizes two categories of students attending private schools and not placed there by school districts. The first category consists of students whose parents do not contest that the district of residence offered a free appropriate public education (FAPE). 20 U.S.C. § 1412(a)(10)(A). The second category comprises children whose parents contend that the district of residence failed to offer a FAPE and who consequently seek reimbursement for the full cost of the unilateral placement. 20 U.S.C. § 1412(a)(10)(C). New Hampshire's EFA statute glosses over that distinction. However, the IDEA refers to only the first category as "parentally placed private school children." 20 U.S.C. § 1412(a)(10)(A)(iii). The IDEA refers to the second category as children removed by their parents from public schools and enrolled in private schools, without using the term "parentally placed." Hence one could argue that RSA 194-F:4, III, by using the term "parentally placed," lumps all EFA children into the first category. That interpretation would bar parents from later demanding that the district of residence reimburse them for tuition and transportation costs

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organization is required to provide parents with an explanation of the rights that parentally placed students possess under the IDEA and applicable state laws.⁵⁵ Thus, school districts continue to have child find obligations towards students in EFA programs, and these students are also likely eligible for equitable services.⁵⁶ However, like other parentally placed students, EFA students *probably* no longer have a right to receive special education or related services from their school district of residence.⁵⁷

When students leave the public school and enroll in an EFA program, the public school district is obligated to provide a “complete copy” of the student’s “school records” to the private school where the student is enrolled.⁵⁸ Such copy must be provided in a “timely manner.”⁵⁹ The law also states that the public school district must comply with the Family Educational Rights and Privacy Act (FERPA) when providing these records to the private school.⁶⁰

The EFA statute does not mention RSA 193:1-c, which allows students attending private schools to attend their district of residence’s public schools part-time for “curricular courses and cocurricular programs.” Thus, although the EFA statute strips the district of residence of *all* state aid tied to a student – both adequacy aid and differentiated aid – the district of residence may still incur costs educating the student, such as the cost of providing Section 504 accommodations and modifications while the student physically attends the public school.⁶¹

The EFA program was highly controversial when it was initially introduced in House Bill 20, and later as Senate Bill 130. Critics expressed concern that the entities receiving EFA funds were not subject to sufficient accountability measures, and that this program was yet a new way to divert public money from public schools and into private programs. Although there was no fiscal note for the EFA bill, proponents of

exceeding the value of the EFA voucher. In the meantime, this much is clear. *First*, the EFA statute does not *automatically* compel the district of residence to provide a FAPE while the student is parentally placed at a private school. *Second*, if the EFA statute allows parents to seek reimbursement for costs not covered by the EFA program, on the ground that the school district failed to offer a FAPE, the 90-day statute of limitations in RSA 186-C:16-b, II governs such claims.

⁵⁵ *Id.* (enacting RSA 194-F:4, III).

⁵⁶ The school district in which a private school is located must spend a pro rata share of its federal IDEA flow-through funds on IDEA-eligible students who attend that private school. 20 U.S.C. § 1412(a)(10)(A). The IDEA refers to that as “equitable services.” No such student has an *individual right* to any services from the district where the private school is located. *Id.* Rather, the school district must spend that pro rata share on IDEA-eligible students *in general* enrolled at the private school. *Id.*

⁵⁷ See note 56 above.

⁵⁸ N.H. Laws of 2021, Chapter 91, Section 431 (enacting RSA 194-F:8).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ The EFA statute includes a “phase-out provision that provides some relief to school districts in the short term. Specifically, during a student’s first year in an EFA program, the district of residence will lose only 50 percent of the state aid tied to that student, and during the second year the district will lose only 75 percent. However, these phase out grants to school districts terminate “for new EFA students receiving an EFA effective July 1, 2026.” *Id.* (enacting RSA 194-F:10).

the program, including the NH DOE, said that the law will not have a detrimental effect on school funding because reductions in school enrollment will lead to reduced costs for districts.

The EFA statute is also controversial because of its potential to spend taxpayer dollars on religious education. Two provisions in the statute open that door. The first provision, RSA 194-F:5, XVII states:

The scholarship organization shall not exclude, discriminate against, or otherwise disadvantage any education provider with respect to programs or services under this section based in whole or in part on the provider's *religious character* or affiliation, *including religiously based* or mission-based policies or *practices*.

(Emphasis added.) The second provision, RSA 194-F:7, V states:

An education service provider shall not be required to alter its creed, practices, admissions policy, or curriculum in order to accept payments from an EFA.

If the statute indeed leads to public funding for religious education, it may collide with two provisions of the New Hampshire Constitution requiring the separation of church and state.⁶² Applying the U.S. Constitution, which trumps state constitutions, the U.S. Supreme Court recently ruled that publicly funded school voucher programs may not discriminate against a private school solely on the school's *affiliation* with a religious organization. However, the Court stopped short of holding that a school voucher program must fund *religious education*.⁶³

The state Board of Education is now in the midst of adopting rules to implement the EFA statute.

H. Education Tax Credit Scholarships

RSA 77-G permits businesses to donate to certain approved scholarship organizations and receive tax credits towards certain business taxes.⁶⁴ The scholarship organization then awards scholarships to “eligible students.” An “eligible student” is defined as a New Hampshire resident who is at least five years of age and no more than 20 years of age, who has not graduated from high school, and whose annual household income is less than 300 percent of the federal poverty guidelines.⁶⁵

⁶² N.H. Constitution, Part 1, Article 6, adopted in 1784 (“no person shall ever be compelled to pay towards the support of the schools of any sect or denomination”); Part 2, Article 83, added in 1877 (“no money raised by taxation shall ever be granted or applied for the use of the schools of institutions of any religious sect or denomination”).

⁶³ *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246 (2020).

⁶⁴ RSA Chapter 77-G.

⁶⁵ RSA 77-G:1, VII.

An eligible student may receive a scholarship to attend:

- A nonpublic school, except when the student has been placed by the local school district through the special education process;
- A public school located outside of the school district in which the student resides and for which the public school is not eligible to receive an adequate education grant payment for the student in the current fiscal year, in an amount not to exceed the tuition cost of the public or nonpublic school; or
- The cost of college or university, accredited tutor or tutoring facility, or distance education program.⁶⁶

A home education student may also receive a scholarship to cover educational expenses.⁶⁷ A student shall not receive a scholarship from more than one scholarship organization.⁶⁸

House Bill 2, Sections 96 and 97, amend the Education Tax Credit Scholarship program to clarify the business tax credits that businesses can receive. As a result of the amended law, businesses can receive tax credits on the business profits tax or the business enterprise tax.⁶⁹ Businesses can no longer receive a tax credit on the interest and dividends tax as the legislature repealed the interest and dividends tax effective 2027.⁷⁰

IV. Innovation Schools

House Bill 609 gives school districts the option to form “innovation schools.”⁷¹ The bill defines an innovation school as a school in which the local school board implements an “innovation plan” with the approval of the state Board of Education.⁷² An innovation plan, while vaguely defined, may include information such as: the innovations the school would implement; the research-based educational program the school would implement; the length of the school day and school year; a proposed budget; a proposed staffing plan; and identification of the improvements in academic performance that the school expects to achieve by implementing the innovations.⁷³

House Bill 609 also permits the development of an “innovation school zone.” This allows a group of schools from one district or from multiple school districts that

⁶⁶ RSA 77-G:2, I.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ N.H. Laws of 2021, Chapter 91, Sections 96 and 97 (amending RSA 77-G:3 and RSA 77-G:5, I(i)(2)).

⁷⁰ N.H. Laws of 2021, Chapter 91, Section 38 (repealing and amending multiple laws).

⁷¹ N.H. Laws of 2021, Chapter 27, Section 1 (enacting RSA 194-E).

⁷² *Id.*

⁷³ *Id.*

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share a common interest, to form an innovation school zone.⁷⁴ Schools or districts interested in forming an innovation school zone must also develop an innovation plan which must be approved by the local school board(s) and the state Board of Education.

Innovation schools and innovation school zones are still considered “public schools” in New Hampshire. However, House Bill 609 permits innovation schools and innovation school zones to “request a waiver from state regulations which may interfere with an innovative idea to better provide the opportunity for an adequate education for all students”⁷⁵ In other words, the state Board of Education may grant innovation schools and innovation school zones waivers which would allow them to bypass certain state rules and regulations.

Representative Alicia Lekas for the Majority of the House Education Committee, stated that “this legislation will provide districts and schools support in meeting challenges resulting from declining student demographics and related program and funding issues.”⁷⁶

Opponents of the bill noted it “lacks clear definition in many places[,]”⁷⁷ lacks local control and accountability, and has no fiscal note regarding its impact on taxpayers.⁷⁸ As stated by Representative Stephen Woodcock for the Minority of the House Education Committee:

This bill is not needed. The bill presents itself as legislation that would provide the opportunity for innovation in public schools, which currently already exists in every NH public school. As recently as this fall, NH has been the incubator for many innovative schools; we call them charter schools, and 33 currently exist.⁷⁹

This law went into effect on July 5, 2021.

V. Criminal History Record Checks

A. Criminal History Record Checks and Trainings

House Bill 401 enacts three changes to the already existing law requiring school districts to complete background checks on all applicants for employment.⁸⁰

First, it allows superintendents to appoint a designee to receive and review the

⁷⁴ *Id.*

⁷⁵ House Calendar No. 4, pg. 30 (Feb. 25, 2021).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ N.H. Laws of 2021, Chapter 71, Section 1 (amending RSA 189:13-a, II and III).

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criminal history records of applicants.⁸¹ The designee may be “the assistant superintendent, the head of human resources, the personnel director, the business administrator, or the finance director.”⁸²

Second, it requires the NH DOE to provide trainings on the reading and interpretation of criminal history records.⁸³

Third, it requires that superintendents or their designees complete the training on the reading and interpretation of criminal history records.⁸⁴

This law went into effect on July 1, 2021.⁸⁵

B. Human Trafficking Added to Prohibited Crimes

RSA 189:13-a, V lists the crimes that will prohibit an applicant from being hired by a school administrative unit, school district, chartered public school, or public academy. House Bill 432 amends this statute to add RSA 633:7, “Trafficking in Persons,” to this list.⁸⁶ Effective September 21, 2021, RSA 189:13-a, V now reads as follows:

V. Any person who has been charged pending disposition for or convicted of any violation or attempted violation of RSA 630:1; 630:1-a; 630:1-b; 630:2; 632-A:2; 632-A:3; 632-A:4; 633:1; **633:7**, 639:2; 639:3; 645:1, II or III; 645:2; 649-A:3; 649-A:3-a; 649-A:3-b; 649-B:3; or 649-B:4; or any violation or any attempted violation of RSA 650:2 where the act involves a child in material deemed obscene; in this state, or under any statute prohibiting the same conduct in another state, territory, or possession of the United States, shall not be hired by a school administrative unit, school district, chartered public school, or public academy. The superintendent of the school administrative unit or the chief executive officer of the chartered public school or public academy may deny a selected applicant a final offer of employment if such person has been convicted of any crime, misdemeanor or felony, in addition to those listed above. The governing body of a school district, chartered public school, or public academy shall adopt a policy relative to hiring practices based on the results of the criminal history records check and report of misdemeanors and felonies received under paragraph II. Such policy may include language stating that any person who has been convicted

⁸¹ N.H. Laws of 2021, Chapter 71, Section 1 (amending RSA 189:13-a, II); Senate Journal No. 15, pg. 421 (May 6, 2021).

⁸² N.H. Laws of 2021, Chapter 71, Section 1 (amending RSA 189:13-a, II).

⁸³ *Id.* (amending RSA 189:13-a, III).

⁸⁴ *Id.*

⁸⁵ N.H. Laws of 2021, Chapter 71, Section 2.

⁸⁶ N.H. Laws of 2021, Chapter 142, Section 1 (amending RSA 189:13-a).

of any misdemeanor, or any of a list of misdemeanors, may not be hired. Such policy may also include language stating that any person who has been convicted of any felony, or any of a list of felonies, shall not be hired.⁸⁷

C. Criminal History Record Checks for Credentialing Applicants

Senate Bill 134 contains a provision permitting the NH DOE to conduct criminal history record checks on any person who is a first time applicant for a New Hampshire teaching credential.⁸⁸ The applicant must submit to the NH DOE a records release form authorizing the state police to conduct a criminal records check through their records and through the FBI's records and to provide the NH DOE with a report on that information.⁸⁹ The applicant must also submit a complete set of fingerprints taken by a qualified law enforcement agency or an authorized employee of the NH DOE.⁹⁰

The NH DOE must maintain the confidentiality of all criminal history record information received through this application process and must destroy the records within 60 days of receiving the information.⁹¹

Finally, the bill prohibits the NH DOE from granting a teaching credential to any candidate who has "been charged pending disposition for" or been convicted of a number of statutorily prescribed crimes.⁹²

The NH DOE is also charged with adopting rules governing the rights of applicants and their ability to appeal a denial of a teaching credential. This provision will go into effect on January 1, 2022.⁹³

D. Committee to Study Criminal History Background Checks for Private Schools

A committee to study the NH DOE's oversight of criminal history background checks for private schools will go into effect upon the signing of Senate Bill 134.⁹⁴ The committee will review current laws and rules governing private schools, review the laws and practices of other states, and will make recommendations for updating state laws and NH DOE rules regarding criminal history background checks in private schools.⁹⁵

⁸⁷ *Id.* (new language in bold).

⁸⁸ N.H. Laws of 2021, Chapter 206, Part VII, Section 4 (enacting RSA 189:13-c).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ N.H. Laws of 2021, Chapter 2016, Part VII, Section 5.

⁹⁵ *Id.*

VI. Program to Reduce School Food Waste

House Bill 500 permits a school to “partner with a nonprofit or implement a program on its own to make leftover school food that was prepared but never served into frozen to-go meals or portions for distribution in compliance with state food safety regulations and [FDA] . . . guidelines.”⁹⁶ The frozen meals may be sent home “with any child whose family indicates a desire to participate in such program.”⁹⁷

As described by Senator Erin Hennessey:

This bill simultaneously addresses two issues: food insecurity and food waste. This bill permits schools, through a partnership with a nonprofit or on its own, to freeze leftover school food that was never served. The school can then send the frozen meals home with children whose families have opted into the program. The bill provides flexibility to school districts for implementation and collaboration with local organizations and nonprofits while abiding by food safety guidelines and regulations. It bridges the gap between schools with an abundance of unserved food and nonprofits seeking excess food to serve families and children in their communities who are food insecure.⁹⁸

Notably, participating schools will receive the protections of the Bill Emerson Good Samaritan Food Donation Act,⁹⁹ which establishes federal protection from liability for those involved in the donation and distribution of food products to needy individuals.¹⁰⁰

This law went into effect on July 16, 2021.

VII. School Board Governance

A. Special Meetings

RSA 197:3-a has long permitted school districts to call a special meeting of the legislative body in response to “statutory changes resulting in reductions or increases of state revenues for education.” As a result of Section 54 of House Bill 2, school districts may also call a special meeting to determine how any adjustments in the educational aid they are receiving under House Bill 2 shall be budgeted.¹⁰¹

⁹⁶ N.H. Laws of 2021, Chapter 45, Section 1 (adding RSA 194:3-e).

⁹⁷ *Id.*

⁹⁸ Senate Calendar No. 20, pg. 3 (April 16, 2021).

⁹⁹ N.H. Laws of 2021, Chapter 45, Section 1 (adding RSA 194:3-e).

¹⁰⁰ *Id.* See also 42 U.S.C § 1791(c).

¹⁰¹ N.H. Laws of 2021, Chapter 91, Section 54.

B. Emergency Special Meetings

House Bill 71 prohibits the Superior Court from allowing special school district meetings to occur if the emergency pertains to a collective bargaining agreement that was voted down at the regular meeting and/or modified afterwards.¹⁰² The goal of this bill is to prevent unnecessary or unfair special elections concerning contractual agreements.¹⁰³ According to Representative Ralph Boehm for the Majority of the House Education Committee:

This bill . . . makes it clear that a special election cannot be held for a collective bargaining agreement that failed at the previous school district meeting. No means no. It is not fair to the school district voters if they say no to a contract and a judge rules that a special election can be held, thus negating the wishes of the voters.¹⁰⁴

While the new language prevents the Superior Court from allowing special school district meetings, RSA 197:3, III still permits the school district voters to approve a warrant article authorizing the school board to call a special meeting, at its option, to address cost items only. House Bill 71 went into effect on August 17, 2021.¹⁰⁵

C. School Board Vacancies

RSA 671:33 is a long-standing law that addresses vacancies among members of school district offices.¹⁰⁶ House Bill 409 amends this law by clarifying that “[a]ny vacancy which occurs between the beginning of the filing period and the [school] district election shall not be filled by official ballot until the following year.”¹⁰⁷ According to Senator Soucy of the Senate Election Law and Municipal Affairs Committee, “[t]his will align the school district statute with the town statute [RSA 669:61, II] and does not affect appointments to vacancies within the district.”¹⁰⁸ House Bill 409 is already in effect.¹⁰⁹

D. School Board and Budget Committee At-Large Member Vacancies

RSA 671:33 sets forth how vacancies are filled on cooperative school

¹⁰² N.H. Laws of 2021, Chapter 77, Section 1 (adding RSA 197:3, I(d)).

¹⁰³ House Journal No. 7, pg. 12 (April 8, 2021).

¹⁰⁴ *Id.*

¹⁰⁵ N.H. Laws of 2021, Chapter 42, Section 2.

¹⁰⁶ RSA 671:33.

¹⁰⁷ N.H. Laws of 2021, Chapter 42, Section 1 (adding RSA 671:33, V).

¹⁰⁸ Senate Journal No 12, pg. 388 (April 22, 2021).

¹⁰⁹ N.H. Laws of 2021, Chapter 42, Section 2.

boards.¹¹⁰ House Bill 2 amends RSA 671:33 as follows:

RSA 671:33, II(b) In a cooperative school district, the remaining school board members representing the same town or towns as the departed member shall fill a vacancy on the school board, provided that there are at least 2 such members. **A member-at-large shall also be included as a representative of the same town.** If there are less than 2 remaining members on the cooperative school board representing the same town or towns as the departed member, or if the remaining members are unable, by majority vote, to agree upon an appointment, the selectmen of the town or towns involved shall fill the vacancy by majority vote in convention. If the selectmen are unable to fill the vacancy then the cooperative school district moderator shall make the appointment. A member appointed to fill a vacancy under this subparagraph shall serve until the next district election when the voters of the district shall elect a replacement for the unexpired term.

...

RSA 671:33, IV. In a cooperative school district, the remaining budget committee members representing the same town or towns as the departed member shall fill a vacancy on the budget committee, provided that there are at least 2 such members. **A member-at-large shall also be included as a representative of the same town.** If there are less than 2 remaining members on the budget committee representing the same town or towns as the departed member, or if the remaining members are unable, by majority vote, to agree upon an appointment, the selectmen of the town or towns involved shall fill the vacancy by majority vote in convention. If the selectmen are unable to fill the vacancy then the cooperative school district moderator shall make the appointment. If the vacancy is for the cooperative school board representative to the cooperative school district budget committee, such vacancy shall be filled by the cooperative school board. A member appointed to fill a vacancy under this subparagraph shall serve until the next district election when the voters of the district shall elect a replacement for the unexpired term.¹¹¹ [New language in bold.]

E. Cooperative School Districts

For a cooperative school district organized prior to July 1, 1963, the process for modifying their apportionment formula is set forth in RSA 195:8. The law

¹¹⁰ RSA 671:33.

¹¹¹ N.H. Laws of 2021, Chapter 91, Section 318 (amending RSA 671:33) (new language in bold).

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provides that the apportionment formula can be changed by a simple majority vote of the district, by the adoption of one of the formulas in RSA 195:7, I.¹¹² Once a cooperative school district votes to change its formula, the formula is not subject to review or modification by the voters again until five years after that change.¹¹³

House Bill 152 amended RSA 195:8 to also allow the voters of a cooperative school district to keep their apportionment formulas in place for an additional period of five years after the last change was made simply by voting to continue the current formula.¹¹⁴ The voters no longer have to *change* the apportionment formula to trigger this five year period during which the formula cannot be changed.

VIII. Use of Unused District Facilities by Charter Schools

House Bill 278 gives public charter schools the right of first refusal to lease or purchase unused facilities that are owned by a public school district.¹¹⁵ Under this new law, superintendents are required to annually report to the NH DOE each “unused facility” owned by the school district.¹¹⁶ The NH DOE will then establish and maintain a list of such unused facilities and make such list available on the NH DOE’s website.¹¹⁷ An unused facility is defined as:

a school building owned by a school district which is not used for academic purposes, extracurricular activities, administrative school functions, or sports and for which the school district has no school board approved written plan for future use. In order to comply with this paragraph, such school approved plan shall include academic purposes, extracurricular activities, administrative functions, or sports to be used by the school within 2 years of the plan's approval.¹¹⁸

The law sets forth the process by which “the school district shall offer an unused facility to a chartered public school for purchase or lease.”¹¹⁹ Under this process, if the school district extends an offer to purchase or lease an unused facility to a third party, the contract must include a provision that makes the purchase or lease subject to the right of first refusal by an approved chartered public school operating in New Hampshire.¹²⁰ The law goes on to list a fairly specific process that must then be followed with respect to moving forward with the lease or purchase of district

¹¹² RSA 195:7.

¹¹³ RSA 195:8.

¹¹⁴ N.H. Laws of 2021, Chapter 80, Section 1 (amending RSA 195:8).

¹¹⁵ N.H. Laws of 2021, Chapter 186 (adopting RSA 194:61).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

property by a charter school.¹²¹

School districts that have unused facilities that may be up for lease or purchase in the coming years will want to look at this law closely and confer with legal counsel to ensure compliance with this new law.

IX. Covid-19 Immunizations

The legislature amended RSA 141-C to limit requirements for Covid-19 vaccinations.¹²² As a result of House Bill 220, RSA 141-C:1-a is enacted to read as follows:

I. Every person has the natural, essential, and inherent right to bodily integrity, free from any threat or compulsion by government to accept an immunization. Accordingly, no person may be compelled to receive an immunization for COVID-19 in order to secure, receive, or access any public facility, any public benefit, or any public service from the state of New Hampshire, or any political subdivision thereof, including but not limited to counties, cities, towns, precincts, water districts, school districts, school administrative units, or quasi-public entities.¹²³

The law also goes on to clarify that this vaccine prohibition is not intended to “[s]upersede the requirement for vaccination as a prerequisite for admission to a school or child care agency pursuant to RSA 141-C:20-a, II.”¹²⁴ Therefore, schools can still require, with some exceptions, students to be vaccinated against the diseases listed in RSA 141-C:20-a, II, which includes diphtheria, mumps, pertussis, poliomyelitis, rubella, rubeola, and tetanus.¹²⁵

X. Right to Know Law

A. Nonpublic Sessions

Under the Right to Know Law, public bodies, including school boards of public schools, are required to meet in public session unless they meet one of the statutorily listed bases for meeting in nonpublic session.¹²⁶ House Bill 566 adds to the list of matters that can be considered or acted upon in nonpublic session.¹²⁷ Effective

¹²¹ *Id.*

¹²² N.H. Laws of 2021, Chapter 131, Section 1 (adopting RSA 141-C:1-a).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*; see also RSA 141-C:20-a.

¹²⁶ RSA 91-A:3, I and II.

¹²⁷ N.H. Laws of 2021, Chapter 172 (amending RSA 91-A:3, II).

January 1, 2022, the following can be considered or acted upon in nonpublic session:

- (m) Consideration of whether to disclose minutes of a nonpublic session due to a change in circumstances under paragraph III. However, any vote on whether to disclose minutes shall take place in public session.¹²⁸

B. Nonpublic Sessions – Meeting Minutes

New Hampshire's Right to Know Law, RSA 91-A, has long required that public bodies, such as the school boards of public school districts, keep minutes of all nonpublic sessions. Such minutes shall be disclosed within 72 hours unless 2/3 of the members present vote not to release the records due to a statutorily prescribed reason. House Bill 108 amends RSA 91-A:3, III to require public bodies, including school districts, to keep a list of all minutes that are not disclosed and to make that list available to the public.¹²⁹

Effective January 1, 2022, RSA 91-A:3, III will read as follows:

III. Minutes of meetings in nonpublic session shall be kept and the record of all actions shall be promptly made available for public inspection, except as provided in this section. Minutes of such sessions shall record all actions in such a manner that the vote of each member is ascertained and recorded. Minutes and decisions reached in nonpublic session shall be publicly disclosed within 72 hours of the meeting, unless, by recorded vote of 2/3 of the members present taken in public session, it is determined that divulgence of the information likely would affect adversely the reputation of any person other than a member of the public body itself, or render the proposed action ineffective, or pertain to terrorism, more specifically, to matters relating to the preparation for and the carrying out of all emergency functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life. This shall include training to carry out such functions. In the event of such circumstances, information may be withheld until, in the opinion of a majority of members, the aforesaid circumstances no longer apply. **For all meetings held in nonpublic session, where the minutes or decisions were determined to not be subject to full public disclosure, a list of such minutes or decisions shall be kept and this list shall be made available as soon as practicable for public disclosure. This list shall identify the public body and**

¹²⁸ *Id.*

¹²⁹ N.H. Laws of 2021, Chapter 163 (amending RSA 91-A:3, III).

include the date and time of the meeting in nonpublic session, the specific exemption under paragraph II on its face which is relied upon as foundation for the nonpublic session, the date of the decision to withhold the minutes or decisions from public disclosure, and the date of any subsequent decision, if any, to make the minutes or decisions available for public disclosure. Minutes related to a discussion held in nonpublic session under subparagraph II(d) shall be made available to the public as soon as practicable after the transaction has closed or the public body has decided not to proceed with the transaction. (new language in bold).¹³⁰

C. Attorney Client Privilege

Municipalities have long presumed that consultations with their attorneys are protected from the Right to Know Law. House Bill 108 codifies that presumption by adding “records protected under the attorney-client privilege or the attorney work product doctrine” to the list of governmental records that are exempt from release under the Right to Know Law.¹³¹ This change in the law is already in effect.

D. Committee to Review Holding Virtual Meetings

House Bill 108 establishes a committee to review authorizing governing bodies of municipalities to hold virtual meetings and to study remote access to meetings under RSA 91-A.¹³² The committee includes two members of the senate and three members of the house of representatives. The committee shall report its findings and any recommendations for proposed legislation by November 1, 2021.

¹³⁰ *Id.* (new language in bold).

¹³¹ N.H. Laws of 2021, Chapter 163 (adopting RSA 91-A:5, XI).

¹³² N.H. Laws of 2021, Chapter 163.

XI. Mottos

House Bill 69 permits public schools and school districts to display the state and national mottos in school buildings.¹³³ House Bill 69 adopts RSA 189:17-b, which states as follows:

Authority of Schools to Display the National and State Mottos.
Notwithstanding any other provision of law to the contrary, no power or authority of the state of New Hampshire, or any political subdivision thereof, shall in any way restrict, or be construed to restrict, the authority of any school or school district to display the national motto, “In God We Trust,” or the state motto, “Live Free or Die,” in any school building.¹³⁴

XII. Civics Instruction

House Bill 320 amends RSA 189:11, II to require additional civics competency assessments in order for a student to graduate.¹³⁵

II. As a component of instruction under paragraph I, a locally developed competency assessment of United States government and civics that includes, but is not limited to, the nature, purpose, structure, function, and history of the United States government, the rights and responsibilities of citizens, and noteworthy government and civic leaders, shall be administered to students as part of the **required** high school course in history and government of the United States and New Hampshire. ~~[Students who attain a passing grade on the competency assessment shall be eligible for a certificate issued by the school district. The United States Citizenship and Immigration Services (USCIS) test may be used to satisfy the requirement of this paragraph.]~~ **To be eligible for a graduation certificate, a student shall attain a locally sanctioned passing grade on the competency assessment, and a grade of 70 percent or better on the 128 question civics (history and government) naturalization examination developed by the 2020 United States Citizen and Immigration Services.** Schools may modify the naturalization examination for a child with a disability in accordance with the child's individualized education program. By June 30 of each year, each school district shall submit the results of either the locally developed competency assessment of United States government and civics or the United States Citizenship and Immigration Services (USCIS) test to

¹³³ N.H. Laws of 2021, Chapter 161 (adopting RSA 189:17-b).

¹³⁴ *Id.*

¹³⁵ N.H. Laws of 2021, Chapter 157 (amending RSA 189:11, II).

the department of education.¹³⁶

This new requirement takes effect on July 1, 2023.

XIII. Reports on Talented and Gifted Programs

House Bill 321 adopts RSA 189:29-b, which requires public schools to submit reports to the NH DOE “detailing the policies, programs, and procedures that are in place to identify and accommodate the unique needs of gifted and talented students.”¹³⁷ Beginning in the 2022-2023 school year, the public school must file such reports by August 1.¹³⁸ If no such policies, programs, or procedures exist, the public school must still file a report stating so.

The law also defines “gifted and talented student” to mean “a student identified as having unique academic, artistic, or athletic potential according to assessments selected and administered locally.”¹³⁹

XIV. Penalties for a School’s Failure to File Reports with the Department of Education

House Bill 442, which was requested by the NH DOE, increases the number of reports school districts must file annually, requires nonpublic schools to file statistical reports, and permits revocation of a charter school’s enabling charter for failure to file such reports.¹⁴⁰

School districts have long been required to submit a number of budgetary reports to the NH DOE annually, including “[a] financial report . . . showing the summary of receipts and expenditures . . . and a balance sheet showing assets and liabilities”¹⁴¹ Such reports must be filed no later than September 1 of each year, although 30 day extensions can be granted by the commissioner of the NH DOE. Any district which does not timely file complete and accurate reports are at risk of the NH DOE withholding all state aid to the district until “complete and accurate information is submitted.”¹⁴² This requirement now extends to chartered public schools and the state Board of Education now has the authority to revoke a charter school’s charter or place the charter school on probationary status, if it fails to comply with these

¹³⁶ *Id.* (new language in bold, strike through language removed).

¹³⁷ N.H. Laws of 2021, Chapter 139 (adopting RSA 189:29-b).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ House Calendar No. 12, pg. 4 (Feb. 19, 2021); N.H. Laws of 2021, Chapter 44, Sections 1-6 (amending RSA 198:4-f; 189:28, I; RSA 189:28, IV; RSA 194-B:16, II; RSA 198:4-d).

¹⁴¹ RSA 198:4-d, III.

¹⁴² RSA 198:4-f.

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reporting requirements.¹⁴³

In addition to the long required financial report, school districts and charter schools are now required to submit “prior year annual safety reports” and “other reports necessary to meet state and federal requirements as determined by the [NH DOE].”¹⁴⁴ Specifically, House Bill 442 amends RSA 198:28, I to read as follows:

The governing body of each public, **chartered public school, and nonpublic** education agency, shall on or before ~~[August 1]~~ **the deadline established by the department as deemed appropriate** in each year, submit the department of education those statistical reports necessary to compute the average daily membership of pupils attending each school district, and the average daily membership of pupils resident in each school district. Information relating to fall enrollment, drop-outs, staffing census, and ~~[average teacher salary],~~ **prior year annual safety reports** as of October 1 of each school year, **and other reports necessary to meet state and federal requirements as determined by the department**, shall be submitted to the department of education on or before ~~October 15. Private schools shall submit average daily membership in attendance, fall enrollment, and teacher staff census]~~ **the deadline established by the department.**¹⁴⁵

Schools must also continue to submit the average teacher salary to the NH DOE; this must be provided to the NH DOE “on or before the deadline established by the department.”¹⁴⁶

In addition, nonpublic schools must submit:

general statistics of nonpublic schools, nonpublic school restraint and seclusion collection data, general fall report of nonpublic schools, school emergency operation plan, and other reports necessary to meet state and federal requirements as determined by the department of education.¹⁴⁷

Where a nonpublic school fails to submit the reports listed above for two consecutive years, the state Board of Education is permitted to revoke its enabling charter or approval.¹⁴⁸

¹⁴³ N.H. Laws of 2021, Chapter 44, Section 1 (repealing and re-enacting RSA 198:4-f).

¹⁴⁴ N.H. Laws of 2021, Chapter 44, Section 2 (amending RSA 198:28, I).

¹⁴⁵ *Id.* (new language in bold, strike through removed language).

¹⁴⁶ N.H. Laws of 2021, Chapter 44, Section 2 (adding RSA 189:28, I-a).

¹⁴⁷ N.H. Laws of 2021, Chapter 44, Section 2 (amending RSA 189:28, I-b).

¹⁴⁸ *Id.*

XV. Differential Aid Calculations Fiscal Year 2022

House Bill 2, Section 51 allows the Commissioner of the NH DOE to “compare the average daily membership in attendance (ADMA), defined in RSA 198:38, for each district and town for school year 2019-2020 and school year 2020-2021.”¹⁴⁹ Whichever year had the greater enrollment will be used to calculate the cost of an opportunity for an adequate education under RSA 198:40-a and relief funding under RSA 198:40-e for the fiscal year ending June 30, 2022.¹⁵⁰

Similarly, when determining ADMA for third grade pupils scoring below proficiency on the reading component of the state assessment as required by RSA 198:40-a, II(e), the Commissioner must compare the ADMA for this category of differentiated aid in school year 2018-2019 and school year 2020-2021.¹⁵¹ The greater ADMA shall be used to calculate the cost of an opportunity for an adequate education under RSA 198:40-a, II(e) for the fiscal year ending June 30, 2022.¹⁵²

XVI. Increase in Aid for Some Districts Based on Number of Students who Qualify for Free or Reduced-Price Meals

Section 53 of House Bill 2 amends RSA 198 to include additional funding for school districts with a certain percentage of students who are eligible to receive free or reduced price meals.¹⁵³ Specifically, school districts comprised of at least 48% of students eligible to receive free or reduced-price meals will receive an additional \$600 per free or reduced-price meal eligible pupil.¹⁵⁴ School districts comprised of at least 12% (but less than 48%) free or reduced-priced meal eligible students will receive “an amount equal to \$150 plus \$0.1250 for each 0.01 percent that its free or reduced-priced meal eligibility rate exceeds 12 percent” per eligible pupil.¹⁵⁵ School districts with less than 12% free or reduced-price meal eligible students will receive no additional aid.¹⁵⁶

XVII. Closure of Sununu Center

The Sununu Youth Services Center will be closed and a replacement facility opened no later than March 1, 2023.¹⁵⁷ In ordering this closure, the General Court issued findings that “[p]lacement in corrections settings can be harmful to children

¹⁴⁹ N.H. Laws of 2021, Chapter 91, Section 51.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ N.H. Laws of 2021, Chapter 91, Section 53 (adding RSA 198:40-e).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ N.H. Laws of 2021, Chapter 91, Section 329.

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and lead to increased delinquency and adult criminal behavior.”¹⁵⁸

Section 330 of House Bill 2 establishes a committee “to develop a plan for the closure and replacement of the Sununu youth services center[,]” which will consist of three members of the House of Representatives and two members of the Senate.¹⁵⁹ In the process of developing their plan, committee members will be required to seek input and expert advice from a variety of child welfare organizations, including the Department of Health and Human Services, the Disabilities Rights Center, and New Futures.¹⁶⁰

Through this legislation, the legislature has already set the parameters of the Sununu Center’s replacement facility. Set to open no later than March 1, 2023,¹⁶¹ the replacement facility will resemble its predecessor: a correctional facility for children up to 18 years old, who have been detained,¹⁶² committed,¹⁶³ or otherwise incarcerated. The facility will have space for up to 18 beds, as well as “adequate space to meet the educational needs of all youth potentially eligible, including youth with special education needs.”¹⁶⁴

According to DHHS Spokeswoman Kathy Remillard, the State Department of Health and Human Services contracted with a consulting firm to write the Sununu Center’s closure plan before this legislation even passed.¹⁶⁵ “Under the terms of the contract . . . the consultant must draft a plan by mid-July and a final plan by August, when the department will present its recommendations to the legislative committee . . .”¹⁶⁶ Pursuant to Section 330, the committee’s final plan must be submitted on or before November 1, 2021.¹⁶⁷

XVIII. Reimbursement for Court Ordered Services

Historically, New Hampshire juvenile courts have ordered parents to reimburse the State for the costs of court-ordered services, such as residential placements. In 2020, the legislature repealed the statutes requiring that parents reimburse the State for court-ordered services.¹⁶⁸ The 2020 legislation went into effect on July 22, 2020, and clearly applied to court ordered services going forward. This left many to wonder about past reimbursement orders. The legislature answered

¹⁵⁸ N.H. Laws of 2021, Chapter 91, Section 326.

¹⁵⁹ N.H. Laws of 2021, Chapter 91, Section 330.

¹⁶⁰ *Id.*

¹⁶¹ N.H. Laws of 2021, Chapter 91, Section 329.

¹⁶² Pursuant to RSA 169-B:14.

¹⁶³ Pursuant to RSA 169-B:19.

¹⁶⁴ N.H. Laws of 2021, Chapter 91, Section 330.

¹⁶⁵ Annmarie Timmins, Closure Plan in Works for Sununu Youth Services Center, New Hampshire Bulletin (June 29, 2021).

¹⁶⁶ *Id.*

¹⁶⁷ N.H. Laws of 2021, Chapter 91, Section 330.

¹⁶⁸ N.H. Laws of 2020, Chapter 26 (HB 1162).

that question in House Bill 2, Section 33, as this authorizes the Department of Health and Human Services “to motion the court to terminate any court orders for parental reimbursement either for on-going repayment or arrears ...”¹⁶⁹

XIX. Burden of Proof at IDEA Due Process Hearings

House Bill 581 contains two components. First, it places the “burden of proof” on school districts at IDEA due process hearings. Second, it creates a legislative committee to study various elements of New Hampshire’s special education laws.

Interestingly, the House defeated an almost identical bill during the 2020 session.¹⁷⁰ What changed was the composition of the legislature as a result of the November election.¹⁷¹

The House passed House Bill 581 on a voice vote and the Senate adopted the bill by a vote of 24-0. The Governor signed the bill on July 29, 2021, whereupon it became effective immediately.¹⁷²

The term “burden of proof” encompasses two distinct elements:

- the burden of production (which *typically* determines which party must present evidence first); and
- the burden of persuasion (which party loses if the evidence is evenly balanced).

House Bill 581 imposes *both* burdens on school districts in all IEP and placement disputes. The bill accomplishes this by inserting the following as RSA 186-C:16-b, III-a:

In all hearings the school district shall have the burden of proof, including the burden of persuasion and production, of the appropriateness of the child's program or placement, or of the program or placement proposed by the public agency. This burden shall be met by a preponderance of the evidence.

This is a significant change from current law.

- The state Board of Education’s rules require that the party who filed for a hearing present its evidence first, unless the hearing officer

¹⁶⁹ N.H. Laws of 2021, Chapter 91, Section 33.

¹⁷⁰ House Bill 1232 (2020).

¹⁷¹ The 2020 bill, HB 1232, mirrored HB 581 regarding the burden of proof, but did not propose to create a study committee. On March 3, 2020 the House Education Committee voted 17-2 to refer HB 1232 for interim study. On March 12, 2020, by a voice vote, the full House approved that recommendation. On October 20, 2020, the interim study committee voted 13-0 to issue the following report: “Not recommended for Future Legislation.”

¹⁷² N.H. Laws of 2021, Chapter 158.

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determines that altering this sequence would be more efficient. N.H. Code Admin. Rules, Ed 1123.17(a).

- The U.S. Supreme Court has ruled that, when state law is silent, the IDEA imposes the burden of persuasion on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005).¹⁷³

House Bill 581 may be unconstitutional insofar as it alters current law by shifting the *burden of persuasion* onto school districts. Part 1, Article 28-a of the New Hampshire Constitution, adopted in 1984, prohibits the State from imposing new unfunded mandates on school districts.

The New Hampshire Supreme Court has ruled that a state law shifting the *burden of persuasion* onto municipalities violates Part 1, Article 28-a, because it will cause them to lose more cases. *New Hampshire Municipal Trust Workers' Compensation Fund v. Flynn*, 133 N.H. 17 (1990).¹⁷⁴

A challenge to the constitutionality of House Bill 581 would require gathering some data. This is because, when a school district loses an IDEA case, it does not necessarily have to spend more money. It is theoretically possible that the program an IEP team proposes will be more expensive than the program a parent favors.

Special education administrators know that in the vast majority of IDEA cases – both hearing requests and cases that actually go to a hearing – losing will cost the district more than winning. However, a court will probably demand evidence of this before finding House Bill 581 unconstitutional.

Another question is whether altering the burden of persuasion will really, as a practical matter, make a difference.

Assuming that hearing officers think with their heads, not with their hearts, the burden of persuasion should matter only in rare cases when the evidence is evenly balanced in each party's favor.¹⁷⁵ However, imposing the burden of persuasion on school districts may embolden hearing officers who think with their hearts, encouraging them to tilt the playing field against school districts.

Turning from the *burden of persuasion* to the *burden of production*, House Bill 581 will certainly make a difference in many cases *if* this means a school district must present all of its evidence before the parents present any. New Hampshire's

¹⁷³ This may be the party that filed for the hearing or the party challenging the IEP team's decision. E.g., *D.B. v. Esposito*, 675 F.3d 26, note 3 (1st Cir. 2012). The *Weast* decision explicitly declined to answer whether states may alter the burden of persuasion in IDEA cases through state law.

¹⁷⁴ *Flynn* involved workers compensation hearings. A 1989 amendment to the statute created a rebuttable presumption that, when a firefighter contracted cancer, the cause was occupationally related. The court found that this presumption would cause municipalities (who employed firefighters) to lose more hearings and thus pay more for workers compensation.

¹⁷⁵ See Skidmore and Zirkel, *Has the Supreme Court's Shaffer Decision Placed a Burden on Hearing Officer Decision-Making Under the IDEA?*, 35 J. Nat'l Ass'n Admin. L. Judiciary 293 (2015).

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special education rules currently require that the party who “initiated the hearing” present its evidence first, unless the hearing officer concludes that reversing this order would be more efficient.¹⁷⁶

Peter Wright, a nationally recognized attorney who represents parents in special education cases, prefers to present his evidence first. He realizes that requiring school districts to present their evidence first elongates hearings. This is because the school district’s attorney must “anticipate my case, the testimony of my witnesses, and cover every possible issue from A to Z in direct examination of school witnesses.”¹⁷⁷

On the other hand, one could argue that House Bill 581 does not necessarily compel a school district to present all of its evidence first. The statute uses the term “burden of production” without defining the term. Some will argue that this compels all the school district’s witnesses to testify before the parents’ witnesses do. However, one could argue that the burden of production simply means: (a) that a school district must disclose its exhibits before the parents disclose theirs; or (b) that the district must present enough evidence at the beginning of the hearing to establish that a full hearing is warranted (i.e., by presenting a “prima facie case”).

House Bill 581 as originally introduced addressed only the burden of proof, but the final version added the provision creating an interim study committee. The committee, consisting of three members of the House and one member of the Senate, must conduct its first meeting within 45 days after the Governor signs the bill and must issue a report no later than November 1, 2021.

The bill directs the interim study committee to “examine” the following elements of the special education laws:

- The burden of proof (which is strange, since the bill already shifts that burden).
- Special education dispute resolution options.
- The IDEA’s child-find requirements.
- The IEP process, including team participants, roles and responsibilities, time frames, and parental consent.
- “[NH DOE] and other agency supports for parents including information for parents on procedural safeguards and available remedies.”
- The NH DOE’s monitoring of: (a) district compliance with the special

¹⁷⁶ Ed 1123.17(a).

¹⁷⁷ Wright, Peter W.D., “Schaffer v. Weast: How Will the Decision Affect YOU?” *Wrightslaw*, 2005, www.wrightslaw.com/law/art/schaffer_impact.pwright.htm.

education laws; and (b) parental complaints leading to IDEA hearings.

- “Opportunities and best practices for dispute resolution processes at the ‘early stages.’”

The bill directs the committee to “consult with parents, other state agencies, and experts, as needed,” *but makes no mention of consulting with school districts.*

It will be wise for school districts to lobby the interim study committee. Witnesses who testified at the House and Senate Education Committee hearings in support of House Bill 581 delivered a blizzard of misinformation.¹⁷⁸ We can expect the same when the interim study committee meets.

XX. Allowing a Civil Action for Violations of the Anti-Bullying Statute

RSA 193-F, “The Pupil Safety and Violence Prevention Act of 2000,” targets student-on-student bullying, including “cyberbullying.” Despite its title, the statute does not address other aspects of safety or violence.

RSA 193-F imposes many procedural duties and deadlines on school districts. For example, RSA 193-F:4:

- directs every school board to adopt a policy prohibiting bullying or cyberbullying;
- establishes a process for promptly reporting to school authorities every alleged incident of bullying or cyberbullying;
- compels school authorities to notify the alleged victim’s parents within 48 hours of the report;
- mandates that school authorities initiate an investigation of each reported incident within 5 school days of the incident;
- directs the school principal (or his/her designee) to “develop a response to remediate any substantiated incident of bullying or cyberbullying ... to reduce the risk of future incidents”; and
- requires that the school district notify the parents of both the victim

¹⁷⁸ For example, they said parents have no power to veto an IEP. This overlooks that, unlike many states, New Hampshire prohibits a school district from implementing an IEP without parental consent or permission from a hearing officer. Ed 1120.04(a), (h). The bill’s sponsor, Rep. Cordelli, insisted that school districts have superior access to information on the child. In fact, FERPA and state law guarantee parents access to all records a school district maintains on their child, without imposing a reciprocal obligation on parents to disclose information to the school district. 20 U.S.C. § 1232(a)(1)(A); RSA 189:67, I. Some speakers argued a school district need not explain the basis for its decision until the hearing. This ignores that the IEP team must accompany every decision with a written prior notice explaining the decision and the reasons for it, 20 U.S.C. § 1415(b)((3), (c)(1), and that the school district must explain its decision again by filing a response within 10 days after parents request a hearing. 20 U.S.C. § 1415(c)(2)(B).

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and the perpetrator regarding “the school’s remedies” no later than 10 days after completing the investigation.

What if a school district violates those duties? RSA 193-F:9 clarifies that “[n]othing in this chapter shall ... create a private right of action for enforcement of this chapter against any school district,” which means that courts cannot entertain lawsuits to enforce *any* provision of the Act. Moreover, RSA 193-F:7 adds that school districts and school personnel “shall be immune from civil liability for good faith conduct arising from or pertaining to the reporting, investigation, findings, recommended response, or implementation of a recommended response under this chapter.”

In *Gauthier v. Manchester School District*, 168 N.H. 143 (2015), the New Hampshire Supreme Court held that those immunity provisions mean what they say. In *Gauthier*, a student was bullied twice. After the first incident, the victim met with the school principal, minimized the incident, and asked him to not notify her mother. The principal obliged. The second incident was more violent: the student suffered injuries to her head, face, and mouth. The student (through her parent) then sued the school district for money damages, arguing that the school district violated the reporting provisions of RSA 193-F. Pointing to RSA 193-F:7 and :9, the Supreme Court held that a violation of RSA 193-F did not, by itself, create grounds for liability.

House Bill 140 overrules *Gauthier*. The bill, which has passed both chambers of the legislature and awaits the Governor’s signature, repeals RSA 193-F:9 and inserts the following in its place:

Private Right of Action Permitted. Any person aggrieved as a result of gross negligence or willful misconduct in violation of any provision of RSA 193-F:4 may initiate an action against a school district or chartered public school and may recover court costs and reasonable attorney's fees as the prevailing party. For the purposes of this chapter, "gross negligence" means deliberate indifference. Nothing in this section shall supercede [sic] or replace existing rights or remedies under any other law.

House Bill 140 is controversial because that language is so broad, encompassing violations of “any” provision in RSA 194-F:4. As a minority of the House Education Committee observed when recommending against its passage, the bill invites lawsuits alleging “technical violations” of the statute, even “when nobody was injured and when no bullying occurred.”

On the other hand, the bill does not strip school *employees* of immunity from personal liability. It merely allows lawsuits against *school districts and charter schools* whose employees violate RSA 194-F:4 with “deliberate indifference.”

XXI. Telemedicine Provided by Out-of-State Psychologists

Senate Bill 133 repeals and replaces RSA 329-B:16, which governs the electronic practice of psychology. This bill expands the number of individuals who can practice psychology through telehealth. This bill requires psychologists to obtain a New Hampshire “tele-pass license” in order to provide telepsychology, telehealth, or telemedicine services to people in New Hampshire.¹⁷⁹ There are a number of exemptions to this requirement, including psychologists currently licensed in New Hampshire.¹⁸⁰ The bill states that those who have been granted emergency licenses to practice psychology under the Governor’s Emergency Order #29 shall be granted a tele-pass license upon application.¹⁸¹

There is not currently an application procedure to obtain a tele-pass license. This bill directs the Board of Psychologists to adopt rules establishing such a procedure, as well as rules regarding standards of care for the telemedicine practice of psychology and their enforcement, procedures for investigation and discipline (including revocation of a tele-pass psychology license), and additional requirements for psychologists licensed in Canada.¹⁸²

Importantly for school districts, this change to the law does not impact the ability of New Hampshire licensed psychologists to provide tele-psychology services. For those districts in which the pandemic has changed the way school psychologists provide services, this bill maintains the status-quo, while opening up the possibility of one day expanding telehealth services to include out-of-state providers.

XXII. Audiology and Speech Language Pathology Compact & Occupational Therapy Compact

Senate Bill 133 adopts the Audiology and Speech Language Pathology Compact.¹⁸³ Set out in RSA 326-F:17, the purpose of the compact is to “facilitate interstate practice of audiology and speech language pathology services. The practice of audiology and speech language pathology occurs in states where the patient/client/student is located at the time of the patient/client/student encounter.”¹⁸⁴ Another goal of the compact is to allow for the use of telehealth technology to increase access to audiology and speech language pathology services.¹⁸⁵ This comprehensive bill sets forth requirements to participate in the compact, privileges once participating in the compact, and oversight of participants in the compact.

¹⁷⁹ N.H. Laws of 2021, Chapter 205, Part IX (repealing and replacing RSA 329-B:16).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ N.H. Laws of 2021, Chapter 205, Part IV, Section 2 (2021) (enacting RSA 326-F:17).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

Senate Bill 133 also adopts a similar Occupational Therapy Licensure Compact for occupational therapists.¹⁸⁶

XXIII. Supported Decision Making

New Hampshire's special education rules require that a school district obtain parental consent (or permission from a hearing officer) before implementing an IEP team's proposals.¹⁸⁷

Once a student reaches the age of majority (age 18 in New Hampshire), all rights (including the right to consent to special education proposals) transfer from parents to the student *unless the Probate Court has appointed a legal guardian*.¹⁸⁸

In order to appoint a legal guardian for an adult, the Probate Court must first find that the adult is legally incompetent. Incompetence may arise if the adult has a severe cognitive or emotional disability.

New Hampshire's special education rules create another option. They allow a *competent* adult student to sign a "power of attorney" delegating to some other adult decision-making authority, including authority to consent.¹⁸⁹

House Bill 540 proposed to create an alternative less extreme than either legal guardianship or a power of attorney. The bill would have allowed a competent adult with disabilities ("the principal") to sign a document appointing a "supporter" to *assist* the principal in making decisions. The House passed this bill, but it ultimately died in the Senate.

Similar provisions then found their way into Senate Bill 134, an omnibus bill passed by both chambers and now awaiting the Governor's signature.

- Part VI, Section 15 of Senate Bill 134 creates a new statute, RSA Chapter 464-D, nested among the laws governing probate and guardianship. RSA 464-D establishes the procedure for a competent adult to appoint a "supporter," prescribes the form a principal must sign to appoint a supporter, and describes the supporter's ethical duties. These provisions will take effect soon after the Governor signs the bill.¹⁹⁰
- Part VI, Section 14 of Senate Bill 134 amends the special education laws to operate in tandem with RSA 464-D. These amendments will

¹⁸⁶ Senate Bill 133, Part IV, Section 3 (2021) (enacting RSA 326-C:9).

¹⁸⁷ Ed 1120.04, .05.

¹⁸⁸ Ed 1102.01(f), 1120.01(b).

¹⁸⁹ Ed 1120.01(c).

¹⁹⁰ N.H. Laws of 2021, Chapter 206, Part VI, Section 15 (adopting RSA Chapter 464-D).

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not take effect until January 1, 2022.¹⁹¹

RSA 464-D:5, VII, as proposed by Senate Bill 134, requires that the agreement the principal signs, appointing a supporter, identify the categories of decisions covered by the agreement. One allowable category is “education.”¹⁹²

If the principal appoints a supporter to assist in making decisions regarding education, the following provisions of RSA 464-D come into play:

Recognition of Supporters. A decision or request made or communicated with the assistance of a supporter in conformity with this chapter shall be recognized for the purposes of any provision of law as the decision or request of the principal¹⁹³

Access to Information. A supporter may assist the principal with obtaining any information to which the principal is entitled, including, with a dated specific consent executed by the principal, protected health information under the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, *educational records under the Family Educational Rights and Privacy Act of 1974*, 20 U.S.C. section 1232g, or information related to a substance use disorder protected by 42 U.S.C. section 290dd-2 and 42 C.F.R. Part 2.¹⁹⁴

Senate Bill 134’s amendments to the special education laws insert RSA 186-C:3-c and :3-d. These amendments provide as follows:

- If an IEP team discusses adult guardianship with a student or the student’s family, the team must inform them of the availability of supported decision-making as an alternative to guardianship. “This shall be done promptly when guardianship is first discussed.” The IEP team must also “make available resources to assist in establishing a supported decision-making agreement.”¹⁹⁵
- The NH DOE must “develop information resources regarding alternatives to guardianship, including supported decision making agreements pursuant to RSA 464-D, for children with disabilities who are approaching the age of 18.” These resources shall be made

¹⁹¹ N.H. Laws of 2021, Chapter 206, Part VI, Section 14 (amending RSA 186-C:3-c).

¹⁹² N.H. Laws of 2021, Chapter 206, Part VI, Section 15 (amending RSA 464-D:5, VII).

¹⁹³ N.H. Laws of 2021, Chapter 206, Part VI, Section 15 (adopting RSA 464-D:11).

¹⁹⁴ N.H. Laws of 2021, Chapter 206, Part VI, Section 15 (adopting RSA 464-D:15).

¹⁹⁵ N.H. Laws of 2021, Chapter 206, Part VI, section 14 (amending RSA 186-C:3-c).

available to school districts to assist IEP teams.¹⁹⁶

- If a supported decision-making agreement is executed, “the IEP team shall abide by decisions made by the student pursuant to the supported decision-making agreement.”

School districts will need to train IEP teams to comply with these notice requirements and to document compliance.

XXIV. Free Application for Federal Student Aid (FAFSA)

Part I of Senate Bill 147 requires graduating high school students to either complete a Free Application for Federal Student Aid (FAFSA) or file a waiver in order to receive a high school diploma.¹⁹⁷ The waiver must be on a form created by the state Board of Education and must state that the parent/guardian (or student, if applicable), understands what the FAFSA is and has chosen not to file an application.¹⁹⁸ As noted by Representative David Luneau for the House Education Committee:

Many high school students do not complete the FAFSA because they think they cannot afford post-secondary education. Oftentimes, completion of the FAFSA reveals otherwise and may confirm that the student is qualified for federal Pell grants. This would open the door for many more high school graduates to further their education and obtain degrees or credentials in fields that are in high demand and improve economic opportunities for themselves and our state as a whole.¹⁹⁹

The legislation further provides that school districts must provide “any support or assistance necessary” to students and families in complying with these new requirements.²⁰⁰ However, students who are unable to complete a FAFSA or the associated waiver must still be awarded a high school diploma “if the student has met all other graduation requirements and the principal attests that the school district has made a good faith effort to assist the student” and/or their family.²⁰¹ This portion of Senate Bill 147 will take effect July 1, 2023.²⁰²

Part I of Senate Bill 147 also requires school districts to report to the NH DOE the number and percentage of graduating high school students provided with in-

¹⁹⁶ N.H. Laws of 2021, Chapter 206, Part VI, Section 14 (amending RSA 186-C:3-d).

¹⁹⁷ N.H. Laws of 2021, Chapter 209, Part I, Section 1 (adding RSA 193:26-a).

¹⁹⁸ *Id.*

¹⁹⁹ House Calendar No. 26, pg. 19 (May 28, 2021).

²⁰⁰ N.H. Laws of 2021, Chapter 209, Part I, Section 1 (adding RSA 193:26-a).

²⁰¹ *Id.*

²⁰² *Id.*

person assistance in completing a FAFSA form.²⁰³ Notably, this requirement became effective on August 10, 2021.²⁰⁴

XXV. Special Education Funding

A. Special Education Risk Management Association

Since 1987, RSA 5-B has allowed municipalities, including school districts to create “risk management programs.” In a nutshell, such programs offer an alternative to traditional insurance purchased from an insurance company.

“Pooled risk management” is one sort of program authorized by RSA 5-B. Unlike pure self-insurance, where a municipality pays all claims out of its own treasury, members of a pooled risk management program contribute to a jointly owned reserve fund. Any covered claim against a member is paid from this reserve fund.

Part IV, Section 5 of Senate Bill 147 allows five or more school districts to band together and create a risk management pool to cover “unanticipated special education cost[s]” that “occur after school budgets are fixed.” Such costs include, for example, “last minute student transfers into the district.”²⁰⁵

Part IV, Section 5 also allows school districts to purchase insurance from commercial insurance companies to cover such costs.

The bill directs the NH DOE to solicit bids from actuarial firms. The purpose is to select an actuarial firm that will make recommendations concerning how school districts may self-fund a pool or purchase insurance to cover eligible costs.

Part IV, Section 5 went into effect on October 9, 2021.²⁰⁶

New Hampshire law already allows any school district to create a special non-lapsing reserve fund, akin to a capital reserve fund, to cover extraordinary special education costs. Risk management pools under Senate Bill 147 offer an alternative, but only for unanticipated special education costs that occur after school budgets are fixed.

Part IV, Section 2 of Senate Bill 147 includes some interesting factual assertions, which the legislature inserted to justify Section 5. For example, the bill “finds” that:

- “Only 15 percent of the funds necessary to pay for mandated special

²⁰³ N.H. Laws of 2021, Chapter 209, Part I, Section 3 (adding RSA 193-E:3, I(o)).

²⁰⁴ *Id.*

²⁰⁵ N.H. Laws of 2021, Chapter 209, Part IV, section 2, VIII.

²⁰⁶ N.H. Laws of 2021, Chapter 209, Part IV, Section 6.

education services are provided by the federal government.”

- “Only 20 percent of the funds necessary to pay for mandated special education services are provided by the state of New Hampshire.”
- “The remaining 65 percent of the funds necessary to pay for mandated special education services are borne by local school district taxpayers.”
- “The average per student special education cost in 2020 was \$74,000.”

B. Additional State Special Education Aid for Communities with 1,000 or Fewer Residents

New Hampshire school districts front all special education costs.²⁰⁷ However, when a student’s annual special education costs exceeds 3.5 times the state average annual per pupil expenditure, RSA 186-C:18 offers the school district *partial* reimbursement.

RSA 186-C:18, III(b) directs the NH DOE to reimburse a school district for 80 percent of the costs in excess of 3.5 times the state average.²⁰⁸ This mechanism was once termed “catastrophic aid,” but has since been renamed “special education aid.”

Importantly, the legislature often fails to appropriate sufficient funds for the State to pay its 80 percent share. In those years, “the appropriation shall be prorated proportionately based on entitlement among school districts entitled to a grant.”²⁰⁹

Furthermore, the State does not reimburse school districts immediately. Reimbursement occurs a year after the school district fronted all costs.

This delay can wreak financial havoc on small districts, especially when a student with severe disabilities moves in after local voters have set the annual budget.

Part IV, Section 1 of Senate Bill 147 offers small school districts some relief in such situations. It amends RSA 186-C:18, III by adding the following provision:

The state may designate up to an additional \$250,000 of the funds which are appropriated under this paragraph for each fiscal year for any *community of 1,000 or fewer residents* to mitigate the impact of special education costs when emergency assistance is *necessary to prevent significant financial harm to such district or community*.

²⁰⁷ The only exception is when a juvenile court placed the student in a residential program, in which case the responsible school district’s liability is capped at 3 times the state average annual per pupil expenditure and the State Department of Education pays any excess special education costs. RSA 186-C:19-b.

²⁰⁸ The state is also supposed to *fully* reimburse a school district for any student’s special education costs that exceed \$100,000 annually. RSA 186-C:18, III(c).

²⁰⁹ RSA 186-C:18, III(b).

(Emphasis added.) The term “community of 1,000 or fewer residents” presumably means a school district consisting exclusively of towns whose total combined population does not exceed 1,000 residents.

This special state aid is subject to two conditions. First, it is contingent on the state legislature appropriating funds for this category of emergency aid.²¹⁰ Second, a school district that receives such emergency assistance forfeits for that fiscal year any other state aid under RSA 186-C:18 tied to that student.²¹¹ Furthermore, the statute does not define the triggering event, which is “when emergency assistance is necessary to prevent significant financial harm to such district or the community.”

Part IV, Section 1 went into effect on October 9, 2021.²¹²

XXVI. Transportation To and From School Activities by Contract Carrier

Senate Bill 147 amends the student transportation laws to allow students to be transported to and from school activities by a “contract carrier.”²¹³ This amendment to RSA 189:6-e states as follows:

I. A school district may contract with a contract carrier of passengers, as defined by RSA 376:2, VII, that is designed to transport 16 or more passengers including the operator, to transport pupils to or from school activities. The motor vehicle used by the contract carrier of passengers shall bear a valid state inspection sticker, comply with applicable provisions of RSA 376, and be operated by a driver who holds a valid commercial driver's license.²¹⁴

A contract carrier is defined in RSA 376:2, VII as:

[A] person providing motor vehicle transportation for compensation under continuing agreements with one or more persons:
(a) By assigning motor vehicles for a continuing period of time for the exclusive use of each such person; or
(b) Designed to meet the distinct needs of each person.²¹⁵

Senate Bill 147 makes it clear that the contract carrier can be used only for transportation to and from “school activities.” The bill goes on to define school activities as follows:

²¹⁰ RSA 186-C:18, III(a).

²¹¹ *Id.*

²¹² N.H. Laws of 2021, Chapter 209, Part IV, section 6 (2021) (amending RSA 186-C:18, III).

²¹³ N.H. Laws of 2021, Chapter 209, Part III (amending RSA 189:6-e).

²¹⁴ *Id.*

²¹⁵ RSA 376:2, VII.

II. In this section, "school activities" shall include, but is not limited to, sporting events, intramural events, events associated with student clubs or organizations, job training programs, field trips, special education transition services that require travel of at least 150 miles round trip. "School activities" shall not include transportation between home and school.²¹⁶

This does not alter a school district's obligations with respect to transporting a student to and from school. Students must continue to be transported to and from school in a school bus.

This bill became effective on August 10, 2021.²¹⁷

XXVII. Check of Founded Abuse Neglect Reports as Part of Teacher Credential Process

The Department of Health and Human Services currently maintains a state registry "for the purpose of maintaining a record of founded reports of abuse and neglect."²¹⁸ Senate Bill 147 allows the credentialing bureau of the NH DOE access to these records upon application by a first time applicant for a New Hampshire teaching credential.²¹⁹

The bill states that by submitting an application for a teaching credential, the applicant is "deemed to have consented to have the NH DOE check his or her name for findings of abuse on the central registry pursuant..."²²⁰ Furthermore, "[a]ny individual whose name has been submitted for this check who has been the subject of finding of abuse, shall be denied a teaching credential by the [NH DOE]."²²¹

The NH DOE is ordered to adopt rules regarding these new credentialing requirements.²²²

²¹⁶ *Id.*

²¹⁷ N.H. Laws of 2021, Chapter 209, Part III, Section 2.

²¹⁸ RSA 169-C:35, I.

²¹⁹ N.H. Laws of 2021, Chapter 209, Part II, Section 2 and 4 (amending RSA 169-C:35, I and adopting RSA 189:13-c).

²²⁰ N.H. Laws of 2021, Chapter 209, Part II, Section 4, (enacting RSA 189:13-c, III).

²²¹ N.H. Laws of 2021, Chapter 209, Part II, Section 4 (enacting RSA 189:13-c, IV).

²²² N.H. Laws of 2021, Chapter 209 Part II, Sections 1 and 4 (amending RSA 21-N:9, adopting RSA 189:13-b, V).

XXVIII. Career and Technical Education (CTE)

A. Amendment of “Sending District”

Senate Bill 148 amends the Regional Career and Technical Education laws.²²³

When a student attends a CTE program in another district, the “student's sending district shall be financially responsible for 25 percent of the career and technical education portion of the receiving district's cost per pupil for the prior school year...” Senate Bill 148 amends the definition of “sending district” to include students who attend nonpublic schools and students who are home schooled.²²⁴ As amended, the statute reads:

If a student attends a chartered public school, *private school, or is home schooled*, the sending district shall be the school district in which the student resides.²²⁵

B. Transportation

Senate Bill 148 also amends RSA 188-E:8, which provides for transportation reimbursement for certain students. The law as amended would read as follows:

188-E:8 Transportation. The department of education is authorized to reimburse from its regular budget the *full* cost of transportation for (a) regional career and technical education students who attend regional career and technical education centers and for (b) at-risk students who attend alternative education programs located at a regional career and technical education center or other comprehensive high school. Transportation costs shall not exceed the rate adopted pursuant to RSA 541-A by the state board. The sending district shall be responsible for *providing transportation and* paying the transportation costs and shall *then* be reimbursed from state funds.²²⁶

This bill also makes changes to the laws addressing the construction, renovation, expansion and replacement of CTE centers, and changes to the Advisory Council on Career and Technical Education, the Pre-Engineering and Technology Advisory Council, and the Advanced Manufacturing Education Advisory Council.²²⁷

²²³ N.H. Laws of 2021, Chapter 210, Part II (amending RSA 188-E:2, :3, :8; :10, :10-b, :12, :16, :22).

²²⁴ N.H. Laws of 2021, Chapter 210, Part II, Section 1 (amending RSA 188-E:2, VIII(b)).

²²⁵ *Id.* (new language in bold).

²²⁶ N.H. Laws of 2021, Chapter 210, Part II, Section 3 (amending RSA 188-E:8) (new language in bold).

²²⁷ N.H. Laws of 2021, Chapter 210, Part II.

C. One Year Teaching Certifications for CTE Teachers

Pursuant to RSA 189:39-b, “the local school board, in consultation with the superintendent, may offer a one-time, one year certificate of eligibility to any person interested in teaching on a full-time or part-time basis, without requiring a person to possess a teaching credential, teaching license, or other teaching certification.”²²⁸

Ordinarily, this offer may only be made when that person:

- (a) Possesses at least a bachelor's degree from an accredited postsecondary institution.
- (b) Is subject to a criminal history records check pursuant to RSA 189:13-a. [and]
- (c) Is qualified for the position by relevant experience and education.²²⁹

Effective July 5, 2021,²³⁰ individuals applying to teach a course in a CTE specialty area are exempt from the bachelor’s degree requirement listed in RSA 189:39-b.²³¹ Importantly, this certification is only valid for one year and individuals who are awarded this certification must still undergo a criminal background check. As explained by Senator Kahn for the Senate Education Committee, “[t]his bill will give CTE centers flexibility, when an emergency or sudden need arises, to hire individuals who may not possess a bachelor’s degree.”²³²

D. Committee to Review Tuition and Transportation Funding of Career and Technical Education

House Bill 304 “establishes a [study] committee to make recommendations relative to tuition and transportation funding of career and technical education.”²³³ The intent of House Bill 304 is to increase student access to career and technical education (CTE) programs by identifying areas where the policy and funding of tuition and transportation costs can be improved.²³⁴ The committee is tasked with: (1) evaluating and making recommendations regarding the CTE tuition and transportation funding formula; (2) assessing and making recommendations for providing funding reimbursement for students who attend CTE programs within their own districts; (3) identifying policy and funding strategies to increase student access to CTE; and (4) considering other policy and funding issues as the committee deems

²²⁸ RSA 189:39-b.

²²⁹ *Id.*

²³⁰ N.H. Laws of 2021, Chapter 28, Section 2.

²³¹ N.H. Laws of 2021, Chapter 28, Section 1 (amending RSA 189:39-b); Senate Calendar No. 9, pg. 3 (Jan. 28, 2021).

²³² Senate Calendar No. 9, pg. 3 (Jan. 28, 2021).

²³³ N.H. Laws of 2021, Chapter 11.

²³⁴ House Calendar No. 12, p. 4 (Feb. 19, 2021).

necessary.²³⁵

The committee is comprised of seven members of the House of Representatives and two members of the Senate. The committee is tasked with reporting its findings and recommendations on or before November 1, 2022.²³⁶

XXIX. Adequate Education

A. Environmental Science Required for Adequate Education

Part V of Senate Bill 148 amends RSA 193-E:2, III which sets forth requirement for an adequate education. The law now requires that an adequate education shall provide all students with the opportunity to acquire:

III. Knowledge of the biological, physical, and earth sciences, **including environmental sciences that investigate the complex interaction of physical, chemical, and biological processes that take place on the earth**, to enable them to understand and appreciate the world **and the engineering, socio-economic, and geopolitical challenges** around them.²³⁷ (New language in bold.)

VI. Sound wellness and environmental practices, **including outdoor recreation**, to enable them to enhance their own well-being, as well as that of others.

VII. Skills for lifelong learning, including interpersonal, **environmental education**, and technological skills, to enable them to learn, work, **communicate**, and participate effectively in a changing society and environment.²³⁸ (New language in bold.)

Senate Bill 148 also requires the state director of career and technical education to report on the availability of programs in outdoor recreation in order to provide training for careers related to the outdoor recreation industry.²³⁹ The director must report his findings to the advisory council on CTE by June 1, 2022.²⁴⁰

The stated intent of Part V of Senate Bill 148 is “to prepare job-ready students for NH’s tourism and outdoor recreation industry.”²⁴¹

²³⁵ N.H. Laws of 2021, Chapter 11, Section 3.

²³⁶ *Id.*

²³⁷ N.H. Laws of 2021, Chapter 210, Part V, Section 1 (amending RSA 193-E:2, III) (new language in bold).

²³⁸ N.H. Laws of 2021, Chapter 210, Part V, Section 2 (amending RSA 193-E:2, VI-VII) (new language in bold).

²³⁹ N.H. Laws of 2021, Chapter 210, Part V, Section 3 (adding RSA 188-E:5, XII).

²⁴⁰ *Id.*

²⁴¹ House Calendar No. 26, pg. 20 (May 28, 2021).

B. Adequate Education Data Reports to New Hampshire Department of Education

Chapter 193-E outlines the criteria for an adequate education in New Hampshire. This law also outlines the data that school districts must report to the NH DOE.²⁴² Signed into law on August 10, 2021, Senate Bill 148 adds another category of information into the data that must be provided to the NH DOE This provision reads as follows:

Beginning in September 2021, and each year thereafter, school districts shall, for entering high school freshman: assess student career interests; document school pathways to career readiness credentials; advise all entering high school students how to achieve a career ready credential upon graduation; and record on a student's transcript progress towards the credential. School districts shall report the following annually: the number of students who complete CTE; the number of dual enrollments, concurrent enrollments, extended learning opportunities, and work based learning enrollments; and the number of career ready credentials awarded.²⁴³

XXX. Emergency Action Plans for Sports Related Injuries

Senate Bill 148 includes a provision that requires districts to establish emergency action plans related to potential sports injuries, as well as collecting certain medical information from student athletes.²⁴⁴ The bill also applies to nonpublic schools containing grades 4-12.

First, districts must establish an emergency action plan for responding to serious or potentially life-threatening sports-related injuries.²⁴⁵

The emergency action plan must:

- Document the proper procedures to be followed when a student sustains a serious injury or illness while participating in school sponsored sports or other athletic activity.
- List the employees, team coaches, and licensed athletic trainers in each school who are trained in first aid or cardiopulmonary resuscitation;
- Identify the employees, team coaches, or licensed athletic trainers responsible for carrying out the emergency action plan;

²⁴² RSA 193-E:3.

²⁴³ *Id.*

²⁴⁴ N.H. Laws of 2021, Chapter 210, Part III, Section 1 (enacting RSA 200:40-c).

²⁴⁵ *Id.*

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- Identify the activity location, address, or venue for the purpose of directing emergency personnel;
- Identify the equipment and supplies and location thereof needed to respond to the emergency;
- Identify the location of any automated external defibrillators and personnel trained in the use of the automated external defibrillator; and
- Document policies related to cooling for an exertional heat stroke victim consistent with guidelines established by the American College of Sports Medicine and the National Athletic Trainers' Association.

The emergency action plans must be posted within each school and disseminated to, and coordinated with emergency medical services, the fire department, and law enforcement.²⁴⁶ Each plan shall be added to the school's emergency response plan, and adopted procedures shall be reviewed annually and updated as necessary.²⁴⁷

Second, the bill requires that each school district adopt procedures for obtaining the following medical information from student athletes prior to their participation in athletic activities:

- Information relative to any injury or illness related to or involving any head, face, or cervical spine
- History of cardiac injury or diagnosis
- History of exertional heat stroke
- Presence of sickle cell trait, asthma, allergies, or diabetes²⁴⁸

Notably, the bill requires that access, filing, and confidentiality of the above medical information be managed in accordance with both HIPAA and FERPA.²⁴⁹

In addition, the bill requires that districts establish policies related to hydration, heat acclimatization and wet bulb globe temperature guidelines (measuring Heat Index), as well as procedures for students to return to play after a sports or illness related injury.²⁵⁰ These policies must be kept on file by each school district and made available to the NH DOE and the public upon request.²⁵¹

This law goes into effect September 1, 2022,²⁵² and plans shall be

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² Senate Bill 148, Part III, Section 2 (2021)

implemented by the beginning of the first full school year after that date.

XXXI. Statewide Assessment – Collection of Data

House Bill 194 amends RSA 193-C:12 to allow the NH DOE to collect results of the statewide assessment and comparative data, and to provide such information to parents.²⁵³ The law, as amended, still permits the NH DOE to provide the testing entity with pupil names and unique pupil identifiers and requires the testing entity to maintain the results. The law now allows for the testing entity to provide the results to parents and allows the NH DOE to collect testing data directly from public school districts.²⁵⁴ RSA 193-C:12, II now reads:

II. The department may provide, **or may request the testing entity to provide**, the assessment results and comparative data to a parent, a legal guardian, or the pupil's school as provided in RSA 193-C:11. **The department may collect, and the districts shall provide, student address information from the individual school districts solely for the purpose of effectuating the distribution of assessment results and comparative data as provided in this section.** (new language in bold).

This new law is already in effect.

XXXII. Annual Report on State Mental Health Plan

Section 395²⁵⁵ of House Bill 2 requires that New Hampshire's 10-year mental health plan include a report on the implementation of Senate Bill 14-FN, an act directing DHHS to expand home and community-based behavioral health services for children and implement a number of improvements to the State's child-serving system.²⁵⁶ The report must also address:

- (1) The total cost of children's behavioral health services.
- (2) The identification of barriers and service gaps in the array of children's behavioral health services, along with a description of efforts and plans to fill those gaps.
- (3) The availability of mobile crisis and stabilization services in each part of the state and plans to fill any gaps.
- (4) Changes to statutes, administrative rules, policies, practices, and

²⁵³ N.H. Laws of 2021, Chapter 20 (amending RSA 193-C:12) (new language in bold).

²⁵⁴ *Id.*

²⁵⁵ N.H. Laws of 2021, Chapter 91, Section 394 (amending RSA 126-A:5, XXXIII).

²⁵⁶ N.H. Laws of 2019, Chapter 44, Section 1.

managed care and provider contracts which will be necessary to fully implement the system of care.

- (5) Shortfalls in workforce sufficiency affecting full implementation of the system of care as well as efforts and plans for addressing those shortfalls.
- (6) Numbers of children and youth awaiting services in various categories.
- (7) Plans to coordinate the system of care with existing efforts addressing early childhood interventions, primary prevention, and primary care integration.
- (8) Plans to develop and/or coordinate a cross-system assessment tool and data collection system to measure outcomes, including but not limited to status upon exit from the system of care, measured treatment results, recidivism, and other returns to the service system.²⁵⁷

This report was to be submitted to the Oversight Committee on Health and Human Services and the chairpersons of the House and Senate policy committees on or before September 1, 2021.²⁵⁸

XXXIII. Establishment of Emergency Services for Children, Youth and Families Fund

House Bill 2, Sections 30 – 31, amends RSA 6:12, I(b) and RSA 170-G:4-h to establish the Emergency Services for Children, Youth and Families Fund.²⁵⁹ Comprised of “public funds, gifts, grants, or donations[,]” this non-lapsing fund may be used by the Department of Health and Human Services or its providers in order to “meet the immediate needs of children and families . . . when there are no other supports or services available . . . in a timely manner.”²⁶⁰ The goal of this legislation is to avoid the removal of children from their homes and support reunification wherever possible.²⁶¹

XXXIV. School Resource Office Memorandum of Understanding

All school districts that have a school resource officer (SRO) must have a signed memorandum of understanding (MOU) between the district and the law

²⁵⁷ N.H. Laws of 2021, Chapter 91, Section 395 (amending RSA 126-A:5, XXXIII).

²⁵⁸ N.H. Laws of 2021, Chapter 91, Section 395 (amending RSA 126-A:5, XXXIII).

²⁵⁹ N.H. Laws of 2021, Chapter 91, Sections 30-31 (amending RSA 6:12, I(b) and RSA 170-G).

²⁶⁰ N.H. Laws of 2021, Chapter 91, Section 31 (amending RSA 170-G).

²⁶¹ *Id.*

enforcement agency from which the SRO is deployed.²⁶² Senate Bill 96 states that such MOUs are public documents.²⁶³ Districts should ensure that they are in compliance by making these MOUs available for public inspection.

XXXV. Services for Individuals with Developmental Disabilities Aged 18 - 21

There has long been a gap in community based services for adult students with disabilities. New Hampshire's area agencies, which provide such services to adults with disabilities, have historically declined to provide services to students aged 18 -21, asserting that they do not have an obligation to support such students while they are enrolled in the public school system. The New Hampshire Department of Health and Human Services has taken the position that state law prohibits the Department from providing such services to individuals who are still enrolled in school.²⁶⁴ The New Hampshire Superior Court recently disagreed with the Department of Health and Human Service's position asserting that RSA 171-A did not bar a developmentally disabled adult who was also enrolled in school from receiving services from the area agency.²⁶⁵

Senate Bill 162 appears to be a bridge between these two positions. Senate Bill 162 requires a number of stakeholders to meet and collaborate to develop a plan by October 1, 2021 that will provide "coverage for services to individuals with developmental disabilities aged 18-21 enrolled in school and determined eligible for developmental services that are not the responsibility of the local education agency, another state agency, or another division of the department."²⁶⁶ Of course, it remains to be seen whether the legislature will fully fund these services. Senate Bill 162 requires DHHS to incorporate such costs into its appropriate requests, but stops short of requiring the legislature to fund such requests.²⁶⁷

XXXVI. Court Placements and Assessments

Senate Bill 162 sets forth new requirements for children who are court placed into a qualified residential treatment program.²⁶⁸ For students placed into such programs through the court proceedings associated with abuse/neglect, juvenile delinquency, or child in need of services, the court must now "order an assessment to be completed within 30 days of placement by a qualified individual as defined by the

²⁶² RSA 186:11, XXXVII.

²⁶³ N.H. Laws of 2021, Chapter 227. Section 3 (amending RSA 186:11, XXXVII).

²⁶⁴ See RSA 171-A:1-a, I(a).

²⁶⁵ *Verrill v. Shibinette*.

²⁶⁶ N.H. Laws of 2021, Chapter 122, Section 56.

²⁶⁷ N.H. Laws of 2021, Chapter 122, Section 57 (amending RSA 171-A:1-a, II).

²⁶⁸ N.H. Laws of 2021, Chapters 69, 70, and 71 (adopting RSA 169-B:19-d, RSA 169-C:19-d, RSA 169-D:19-d).

federal Family First Prevention Services Act of 2017.”²⁶⁹ The court must also “review the assessment and issue an order approving the placement or changing the placement within 60 days of placement.”²⁷⁰

XXXVII. Psychotropic Medications for Children in Foster Care

House Bill 120 amends a number of state laws relative to the administration of psychotropic medications to students in state care. Effective January 1, 2022, the Division for Children Youth and Families (DCYF) provides medication monitoring for children in foster care who receive psychotropic medication.²⁷¹ Further, such monitoring must be consistent with the current American Academy of Child and Adolescent Psychiatry (AACAP) Standards, “which shall include providing relevant health education and guidance to caregivers and DCYF field staff, and that any use of medication restraint conforms with the limitations in RSA 126-U.”

The bill also amends the Foster Care Bill of Rights, RSA 170-G:21 to include that any “child who is placed in a foster home or other out-of-home placement pursuant to a juvenile court proceeding under RSA 169-B, RSA 169-C, or RSA 169-D shall have the right or privilege” to “receive appropriate medical supervision of any prescribed psychotropic medications.”²⁷²

Additionally, effective January 1, 2023, new requirements will be in place for students who may need psychotropic medication. As amended, RSA 170-G:4-i, will read as follows:

170-G:4-i Assessment for the Use of Psychotropic Medications. For children in out-of-home care with the department, prior to seeking a prescription or renewal for psychotropic medication, the department shall ensure the undertaking of, and guidance from, a recent comprehensive medical assessment to rule out an underlying physical cause and a comprehensive psychosocial assessment to address psychosocial issues. The prescribing of any medication shall include consultation with the child’s caregiver or legal guardian and the division for children, youth and families (DCYF) district nurse. The use of medication restraint shall be limited as provided in RSA 126-U.²⁷³

²⁶⁹ *Id.* A “qualified individual” under the Family First Prevention Services Act is a trained professional or licensed clinician who is not a state employee or affiliated with any placement setting in the state.

²⁷⁰ *Id.*

²⁷¹ N.H. Laws of 2021, Chapter 182 (amending RSA 170-G:4).

²⁷² N.H. Laws of 2021, Chapter 182 (amending RSA 170-G:21).

²⁷³ N.H. Laws of 2021, Chapter 182 (amending RSA 170-G:4-i).

XXXVIII. Juvenile Diversion Programs

Senate Bill 94 creates a process for referring a juvenile for a “needs assessment.”²⁷⁴ The needs assessment may be done before or after a police officer or juvenile probation and parole officer takes a minor into custody. However, if the arresting agency contemplates the initiation of juvenile delinquency proceedings, the minor must be referred to the Department of Health and Human Services for a voluntary needs assessment within two business days of arrest.²⁷⁵ Upon receiving parental consent, the needs assessment must be completed within 30 days from referral.²⁷⁶

If a needs assessment conducted “reveals that the child has complex behavioral health needs and is at risk of residential, hospital, or secure placement, or is already involved in multiple service systems, the Department of Health and Human Services shall refer the child and family to the FAST Forward program to determine eligibility for FAST Forward and referral to a care management entity.”²⁷⁷ Additionally, the Department of Health and Human Services must create a report and recommendations to be provided to the minor, the minor's parent or guardian, the minor's attorney, and the referring entity and shall include the Department's specific recommendation regarding whether a juvenile delinquency petition should be filed and any recommendations for supports and services.²⁷⁸

The bill also sets forth how/when the needs assessment and statements made by the minor during that process may be used. The Children and Family Law Committee noted that, in its opinion, this bill will reduce the recidivism rate among juveniles being detained at the Sununu Youth Service Center (SYSC). This new law will be phased in throughout the juvenile courts in the state with some courts starting January 1, 2022, and it will be in effect in all courts by October 1, 2022.

XXXIX. Limits on Juvenile Delinquency Proceedings

Occasionally students are involved in juvenile delinquency proceedings. Senate Bill 96 limits the age of students who may be the subject of delinquency proceedings.²⁷⁹ This bill amends the definition of a delinquent, RSA 169-B:24, IV, to read as follows:

IV. “Delinquent” means a person who has committed an offense before reaching the age of 18 years which would be a felony or misdemeanor under the criminal code of this state if committed by an

²⁷⁴ N.H. Laws of 2021, Chapter 220 (amending various provisions of RSA 169-B).

²⁷⁵ *Id.* (amending RSA 169-B:10).

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ N.H. Laws of 2021, Chapter 227, Section 6 (amending RSA 169-B:2, IV).

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adult, or which is a violation of RSA 318-B:2-c, II or III, and is expressly found to be in need of counseling, supervision, treatment, or rehabilitation as a consequence thereof. **No person under 13 years of age shall be subject to proceedings under this chapter unless such person has committed a violent crime as defined in RSA 169-B:35-a, I(c). This provision shall not be construed to limit the filing of a petition for any minor child under RSA 169-D.**²⁸⁰ [New language in bold.]

The bill also limits the circumstances under which a juvenile delinquency case can be transferred from District Court to Superior Court.²⁸¹

²⁸⁰ *Id.* (new language in bold).

²⁸¹ N.H. Laws of 2021, Chapter 227, Section 7 (amending RSA 169-B:24, IV).