

Recent Developments in Special Education Law: New Hampshire Statutes

By

Gerald M. Zelin, attorney

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New Hampshire Association of Special Education
Administrators

Annual August Academy
Meredith, N.H.

DrummondWoodsum

100 International Dr., Suite 340
Portsmouth, N.H. 03801
Tel: (603) 433-3317
Fax: (603) 433-5384
Toll Free Tel: 1-800-727-1941
gzelin@dwmlaw.com
www.dwmlaw.com
www.SchoolLaw.com

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NEW HAMPSHIRE STATUTES

By Gerald M. Zelin
Drummond, Woodsum & MacMahon
Portsmouth, N.H. 03801

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I. SOME NEW STATE STATUTES

A. Catastrophic aid.

1. New Hampshire's catastrophic aid statute, RSA 186-C:18, requires that the State Department of Education partially reimburse school districts for the costs of extraordinarily expensive special education programs.
2. The statute directs the State to reimburse a school district for 80 percent of any student's annual special education costs that exceed 3.5 times the state average per pupil cost. In addition, the State is liable for *all* costs in excess of 10 times the state average annual per pupil cost.¹
3. However, the statute goes on to provide as follows: "If in any year, the amount appropriated for distribution as catastrophic special education RSA 186-C:18 aid in accordance with this section is insufficient therefor, the appropriation shall be prorated proportionately based on entitlement among the districts entitled to a grant."²
4. House Bill 1, the budget bill enacted in June 2011,³ appropriates \$21,537,308 for catastrophic aid for fiscal year 2012 (July 1, 2011 to June 30, 2012) and an identical amount for fiscal year 2013.
5. This appropriation bill severely underfunds the catastrophic aid program for fiscal years 2012 and 2013, in effect "downshifting" costs from the State to local school districts.

¹ RSA 186-C:18, III(b) and (c).

² RSA 186-C:18, III(a).

³ N.H. Laws of 2011, Chapter 223, p. 746.

6. The State legislature appropriated the following amounts for catastrophic aid over the past several years:⁴

FY 2008	\$33,968,831	covered 100% of the State's share
FY 2009	\$32,168,544	covered 91% of the State's share
FY 2010	\$29,875,338	covered 85% of the State's share
FY 2011	\$23,537,315	covered 77% of the State's share
FY 2012	\$21,537,308	will cover ??% of the State's share
FY 2013	\$21,537,308	will cover ??% of the State's share

7. Does this reduction in State funding violate "maintenance of effort" provisions in the IDEA?

That possibility dissuaded the Kansas state legislature from reducing state funding for special education.⁵

8. Does this reduction in State funding violate the "unfunded mandates" provision of the New Hampshire Constitution?

According to this provision, "The state shall not mandate or assign any new, *expanded or modified* programs or *responsibilities* to any political subdivision in such a way as to necessitate *additional local expenditures* by the political subdivision unless such program or responsibilities are fully funded by the state or unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political subdivision." ⁶

B. Amended CHINS statute.

1. New Hampshire has three juvenile justice statutes:
 - a. The delinquency statute, RSA 169-B, applies to minors who commit serious criminal offenses.

⁴ Source: July 26, 2011 email, Paul Leather, Deputy Commissioner, N.H. Dept. of Education, to Mark Joyce, Executive Director, N.H. School Administrators Association.

⁵ See <http://kansas.watchdog.org/6969/special-education-funding-shows-how-feds-control-state-dollars>.

⁶ N.H. Constitution, Part 1, Article 28-a, popularly known as "Con Con 2" (emphasis added).

- b. The neglect and abuse statute, RSA 169-C, applies to minors who have been abused or neglected by parents or other adults.
 - c. The CHINS statute, RSA 169-D, applies to “Children in Need of Services.”
2. Until June 2011, the CHINS statute covered any child “in need of care, guidance, counseling, discipline, supervision, treatment, or rehabilitation” who:
 - a. was chronically truant from school;
 - b. habitually ran away from home;
 - c. repeatedly disregarded the reasonable and lawful commands of his or parents; or
 - d. repeatedly committed acts that would be minor crimes if committed by adult.⁷
3. House Bill 2,⁸ the budget trailer bill enacted in June 2011, amends many social welfare statutes in order to reduce State costs.
4. One casualty is the CHINS statute.

House Bill 2 amends that statute effective September 30, 2011⁹ by repealing the old definition of a child in need of services and by inserting a new definition in its place.

5. The amended statute defines “child in need of services” as “a child under the age of 18 with a diagnosis of severe emotional, cognitive, or other mental health issues who engages in aggressive, fire setting, or sexualized behaviors that pose a danger to the child or others and who is otherwise unable or ineligible to receive services under RSA 169-B or RSA 169-C.”¹⁰
6. The statute adds that nobody may file a CHINS petition in juvenile court without the consent of the New Hampshire Department of Health and Human Services (DHHS).¹¹

DHHS has not yet adopted guidelines for providing consent.

7. According to DHHS, approximately 536 CHINS cases are currently active throughout the state and approximately 43 of those cases satisfy the new definition.

7 RSA 169-D:2, II.

8 N.H. Laws of 2011, Chapter 224.

9 N.H. Laws of 2011, Chapter 224, Section 413, VI.

10 RSA 169-D:2, II, as amended by N.H. Laws of 2011, Chapter 224, Section 279.

11 RSA 169-D:5, I, as amended by N.H. Laws of 2011, Chapter 224, Section 280.

8. DHHS will be filing motions to close active CHINS cases that do not meet the new definition. Courts may or may not grant those motions.
9. If a CHINS case closes and parents refuse to allow the child home, DHHS may then file a neglect petition.
10. These amendments to the CHINS statute eliminate the most commonly used legal procedure for enforcing the compulsory attendance law.
11. Alternative legal procedures for combating truancy include:
 - a. Filing a neglect petition against parents alleging “educational neglect” under RSA 169-C:3, XIX(b).
 - b. Filing a criminal complaint against parents under RSA 193:7, which may lead to a fine of up to \$ 1,000 for each offense.¹²
 - c. Filing a civil suit in Superior Court to obtain an injunction ordering the parents to send their child to school.
12. Prediction: These amendments to the CHINS statute will increase school districts’ special education costs.
 - a. Parents who might otherwise obtain residential placements under the CHINS statutes will now seek residential placements from their school districts.
 - b. When a school district makes an out-of-district placement, the district pays less (and the State pays more) if the child has been residentially placed by a juvenile court.
 - (i) The school district’s liability is then governed by RSA 186-C:19-b (popularly known as “Chapter 402”), rather than by RSA 186-C:18 (the catastrophic aid statute).
 - (ii) RSA 186-C:19-b caps the school district’s annual liability at three times the state average per pupil cost and directs the State Department of Education to pay the service provider directly for all excess special education costs.

C. Local school boards must adopt instructional policies and goals for each school.

1. RSA 189:1-a, requires that every school board “provide, at district expense, elementary and secondary education to all pupils who reside in the district.”
2. 2011 amendments to this statute add the following:

¹² RSA 651:2, IV(a) (2010 Supp.).

“Elected school boards shall be responsible for establishing a structure, accountability, advocacy, and delivery of instruction in each school operated in its district.

To accomplish this end, and to support flexibility in implementing diverse educational approaches, *school boards shall establish, in each school operated and governed in the district, instructional policies that establish instructional goals based on information available about the knowledge and skills pupils will need in the future.*”¹³

3. Warning! Whatever these policies say may unwittingly affect the school district’s duties under the IDEA, Section 504, and the Americans with Disabilities Act.

For example, if a school’s mission statement says that all students shall develop excellent social skills, this will buttress the following arguments.

- a. that students with mild disabilities, who are academically successful but socially inept, qualify under the special education laws; and
- b. that a special education program is inappropriate if the student’s social skills do not improve.

D. Court consolidation.

1. N.H. Laws of 2011, Chapter 88, consolidates the current probate, family division, and local district courts into New Hampshire Circuit Courts.
2. This statute became effective July 1, 2011.
3. The probate, family, and district courts will operate as “divisions” of the Circuit Court.
4. There will be one Circuit Court in each county and one clerk for each Circuit Court. However, each county’s Circuit Court may operate in multiple locations.
5. Divisions are currently operating in their former locations.
6. According to one press release, “merging the District and Probate Courts and the Family Division into a single, streamlined system” will “improve services to both the public and the Bar while producing significant cost savings.”¹⁴
7. For more details (including new contact information), see www.courts.state.nh.us/

¹³ N.H. Laws of 2011, Chapter 108, effective July 30, 2011.

¹⁴ www.courts.state.nh.us/press/2011/new-circuit-court-begins-july-1.htm.

E. Teacher tenure.

1. Background.

- a. All teachers, tenured or not, are entitled to written notice if the school district does not intend to renew their contracts for the coming school year.
 - (i) The notice deadline is April 15 or within 15 days of the adoption of the district budget by the district's legislative body, whichever is later.¹⁵
 - (ii) If the teacher does not receive written notice of nonrenewal by that deadline, the contract is automatically renewed.
- b. The benefit of tenure is that, if the teacher receives a notice of nonrenewal, he or she may within 10 days request a hearing before the local school board, along with reasons for the nonrenewal.

The teacher may then appeal the local school board's decision to the State Board of Education.

- c. RSA 189:14-a previously required that a school district grant tenure to:
 - (i) any teacher who taught for 3 consecutive years or more in that school district; and
 - (ii) any teacher who taught for 2 consecutive years or more in that school district, if the teacher previously taught for 3 consecutive years or more in any other New Hampshire school district.
- d. In recent years, many school districts negotiated collective bargaining agreements that gave tenured teachers two bites at the apple after the local school board hearing:
 - (i) a right to appeal the local school boards' decision to the State Board of Education; and
 - (ii) arbitration.

2. New Hampshire Laws of 2011, Chapter 267, amends this scheme effective July 1, 2011.

3. RSA 189:14-a now requires that a school district grant tenure to:

- a. any teacher who taught for 5 consecutive years or more in the teacher's current

¹⁵ However, notice must be provided no later than the Friday following the second Tuesday in May. RSA 189:14-a, I(a).

- district;
- b. any teacher who, by July 1, 2011, taught for 3 consecutive years or more in the teacher's current district;
 - c. any teacher who taught for 5 consecutive years or more in any district in the state and has taught for 3 consecutive years or more in the teacher's current district; and
 - d. any teacher who, by July 1, 2011, taught for 3 consecutive years or more in any district in the state and taught for 2 consecutive years or more in the teacher's current district.¹⁶
4. The amended statute codifies previous New Hampshire Supreme Court decisions defining the term "teacher" for tenure purposes. According to the amended statute, the term includes:
 - a. "any professional employee of any school district whose position requires certification as a professional engaged in teaching"; and
 - b. "principals assistant principals, librarians, and guidance counselors."
 5. The amended statute adds that when a teacher is nonrenewed "because of reduction in force, the reduction in force shall not be based solely on seniority."¹⁷
 6. The amended statute requires that every school board adopt "a teacher performance evaluation policy."¹⁸
 7. The amended tenure statute, along with companion amendments to the state Public Employee Labor Relations Act (RSA 273-A), restricts a teacher's right to arbitration.¹⁹
 - a. If a collective bargaining agreement in effect on July 1, 2011 includes a provision allowing arbitration for teacher nonrenewals, that provision shall be null and void when the collective bargaining agreement expires.
 - b. School districts may henceforth include in collective bargaining agreements provisions allowing arbitration for teacher nonrenewals, but those provisions become null and void upon the expiration of the collective bargaining agreement.
 - c. Nonrenewed teachers have only one bite at the apple.

¹⁶ RSA 189:14-a, I-II.

¹⁷ RSA 189:14-a, III.

¹⁸ RSA 189:14-a, I(b).

¹⁹ RSA 189:14-b, I and RSA 273-A:4, as amended by N.H. Laws of 2011, Chapter 267.

- (i) After the local school board hearing, a teacher may appeal to the State Board of Education or, if the collective bargaining allows it, may seek arbitration.
- (ii) However, a teacher may not pursue *both* a State Board hearing and arbitration.

F. Charter schools.

1. New Hampshire law recognizes two alternative mechanisms to create a charter school.
 - a. Through local authorization (wherein the annual school district meeting approves a contract negotiated between the local school board and the charter school). RSA 194-B:3.
 - b. Through approval by the State Board of Education, bypassing the local approval process. RSA 194-B:3-a.
2. Until 2011, RSA 193-B:3-a was considered a “pilot program.” The statute allowed the State Board of Education to approve no more than 20 charter schools.
3. N.H. Laws of 2011, Chapter 228, eliminates that numerical cap and removes the reference to “pilot program.”²⁰

G. State adequacy aid.

1. N.H. Laws of 2011, Chapter 258, amending RSA 198:40-a, *et seq.*, tinkers with state adequacy aid to public schools.
2. The general outlines of the funding formula remain largely unchanged.
3. Under the amended statute, the state pays a school district the following amounts:
 - a. \$3,450 annually per pupil;²¹
 - b. an additional \$1,725 annually in “differentiated aid” for each pupil who qualifies under the federal free and reduced-meal program;²²
 - c. an additional \$675 annually for each pupil “who is an English language learner and who is receiving English language instruction”;²³

²⁰ RSA 194-B:3-a, I, as amended by N.H. Laws of 2011, Chapter 228.

²¹ RSA 198:40-a, I, as amended by N.H. Laws of 2011, Chapter 258.

²² *Id.*

²³ RSA 198:40-a, II, as amended by N.H. Laws of 2011, Chapter 258.

- d. an additional \$675 annually for each third grader who did not test as proficient or above in the reading component of the statewide assessment (provided that the student is not eligible to receive special education, English as a second language services, or free or reduced-price meals);²⁴ and
- e. *an additional \$1,856 for each pupil receiving special education.*²⁵
4. Beginning July 1, 2013, the amounts paid under #3 shall be adjusted based on changes in the Consumer Price Index.²⁶
5. If a student attends a charter school *authorized by a school district in which the student does not reside*, the state pays all the money listed in #3 directly to the charter school rather than to the student's school district.²⁷
6. If a student attends a charter school *approved by the State Board of Education*, the state pays:
 - a. all the money listed in #3 directly to the charter school rather than to the student's school district;
 - b. *plus* an additional \$2,000 annually to the charter school.²⁸
7. Question regarding special education students attending charter schools: Since the state pays the \$1,856 bonus under 3-e to the charter school, rather than to the school district in which the student resides, doesn't this imply that the school district has no obligation to provide or fund special education and related services at the charter school?

H. Special school district meetings.

1. School districts establish their budgets at annual meetings of their "legislative body." In most school districts, the electorate is the legislative body.
2. Ordinarily, a school district must obtain approval from a Superior Court judge before conducting a special meeting between annual meetings.

24 RSA 198:40-a, II-a, as amended by N.H. Laws of 2011, Chapter 258.

25 RSA 198:40-a, III, as amended by N.H., Laws of 2011, Chapter 258.

26 RSA 198:40-d, as amended by N.H., Laws of 2011, Chapter 258.

27 RSA 194-B:11, I(a) as amended by N.H. Laws of 2011, Chapter 228, Section 2.

28 RSA 194-B:11, I(b) as amended by N.H. Laws of 2011, Chapter 258, Section 1.

3. N.H. Laws of 2011, Chapter 211, allows school districts to conduct special meetings without court approval “in response to statutory changes resulting in reductions or increases in distribution of state revenues pursuant to RSA 198:41 to school districts.”
4. Chapter 2011 became effective on June 27, 2011 and expires on July 1, 2012.

I. Accountability for providing an adequate education.

1. The New Hampshire Constitution, as interpreted in the *Claremont* cases, requires that the State offer every student an “adequate” public education.
2. RSA 193-E:3-b authorizes two alternative methods for a public school to demonstrate that it offers an adequate education.
 - a. The first option, which is “in-put based,” requires that the school demonstrate compliance with the State Board of Education’s minimum standards.
 - b. The second option relies on a “performance-based school accountability system to be developed and implemented by the [state] department [of education] . . . and designed to measure educational *outcomes*.”²⁹
3. Until 2011, RSA 193-E:3-b required that a school utilizing the in-put based method persuade the Department of Education that it satisfies the minimum state standards.
4. N.H. Laws of 2011, Chapter 255, amends RSA 193-E:3-b by allowing a school to demonstrate compliance with the minimum state standards by either:
 - a. persuading the State Department of Education that it complies; or
 - b. receiving full accreditation from the New England Association of Schools and Colleges (NEASC).³⁰
5. The outcome-based method still remains an option.

J. Student residence.

- 1 Background.
 - a. New Hampshire’s *special education* statute, RSA 186-C, imposes responsibility on

²⁹ RSA 193-E:3-b, I and II.

³⁰ RSA 193-E:3-b, I(c), as amended by N.H. Laws of 2011, Chapter 255.

the school district where a student “resides,” but does not define that term.³¹

- b. New Hampshire’s *regular education* statute, RSA 193:12, states that a student shall attend school in the district where he or she is a “legal resident.”³²
 - (i) RSA 193:12, II defines the term “legal resident” in great detail.
 - (ii) The definition of “legal resident” in RSA 193:12 provides guidance when interpreting the term “resides” in the special education law and other school statutes.
- c. Two statutes allow a student to attend school regardless of where he or she resides.
 - (i) The Steward B. McKinney Homeless Assistance Act, a federal law.³³
 - (ii) RSA 193:28.
- d. What does RSA 193:28 say?
 - (i) This statute applies to any child:
 - (a) living in a foster home or group home; or
 - (b) placed by the N.H. Department of Health and Human Services in the home of a “relative or friend.”
 - (ii) RSA 193:28, II allows the child to attend public school in the district where he or she *currently lives*.
 - (iii) RSA 193:28, I allows the student to attend school in the district where he or she *formerly lived*, if a court finds that “continuing in the same school district is in the best interest of the child.”³⁴
- e. RSA 193:12, VI(a) empowers the State Commissioner of Education to resolve “residency issues for all pupils, including homeless children and youths.”
 - (i) The statute details the procedures the Commissioner must follow when resolving residency disputes.

31 RSA 186-C:7, I, RSA 186-:13, I.

32 RSA 193:12, I.

33 20 U.S.C. § 11432(g)(3).

34 The statute allows a court to make such a finding only if the child lives within a reasonable distance of the school to be attended and suitable transportation can be arranged without imposing any additional costs on a school district or the N.H. Department of Health and Human Services. RSA 193:28, I.

- (ii) The reference to “homeless children and youths” is illogical, since responsibility for their education is not tethered to where they reside.
- 2. N.H. Laws of 2011, Chapter 178 amends RSA 193:12, VI as follows.
 - a. The statute now describes the procedures the Commissioner must follow when resolving residency disputes.

For example, the Commissioner must provide notice to “all parties with an interest in the proceedings,” such as any potentially responsible school district, and must give all interested parties an opportunity to present facts and legal arguments.
 - b. The Commissioner’s authority to resolve residency disputes no longer includes disputes involving homeless children and youths.
- 3. Chapter 178 also corrects an error the legislature made in 2008, but introduces a new error in its place.
 - a. RSA 193:12, II(a)(2) is a long paragraph devoted to identifying a student’s legal residence when parents are divorced.
 - b. In 2008, the legislature added the following at the end of that paragraph:

“If the child is in a court-ordered residential placement, foster home, or group home pursuant to RSA 169-B, RSA 169-C, RSA 169-D, RSA 170-C, or RSA 463, residence shall be determined in accordance with RSA 193:27.”
 - c. This 2008 amendment was nonsense.
 - (i) RSA 193:27 defines some terms used in RSA 193:29, which allows a “receiving district” to seek reimbursement from a “sending district.”
 - (ii) RSA 193:27 provides no guidance whatsoever for determining where a student “resides.”
 - d. Chapter 178 – the 2011 amendment to RSA 193:12, II(a)(2) – deletes the reference to RSA 193:27 and inserts “RSA 193:28” in its place.
 - (i) This too is nonsense.
 - (ii) RSA 193:28, I allows a child *no longer living in a district* to attend that district’s public schools when a court finds that this is in the child’s best interest. But how can the legislature say that the child is a “legal resident” of that former school district?

- (iii) Instead of citing “RSA 193:28,” the legislature should have cited “RSA 193:28, II.” This would establish that a child living in a foster home, group home, or with relative or friend is a legal resident of the district where the child lives.

4. Questions:

- a. Does the new final sentence in RSA 193:12, II(a) apply to all students who qualify under RSA 193:28, or to only children of divorced parents?
- b. Does this amended definition of “legal resident” govern when interpreting the term “resides” in other school law statutes, such as the special education and vocational education laws?

For example, when a student attends an out-of-district vocational education program for part of the school day and a regular public high school for the remainder of the school day, RSA 188-E:6 directs the district in which the student “resides” to pay tuition for the vocational program.

If a court acting under RSA 193:28, I orders a child living in a foster home to attend a high school operated by the school district in which the student *formerly* lived, is that district also liable for the out-of-district vocational program?

K. Service animals.

1. Background.

- a. Until 2011, RSA 167-D:3 allowed a person who is deaf, hearing impaired, blind, visually impaired, mobility impaired, or diagnosed with a seizure disorder to bring an “ear dog, guide dog, or service dog” to any “public facility” or “place of public accommodation to which the general public is invited.”
- b. The term “public accommodation” included all public elementary and secondary schools, in addition to private nonsectarian elementary and secondary schools.³⁵

2. N.H. Laws of 2011, Chapter 170, repeals the old statute and inserts the following in its place.

- a. The term “place of public accommodation” still includes all public and private nonsectarian elementary and secondary schools.³⁶

35 RSA 167-D:1, V, 167-D:2.

36 RSA 167-D:1, III and 167-D:3, as amended by N.H. Laws of 2011, Chapter 170.

- b. The statute now allows any “*service animal*” to accompany “his or her *handler* or *trainer*” into any “public facility” or “place of public accommodation to which the general public is invited.”³⁷
- c. The statute defines “service animal” as a *dog* “individually *trained* to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.”³⁸
- d. “Other species of animals, whether wild or domestic, trained or untrained, are not service animals for purposes of this definition.”³⁹

The legislature considered, and rejected, a proposal to include monkeys in the definition of service animal.

- e. “The work or tasks performed by a service animal shall be *directly related* to the handler’s disability.”⁴⁰
- f. “Work and tasks” may include, but are not limited to:
 - (i) assisting individuals who are blind (or have low vision) with navigation and other tasks;
 - (ii) alerting individuals who are deaf or hard of hearing to the presence of people or sounds;
 - (iii) providing nonviolent protection or rescue work;
 - (iv) pulling a wheelchair;
 - (v) assisting an individual during a seizure;
 - (vi) alerting individuals to the presence of allergens;
 - (vii) retrieving items such as medicine or a telephone;
 - (viii) providing physical support and assistance with balance and stability to individuals with mobility disabilities; or

³⁷ RSA 167-D:4, as amended by N.H. Laws of 2011, Chapter 170 (emphasis added).

³⁸ RSA 167-D:1, IV, as amended by N.H. Laws of 2011, Chapter 170 (emphasis added).

³⁹ *Id.*

⁴⁰ RSA 167-D:2, I, as amended by N.H. Laws of 2011, Chapter 170 (emphasis added).

- (ix) helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors.⁴¹
- g. “Work and tasks” do *not* include “the provision of emotional support, well-being, comfort, or companionship.”⁴²
- h. “It is lawful for any service animal to accompany his or her handler or trainer to any public facility, housing accommodation, or place of public accommodation *to which the general public is invited*, subject only to the conditions and limitations established by law and applicable alike to all persons.”⁴³
- i. It is a misdemeanor to:
 - (i) interfere or attempt to interfere with a service animal; or
 - (ii) prohibit, hinder, or interfere with a service animal’s handler or trainer who “otherwise complies with the limitations applicable to persons without disabilities.”⁴⁴
- j. All service animals must be licensed under RSA 466.⁴⁵
 - (i) RSA 466 requires that all dogs (not just service animals) be licensed for one year by the clerk of the town or city in which the dog is kept.⁴⁶
 - (ii) RSA 466 does not establish a special license for service animals.
- k. Do the protections of RSA 167-D extend to students during school hours?
 - (i) The statute applies only to public accommodations “to which the general public is invited.”⁴⁷
 - (ii) Many schools do not invite the general public to visit during regular school hours.
- l. The 2011 amendments to RSA 167-D are almost identical to March 15, 2011

41 RSA 167-D:2, I(a)-(i), as amended by N.H. Laws of 2011, Chapter 170.

42 RSA 167-D:2, II.

43 RSA 167-D:4 (emphasis added).

44 RSA 167-D:8.

45 RSA 167-D:7.

46 RSA 466:1.

47 RSA 167-D:4.

amendments to the U.S. Department of Justice’s regulations implementing the Americans with Disabilities Act (ADA).

- m. These ADA regulations clearly extend to students attending public schools during regular school hours.
 - (i) The ADA regulations apply to “all services, programs, and activities provided or made available by public entities.”⁴⁸
 - (ii) The term “public entities” in the ADA regulations includes “any State or local government.”⁴⁹

- n. There are some subtle differences between RSA 167-D and the new ADA regulations regarding service animals.
 - (i) The ADA regulations protect only individuals with disabilities. RSA 167-D, in contrast, also protects the animals’ “trainers.”
 - (ii) RSA 167-D requires that the dog be licensed.
 - (iii) RSA 167-D allows only dogs to function as service animals. The ADA regulations include special provisions for miniature horses.⁵⁰
 - (iv) Unlike RSA 167-D, the ADA regulations allow the exclusion of a service animal that is:
 - (aa) not housebroken; or
 - (bb) out of control, if the animal’s handler does not take effective action to control it.⁵¹
 - (v) The ADA regulations clarify that a school is not responsible for the animal’s care or supervision.⁵²
 - (vi) According to the ADA regulations, in order to determine whether an animal qualifies as a service animal, a public entity may ask “if the animal is *required* because of a disability and what work or task the animal has been

48 28 C.F.R. §§ 35.102(a), 35.136(a). See also 28 C.F.R. § 35.136(g).

49 28 C.F.R. § 35.104.

50 28 C.F.R. § 35.136(i).

51 28 C.F.R. § 35.136(b).

52 28 C.F.R. § 35.136(e).

trained to perform.”⁵³

- (vii) Violation of RSA 169-D is a misdemeanor.⁵⁴ A misdemeanor is a criminal offense punishable by fine or imprisonment.

L. Procedures for rulemaking by state agencies.

1. RSA 541-A establishes a process that state agencies (including the State Board of Education) must follow when adopting rules.

The process includes public notice of the proposed rules, a public hearing, and review by the Joint Legislative Committee on Administrative Rules (JLCAR).

2. N.H. Laws of 2011, Chapter 252 amends RSA 541-A by adding another level of oversight.
 - a. When a state agency proposes a rule “to implement newly-enacted statutory authority,” the agency must send a copy of the proposed rule “to the chair of each house and senate standing policy committee . . . for distribution to members of such committee.”

For example, if the New Hampshire Board of Education proposes a rule based on new legislation, it must send copies to the chairs of the New Hampshire House and Senate Education Committees.

- b. Members of the standing policy committee may then review the proposed rule to determine whether it “is consistent with the intent of the authorizing legislation.”
- c. If the standing policy committee concludes that the proposed rule is not consistent with the intent of the authorizing legislation, the committee shall send written notice to the agency.⁵⁵

M. Legislative committee to study the wisdom of allowing education tax credits.

1. New Hampshire Laws of 2011, Chapter 218, creates a committee to “to study the implementation of an education tax credit plan in New Hampshire.”
2. The committee, consisting of three members of the House and three members of the Senate, must issue an interim report of findings and recommendations by November 1, 2011 and a

⁵³ 28 C.F.R. § 35.136(f) (emphasis added.). However, a public entity may not ask these questions “when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (e.g., the dog is observed guiding an individual who is blind . . .).” *Id.*

⁵⁴ RSA 169-D:10.

⁵⁵ RSA 541-A:10, I, as amended by N.H. Laws of 2011, Chapter 252, Section 5.

final report by November 1, 2012.

3. The statute provides that this study may consider, but is not limited to considering, the following:
 - a. authorizing a tax credit against the state business profits tax for cash contributions made by businesses “to support the education of students at nonpublic schools”; and
 - b. authorizing the establishment of “tax-exempt scholarship granting organizations which would award grants to offset the cost of attending nonpublic schools.”
4. Note that the statute does not expressly authorize the committee to consider “vouchers” consisting of direct public funding for private education.
 - a. The statute, read literally, confines the committee to considering the wisdom of “tax credits.”
 - b. However, tax credits might include reductions in local real estate taxes for parents who send their children to private schools.

N. Legislative committee to review state participation in federal grant programs.

1. New Hampshire Laws of 2011, Chapter 226, establishes a committee “to review state participation in federal grant-in-aid programs.”
2. The committee, consisting of four members of the House and two members of the Senate, must hold its first meeting by August 15, 2011 and issue a report by November 1, 2011.
3. The committee will:
 - a. “identify the statutory authority for each federal grant-in-aid program in which the state participates”; and
 - b. “then assess the value to the state of each program on its merits, without reference to the availability of federal aid, and the feasibility of retaining each meritorious program in the absence of federal aid.”
4. The committee “shall solicit information and testimony from the legislative budget assistant’s office, the department of health and human services, the *department of education*, and other agencies and individuals with information and expertise relevant to the study.”⁵⁶
5. Warning! The committee will probably consider whether New Hampshire should continue to participate in the federal Individuals with Disabilities Education Act. This may spawn debate over the extent to which other federal laws – such as the Fourteenth Amendment of

⁵⁶ N.H. Laws of 2011, Chapter 226, Section 2, II (emphasis added).

the U.S. Constitution, the Americans with Disability Act, and Section 504 of the Rehabilitation Act of 1973 – require what the IDEA requires.

O. Legislative committee to study amending the delinquency and CHINS statutes.

1. New Hampshire Laws of 2011, Chapter 105, establishes a committee to study the juvenile delinquency and CHINS statutes, RSA 169-B and 169-D.
2. The committee, which consists of three members of the House and one member of the Senate, must issue a report with findings and recommendations by November 1, 2011.
3. The committee must consult with:
 - a. the State Department of Health and Human Services;
 - b. the State Department of Education;
 - c. “the law enforcement community”: and
 - d. “others with information and testimony relevant to the study.
4. Changes to the delinquency and CHINS statutes may affect school districts.
5. Yet the committee is not required to consult with the school districts.

P. Required numbers of instructional days and hours.

1. RSA 189:1 and 189:14 previously required that every public school operate for at least 180 days each year “or the equivalent number of hours if approved by the commissioner of the department of education.”
2. 2011 amendments to those statutes remove “if approved by the commissioner of the department of education” and insert “as required in the rules of the department of education.”⁵⁷
3. These amendments became effective July 8, 2011.⁵⁸

Q. Some relevant provisions in New Hampshire Laws of 2011 (enacting House Bill 2, the budget trailer bill).

⁵⁷ N.H. Laws of 2011, Chapter 42.

⁵⁸ *Id.*

1. This statute is 113 pages long.
2. The following are some relevant provisions *directly* affecting school districts.
 - a. Section 4 suspends state building aid for school districts for the period July 1, 2011 through June 30, 2013, subject to a narrow exception allowing expenditures to make unsafe buildings safe.

However, Sections 328 and 331 appropriate money for state building aid for school districts to construct kindergarten facilities during that period.
 - b. Section 228 establishes a legislative committee to study the relationship between the State Department of Education and “local education authorities.”
 - (i) This study shall “include a review of the methodology for determining tuition rates for career and technical education programs and the role of state funding in that determination process,” including possible “changes in that relationship in order to realize savings at the state level, the local level, or both.”
 - (ii) The committee, which shall consist of three members of the House and two members of the Senate, must file its report by November 1, 2011.
3. The budget trailer bill also includes numerous provisions slashing social services, which may *indirectly* increase costs for school districts. For example:
 - a. The legislature previously appropriated funds to help area agencies reduce waiting lists for developmentally disabled children and adults to receive services under RSA 171-A.
 - b. The budget trailer bill suspends that funding until July 1, 2014.
4. On the other hand, the budget trailer bill is generous to charter schools.

Section 153 of the bill authorizes the State Department of Education, beginning July 1, 2011 and every fiscal year thereafter, to expend funds up to 110 percent of budgeted amounts as necessary to make charter school tuition payments under RSA 194-B:11, I.

**II. SOME RETAINED BILLS (INTRODUCED DURING THE PAST SESSION,
TO BE CONSIDERED DURING THE UPCOMING SESSION)**

A. Abolishing the State Department of Education.

1. House Bill 219 proposes to create a legislative study committee to consider abolishing the State Department of Education and to transfer the Department's powers and duties to the State Board of Education.
2. This bill has been retained in the House Education Committee, which must issue a report by November 2, 2011.
3. The House Education Committee may recommend amending the bill to accomplish other reforms, such as barring the New Hampshire Board of Education from adopting special education rules that exceed the requirements of federal law.

B. Lowering the threshold for catastrophic aid.

1. The catastrophic aid statute, RSA 186-C:18, directs the State Department of Education to reimburse school districts for 80 percent of all special education and related service costs that exceed 3.5 times the state average per pupil cost.
2. House Bill 318 proposes to lower the threshold to 2 times the state average per pupil cost.
3. That bill has been retained in the House Education Committee.

C. Juvenile delinquency petitions involving school-related crimes.

1. Background.
 - a. The juvenile delinquency statute, RSA 169-B, covers minors who before age 17 commit acts that would be felonies or misdemeanors if committed by an adult.
 - b. Juvenile delinquency cases are commenced by filing a "petition" in court.
2. House Bill 296 proposes to add complex new requirements for petitions involving delinquent acts at school.
 - a. Students in general.

House Bill 296, if enacted, would insert the following as RSA 169-B:6, III:

“Absent serious threats to school safety,

when a delinquency petition is filed by a school official, including a school resource officers . . . , or when a petition is filed by a local police department as a result of a report made by a school official or school resource officer,

based on acts committed on school grounds during the school day,

information shall be included in the petition

- which shows that the legally liable school district sought to resolve the expressed problem through available educational approaches, including the school discipline process if appropriate,
- that the school has sought to engage the parents or guardian in resolving the problem but they have been unwilling or unable to do so,
- that the minor has not responded to such approaches and continues to engage in delinquent behavior,
- and that court intervention is needed.”

b. Special education students.

House Bill 296, if enacted, would also insert the following as RSA 169-B:6, IV:

“When a school official, including school resource officers . . . , or a local police department as a result of a report made by a school official or school resource officer,

files a petition involving a minor with a disability pursuant to RSA 186-C,

information shall be included which demonstrates that the legally liable school district:

- (a) Has determined that the minor has a disability;
- (b) Has determined whether the conduct leading to the juvenile petition is a manifestation of the minor’s disability; and
- (c) Has reviewed for appropriateness the minor’s current individualized education program (IEP), behavior intervention plan, and placement, and has made modifications where appropriate.”

3. House Bill 296 has been retained in the House Education Committee, which must issue a report by November 2, 2011.

III. SOME DEFEATED BILLS

A. Proposed amendments to the bullying statute.

1. A year ago, the state legislature amended RSA 193-F by requiring that school officials take certain steps in response to incidents of bullying and cyberbullying.
2. The 2010 amendments to RSA 193-F define bullying and cyberbullying broadly. The terms include acts off of school property and away from school-related events, “if the conduct interferes with a pupil’s educational opportunities or substantially disrupts the orderly operations of the school or school-sponsored activity or event.”⁵⁹
3. 2011 House Bill 370 proposed to narrow the definitions of bullying and cyberbullying in RSA 193-F by limiting them to events that occur on school property.
4. The House passed SB 370, but the Senate defeated it.

B. Rolling back the state special education rules.

1. House Bill 2 (the budget trailer bill), as *originally* passed by the House, included a special education “rollback” provision.
2. This provision directed the State Board of Education to repeal all special education rules requiring that school districts provide *services* beyond the minimum required by federal law.
3. The rollback provision was inartfully worded. It did not prohibit *procedural* rules that exceed the requirements of federal law.
4. House Bill 2 was supposed to focus on budget issues. The House added nonbudget provisions to the bill without submitting them to the appropriate policy committees for review.

For example, the House Finance Committee, not the House Education Committee, reviewed and approved the special education rollback provision.

5. Once House Bill 2 reached the Senate, the Senate Finance Committee recommended stripping many policy provisions from the bill, including the special education rollback provision.

⁵⁹ RSA 193-F:4, I(b).

6. Heeding that recommendation, the Senate deleted the rollback provision before passing House Bill 2.
7. The House then accepted the Senate's position on this point.
8. Similar rollback proposals may surface during the coming session, such as via an amendment to House Bill 219 (discussed in Section II-A above).

C. Allowing parents to object to specific course material.

1. House Bill 542 proposed to amend RSA 186:11, which lists some of the State Board of Education's duties.
2. The bill directed the State Board to require that every school district adopt a policy "allowing an exception to specific course material based on a parent's or legal guardian's determination that the material is objectionable."
3. Both chambers of the legislature to pass the bill, but the Governor vetoed it.

The Governor criticized the bill as overbroad, allowing parents to demand alternative lessons on the civil rights movement or even algebra.

4. RSA 186:11, IX-b already requires that every school district adopt a policy "allowing an exception to a particular unit of health or sex education instruction based on religious objections," including "a provision for alternative learning sufficient to meet state requirements for health education."