Protecting Students from Discrimination on the Basis of Gender Identity: Compliance with Federal and State Anti-Discrimination Laws.

Presented to the ConVal School District

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A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with a broad understanding of the law pertaining to the pertinent state and federal anti-discrimination laws impacting the treatment of transgender students in schools. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

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I. OVERVIEW

The goal of this material is to provide educators with a better understanding of the protections afforded to transgender students under state and federal law, as well as the practical applications of these protections. This material does not cover all aspects of the law, and you are encouraged to seek advice from your district's legal counsel regarding any specific case.

II. DEFINITIONS

The following definitions are provided in an effort to better aid you in understanding this material:

- **Gender identity**: A person's gender-related identity, appearance, or behavior, whether or not that gender-related identity, appearance, or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth. Gender-related identity may be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity, or any other evidence that the gender-related identity is sincerely held as part of a person's core identity provided, however, that gender-related identity shall not be asserted for any improper purpose.[1]

- **Sex assigned at birth:** The sex, male, female or intersex, that a doctor or midwife uses to describe a child at birth based on their external anatomy.[2]

- **Gender expression**: External appearance of one's gender identity, usually expressed through behavior, clothing, body characteristics or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine.[3]

- **Cisgender**: A term for people whose gender identity generally matches the gender assigned for their physical sex.[4]

- **Transgender:** An umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth. Being transgender does not imply any specific

[1] RSA 354-A:2, XIV-2; see also RSA 21:54.
[2] "Glossary of Terms", Human Rights Campaign, available at https://www.hrc.org/resources/glossary-of-terms (last accessed March 9, 2022).
[3] Id.
[4] Id.

sexual orientation. Therefore, transgender people may identify as straight, gay, lesbian, bisexual, etc.[5]

- **Transgender male:** Someone who identifies as male but was assigned the sex of female at birth;

- **Transgender female:** Someone who identifies as female but was assigned the sex of male at birth;

- **Gender nonconforming**: A broad term referring to people who do not behave in a way that conforms to the traditional expectations of their gender, or whose gender expression does not fit neatly into a category. While many also identify as transgender, not all gender non-conforming people do.[6]

- **Gender fluid:** A person who does not identify with a single fixed gender or has a fluid or unfixed gender identity.[7]

- **Gender transition**: The process of shifting toward a gender role different from that assigned at birth, which can include social transition, such as new names, pronouns and clothing, and medical transition, such as hormone therapy or surgery.[8]

III. LEGAL BACKGROUND FOR TRANSGENDER STUDENTS' RIGHTS

A. Federal Law: Title IX, 20 USC 1681(a)

Title IX is applicable to all school districts that receive federal financial assistance. See 20 U.S.C. § 1681(a). Therefore, since New Hampshire school districts receive the federal financial assistance, Title IX applies to school districts in New Hampshire.

Title IX states:

> No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

[5] Id.
[6] Id.
[7] Id.
[8] "A glossary: Defining transgender terms", American Psychological Association (September 2017), available at https://www.apa.org/monitor/2018/09/ce-corner-glossary (last accessed March 9, 2022).

20 USC § 1681(a). Title IX offers both substantive as well as procedural protections. See 20 USC § 1681(a); see also 34 C.F.R. § 106.71 (providing that Title IX applies the procedural provisions applicable to Title VI of the Civil Rights Act of 1964). Title IX requires that schools have policies and procedures in place to address complaints made alleging harassment on the basis of sex. See, e.g., Ed 303.01(j) and 306.04(a)(9) (requiring that schools adopt a policy on sexual harassment).

The United States Supreme Court has held that Title IX may be enforced through a private right of action, and that plaintiffs may obtain damages for violations of Title IX. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992) (damages); Cannon v. Univ. of Chicago, 441 U.S. 677, 717 (1979) (private right of action). The Court has also held that plaintiffs alleging unconstitutional gender discrimination in schools may bring suit under 42 U.S.C. § 1983, based on the Equal Protection Clause of the Constitution. Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009).

The major question in the conversation regarding transgender students is whether they are entitled to protection under Title IX due to their gender identity. Title IX protects students from discrimination on the basis of sex, but the question is how "sex" is defined under Title IX. If sex is defined as biological sex, Title IX would not afford transgender students protection on the basis of their gender identity. However, if sex is also defined as a student's gender identity, transgender students would be entitled to protection against discrimination on the basis of their gender identity. These issues often come up in the context of students' preferred names and pronouns, student records, school facilities, and school operated or sponsored athletics.

It is important to note that the answer to this question has been subject to change depending on the presidential administration in office. During President Barack Obama's Administration, the Department of Education ("DOE") and the Department of Justice ("DOJ") provided several guidance documents advising school districts that Title IX's prohibition of discrimination on the basis of sex encompasses discrimination on the basis of gender identity. After President Donald Trump was elected, some of the guidance was rescinded. Now, President Joseph Biden's Administration has reiterated its implementation of the prior stance, namely, that transgender students are protected by Title IX.

There was one notable development in the interim which may suggest a more permanent shift in federal law concerning transgender rights. On June 15, 2020, the United States Supreme Court issued a landmark decision in Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731 (2020), holding that, in the Title VII[9] context, discrimination on the basis of transgender status (or sexual orientation) necessarily discriminates against a person for "traits or actions it would not have questioned in members of a different sex." Id. at 1737. Thus, the Court held "it is impossible to discriminate against a person"

[9] Title VII is the Title IX equivalent in an employment context.

based on their gender identity (or sexual orientation) "without discriminating against that individual based on sex." Id. at 1741.

Traditionally, based on the similarities between Title VII and Title IX, cases interpreting Title IX have looked to caselaw discussing Title VII for guidance. Indeed, the Biden Administration has issued its interpretation on this case, clarifying that "the Department has determined that the interpretation of sex discrimination set out by the Supreme Court in Bostock—that discrimination 'because of . . . sex' encompasses discrimination based on sexual orientation and gender identity—properly guides the Department's interpretation of discrimination 'on the basis of sex' under Title IX and leads to the conclusion that Title IX prohibits discrimination based on sexual orientation and gender identity." 86 Fed. Reg. 117, 32637-39 (2021); see also US DOE Press Release (6/16/2021), available at https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity (last accessed March 2, 2022).

Thus, after many years, three presidential administrations, and one U.S. Supreme Court case with ensuing federal guidance, we may finally have an answer to this question. Yes, discrimination on the basis of transgender status is, indeed, discrimination on the basis of sex under Title IX, at least while this Administration is in office.

B. New Hampshire Law

The New Hampshire Bill of Rights under the New Hampshire Constitution prohibits discrimination on the basis of sex, providing,

> All men have certain natural, essential, and inherent rights--among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, **sex** or national origin.

N.H. Const. Pt. 1, art. II (emphasis added). However, nowhere in the New Hampshire Constitution is the term "sex" defined. See also RSA 186:11, XXXIII (outlining the duties of the State Board of Education and similarly ensuring there is no unlawful discrimination on the basis of "sex", without defining the term).

The first specific legislative protections for transgender students came in September 2019, when New Hampshire passed a law specifically prohibiting discrimination in public schools, including discrimination on the basis of "gender identity," stating,

> No person shall be excluded from participation in, denied the benefits of, or be subjected to discrimination in public schools because of their age, sex, **gender identity**, sexual orientation, race, color, marital status, familial status, disability, religion, or national origin, all as defined in RSA 354-A. Any person claiming to be aggrieved by a discriminatory practice prohibited under this section, including the attorney general, may initiate a civil action against a school or school district in superior court for legal or equitable relief, or with the New Hampshire commission for human rights, as provided in RSA 354-A:27-28.

See RSA 193:38 (emphasis added). RSA 193:38 provided a remedy, indicating that, "any person claiming to be aggrieved by discriminatory practices prohibited under this section, including the attorney general, may initiate a civil action against a school or a school district in superior court for legal or equitable relief, or with the New Hampshire Commission for Human Rights, as provided in RSA 354-A:27-28." RSA 193:39 goes on to require school districts to "develop a policy that guides the development and implementation of a coordinated plan to prevent, assess the presence of, intervene in, and respond to incidents of discrimination on the basis of age, sex, **gender identity**, sexual orientation, race, color, marital status, familial status, disability, religion, national origin, or any other classes protected under RSA 354-A." (Emphasis added).

Thus, as of September 2019, school districts were required to not only refrain from discriminating on the basis of gender identity, which includes discrimination based on transgender status, but they were also required to affirmatively develop policies and plans to identify and respond to discrimination.

At the same time, RSA 354-A was amended to include RSA 354-A:27, entitled "Opportunity for Public Education Without Discrimination a Civil Right." This provision mirrored the language in RSA 193:38 in prohibiting discrimination based on, among other protected classes, gender identity. RSA 354-A:28 goes on to provide a procedure for addressing discrimination complaints, including a private right of action in superior court against a school or school district for legal or equitable relief. A complainant may also initiate a complaint with the State Commission for Human Rights[10].

Shortly after, New Hampshire revised its Civil Rights Act to include "gender identity" as a protected class, with it now stating:

> All persons have the right to engage in lawful activities and to exercise and enjoy the rights secured by the United States and New Hampshire Constitutions and the laws of the United States and New Hampshire without being subject to actual or threatened physical force or violence

[10] Another option found within this section is for the Attorney General to initial an action in superior court or by complaint with the Commission. See RSA 354-A:28, I.

against them or any other person or by actual or threatened damage to or trespass on property when such actual or threatened conduct is motivated by race, color, religion, national origin, ancestry, sexual orientation, sex, **gender identity**, or disability.

RSA 354-B:1 (emphasis added). This section includes its own set of remedies, as outlined in RSA 354-B:3.

Accordingly, similar to the federal antidiscrimination laws, the New Hampshire civil rights and discrimination laws protect individuals from discrimination on the basis of gender identity. The practical question then becomes how to apply these protections within New Hampshire's schools.

IV. PRACTICAL CONSIDERATIONS FOR DISTRICTS

A. "Identification Documents," Names, and Pronouns

As outlined above, both state law and Title IX protect students from discrimination or harassment on the basis of their gender identity. Thus, once a student or parent has notified a school district that the student will assert a different gender identity, the school district is required to then treat the student consistent with their gender identity. This includes referring to the student with pronouns and names consistent with their gender identity. Failure to do so likely constitutes discrimination because it (1) creates a hostile school environment for the student and (2) violates the student's privacy with regard to their transgender status.

Therefore, it is recommended that school districts train their staff and officials to use the names and pronouns preferred by each student, as communicated by either the student or their parent. It is also recommended that appropriate school staff meet with the student to create a transition plan in order to be clear on how the student wishes to be addressed in a variety of situations.

An issue arises when parents are unsupportive of their child's preferred gender identity, and request that the school use the name and pronoun assigned to the student at birth. This is a very close call and an unsettled question in the law because it balances the student's rights with the parents' rights to exhibit control over their child. This issue is discussed in more detail in Section V.

B. Student Records

1. Protecting Privacy

A school district may commit a violation if it fails to take reasonable steps to protect a student's privacy related to their transgender status. In addition, under FERPA, a school may not disclose personally identifiable information unless it is with

proper consent or in accord with an applicable FERPA exception, such as a disclosure to school personnel who have a legitimate educational interest in the information.

Schools should utilize their existing FERPA policies when handling information about a transgender student. In doing such, school administrators should keep in mind that transgender status constitutes "personally identifiable information," and a student's gender is not "directory information." Therefore, they should take the required steps under FERPA to ensure that the student's privacy is protected, as they would with any other student's personal information.

Furthermore, FERPA requires parental consent prior to the disclosure of a student's records. See 20 U.S.C. § 1232g (b)(1), providing that,

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information…) of students without the written consent of their parents to any individual, agency, or organization…

Therefore, in the absence of an applicable FERPA exception to the consent requirement, school districts should always obtain parental consent prior to the disclosure of minor student's records or personally identifiable information.

2. Amending Records

No New Hampshire or First Circuit Appellate Court has determined whether a district is required under state or federal law to amend a student's records where the student's gender identity and/or preferred name is inconsistent with the name and/or gender assigned at birth. Therefore, in crafting policies and procedures relative to transgender matters, districts will have to undergo a careful balancing act, looking to existing laws and processes governing the maintenance of accurate records, as well as considering the important privacy interests of its transgender students.

Under FERPA, a student or parent can request an amendment in their educational records when the records are inaccurate, misleading, or in violation of the student's rights of privacy. At this point, it is unclear under state and federal law whether, absent a legal name/gender change, a school district's records are inaccurate or misleading when they represent the name or gender on the student's birth certificate. Additionally, one could make a persuasive argument either way on whether a student's privacy is violated by maintaining these records, provided that the school takes steps to keep them confidential. The DOE has taken the position that districts should adopt policies "to safeguard students' privacy", which would include "maintaining the confidentiality of a student's birth name or sex assigned at birth if the student wishes to

keep this information private, unless the disclosure is legally required." *Supporting Transgender Youth in School*, U.S. Dep't of Education (June 2021), available at https://www2.ed.gov/about/offices/list/ocr/docs/ed-factsheet-transgender-202106.pdf (last accessed March 2, 2022).

While neither the First Circuit nor the New Hampshire Supreme Court have addressed whether failing to amend a student's records to accurately reflect their preferred name and/or gender identity is a violation of that student's privacy rights, the Fourth Circuit has held that the failure to do so when a student has legally changed their gender is violative of their rights under the Equal Protection Clause and Title IX. See Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586, 615 (4th Cir. 2020), as amended (Aug. 28, 2020), cert. denied, 141 S. Ct. 2878, 210 L. Ed. 2d 977 (2021). Based on this case and the current legal trend, **a District should always permit the amendment of a student's records to reflect a legal name change[11] or a change in gender[12].** Thus, the question presented is whether a district should permit the change of records absent any legal changes.

While there is no legal precedent governing this issue, the safest option for a district, which both protects student privacy and comply with applicable laws, would be to allow the prospective amendment of the records to comport with a student's gender identity unless there is a law to the contrary. Practically speaking, this would mean a distinction between official and unofficial school records.

Practice Pointer: *When a district receives a request to change a student's records, it should make every effort to change the student's records to the extent permitted by law. Where a district maintains a record with a student's birth name and/or gender assigned at birth, it should establish protections to limit the availability of this information to only those people who have a legitimate educational interest in that*

[11] The New Hampshire process for changing one's name is governed by RSA 547:3-I, which states, "the probate court may grant the petition of any person to change the name of that person or the name of another person." According to New Hampshire law, a court order is required to change the name on a birth certificate. See RSA 5-C:89 (providing that "Other than corrections in spelling, clerical errors, or omissions, name changes involving the name of the registrant, or the names of his or her parents as listed on a birth record, shall require a certified copy of a court order that states the name to be changed and how the name is to appear on the birth record.")

[12] RSA 5-C:87, V permits a change of gender on an individual's birth certificate "Upon receipt of a certified copy of a court order advising that such individual born in the state of New Hampshire has had a sex change". The New Hampshire Division of Motor Vehicles also permits a person to update their license to reflect their gender identity. See Saf-C 1011.03(b) (An individual may have the gender designation on his or her current driver license or non-driver identification card changed upon completion and submission of form DSMV 626, "Change of Gender Designation", (rev. 12/2014), which shall include a written certification of the individual's gender identity by a licensed and qualified health care provider.") The medical certification requirement was eliminated in August 2021. See https://www.glad.org/post/new-hampshire-eliminates-barrier-for-gender-x-marker-on-state-ids/; see also https://www.dmv.nh.gov/drivers-licensenon-driver-ids/update-personal-information (last accessed March 2, 2022).

information. Best practices would include maintaining this information in a separate file with more limited access.

Point of Discussion: What about a situation where a student is gender fluid or otherwise changes their gender identity multiple times?

C. Bathrooms and Locker Rooms

Although not yet addressed in the First Circuit or by the New Hampshire Supreme Court, other jurisdictions have made it clear that school districts should allow transgender students access to the locker rooms and bathrooms designated for the gender for which they identify. See, e.g., N.H. v. Anoka-Hennepin Sch. Dist. No. 11, 950 N.W.2d 553, 563 (Minn. Ct. App. 2020) (noting that "the overwhelming majority of federal courts that have recently examined transgender education-discrimination claims under Title IX have concluded that preventing a transgender student from using a school restroom or locker room consistent with the student's gender identity violates Title IX" and listing cases); Grimm, 972 F.3d at 616; Adams by & through Kasper v. Sch. Bd. of St. Johns Cty., 968 F.3d 1286, 1320, 1325 (11th Cir. 2020)[13]; Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1052 (7th Cir. 2017); M.A.B. v. Bd. of Educ. of Talbot Cty., 286 F. Supp. 3d 704, 724 (D. Md. 2018).

In addition, these cases have made it clear that it is insufficient to provide separate, unisex bathrooms for transgender students to use, as this is likely to be stigmatizing and isolating. See Adams, 968 F.3d at 1316-17 ("The Court finds the placement of the numerous gender-neutral single-stall bathrooms on campus, while useful and well-intentioned, does not remedy the Equal Protection violation.") The discomfort of others and hypothetical concerns about other students' privacy are insufficient reason to deny the transgender students their rights. See Whitaker, 858 F.3d at 1052. However, it is likely permissible for schools to provide separate bathrooms for those who are uncomfortable using the bathrooms for each designated sex. See, e.g., Adams, 968 F.3d at 1319-20 ("Moreover, while the Court finds that the gender-neutral bathrooms are not an adequate remedy for the breach of Adams' rights, they remain an alternative for any cisgender student who is uncomfortable sharing a restroom with Adams. ")

Practice Pointer: *Given the above recommendations, schools should consider adding additional privacy options to their existing locker rooms and bathrooms, if*

[13] Full citation is: Adams by & through Kasper v. Sch. Bd. of St. Johns Cty., Fla., 318 F. Supp. 3d 1293 (M.D. Fla. 2018), aff'd sub nom. Adams by & through Kasper v. Sch. Bd. of St. Johns Cty., 968 F.3d 1286 (11th Cir. 2020), opinion vacated and superseded sub nom. Adams v. Sch. Bd. of St. Johns Cty., Fla., 3 F.4th 1299 (11th Cir. 2021), and aff'd sub nom. Adams v. Sch. Bd. of St. Johns Cty., Fla., 3 F.4th 1299 (11th Cir. 2021)

possible. This could mean adding a privacy curtain in the locker room, or higher stalls in the bathrooms. In addition, it would be wise to offer separate, single-user options to those students who voluntarily seek additional privacy. Moreover, as districts consider constructing new school buildings, or renovating existing facilities, they should consider consulting an architect in an effort to provide options that maximize the privacy and safety of all students while using bathrooms and locker rooms.

D. Athletic Programs

In New Hampshire, school athletic programs are run by an independent organization, called the New Hampshire Interscholastic Athletic Association ("NHIAA"). The NHIAA is a voluntary organization run by several committees and an athletic council. The council is the governing body of the Association, and the committees administer the athletic programs.

The 2021-22 Handbook for the NHIAA includes a Policy Statement and School Recommendation Regarding Transgender Participation, available at https://www.nhiaa.org/ckfinder/userfiles/files/4HB%2021-22%20%20II%20Eligibility.pdf (last accessed March 2, 2022). As part of this, the NHIAA reaffirmed that it is "committed to providing transgender student-athletes with equal opportunities to participate in NHIAA athletic programs consistent with their gender identity." It reasoned that "it would be fundamentally unjust and contrary to applicable State and Federal Law to preclude a student from participation on a gender specific sports team that is consistent with the public gender identity of that student for all other purposes."

The NHIAA's stance is consistent with the position taken by the DOE and DOJ for the Biden Administration. See, e.g., *Statement of Interest of the United States*, No. 2:21-cv-00316 (S.D.W. Va. 6/17/21), available at https://www.justice.gov/crt/case-document/file/1405541/download (last accessed March 2, 2022) (stating its view that Title IX and the Equal Protection clause "do not permit West Virginia to categorically exclude transgender girls from participating in single-sex sports restricted to girls"); see also B. P. J. v. W. Virginia State Bd. of Educ., No. 2:21-CV-00316, 2021 WL 5711543, at *4 (S.D.W. Va. Dec. 1, 2021) (the court denying West Virginia's motion to dismiss in the same case, finding that the student stated claims under the Equal Protection Clause and Title IX).

Relevant here, the NHIAA's policy on transgender students is as follows:

> Therefore, for purposes of sports participation, the NHIAA shall defer to the determination of the student and his or her local school regarding gender identification. In this regard, the school district shall determine a student's eligibility to participate in a NHIAA gender specific sports team based on the gender identification of that student in current school records and daily life activities in the school and community at the time that sports

eligibility is determined for a particular season. Accordingly, when a school district submits a roster to the NHIAA, it is verifying that it has determined that the students listed on a gender-specific sports team are entitled to participate on that team due to their gender identity, and that the school district has determined that the expression of the student's gender identity is bona fide and not for the purpose of gaining an unfair advantage in competitive athletics.

Students who wish to participate on a NHIAA gender-specific sports team that is different from the gender identity listed on the student's current school records are advised to address the gender identification issue with the local school district well in advance of the deadline for athletic eligibility determinations for a current sports season. Students should not be permitted to participate in practices or to try out for gender specific sports teams that are different from their publicly identified gender identity at that time or to try out simultaneously for NHIAA sports teams of both genders.

Nothing in this policy shall be read to entitle a student to selection to any particular team or to permit a student to transfer from one gender specific team to a team of a different gender during a sports season. In addition, the NHIAA shall expect that, as a general matter, after the issue of gender identity has been explicitly addressed by the student and the school district, the determination shall remain consistent for the remainder of the student's high school sports eligibility. The NHIAA has concluded that this policy adequately addresses the concerns that a student might claim a particular gender identity for the purpose of gaining a perceived advantage in athletic competition, but does not unfairly discriminate against transgendered student athletes.

Thus, although the administration of athletic programs in New Hampshire school districts is delegated to the NHIAA, the individual schools are the first decision makers pursuant to the NHIAA transgender policy, as the NHIAA has deferred to the school districts' determinations of its students' gender identities. Therefore, schools should be careful to make these decisions in a manner that does not run afoul to Title IX or State law.

V. DISPUTES BETWEEN PARENTS AND STUDENTS

The New Hampshire Supreme Court has held, on numerous occasions, that "[i]t is well-established that parents have a fundamental liberty interest in raising and caring for their children." Matter of Morris, 267 A.3d 413, 416 (N.H. 2021) (quoting In re Bordalo, 164 N.H. 310, 314 (2012)). Moreover, "the United States Supreme Court has recognized that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and

control of their children." In re R.A., 153 N.H. 82, 90 (2005) (citing Troxel v. Granville, 530 U.S. 57, 66 (2000). "The constitutional rights of the natural or adoptive parent over his or her children are not easily set aside. Only in the most unusual and serious of cases may such fundamental rights be abrogated in favor of an unrelated third person." In re Nelson, 149 N.H. 545, 548 (2003). "Parental rights 'have been found to operate against the State, against third parties, and against the child.'" R.A., 153 N.H. at 90. "There is a presumption, however, that 'fit parents act in the best interests of their children.' … '[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.'" Nelson, 149 N.H. at 547.

While most of the above-cited cases involve family law disputes, these cases are relevant as they highlight the importance of a parent's right to make decisions with respect to their children, and how the State is reluctant to substitute its judgment for that of a "fit" parent. Under FERPA, Parents likewise hold all rights with respect to student records, aside from cases involving an adult student.

On the other hand, as outlined above, State and federal anti-discrimination laws mandate that school districts refrain from discriminating against a student based upon their gender identity. Therefore, when a parent disagrees with a student's assertion of their gender identity, school districts are faced with a difficult choice on whose wishes to abide by. This is an open legal question, and there is no case law or guidance upon which a district may rely in making the decision. Therefore, whenever this circumstance presents itself, it will be a highly fact-specific inquiry, taking into consideration the age of the student. It will always be best to involve counsel early on.

This all being said, there are some guiding principles administrators should keep in mind when faced with a student who does not have support at home relative to their gender identity, or who have not yet come out to their parents:

1. Educators should never lie to parents on matters involving their children.

2. Educators should always work towards the goal of having students disclose their transgender status to their parents.

3. Educators should seek the advice of legal counsel upon receiving any request that asks them to affirmatively engage in discriminatory conduct towards a student.

In most cases, these three ideas will help guide educators in making these difficult decisions in the absence of clear guidance.

By way of illustration, here are some examples for discussion:

- A student is experiencing emotional troubles both at school and at home. That student discloses to an educator that they are transgender; however, they have not yet told their parents because they are afraid of how they will react. Concerned about the changes they are seeing in their child, the parents contact the school to seek out any information relevant to provide to the child's outside therapist. What are the educator's options?

- A transgender student has requested that the district use pronouns and a name that does not match their sex assigned at birth. The student's parents contacted the district directing it to do the opposite. What should the district do? Is the answer different for a request related to which bathroom to use? What about changing the student's records?

In all of these examples, the law is unsettled and there is no "right" answer. Instead, the focus should be on minimizing the district's risk, as well as providing support to the transgender student. The strong preference should be to favor disclosure to parents unless there is an articulable risk to the student.

Practice Pointer: *Educators may wonder how it is conceivable that a parent could ever direct a district to discriminate against their child. However, such a situation currently exists where a parent refuses consent for services under the IDEA or Section 504. By not providing equal access to education based on the student's disability, arguably the District is discriminating against that student. The difference between this and failing to treat a student consistent with their gender identity is that the latter involves a request that the District affirmatively engage in discriminatory conduct.*

While the law pertaining to the respective rights of parents and students, some guidance through case law may be on the way. As outlined in Section VII, A, of these materials, there have been several cases brought in New Hampshire against school districts on this same issue. Moreover, as discussed in Section VII, B, the legislature has been busy considering several bills impacting transgender matters and parental rights.

Finally, other jurisdictions are similarly addressing these questions in their courts. For example, in September 2020, a Wisconsin circuit court partially granted an injunction in a case involving a challenge to a district's transgender and gender nonconforming policy. See John and Jane Doe 1, et al. v. Madison Metropolitan School District, et al., Dane County Circuit Court Case No. 20202CV000454 (Remington, September 28, 2020. In part, the parent argued that the policy violated their parental rights. After filings by both the parent and the school district, the court issued the following injunction:

> NOW, THEREFORE, Defendant Madison Metropolitan School District is hereby enjoined, pending Plaintiffs' appeal, from applying or enforcing any

policy, guideline, or practice reflected or recommended in its document entitled "Guidance & Policies to Support Transgender, Non-binary & Gender-Expansive Students" *in any manner that allows or requires District staff to conceal information or to answer untruthfully in response to any question that parents ask about their child at school, including information about the name and pronouns being used to address their child at school*. This injunction does not create an affirmative obligation to disclose information if that obligation does not already exist at law and shall not require or allow District staff to disclose any information that they are otherwise prohibited from disclosing to parents by any state or federal law or regulation.

(Emphasis added). However, the court declined to issue the remaining injunctive relief requested by the parents, which included a prohibition on enabling students from socially transitioning in school without parent notice or consent. This case is currently on appeal at the Wisconsin Supreme Court, with the issue being whether the plaintiffs may prosecute this case anonymously.

VI. PROHIBITION ON DIVISIVE CONCEPTS

A. Background Regarding HB2

Over the past two years, social media and mainstream media have brought attention to the concept of "critical race theory." Certain media houses and social media publishers have suggested that public schools are engaged in teaching "critical race theory." "Critical race theory" is loosely defined as a "a practice of interrogating the role of race and racism in society that emerged in the legal academy and spread to other fields of scholarship." See "A Lesson on Critical Race Theory", J. George (American Bar Association, 1/11/2021).[14] At times, critical race theory has been utilized to support theories such as social and governmental reparations.

The preliminary response of certain New Hampshire legislators to this social and political movement was to propose House Bill 544 which had the title "Relative to the propagation of divisive concepts." That Bill, which proposed a new chapter in the revised statute annotated Chapter 10-C, was entitled "Propagation of divisive concepts prohibited."

The Bill defined the phrase "divisive concepts" by including such categories as:

(a) One race or sex is inherently superior to another race or sex;
(b) The State of New Hampshire or the United States is fundamentally racist or sexist;

[14] Available at https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/ (last accessed March 9, 2022).

(c) An individual, by virtue of his or her race or sex, is inherently racist, sexist or oppressive, whether consciously or unconsciously;
(d) An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;
(e) Members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
(f) An individual's moral character is necessarily determined by his or her race or sex;
(g) An individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;
(h) Any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or
(i) Meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race;
(j) The term "divisive concept" includes any other form or race or sex stereotyping or any other form of race or sex scapegoating."

See Proposed House Bill 544

HB 544 made it unlawful for "any school district, school, college or university which receives grants, funds, or assets from the State of New Hampshire to engage in the 'unlawful propagation of divisive concepts' by teaching, instructing or training any "employee, contractor, staff member, student or any other individual or group, to adopt or believe any of the divisive concepts defined in RSA 10-C:1, II." Introduced on January 12, 2021, it was laid on the table on April 8, 2021, after being deemed inexpedient to legislate.

B. An Explanation of House Bill 2's Antidiscrimination Provisions

House Bill 2 emerged out of the ashes of House Bill 544, but it is a significantly different bill, both as to its title and content. House Bill 2 was primarily adopted for the purpose of funding State government. It represents the approval of both taxation, fees and the annual budget. Buried within the Act however are the following statutory amendments:

(1) Right to freedom from discrimination in public workplaces and education; and

(2) Prohibition on teaching discrimination

a. The Right to Freedom from Discrimination in Public Workplaces and Education

The "right to freedom from discrimination in public workplaces and education law" (RSA 354-A:29) is an amendment to the law which establishes the State Commission for

Human Rights. RSA Chapter 354-A contains numerous other antidiscrimination or civil rights protections.

In 2020, the legislature adopted RSA 354-A:27 which states that “no person shall be excluded from participation in, denied benefits of, or be subjected to discrimination in public schools because of their age, sex, gender identity, sexual orientation, race, color, marital status, familial status, disability, religion or national origin, all as defined in this Chapter.” At the same time a corollary statute was adopted in RSA 193:38 which provided in relevant part that “no person shall be excluded from participation, denied the benefits of, or be subjected to discrimination in public schools because of their age, sex, gender identity, sexual orientation, race, color, marital status, familial status, disability, religion or national origin, all as defined in RSA 354:A.”

RSA 193:38 went on to provide a remedy indicating that, “any person claiming to be aggrieved by discriminatory practices prohibited under this section, including the attorney general, may initiate a civil action against a school or a school district in superior court for legal or equitable relief, or with the New Hampshire Commission for Human Rights, as provided in RSA 354-A:27-28. In addition, every school and charter public school was required to “develop a policy that guides the development and implementation of a coordinated plan to prevent, assess the presence of, intervene in, and respond to incidents of discrimination on the basis of age, sex, gender identity, sexual orientation, race, color, marital status, familial status, disability, religion, national origin or any other class protected under RSA 354-A.” See RSA 193:39.

It is within this framework that RSA 354-A:29 was laid. Like most laws, the legislature makes preliminary findings, first finding and affirming that discrimination based on protected class not only “threatens the rights and proper privileges of New Hampshire inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety, and general welfare of the state and its inhabitants. This finding in and of itself is not new and in fact the legislature has made similar findings in the past.

The statute also indicates that nothing within it should be construed to “prohibit racial, sexual, religious, or other workplace sensitivity training 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.” The statute does not define “workplace sensitivity training” but generally, that should be understood as training directed towards employees as to the manner in which they treat one another and their students.

In similar fashion, there is a carve-out for the academic freedom of faculty members of the university system of New Hampshire and the community college system of New Hampshire to “conduct research, publish, lecture or teach in the academic setting.” There is no such academic freedom granted to secondary school educators.

RSA 354-A:30 sets forth a definition of a “government program;” it is broad in its ambit and essentially includes any activity undertaken by a public employer, school districts, school administrative unit, school administrative units are included within the definition of a public employer. The definition of “public employees” includes (but is not limited to) any person working on a full or part time basis for a school district or school administrative unit.

RSA 354-A:31 is the statute which sets forth a general prohibition against public employers either directly or through outside contractors engaging in the following activities: teaching; advocating; instructing; or training; any employee, student, service recipient, contractors, staff member… or any other individual of group certain prohibited content, as listed below.

The following subject matters are prohibited for purposes of teaching, advocating, instructing or training:

> The inherent superiority or inferiority of any protected civil rights class whether protected by virtue of age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion or national origin; that an individual is inherently racist, sexist, or oppressive whether consciously or unconsciously by virtue of their being a member of a protected class; that an individual should be discriminated against or receive adverse treatment solely or partly because of their membership in a protected class; or that a people in a protected class cannot and should not attempt to treat other equally without regard to the protected status of others.

RSA 354-A:32 is partially redundant but contains a prohibition on the content of government programs and speech, indicating that no government programs shall teach, advocate or advance any of the categories that are prohibited in RSA 354-A:31 if presented by a public employer.

RSA 354-A:33 purports to protect public employees providing that “no public employee shall be subject to any adverse employment action, warning, or discipline of any kind for refusing to participate in any training, program, or other activity in which a public employer or government program advocates, trains, teaches, instructs or compels participants to express belief in, or support for” any of the four prohibited content areas identified above.

Finally, RSA 354-A:34 extends remedies to “any person aggrieved by an act made unlawful in RSA 354-A:29-32.” These remedies include a complaint to the Human Rights Commission, pursuing an action in superior court, file a collective bargaining grievance, or bring an action under RSA 98E (speech protections for public employees).

b. The Prohibition on Teaching Discrimination (RSA193:40)

RSA 193:40 shifts from protecting public employers and public employees to protecting students. It prohibits any student in a public school from being "taught, instructed, inculcated, or compelled to express belief in or support for, any one or more of the following:"

- One protected class is superior to another protected class[15];
- An individual by virtue of being a member of a protected class is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
- An individual should be discriminated against or receive adverse treatment solely or partly because of being a member of a protected class; or
- That members of a particular protected class cannot and should not attempt to treat others without regard to their protected class status.

The statute goes on to provide that it (RSA 193:40) should not be construed to prohibit discussing as part of a "larger course of academic instruction, the historical existence of ideas and subjects identified in this section." Therefore, within the context of a course of study educators can speak to the existence of critical race theory and historic existence of such ideas."

The remedies for violating this statute include initiating a civil action against a school or school district in superior court for legal or equitable relief or filing a complaint with the New Hampshire Commission for Human Rights.

A violation of RSA 193:40 is considered a violation of the "educator code of conduct that justifies disciplinary sanctions by the State Board of Education." To date, the Code of Conduct has not yet been amended to indicate that a violation of RSA 193:40 is considered a conduct violation.

An "educator" is defined as a professional employee of any school district whose position requires certification by the State Board; this also includes administrators, specialists and teachers.

C. The Joint Frequently Asked Questions

On or about July 21, 2021, the Department of Education, Commission for Human Rights, and Department of Justice issued an advisory titled "Frequently Asked Questions: New discriminatory practices, prohibitions applicable to K-12 educational programs." A

[15] Interestingly, this statute does not include a prohibition against teaching one protected class is "inferior" to another protected class as RSA 354-A:31 does. However, this prohibition can be fairly implied.

similar guidance document was issued at the same time entitled “Frequently Asked Questions; New discriminatory practice prohibitions Applicable to public employers and government programs.”

D. Guidelines for compliance

The following principles will assist the educator in complying with the statutory prohibitions:

1. The statute restricts the teacher not the pupil.

The prohibition in RSA 193:40 is with regard to “teaching, instructing, inculcating, compelling to express belief in or support for” the prohibited topics. It does not fetter a student from forming or expressing an opinion within a proper forum. Similarly, it does not fetter a student from writing about critical race theory when the subject is relevant to the course.

2. History remains history.

There is no prohibition against an educator teaching about historic events of discrimination. Similarly, teaching about a historic world view and permitting student discussion regarding that world view is permitted. Yesterday is history and therefore discussing events and ideas and subjects in the context of a larger course of instruction remains lawful.

3. Student speech when relevant to the course material should not be further impinged upon by this law.

Students are being educated to become critical thinkers and by definition are entitled to maintain opinions and, when relevant to the course work and in the context of discussion, express those opinions. The grammar suggests that the limitation is on teaching, instructing, inculcating or compelling a student “to express belief in or support for the prohibited topics.” This grammar warrants a distinction between teaching for the goal of belief and support versus teaching for purposes of information. In other words, it is appropriate to describe to the students the historic nature of critical race theory without either inculcating or compelling a belief or support for the doctrine.

4. Disclaimers should be used.

It is prudent for a school district’s curricular catalog to state something along the following lines:

“The School District fosters a student-centered community with purposefully designed interactive and relevant learning opportunities. These learning opportunities often result in students expressing their thoughts and/or opinions, which is part of the learning

process. We encourage students to engage in this learning process. However, it is important to note that the thoughts and opinions expressed by students are not necessarily those of the school district, its faculty, staff or administration and the expression of an opinion by a student should not be construed as endorsement of that opinion by the district, faculty, staff or administration."

5. Use the Approved Curriculum.

The District seeks to use curricular resources which are in line with the educational frameworks and objectives of the District. If you are using curricular resources that have been approved by your department you are in a far better place than if you are using a resource that has not been vetted or approved.

6. Know the Content of your Secondary Resources

Often educators will supplement their curricular offering with secondary resources. These resources could contain subject matter which runs afoul of the law. There is no substitute for reviewing and knowing the content of your secondary resources. Similarly, electronic resources are often subject to change. Educators should always review an electronic resource prior to sharing the link for the resource with students.

E. Legislative Attempts to Alter this Law

Since the enactment of House Bill 2, there has been several legislative attempts to repeal, roll back, or expand its "prohibition on teaching discrimination". However, as of the time of this writing, both RSA 193:40 and RSA 354-a:29 to RSA 354-a:34 are still good law.

Practice Pointer: *Educators should be aware of the divisive concept law to the extent it could potentially be used as grounds for challenging a district's policies, trainings, communications, or other materials relating to transgender matters, including any implicit bias trainings. The above principles and guidelines, as well as consultation with legal counsel, should guide a district in navigating this complicated legal landscape.*

VII. RECENT DEVELOPMENTS IN NEW HAMPSHIRE

A. Pending Litigation

a. David "Skip" Murphy v. Gilford School District, et al

This case involved a parental challenge to Gilford School District's policy entitled "Transgender and Gender Non-Conforming Students" a/k/a Policy JBAB. The parent alleged that the policy enables students to transition to a different gender identity without the knowledge or consent of their parents, and that the policy prohibits disclosure to parents absent the students' consent. Finally, the parent alleged that the

policy directs teachers and staff to “affirmatively deceive” parents by using their birth names and corresponding pronouns when the parents are present. Based on the above, among other claims not discussed herein, the parent raised claims under the New Hampshire Constitution, claiming that the policy violated his parental rights as well as his rights to free speech and exercise of religion. The parent also alleged that the policy violated his rights as a parent under FERPA. As a result, the parent sought declarative and injunctive relief, prohibiting the enforcement of the policy. The parent also sought attorney’s fees “pursuant to the substantial public benefit doctrine.”

This case has been dismissed based on a lack of standing. In part, the Court found that the alleged harm was too speculative and hypothetical, and it noted that the parent had not alleged that he had a transgender or gender nonconforming child. Therefore, the Court never reached these arguments on the merits.

b. Sheena Simpson v. Exeter Region Cooperative School District, et al

This case similarly involves a challenge to a school district’s transgender policy on constitutional grounds. The plaintiff, a student in the district, alleges he was disciplined for voicing his opinion that there were only two genders, as opposed to recognizing the existence of gender nonconforming or gender fluid individuals The District has asserted that it did not discipline the student for his opinion, but instead for his use of vulgar language in text messages contrary to the expectations for student athletes.

The student then brought this action, alleging (among other things) that the application of the policy (and his suspension) violated his right to free speech and exercise of religion. As with the Murphy case, this student is seeking injunctive relief as well as nominal damages.

c. Jane Doe v. Manchester School District, et al

This case involves a similar policy to that of the Gilford School District case, as well as similar arguments by the Parent challenging that policy. However, in this case, the Parent’s child did fall under the challenged policy. The Parent alleged that, in the fall of 2021, Parent became aware (via inadvertent disclosure by one of her child’s teachers) that her child had requested that teachers and students address her by a name typically associated with a gender that was different from her sex assigned at birth. Parent then requested that the District cease this practice, but was told by the administration that they are bound by District policy to call the student by the name consistent with her gender identity. Since that time, the student had discussed her gender identity with her parent, and then notified the District that she instead wished to use her birth name and pronouns. The Parent alleged that the continued existence of the policy meant that she could not know whether her child is, in fact, using her birth name and gender at school or if the District is instead utilizing the policy by “misleading

and/or lying to Jane Doe about [the student's] in-school gender expression and the District's response thereto."

Parent's brought a claim under the New Hampshire Constitution, arguing that the disputed policy violated her parental rights. Parent also claimed that the policy is *ultra vires* in that it went beyond the grant of power to craft an antidiscrimination policy in RSA 193:38 and 193:39. Parent's third claim is that the policy violates FERPA to the extent it withholds information/records relative a student from a parent. Parent's final claim is under the Pupil Rights Act, 20 U.S.C. § 1232h. Essentially, she is arguing that student is being required to submit to questions/evaluation of her gender identity without prior consent of parent. Parent has requested declarative and injunctive relief, as well as an award of nominal damages and attorney's fees.

This case is still pending. If the Court reaches the merits of this case, it could provide valuable guidance on the interplay between parental and student rights.

B. Proposed Legislation

House Bill 1431 (2022) is currently pending in the New Hampshire Legislature.

This act is captioned as "AN ACT establishing the parental bill of rights." If passed, this act would create a new section under RSA 169, RSA 169-I. Among other things, this act would include a provision that "The state, any of its political subdivisions, including, without limitation, any school board, school district, or school administrative unit, any other governmental entity shall not infringe on the fundamental rights of a parent to direct the upbringing and education of his or her minor child without demonstrating that such action is reasonable and necessary to achieve a compelling state interest and that such action is narrowly tailored and cannot be achieved by less restrictive means." The act then lists a series of "rights" held by parents, and it provides for the remedies for any violation of said rights.

Notably, the "Declaration of Purpose" states that: "The general court finds that it is a fundamental right of parents to direct the upbringing, education, and care of their minor children. **The general court further finds that important information relating to a minor child should not be withheld, either inadvertently or purposefully, from his or her parent, including information relating to the minor's education. The general court further finds it is necessary to establish a consistent mechanism for parents to be notified of information relating to the health, education, and well-being of their minor children.**" (Emphasis added). To effectuate this purpose, the act requires school districts to affirmatively adopt a policy to promote parental involvement in the public school system. The required policy must include "[t]he right to be notified promptly when any school board, school district, school administrative unit, school administrator, or other school employee initiates, investigates, or finds the need for any action by school authorities relating to the student pursuant to school policies

governing student conduct, truancy, dress code violations, sexual harassment, bullying, hazing, behavior management and intervention, substance use, suicide prevention, **gender expression or identity**, disability accommodation, and special meal prescription." (Emphasis added). If passed, would be further support for the position that a district is required to keep parents apprised of any such decisions.

This bill passed in the House, then it was referred to the Senate Judiciary Committee. On April 20, 2022, the Committee recommended that the bill pass with an amendment and the bill was forwarded to the Senate's Finance Committee. The current version of this bill is attached hereto as Appendix A. This version does not contain criminal penalties for those who are found to have violated this chapter.

VIII. CONCLUSION

The scope of protections for transgender students is an area of the law that is ever changing and in flux. While there is limited guidance from both the state and federal government on how districts should proceed with transgender student questions, the guidance in these materials should enable school districts to make the best decisions to support their students, as well as minimize their risk.

APPENDIX A

HB 1431-FN-LOCAL - AS AMENDED BY THE SENATE

15Mar2022... 0881h
04/28/2022 1670s
04/28/2022 1881s

2022 SESSION

22-2285
07/10

HOUSE BILL ***1431-FN-LOCAL***

AN ACT establishing the parental bill of rights.

SPONSORS: Rep. Terry, Belk. 5; Rep. Greeson, Graf. 16; Rep. Potucek, Rock. 6; Rep. Littlefield, Belk. 3; Rep. Hough, Belk. 3; Rep. Alliegro, Graf. 7; Rep. Ankarberg, Straf. 10; Rep. Johnson, Belk. 3; Rep. Silber, Belk. 2; Rep. Blasek, Hills. 21; Sen. Giuda, Dist 2

COMMITTEE: Children and Family Law

ANALYSIS

This bill establishes a parental bill of rights, a framework for notice of, and to report violations of, such rights, and consequences for affirmative findings of violations.

- -

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

HB 1431-FN-LOCAL - AS AMENDED BY THE SENATE

15Mar2022... 0881h
04/28/2022 1670s
04/28/2022 1881s

22-2285
07/10

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twenty Two

AN ACT establishing the parental bill of rights.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Declaration of Purpose. The general court finds that it is a fundamental right of parents to direct the upbringing, education, and care of their minor children. The general court further finds that important information relating to a minor child should not be withheld, either inadvertently or purposefully, from his or her parent, including information relating to the minor's education. The general court further finds it is necessary to establish a consistent mechanism for parents to be notified of information relating to the health, education, and well-being of their minor children.

2 New Chapter; Parental Bill of Rights. Amend RSA by inserting after chapter 169-H the following new chapter:

CHAPTER 169-I

PARENTAL BILL OF RIGHTS

169-I:1 Short Title. This chapter may be cited as the Parents' Bill of Rights.

169-I:2 Definitions. In this chapter, "parent" means a person who has legal custody of a minor child as a natural or adoptive parent or a legal guardian, but such term shall not include a parent with whom the parent-child relationship has been terminated by judicial decree or voluntary relinquishment.

169-I:3 Infringement of Parental Rights Prohibited. The state, any of its political subdivisions, including, without limitation, any school board, school district, or school administrative unit, any other governmental entity shall not infringe on the fundamental rights of a parent to direct the upbringing and education of his or her minor child without demonstrating that such action is reasonable and necessary to achieve a compelling state interest and that such action is narrowly tailored and cannot be achieved by less restrictive means.

169-I:4 Parental Rights.

I. All parental rights are reserved to the parent of a minor child in this state without obstruction or interference from the state, any of its political subdivisions, including, without limitation, any school board, school district, or school administrative unit, or any other governmental entity including, but not limited to, all of the following rights of a parent of a minor child in this state:

(a) The right to direct the education and care of his or her minor child.

(b) The right to direct the upbringing and the moral or religious training of his or her minor child.

(c) The right to apply to enroll his or her minor child in a public school or, as an alternative to public education, a private school, including a religious school, a home education program, or other available options, as authorized by law.

(d) The right to access and review all school records relating to his or her minor child, pursuant to RSA 189:66, IV.

(e) The right to be notified promptly if an employee of the state, any of its political subdivisions, or any other governmental entity has a reasonable basis to believe that a criminal offense has been committed against his or her minor child, unless the incident has first been reported to law enforcement or the bureau of child protective services and notifying the parent would impede the investigation.

II. An employee of the state, any of its political subdivisions, including, without limitation, any school board, school district, or school administrative unit, or any other governmental entity who encourages or coerces, or attempts to encourage or coerce, a minor child to withhold information from his or her parent who is not suspected of a criminal offense against the minor and sharing the information would not impede an investigation of a criminal offense against the minor may be subject to disciplinary action.

III. A parent of a minor child in this state has rights that are more comprehensive than those listed in this section. This chapter shall not be construed to prescribe all rights to a parent of a minor child in this state.

169-I:5 Parental Rights in Education.

I. Each school board, school district, or school administrative unit shall, in consultation with parents, teachers, and administrators, develop and adopt publicly a policy to promote parental involvement in the public school system. Such policy shall include:

(a) A plan for parental participation in schools to improve parent and teacher cooperation in such areas as homework, school attendance, and discipline.

(b) A procedure for a parent to learn about his or her minor child's course of study, including the source of any supplemental education materials.

(c) Procedures for a parent to learn about the nature and purpose of clubs and activities offered at his or her minor child's school, including those that are extracurricular or part of the school curriculum.

(d) Procedures for a parent to learn about gifted or special education programs offered in the district.

(e) Procedures for a parent to learn about parental rights and responsibilities under general law, including all of the following:

(1) Their right to object to instructional materials and other materials used in the classroom, pursuant to RSA 186:11, IX-c.

(2) Their right to exercise their option to get an exception to a particular health or sex education instruction, pursuant to RSA 186:11, IX-b.

(3) Their right to exempt his or her minor child from immunizations, as provided in RSA 141-C:20-a.

(4) Their right to review statewide, standardized assessment results.

(5) Their right to inspect school district instructional materials.

(6) Their right to access information relating to the school district's policies for promotion or retention, including high school graduation requirements.

(7) Their right to receive a school report card and be informed of his or her minor child's attendance requirements and compliance with such requirements.

(8) Their right to access information relating to the state standards, report card requirements, attendance requirements, and instructional materials requirements.

(9) Their right to participate in parent-teacher associations and parent-teacher organizations that are sanctioned by a school board or the department of education.

(10) The right of a parent to opt out of any district-level data collection relating to his or her minor child not required by law.

(f) The right to be notified promptly when any school board, school district, school administrative unit, school administrator, or other school employee initiates, terminates, or changes:

(1) A student's course of study or registration in classes, athletic teams, clubs, or other extra-curricular activities;

(2) Any discipline imposed by school authorities;

(3) Services recommended or provided pursuant to an individualized education plan or Section 504 of the Rehabilitation Act of 1973;

(4) Provision of any Medicaid services;

(5) Enrollment in any Title I services or free and reduced lunch program;

(6) Off-campus activities, including field trips or off-campus privileges;

(7) Medical treatment, including provision of medication, psychological, or counseling services; or

(8) Directory information.

(g) The right to be notified promptly when any school board, school district, school administrative unit, school administrator, or other school employee initiates, investigates, or finds the need for any action by school authorities relating to the student pursuant to school policies governing student conduct, truancy, dress code violations, sexual harassment, bullying, hazing, behavior management and intervention, substance use, suicide prevention, gender expression or identity, disability accommodation, and special meal prescription.

II. A parent may request, in writing, from the superintendent the information required under this section. Within 10 business days of such request, the superintendent shall provide such information to the parent. If the superintendent denies a parent's request for information or does not respond to the parent's request within 10 business days, the parent may appeal the denial to the school board. The school board shall place a parent's appeal on the agenda for its next public meeting. If it is too late for a parent's appeal to appear on the next agenda, the appeal shall be included on the agenda for the subsequent meeting. If a parent is dissatisfied with the results of such an appeal, or such an appeal does not take place in a timely fashion as required by this paragraph, the aggrieved parent may bring an action for declaratory and injunctive relief as set forth in RSA 169-I:7.

169-I:6 Exceptions. This chapter does not:

I. Authorize a parent of a minor child in this state to engage in conduct that is unlawful or to abuse or neglect his or her minor child in violation of general law, as defined in RSA 169-C.

II. Prohibit a court of competent jurisdiction, law enforcement officer, or employees of a government agency that is responsible for child welfare from acting in his or her official capacity.

169-I:7 Violations. Any parent claiming a violation of any provisions of this chapter may bring an action for declaratory relief, injunctive relief, and money damages against the state or any of its political subdivisions, including, without limitation, any school board, school district, or school administrative unit, any other governmental entity which the parent claims has violated this chapter in the superior court having jurisdiction over the relevant individual or the state or any of its political subdivisions. If the court finds in favor of the parent, it may award reasonable attorneys' fees and court costs to the parent.

3 Effective Date. This act shall take effect January 1, 2023.

LBA
22-2285
Amended 4/5/22

HB 1431-FN-LOCAL- FISCAL NOTE
AS AMENDED BY THE HOUSE (AMENDMENT #2022-0881h)

AN ACT establishing the parental bill of rights.

FISCAL IMPACT: [X] State [ ] County [ ] Local [ ] None

	Estimated Increase / (Decrease)			
STATE:	**FY 2022**	**FY 2023**	**FY 2024**	**FY 2025**
Appropriation	$0	$0	$0	$0
Revenue	$0	$0	$0	$0
Expenditures	$0	Indeterminable Increase	Indeterminable Increase	Indeterminable Increase
Funding Source:	[X] General	[ ] Education	[ ] Highway	[ ] Other

METHODOLOGY:

This bill establishes a parental bill of rights, a framework for notice of, and to report violations of, such rights, and consequences for affirmative findings of violations.

The Judicial Branch indicates this bill provides that any violation by an individual shall constitute a class B misdemeanor. The bill also authorizes any parent to bring an action for injunctive relief and damages in superior court, and would authorize the court to award a parent fees and costs. The Branch assumes that, if this bill is enacted, there would be an increase in criminal complaints and civil petitions filed in Superior Court and an increase in the number of appeals taken to the Supreme Court. The Judicial Branch is unable to estimate the number of such new complaints and petitions, and the fiscal impact is therefore indeterminable.

The Department of Education states many of the enumerated rights are pre-existing by statute, school policy, or both and the required information for parents should currently exist under existing laws or rules. The bill would require that a parental request for any of the enumerated items must be responded to within ten (10) business days. The Department indicates there would be no additional cost to the Department from this legislation.

AGENCIES CONTACTED:

Judicial Branch and Department of Education