

2008 AMENDMENTS TO NEW HAMPSHIRE SPECIAL EDUCATION AND JUVENILE JUSTICE STATUTES

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I. CHAPTER 302 (HOUSE BILL 766), AMENDING THE STATE'S SPECIAL EDUCATION STATUTE

On July 9, 2008, the Governor signed House Bill 766, which thereupon became N.H. Laws of 2008, Chapter 302. The law extensively amends RSA 186-C, New Hampshire's special education statute.

School districts successfully lobbied the legislature to postpone the effective date to January 1, 2009.¹ This will give school districts time to train personnel to comply with Chapter 302.

Since Chapter 302 does not become effective until 2009, this paper will refer to the predecessor version of RSA 186-C as the "current" statute. For brevity, this paper will refer to the U.S. Department of Education as "US DOE" and the New Hampshire Department of Education as "NH DOE." Of course, "FAPE" means "free appropriate public education."

Chapter 302 is 49 pages long with 52 sections, but only some sections will actually become law. The legislature stated that, if Senate Bill 418 and House Bill 679 became law,

¹ N.H. Laws of 2008, Chapter 302, Sections 51-52.

certain sections of Chapter 302 would take effect and other sections would not.² Senate Bill 418 and House Bill 679 both became law.³

This paper will focus on key provisions of Chapter 302 from the perspective of school district special education administrators.

1. Policy and purpose – RSA 186-C:1.

RSA 186-C:1 currently declares:

- a) that it is the “policy” of the state to provide all children “with equal educational opportunities”; and
- b) that the “purpose” of RSA 186-C is to “ensure that the state board of education and the school districts of the state provide a free and appropriate public education for all children with disabilities.”

Chapter 302 revises those provisions.

RSA 186-C:1, as amended by Chapter 302, keeps the reference to “equal educational opportunities,” but adds two more policies:

- 1) that the rights of children with disabilities and their parents are protected; and
- 2) that state and local government and approved programs “provide for the education of all children with disabilities.”⁴

Chapter 302 also expands the “purpose” clause by providing as follows:

“It is the purpose of this chapter to ensure that all children with disabilities have *available* to them a free appropriate public education *in the least restrictive environment* that emphasizes special education and related services *designed to meet their unique needs and prepare them for further education, employment, and independent living.*”⁵

² N.H. Laws of 2008, Chapter 302, Section 51.

³ House Bill 679 was enacted as N.H. Laws of 2008, Chapter 274. It primarily addresses the relationship between the special education and juvenile justice systems. (See Section II of this paper.)

Senate Bill 418, enacted as N.H. Laws of 2008, Chapter 354, renames charter schools “chartered public schools” and establishes a new funding formula for state aid to charter schools.

⁴ RSA 186-C:1, I-III, as amended by N.H. Laws of 2008, Chapter 302, Section 34.

⁵ RSA 186-C:1, I, as amended by N.H. Laws of 2008, Chapter 302, Section 34 (emphasis added).

Note that the term “provide” has been removed. In its place, there is a provision stating that a FAPE should be “available” to all children with disabilities. This makes sense, since the IDEA requires that a school district *offer* a FAPE, but allows parents to decline special education. The reference to “least restrictive environment” in RSA 186-C:1 is also new.

RSA 186-C:1, I, as amended by Chapter 302, echoes many of the purposes recited in the IDEA, such as preparation for further education, employment, and independent living.⁶ However, unlike RSA 186-C:1, the IDEA does not speak of “equal educational opportunities.”

2. Definition of “child with a disability” – RSA 186-C:2, I.

RSA 186-C currently uses the term “educationally disabled child.” Chapter 302 strikes that term and inserts in its place “child with a disability” throughout RSA 186-C and all other state laws. The rationale is that the new term tracks the terminology in the IDEA.

Despite that change in terminology, a child does not qualify for services under RSA 186-C unless the disability creates a need for special education. Chapter 302 amends RSA 186-C:2, I, which formerly defined the term “educationally disabled child,” and which as amended defines the term “child with a disability.” The definition, as amended by Chapter 302, still requires that a student satisfy the following test:

- 1) the child must be between ages 3 and 21 and must have one of the disabilities listed in the statute; *and*
- 2) the child must “because of such impairment, need . . . special education.”⁷

On the other hand, Chapter 302 slightly expands the list of qualifying disabilities.

Chapter 302 adds a new disability – “acquired brain injury” – which is not mentioned in the IDEA. The state and federal special education laws have always included “traumatic brain injury.” Chapter 302 keeps traumatic brain injury in the list of qualifying disabilities, alongside acquired brain injury.⁸

The rationale for adding “acquired brain injury” to the list of qualifying disabilities remains a mystery. Chapter 302 does not define this term. Moreover, the U.S. Department of Education’s regulations implementing the IDEA define traumatic brain injury as “an *acquired* injury to the brain caused by an external physical force.”⁹ By listing acquired brain injury and

⁶ 20 U.S.C. § 1400(d).

⁷ RSA 186-C:2, I, as amended by N.H. Laws of 2008, Chapter 302, Section 35.

⁸ *Id.*

⁹ 34 C.F.R. § 300.8(c)(12) (emphasis added).

traumatic brain injury as two separate disabilities, Chapter 302 imposes an illogical distinction.

The second way Chapter 302 expands the list of disabilities is by redefining who qualifies as “developmentally delayed.” The IDEA gives states discretion to include, among the qualifying disabilities, “developmental delays.” A state may make this option available for children ages “3 through 9 (or any subset of that age range).” The IDEA mentions the following examples: delays in physical development, cognitive development, communication development, social or emotional development, or adaptive development. However, if a state elects the option of adding “developmental delays” to the list of qualifying disabilities, the IDEA expects the State to define that term.¹⁰

Prior to Chapter 302, RSA 186-C:2, I-a allowed a school district to identify a child “between 3 and 9 years of age” as developmentally delayed, “provided that such child must first be determined to have an educationally disabling condition as defined in RSA 186-C:2, I.” In other words, it was not enough to identify a child’s disability as a developmental delay. First, the school district had to identify a disability listed in *RSA 186-C:2, I*, such as mental retardation or a language impairment. *The disabilities listed in that statute did not include developmental delay.* After identifying a disability listed in RSA 186-C:2, I, the school district could add that the child *also* qualifies as developmentally delayed.

Chapter 302 relaxes those limits in three ways:

- It removes from the definition of “developmentally delayed child” the proviso that the child “must first be determined to have an educationally disabling condition as defined in RSA 186-C:2, I.”¹¹
- It adds “experiencing developmental delays” to the disabilities listed in RSA 186-C:2, I.¹²
- It allows a child “less than 10 years of age” to be identified as developmentally delayed.¹³

In short, Chapter 302 elevates developmental delay to the status of a free-standing disability. It also raises the upper limit from children under age 9 to children under age 10.

Instead of specifying the characteristics of this disability, Chapter 302 refers the reader to “criteria established by the state board of education.”¹⁴ However, the New Hampshire Board of

¹⁰ 20 U.S.C. § 1401(3)(B)(i).

¹¹ RSA 186-C:2, I-a, as amended by N.H. Laws of 2008, Chapter 302, Section 35.

¹² RSA 186-C:2, I, as amended by N.H. Laws of 2008, Chapter 302, Section 35.

¹³ RSA 186-C:2, I-a, as amended by N.H. Laws of 2008, Chapter 302, Section 35.

¹⁴ *Id.*

Education’s new rules, adopted in June 2008, contain no explicit criteria for this disability. The new state rules indirectly point to the criteria recited in the US DOE’s regulations at 34 C.F.R. § 300.8(b).¹⁵ This is circular, because the federal regulations, like the IDEA, expect that developmental delays will be “defined by the State.”¹⁶

3. Related services - RSA 186-C:2, V(a)(2).

The IDEA defines the term “related services” to mean “transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education.”

RSA 186-C:2, V currently includes a similar definition, but employs the term “educationally related services” and adds an important proviso – the service must be “specifically required by an individualized education plan. The current version of RSA 186-C:9-a elaborates by stating, “Educationally related services shall be related to one or more educational objectives in the educationally disabled child’s individualized education plan.”

Chapter 302 removes the term “educationally related services” from state law and inserts the term “related services” in its place. The definition of this term, which Chapter 302 nests in RSA 186-C:2, V(a)(2), is terser than the definition contained in federal law, but not inconsistent with federal law.¹⁷

Chapter 302 repeals RSA 186-C:9-a, which stated that related services must be related to one or more objectives in a student’s IEP.¹⁸ Chapter 302’s new definition of related services does not mention IEPs. However, Chapter 302 does not completely sever the link between related services and the IEP. The definition of an IEP, as amended by Chapter 302, refers to a plan that “provides necessary special education or special education and related services.”¹⁹

4. Transportation - RSA 186-C:2, V(a)(1).

RSA 186-C currently has two sections addressing transportation. RSA 186-C:2, V, defining educationally related services, mentions transportation. RSA 186-C:11 elaborates by providing as follows:

“Each school district shall furnish suitable transportation to all

¹⁵ N.H. Code of Administrative Rules, Ed 1102.01(r)(2). See Ed 1107.04(b), Table 1100.1 (describing qualified examiners for developmental delay).

¹⁶ 34 C.F.R. § 300.8(b)(1).

¹⁷ RSA 186-C:2, V(a)(2), as amended by N.H. Laws of 2008, Chapter 302, Section 35.

¹⁸ N.H. Laws of 2008, Chapter 302, Section 33.

¹⁹ RSA 186-C:2, III, as amended by N.H. Laws of 2008, Chapter 302, Section 35.

educationally disabled children whose individualized education plan requires such transportation. The school district may board a child near the place where instruction is to be furnished and shall provide transportation if required by the child's individualized education plan from the place where the child is boarded to the place of instruction."

Chapter 302 repeals RSA 186-C:11,²⁰ but inserts similar language in RSA 186-C:2, V(a)(1) as part of the definition of related services.²¹ Chapter 302 still compels a school district to provide transportation only when required by the student's IEP.²²

5. Residential services - RSA 186-C:2, V(a)(3).

The IDEA does not mention residential services. The US DOE's implementing regulations require public funding for room and board when "placement in a public or private residential program is necessary to provide special education and related services."²³

The U.S. Court of Appeals for the First Circuit, whose jurisdiction includes New Hampshire, has held that the IDEA compels a school district to fund room and board only when residential placement is necessary for a student to make "any" educational progress.²⁴

RSA 186-C:9-a, II, enacted in 1990, codifies the First Circuit's standard. The statute provides as follows:

"Residential services shall be considered an educationally related service *when necessary for an educationally disabled child to benefit from special education* and when placement in a residential facility has been made by the legally responsible school district in order to comply with RSA 186-C:9 or 11, or when placement has been ordered by a hearings officer or by a court of competent jurisdiction on appeal"²⁵

Chapter 302 repeals that quoted paragraph.²⁶ In its place, Chapter 302 inserts RSA 186-C:2, V(a)(3), which defines related services to include the following.

²⁰ N.H. Laws of 2008, Chapter 302, Section 33.

²¹ N.H. Laws of 2008, Chapter 302, Section 35.

²² RSA 186-C:2, V(a)(1), as amended by N.H. Laws of 2008, Chapter 35.

²³ 34 C.F.R. § 300.104.

²⁴ Abrahamson v. Hershman, 701 F.2d 223, 227 (1st Cir. 1983). *Accord*, Burke County Board of Education v. Denton, 895 F.2d 973, 980 (4th Cir. 1990).

²⁵ Emphasis added.

²⁶ N.H. Laws of 2008, Chapter 302, Section 33.

“*Services* necessary for a child with a disability to benefit from special education and when placement *in a residential facility* has been made by the legally responsible school district in order to comply with RSA 186-C:9, or when placement has been ordered by a hearing officer or by a court of competent jurisdiction on appeal”²⁷

This new statute muddles the legal standard. Its predecessor, RSA 186-C:9-a, II, explained *when a school district must make a residential placement*. Chapter 302, in contrast, speaks of *all services* once a child is in a residential facility, without explaining *when* a school district must place a student in a residential facility.

Fortunately, courts tend to interpret state law as tracking the IDEA, except when state law clearly evinces an intent to exceed federal law. We consequently expect that courts will continue to apply the IDEA test in New Hampshire, by requiring that a school district fund room and board only when residential placement is necessary for the student to make *any* educational progress.

6. NH DOE regulation of school districts – RSA 186-C:3-a, I-a.

RSA 186-C:3-a recites the “duties” of the NH DOE’s Division of Educational Improvement. That section currently includes the following sentence:

“The department shall ensure that the regulation and monitoring of school district activities shall not exceed what is necessary for compliance with this chapter and with federal law regarding the education of students with educational disabilities.”

The quoted sentence arguably prohibited the NH DOE from enforcing State Board of Education rules that exceed the minimum requirements of RSA 186-C (“this chapter”) and federal law.

Chapter 302 removes that limitation. It moves the quoted sentence to RSA 186-C:3-a, I-a and expands the sentence to read as follows:

“The department shall ensure that the regulation and monitoring of school district activities shall not exceed what is necessary for compliance with this chapter and with *state* and federal law regarding the education of children with disabilities.”²⁸

The addition of the italicized word allows the NH DOE to enforce State Board of Education rules, which are state law, even when those rules exceed the requirements of RSA 186-C and the

²⁷ N.H. Laws of 2008, Chapter 302, Section 35 (emphasis added).

²⁸ RSA 186-C:3-a, I-a, as amended by N.H. Laws of 2008, Chapter 302, Section 36 (emphasis added).

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7. NH DOE duties – RSA 186-C:3-a.

Chapter 302 imposes the following new duties on the NH DOE, all of which will have an impact on school districts:

- The department shall “[d]evelop and promote evidence-based practices supporting the education of children with disabilities in the least restrictive environment.”
- If children are being placed in out-of-district programs “solely due to lack of qualified personnel,” the department “shall develop and implement strategies” to remedy the shortage.
- The department must identify school districts that place a disproportionate number of students in out-of-district programs” and provide “focused technical assistance” to help those districts serve children in the least restrictive environment.
- The department must include, in its annual report to the State Board of Education and State Commissioner of Education, information that shows: a) “the annual progress and compliance on the state’s performance plan as required by 20 U.S.C. section 1416(b), 20 U.S.C. section 1412(a)(15), and 20 U.S.C. section 1416(a)(3)”; and b) “the progress and compliance with the requirements of the No Child Left Behind Act of 2001, 20 U.S.C. section 6311(b) and RSA 193-E:3 and RSA 193-H:2 with respect to children with disabilities.” The Commissioner shall make these findings “available in an easily accessible format on the [NH DOE’s] website.”
- In addition to monitoring the operations of school districts, as RSA 186-C:3-a currently requires, Chapter 302 directs the NH DOE to also monitor the operations of regional special education centers, charter schools, private schools, and state programs that serve children with disabilities. The purposes of this monitoring have been expanded to include ensuring: a) that special education programs comply with the state and federal special education laws; b) “accountability for failing to meet standards”; and c) “that the special needs of children with disabilities are met.”²⁹

8. Granite State High School and county correctional facilities – RSA 186-C:3-a, VII.

²⁹ RSA 186-C:3-a, II, II-a, V, as amended by N.H. Laws of 2008, Chapter 302, Section 36.

RSA 194:60, enacted in 1998, creates a special school district operated by the New Hampshire Department of Corrections for the purpose of providing education to “eligible adult offenders under the age of 21.”³⁰ This special school district is exempt from the New Hampshire Board of Education’s rules, “except that the standards for the education of students with disabilities and all education programs shall be set by an interagency agreement between the department of education and the department of corrections.”³¹

Granite State High School is the “academic flagship” of that special school district, serving inmates at the New Hampshire State Prison in Concord.³²

Chapter 302 amends RSA 186-C:3-a by requiring that Granite State High School submit a plan to the NH DOE for meeting the “special educational needs” of “persons” incarcerated in the state prison system.³³

Chapter 302 also inserts RSA 186-C:3-a, VII(b) and (c) regarding special education at county correctional facilities. These new sections provide as follows.

- Each county correctional facility must designate one special education coordinator, who shall act as the “contact person for outside entities on matters related to special education.” This person shall also supervise the provision of special education to children with disabilities at the county correctional facility.³⁴
- County correctional facilities are exempted from the State Board of Education’s rules, “except that the standards for the education of students with disabilities and all educational programs shall be set by interagency agreements between the department of education and each county correctional facility.”³⁵

Finally, Chapter 302 subjects Granite State High School and each county correctional facility to monitoring by the NH DOE under RSA 186-C:5, which must include on-site monitoring at least once annually through 2010.³⁶

9. State Advisory Committee on Special Education – RSA 186-C:3-b.

³⁰ RSA 194:60, I.

³¹ RSA 194:60, II. Accord, RSA 186-C:5.

³² “Inside Prison, Minds Expand,” Concord Monitor, February 18, 2006.

³³ RSA 186-C:3-a, VII(a), as amended by N.H. Laws of 2008, Chapter 302, Section 36.

³⁴ RSA 186-C:3-a, VII(b), as amended by N.H. Laws of 2008, Chapter 302, Section 36.

³⁵ RSA 186-C:3-a, VII(c), as amended by N.H. Laws of 2008, Chapter 302, Section 36.

³⁶ RSA 186-C:3-a, VII(d), as amended by N.H. Laws of 2008, Chapter 302, Section 36.

RSA 186-C:3-b describes the membership of the State Advisory Committee on Special Education. Chapter 302 adds the following to the list of requisite members:

- “Individuals with disabilities or parents of children with disabilities.”
- A teacher who is not a special education teacher.
- An individual representing children with disabilities who are home-schooled.
- A representative from a county correctional facility, who must be responsible for administering the provision of special education.

All of the above must be appointed by the Governor.³⁷

Chapter 302 also fine-tunes the qualifications for some members previously listed in RSA 186-C:3-b, II. For example, the New Hampshire Department of Health and Human Services’ representative must be “involved in the financing or delivery of special education or related services to children with disabilities.”³⁸ Similarly, the representative from the Department of Corrections must be someone responsible for administering the provision of special education.³⁹

Perhaps the most important change is the new requirement that a “majority of the committee membership shall be composed of individuals with disabilities or parents of children with disabilities.”⁴⁰ Like many changes to committee membership enacted by Chapter 302, this simply implements what the 2004 amendments to the IDEA require.⁴¹

Lastly, Chapter 302 changes the terms for each member of the committee. Members previously served 3-year terms and could serve no more than two consecutive terms. Chapter 302 calls for “staggered 2-year terms” and removes the limit on consecutive terms.⁴²

10. Program Approval, Monitoring, and Corrective Action – RSA 186-C:5.

The current version of RSA 186-C:5, entitled “Program Approval,” is one sentence long. It directs the State Board of Education to adopt rules establishing standards for the approval of

³⁷ RSA 186-C:3-b, II, as amended by N.H. Laws of 2008, Chapter 302, Section 36.

³⁸ Id.

³⁹ Id.

⁴⁰ Id.

⁴¹ 20 U.S.C. § 1412(a)(21)(B), (C).

⁴² RSA 186-C:3-b, III(a), as amended by N.H. Laws of 2008, Chapter 302, Section 36.

special education programs operated by school districts, regional special education centers, private schools, and state institutions.

Chapter 302 adds four pages of text to RSA 186-C:5. The following are some noteworthy new provisions.

- RSA 186-C:5 as amended addresses not only program approval, but also “monitoring and corrective action.”
- Charter schools (termed “chartered public schools”) and “alternative schools” are now subject to program approval and monitoring. (Does this imply that school districts may now assign disabled children to charter schools?)
- The monitoring process now includes “reporting of outcome or indicator data by school district and non-district programs.”
- Chapter 302 sets strict requirements for the composition of teams that approve and monitor programs.
- The statute empowers the NH DOE to impose a cascade of sanctions when a program fails to obey an order for corrective action. Orders for corrective action may emanate from the monitoring team, a due process hearings officer, or the State Commissioner of Education after a complaint investigation. Available sanctions include but are not limited to:
 - compensatory education;
 - terminating state and federal special education funds;
 - referral to the NH DOE’s bureau of credentialing “for review of compliance with professional licensure or certification”;
 - “[o]rdering the cessation of operations of discrete programs”; and
 - referral to the New Hampshire Attorney General.

Although these sanctions are extreme and may seem punitive, they are available only when a program fails to comply with an order for corrective action.

11. Benchmarks and short-term objectives – RSA 186-C:7.

In 2004, Congress amended the IDEA by deleting the requirement that every IEP include benchmarks or short-term objectives. On the other hand, the 1997 and 2004 amendments to the IDEA imposed more rigorous requirements for annual goals.

Since 2004, the IDEA has required that an IEP include benchmarks or short-term objectives only when the IEP team decides that the student will take alternative state-wide or district-wide student assessments.⁴³ Students taking such alternative assessments comprise approximately 1 percent of all disabled students.

Chapter 302 amends state law by requiring that every IEP include benchmarks or short-term objectives, unless the student's parents waive that entitlement. RSA 186-C:7 currently states that every student shall have an IEP, but does not specify the elements of an IEP. Chapter 302 amends RSA 186-C:7, III by adding the following:

“Each child’s individualized education program shall include short-term objectives or benchmarks unless the parent agrees that they are not necessary for one or more of the child’s annual goals.”

Chapter 302 also changes the title of the document, from “individualized education plan” to “individualized education program,” which is the term used in federal law.⁴⁴

12. Interagency agreements – RSA 186-C:7-a.

The IDEA recognizes that a school district’s duty to provide a FAPE may overlap with the duties of other public agencies to provide social services under other state or federal laws.

For example, RSA 171-A directs the New Hampshire Department of Health and Human Services (DHHS) and its area agencies to provide a wide array of services to developmentally disabled individuals of all ages. These services include “care, habilitation, treatment, and training,”⁴⁵ such as “psychological, medical, vocational, social, educational, or rehabilitative services.”⁴⁶ Many of those services, if provided by a school district, would qualify as special education or related services.

The IDEA addresses such overlapping responsibility by making special education the provider of *last resort*. The IDEA requires that every participating state establish interagency agreements.⁴⁷ These agreements must include a process to resolve disputes between public agencies, including disputes between school districts and state agencies.⁴⁸ These agreements must also recognize that the obligations of any “public agency other than an educational agency”

⁴³ 20 U.S.C. § 1414(d)(1)(A)(i)(I)(cc).

⁴⁴ RSA 186-C:2, III and RSA 186-C:7, I, as amended by N.H. Laws of 2008, Chapter 302, Sections 35 and 40.

⁴⁵ RSA 171-A:4.

⁴⁶ RSA 171-A:13. See also RSA 171-A:2, IX (defining habilitation) and RSA 171-A:2, XVII (defining treatment).

⁴⁷ 20 U.S.C. § 1412(a)(12)(A).

⁴⁸ 20 U.S.C. § 1412(a)(12)(A)(iii).

shall “*precede* the financial responsibility of the local educational agency.”⁴⁹

RSA 186-C:7-a currently directs the New Hampshire Commissioner of Education and the New Hampshire Commissioner of Health and Human Services to enter into an interagency agreement. That agreement, which the two commissioners signed years ago, essentially states that when the duties of a school district to provide special education overlap with the duties of DHHS to provide services, the school district is responsible and DHHS is not. That contradicts federal law.

Chapter 302 rewrites RSA 186-C:7-a by specifying in greater detail the contours of the interagency agreement.⁵⁰ The following are some highlights.

- The State Board of Education must be a party to the agreement, in addition to the State Commissioner of Education and the State Commissioner of Health and Human Services.⁵¹
- The agreement must establish a procedure for resolving interagency disputes.⁵² Chapter 302 guarantees parents and “participating agencies” the right to initiate such proceedings, but is ambiguous on whether *school districts* may initiate such proceedings.⁵³ The statute certainly does not guarantee a process that is fair to school districts when the dispute pits a school district against a state agency.
- School districts are responsible, and other agencies are not, when their duties overlap.⁵⁴ This contradicts federal law.⁵⁵
- The Commissioners must submit a revised interagency agreement to the New Hampshire House and Senate Education Committees by October 1, 2008.⁵⁶
- Before adopting that revised agreement, or any subsequent amendments to the agreement, the Commissioners “shall jointly solicit input from relevant advisory

⁴⁹ 20 U.S.C. § 1412(a)(12)(A)(i), (B) (emphasis added).

⁵⁰ RSA 186-C:7-a, as amended by N.H. Laws of 2008, Chapter 302, Section 41.

⁵¹ RSA 186-C:7-a, I, as amended by N.H. Laws of 2008, Chapter 302, Section 41.

⁵² RSA 186-C:7-a, III(e)(3), as amended, by N.H. Laws of 2008, Chapter 302, Section 41.

⁵³ *Id.*

⁵⁴ RSA 186-C:7-a, III(e)(2), as amended by N.H. Laws of 2008, Chapter 302, Section 41.

⁵⁵ This legal flaw may have no practical significance, since the New Hampshire Supreme Court has ruled that NH DHHS’s duties under RSA 171-A are not absolute. Unlike special education, which the IDEA and RSA 186-C guarantee, the state’s duties under RSA 171-A are conditional on the legislature appropriating sufficient funds. *Petition of Strandell*, 132 N.H. 110, 562 A.2d 173 (1989).

⁵⁶ RSA 186-C:7-a, IV, as amended by N.H. Laws of 2008, Chapter 302, Section 41.

committees and the public.”⁵⁷ School districts and parent advocates urged the legislature to apply to the interagency agreement the more formal rulemaking process established by RSA 541-A, since the interagency agreement essentially amounts to lawmaking. The legislature rejected that proposal. However, the IDEA provides as follows.

“Prior to the adoption of any policies and procedures needed to comply with this section (including amendments to such policies and procedures), the State [must] ensure[] that there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public”⁵⁸

Thus, the IDEA arguably requires that the State Board of Education conduct public hearings on the interagency agreement, even though state law does not.

13. Rate setting - RSA 186-C:7-c.

RSA 21-N:5, I(g) authorizes New Hampshire’s Deputy Commissioner of Education to set rates in accordance with RSA 186-C:7, III.

RSA 186-C:7, III currently directs the NH DOE to assist school districts in developing approved programs, “including the setting of approved rates for private providers of special education services pursuant to RSA 21-N:5, I (h) [sic].”

Chapter 302 repeals RSA 186-C:7, III⁵⁹ and inserts new, more detailed provisions regarding rate setting. Those new provisions, codified at as RSA 186-C:7-c:

- Direct the NH DOE’s Division of Educational Improvement to “set an approved rate for private providers of special education services pursuant to RSA 21-N:5, I(h) [sic].”⁶⁰
- Prohibit a “provider” from charging the NH DOE or any school district in New Hampshire “an amount in excess of” the state-approved rate.⁶¹

⁵⁷ Id.

⁵⁸ 20 U.S.C. § 1412(a)(19).

⁵⁹ N.H. Laws of 2008, Chapter 302, Section 40.

⁶⁰ RSA 186-C:7-c, II, as amended by N.H. Laws of 2008, Chapter 302, Section 8.

⁶¹ RSA 186-C:7-c, IV, as amended by N.H. Laws of 2008, Chapter 302, Section 8.

14. Collaborative programs – RSA 186-C:8.

RSA 186-C:8, I currently allows school districts and school administrative units to enter into “cooperative agreements” to provide approved special education programs “in regional special education centers.” This section also directs the State Board of Education to “encourage” such agreements “when appropriate because of low incidence of a disabling condition, high costs of services, or scarcity of trained personnel.”

Chapter 302 amends RSA 186-C:8, I, by deleting the reference to “regional special education centers.”⁶²

In our opinion, that change does not mean that regional special education centers must stop operating special education programs. Other sections of RSA 186-C that were amended by Chapter 302 still mention regional centers. For example, regional special education centers remain subject to RSA 186-C:5, governing program approval and monitoring.⁶³

It seems that the purpose behind striking regional special education centers from RSA 186-C:8 was to continue to allow such facilities while encouraging alternative types of collaborative programs.

15. Graduation – RSA 186-C:9.

RSA 186-C:9 currently requires that a school district provide a FAPE to every educationally disabled child age of 3 or older until the student “has acquired a high school diploma or has attained the age of 21, whichever occurs first.”

Chapter 302 amends RSA 186-C:9 by changing “high school diploma” to “regular high school diploma.”⁶⁴ This comports with federal law. The US DOE’s 2006 regulations clarify that, while a school district may discharge a student from special education based on “graduation from high school with a regular high school diploma,” the term “regular high school diploma” does not include “an alternative degree that is not fully aligned with the State’s academic standards, such as a certificate or a general educational development credential (GED).”⁶⁵

16. Local school board involvement – RSA 186-C:10.

⁶² RSA 186-C:8, I, as amended by N.H. Laws of 2008, Chapter 302, Section 42.

⁶³ RSA 186-C:5, I(a), as amended by N.H. Laws of 2008, Chapter 302, Section 39.

⁶⁴ RSA 186-C:9, as amended by N.H. laws of 2008, Chapter 302, Section 42.

⁶⁵ 34 C.F.R. § 300.102(a)(3).

RSA 186-C:10 requires that a school district educate a disabled student in an approved program in or pay tuition for the student to attend an approved out-of-district program.

Since 1981, RSA 186-C:10 has concluded with the following sentence:

“Eligibility for participation in an approved program of special education shall be determined by the school board of the school district under rules adopted by the state board of education.”

Chapter 302 strikes the quoted sentence.⁶⁶

This amendment was necessary to comply with federal law. It has always been unclear whether the quoted sentence required school board approval before a school district identified a student as eligible for special education or for the student’s placement. Federal law delegates both decisions to a team that includes the student’s parents, not to the local school board.

17. Juvenile courts contemplating residential placements – RSA 186-C:13, III.

RSA 169-B:22, 169-C:20, and 169-D:18 (discussed in Section II below regarding Chapter 274) foster cooperation between the juvenile justice and special education systems. Those statutes give a juvenile court discretion to join a legally liable school district to the proceedings, unless the court contemplates making a residential placement, in which case the court “shall” join the school district. Once the court joins a school district as a party, the district “shall make a recommendation to the court as to where the child’s educational needs can be met.”⁶⁷

RSA 186-C:13, III contains somewhat similar provisions. According to this statute, a juvenile court must notify the “sending district” when the court orders a “placement.” (The term “sending district” means the school district ultimately liable for special education costs under RSA 193:29 when the court places a student in a foster home, group home, residential school, or similar facility.) Upon receiving this notice, the school district “may submit recommendations to the court concerning the financial impact of the placement on the sending district.”

Chapter 302 amends RSA 186-C:13, III by expanding the permissible scope of the school district’s recommendations. The school district may now also submit recommendations to the court “concerning . . . the appropriateness of the placement,” in addition to information on the financial impact.⁶⁸

⁶⁶ RSA 186-C:10, as amended by N.H. Laws of 2008, Chapter 302, Section 43.

⁶⁷ RSA 169-B:22, 169-C:20, and 169-D:18, as amended by N.H. Laws of 2008, Chapter 274.

⁶⁸ RSA 186-C:13, III, as amended by N.H. Laws of 2008, Chapter 302, Section 45.

RSA 186-C:13, III remains plagued by imprecise language. For example:

- The word “placement” is a chameleon term. When a juvenile court “places” a student, it usually selects a facility where the student will live – with parents, with relatives, in a foster home, in a group home, or in a residential treatment center that may operate a day school.⁶⁹ When a school district “places” a disabled student, it selects a school in which the student will receive special education at the district’s expense. RSA 186-C:13, III is part of the special education laws, but uses the term “placement” as if it were located in the juvenile justice laws.
- RSA 186-C:13, III, read literally, requires that the court notify a school district once the court has already made a placement. By that time, the school district’s recommendations serves no useful purpose.
- It is difficult to imagine a situation where RSA 186-C:13, III gives a school district a right to make recommendations and the school district does not already have that right under RSA 169-B:22, 169-C:20, and 169-B:18.

Despite those imperfections, RSA 186-C:13, III is not utterly worthless. It adds an arrow to a school district’s quiver of defenses. On the other hand, judges may never read RSA 186-C:13, III, since it is located in the special education statutes rather than in the juvenile justice statutes.

18. Surrogate parents – RSA 186-C:14.

RSA 186-C:14, III currently allows the State Commissioner of Education to appoint a surrogate parent under the following circumstances:

- When the child’s parents are “unknown.”
- When the parents “after reasonable efforts, cannot be located.”
- When the child is “a ward of the state.”

Unfortunately, the current statute does not define “ward of the state.” This led to confusion concerning whether a child qualified as a ward of the state when a juvenile court awarded DCYF legal custody but a probate court did not take the more extreme step of terminating the parents’ residual rights.

Chapter 302 amends RSA 186-C:14, III in three ways.

⁶⁹ If the student qualifies for special education, such an out-of-home placement triggers RSA 193:27 through 29, which impose ultimate liability for special education costs on the “sending district.” However, this does not imply that the “sending district” actually sent the student to the court-ordered placement. The label “sending district” attaches to whatever district the child lived in before the court-ordered placement, if the child’s parents no longer have legal custody, or to the district where the parents currently reside, if they retain legal custody. RSA 193:27, IV.

1. It deletes the phrase “a ward of the state” and inserts in its place “in the legal custody of the division of children, youth, and families” (DCYF).
2. If DCYF has legal custody, a judge “overseeing the child’s case” may appoint a surrogate parent. (This supplements, rather than supplants, the Commissioner’s authority to appoint a surrogate parent for such children.)
3. If the child is an “unaccompanied youth” as defined in the McKinney-Vento Homeless Assistance Act, 42 U.S.C. § 11432a(6), the school district may appoint a surrogate parent.⁷⁰

All three amendments track federal law.⁷¹

Remember that IDEA 04 creates another option, which RSA 186-C neglects to mention. If the child is a ward of the state and is not residing with parents, a school district may conduct an *initial evaluation* without parental consent and without a surrogate parent in three situations:

- 1) when the school district cannot locate the parents, despite reasonable efforts to do so;
- 2) when a court has terminated residual parental rights; or
- 3) When the parents’ rights to make educational decisions “have been subrogated by a judge in accordance with State law and consent for an initial evaluation has been given by an individual appointed by the judge to represent the child.”⁷²

19. Extended school year programming – RSA 186-C:15.

Public schools ordinarily operate approximately 180 days each year. They close for weekends, holidays, and summer recess. However, parents of disabled children often seek extended school year (ESY) services. This raises two distinct but related issues: 1) who receives ESY services; and 2) the magnitude of a child’s ESY services.

RSA 186-C:15, enacted in 1981, establishes a “regression/recoupment” standard.

“The length of the school year for an educationally disabled child shall be the same as that provided by the local school district for a child not

⁷⁰ RSA 186-C:14, III, as amended by N.H. Laws of 2008, Chapter 302, Section 46.

⁷¹ IDEA 04 added that judges may appoint surrogate parents for children who are wards of the state and that school districts may appoint surrogate parents for unaccompanied homeless youth. 20 U.S.C. § 1415(b)(2)(A)(i)-(ii). The U.S. Department of Education’s IDEA regulations defer to state law to determine whether a child is a ward of the state. 34 C.F.R. § 300.519(a)(3).

⁷² 20 U.S.C. § 1414(a)(1)(D)(iii)(II)(cc).

educationally disabled, except that the local school district shall provide an approved program for an extended period when it can be demonstrated by a preponderance of evidence, in accordance with rules adopted by the state board of education, that interruption of the program of an educationally disabled child *would result in severe and substantial harm and regression* and would have the effect of negating the benefits of such educationally disabled child's regular special education program.”⁷³

RSA 186-C:15, drafted by the N.H. Department of Justice, codified how many courts had already interpreted the IDEA. The statute made it clear that ESY services are available only to children who would otherwise experience severe regression and that a child's ESY program must provide services necessary to prevent such regression.

Chapter 302 amends RSA 186-C:15 by substituting a vague FAPE standard for the regression/recoupment standard. The new statute also refers to the length of the school day in addition to the length of the school year.

“The length of the school year and school day for a child with a disability shall be the same as that provided by the local school district for a child without a disability of the same age or grade, except that the local school district shall provide an approved program for an extended period when the child's individualized education program team determines that such services are necessary to provide the child with a free appropriate public education.”⁷⁴

Chapter 302 also inserts a new paragraph for preschool children, whose nondisabled age peers ordinarily do not attend public school. This new paragraph states that the IEP team shall determine the length of the child's school day and school year, which “shall not be governed by the school district's school calendar.”⁷⁵

The legislature's decision to strike the regression/recoupment standard was undoubtedly influenced by changes in federal law. The IDEA does not address ESY services. Since 1999, the US DOE's regulations have required that a school district provide ESY services when the IEP team determines that such services are necessary for a student to receive a FAPE.⁷⁶

On the other hand, the US DOE has made it clear that states may adopt more precise and rigorous criteria for ESY services, such as the regression/recoupment standard.⁷⁷ Thus, Chapter

⁷³ RSA 186-C:15 (emphasis added).

⁷⁴ RSA 186-C:15, I, as amended by N.H. Laws of 2008, Chapter 302, Section 47.

⁷⁵ RSA 186-C:15, II, as amended by N.H. Laws of 2008, Chapter 302, Section 47.

⁷⁶ 34 C.F.R. § 300.106.

⁷⁷ “The concepts of ‘recoupment’ and ‘likelihood of regression or retention’ have formed the basis for many standards that States use in making ESY eligibility determinations and are derived from well-established judicial

302's amendments to RSA 186-C:15 were not necessary to comply with federal law.

Now that RSA 186-C:15 parrots the US DOE's regulations, by establishing a vague FAPE standard for ESY programming, two scenarios are possible. These scenarios are illustrated by court decisions in other states that rely on the FAPE standard for ESY programming. In some of those cases, courts looked exclusively at regression/recoupment. In other cases, courts viewed regression/recoupment as an important factor, but not the only relevant factor.

For example, Virginia law contains no legal standard for ESY services, other than the vague FAPE standard. The Virginia Department of Education advises school districts to consider the following when determining a student's eligibility for ESY services:

“regression/recoupment, degrees of progress, emerging skills/breakthrough opportunities, interfering behaviors, the nature and/or severity of the disability, and other factors.”⁷⁸

The NH DOE endorses that advice.⁷⁹

Removing the regression/recoupment test from RSA 186-C:15 makes it likely that more students will receive ESY services and that the services each ESY student receives will be more intensive and expensive. Such an outcome would arguably violate the New Hampshire Constitution, Part 1, Article 28, which prohibits the state from imposing new unfunded mandates on cities, towns, and school districts.

In order to prepare for a possible constitutional challenge, an IEP team may use the following checklist when reviewing a student's eligibility for ESY services.

1. Is the child eligible under the old regression/recoupment standard?
2. If the answer to Question 1 is no, is the child eligible under the new FAPE standard?
3. If the child is eligible for ESY services, what level of services is necessary to prevent severe regression?
4. Applying the new FAPE standard, what ESY services will the child receive in

precedents. . . . *States may use recoupment and retention as their sole criteria* but they are not limited to these standards and have considerable flexibility in determining eligibility for ESY services and establishing State standards for making ESY determinations.” US DOE comments, Federal Register, Vol. 71, No. 156 (Aug. 14, 2006), p. 46582 (emphasis added).

⁷⁸ Virginia Department of Education, “Extended School Year Services Technical Assistance Document” (August 2000).

⁷⁹ N.H. Dept. of Education, Bureau of Special Education FY '08 Memo #44, p. 2 (May 20, 2008).

excess of services the team would have offered under Question 3?

20. Expert witness fees - RSA 186-C:16-b.

The IDEA allows a court to award parents reasonable *attorney's fees* whenever they prevail at a due process hearing or on appeal to the court.⁸⁰ The 2004 amendments to the IDEA also allow a school district to recover attorney's fees from parents and parents' lawyers under egregious circumstances.⁸¹

In 2006, the U.S. Supreme Court held that the IDEA does not give parents the right to recover *expert witness* fees from school districts.⁸²

Chapter 302 amends RSA 186-C:16-b, V, the statute of limitations for seeking attorney's fees, by allowing courts to award parents expert witness fees under extreme circumstances. In order to recover expert witness fees from the school district, a court must find:

- (a) that the fees were incurred as part of a due process hearing;
- (b) that the parent "was the prevailing party" at that due process hearing; and
- (c) that "the school has not acted in good faith in developing or implementing a child's individualized education program, including appropriate placement."⁸³

Obviously, it will be difficult for parents to prove condition (c), which requires a showing of bad faith. On the other hand, condition (c), read literally, allows an award of expert witness fees even if the bad faith occurred in the distant past and bears no relationship to the due process hearing.

Chapter 302 is a one-way valve when it comes to expert witness fees. It does not allow a school district to recover expert witness fees from unreasonable parents.

Chapter 302 allows a court to "deny or reduce" reimbursement of expert witness fees if the *hearing officer* determines:

- (1) that the expert witness "was not a necessary component to the parent's complaint";

⁸⁰ 20 U.S.C. § 1415(i)(3)(B)(i)(I).

⁸¹ 20 U.S.C. § 1415(i)(3)(B)(i)(II), (III).

⁸² Arlington Central School District v. Murphy, 548 U.S. 291 (2006).

⁸³ RSA 186-C:16-b, V(a), as amended by N.H. Laws of 2008, Chapter 302, Section 19.

- (2) that the expert’s fee “exceeds an amount that is reasonable, given the type and location of the service and the skill, reputation, and experience of the expert witness”; or
- (3) that the parent did not provide notice to the school district of his or her intent to have the expert “participate” in the due process hearing.⁸⁴

Note that these conditions leave it to the hearing officer, not the court, to determine the reasonableness of the expert’s fee and the necessity of the expert’s testimony.

Condition (2) is particularly misguided. It requires a school district to anticipate a *potential court claim* for expert witness fees by introducing evidence *at the due process hearing* evidence showing what the expert charged and what a reasonable charge might be. Considering that due process hearings are limited to two days, it makes little sense to consume precious hearing time with evidence on those tangential issues, unless the evidence serves the additional purpose of discrediting the expert’s findings or recommendations (e.g., demonstrating that the expert is a hired gun).

From a practical perspective, the amendment regarding expert witness fees should make little difference, not only because it is difficult to prove that a school district acted in bad faith, but also because the dollar amount involved is relatively small. Other provisions of the special education laws govern school district liability for independent evaluations. Specifically, when a parent seeks public funding for an independent evaluation, the school district must either pay or initiate a due process hearing to show that its own evaluations were appropriate.⁸⁵ Thus, a claim for expert witness fees will probably be limited to the time the expert spent *testifying*, not the time the expert spent *evaluating* the student.

21. State financial assistance to school districts for children moving from out-of-district placements to in-district placements - RSA 186-C:18, XI.

RSA 186-C:18, XI, inserted by Chapter 302, creates a new program of state financial assistance “to establish or support school district-based programs for children with disabilities who have been in out-of-district programs in the previous school year.”⁸⁶

The total state financial assistance under that program is the lesser of: a) \$1,000,000; or b) 3.5 percent of catastrophic aid funds appropriated during that fiscal year. It is unclear whether the state funds for this new program come out of, or are in addition to, the amount the state appropriates for catastrophic aid.⁸⁷

⁸⁴ RSA 186-C:16-b, V(b), as amended by N.H. Laws of 2008, Chapter 302, Section 19.

⁸⁵ 34 C.F.R. § 300.502(b)(2).

⁸⁶ RSA 186-C:18, XI, as amended by N.H. Laws of 2008, Chapter 302, Section 21.

⁸⁷ RSA 186-C:18, XI(a), as amended by N.H. Laws of 2008, Chapter 302, Section 21.

Chapter 302 contains two alternative formulas for distributing funds under the new program. The first formula is simple but ambiguous. The second formula is more complicated, but more specific. The second formula offers state financial assistance for three consecutive years after the child moves from an out-of-district placement to an in-district placement. Whichever formula yields the greatest amount is supposed to apply.⁸⁸

Chapter 302 also directs the State Board of Education to adopt rules implementing this new program.⁸⁹ Those rules will presumably clarify the funding formulas.

22. Children with disabilities in state facilities - RSA 186-C:19.

RSA 186-C:19 currently governs special education at “state institutions,” which RSA 186-C:19, IV defines as “the Philbrook center for children and youth and Laconia developmental services.” The statute requires that the responsible school district develop an IEP and fund a FAPE for every educationally disabled child at these institutions, regardless of whether the school district placed the child there through the special education process. The statute also includes a formula for determining which school district is responsible.

Chapter 302 amends RSA 186-C:19 by deleting the term “state institution” and by inserting in its place “state facility.” Chapter 302 also amends RSA 186-C:19, IV, by defining “state facility” as “any state operated facility for children and youth with disabilities.”⁹⁰ The amended statute does not define the phrase “children and youth with disabilities,” which appears nowhere else in RSA 186-C.

As a practical matter, these amendments expand the coverage of RSA 186-C:19 to any state-operated facility that serves children who qualify for special education.

This expansion conflicts with RSA 186-C:19-a (2008 Supp.), which governs special education at two state-operated facilities – the New Hampshire Youth Development Center and the New Hampshire Youth Services Center.

RSA 186-C:19-a (as amended) is inconsistent with RSA 186-C:19 (as amended) in the following respects.

- RSA 186-C:19-a, II caps a school district’s liability. It limits a district’s annual liability to the state average annual per pupil cost. RSA 186-C:19 as amended by Chapter 302 includes no cap.

⁸⁸ Id.

⁸⁹ RSA 186-C:18, XI(b), as amended by N.H. Laws of 2008, Chapter 302, Section 21.

⁹⁰ RSA 186-C:19, as amended by N.H. Laws of 2008, Chapter 302, Section 49.

- RSA 186-C:19, I(c) clarifies which school district is liable for disabled individuals ages 18 to 21. RSA 186-C:19-a contains no counterpart.

During public hearings on the proposed amendments to RSA 186-C, the NHASEA informed the legislature of these potential conflicts between RSA 186-C:19 and 186-C:19-a, but the legislature chose to ignore the problem.

23. Special education at the Youth Services Center – RSA 186-C:20.

RSA 186-C:20 currently provides that, when a school district *assigns* a child with a disability to the state’s Youth Services Center, the school district is liable for *all* special education costs.

“Notwithstanding the provisions of any other law to the contrary, the expenses for an educationally disabled child *assigned to* the special education program at the youth services center maintained by the department of health and human services shall be the responsibility of the school district so *assigning* the child. Such a school district shall pay the rate established for the special education program of the center.”⁹¹

Chapter 302 amends RSA 186-C:20 to read as follows.

“Notwithstanding the provisions of any other law to the contrary, the expenses for a child with a disability *receiving services at* the special education program at the youth services center maintained by the department of health and human services shall be the responsibility of the liable school district so *assigning* the child. Such a school district shall pay the rate established for the special education program of the center.”⁹²

The purpose of this amendment is a mystery. Perhaps the legislature intended to force school districts to pay the full cost of special education for *all* disabled children at the Youth Services Center, regardless of whether school districts assigned them to that program. If that is true, the legislature failed to accomplish its purpose. Chapter 302 repeals the word “assigned” the first time it appears in RSA 186-C:20, I, but does not remove that word later in the statute.

24. Facilitated IEP team meetings - RSA 186-C:23.

RSA 186-C:23, I currently recognizes two forms of alternative dispute resolution: (1) mediation; and (2) a “neutral conference.” As RSA 186-C:23-b explains, a neutral conference is

⁹¹ RSA 186-C:20, I (emphasis added).

⁹² RSA 186-C:20, I, as amended by N.H. Laws of 2008, Chapter 302, Section 50 (emphasis added).

a short non-binding hearing.

Chapter 302 amends RSA 186-C:23, I, by adding a third form of alternative dispute resolution: “a facilitated individualized education program meeting.”⁹³ Like mediation and a neutral conference, participation in a facilitated IEP meeting is voluntary, not mandatory for either the school district or parents.⁹⁴

Warning! *What occurs at such facilitated IEP meetings must remain confidential.* RSA 186-C:23, III imposes strict secrecy requirements on all forms of alternative dispute resolution listed in RSA 186-C:23, I, including facilitated IEP meetings. Statements made and documents used in such proceedings may not be “disclosed or used in any subsequent proceeding.” A party may not even introduce, in any subsequent proceeding, the fact that an alternative dispute resolution proceeding occurred.

These confidentiality requirements do not extend to alternative dispute resolution techniques conducted outside of RSA 186-C:23. For example, a facilitated IEP team meeting scheduled and arranged by a school district, without involvement by the State Department of Education, probably does not fall within RSA 186-C:23.⁹⁵ In such instances, when a school district hires its own facilitator rather than using one appointed by the Department, the district should notify the parents that RSA 186-C:23 does not govern and that the confidentiality provisions of this statute consequently do not apply.

25. The Medicaid to Schools Program - RSA 186-C:25.

The Medicaid to Schools program is currently governed by RSA 186-C:25 through RSA 186-C:28.

Chapter 302 amends RSA 186-C:25⁹⁶ and repeals RSA 186-C:26 through RSA 186-C:28.⁹⁷

⁹³ RSA 186-C:23, I(c), as amended by N.H. Laws of 2008, Chapter 302, Section 20.

⁹⁴ RSA 186-C:23, II.

⁹⁵ See RSA 186-C:23, II (directing the State Department of Education to “schedule and conduct” alternative dispute resolution); N.H. Code of Administrative Rules, Ed 1102.02(p) (defining “facilitated IEP meeting” as “an IEP meeting at which an impartial facilitator, trained by the department, assists the parties to conduct special education meetings”).

⁹⁶ N.H. Laws of 2008, Chapter 302, Section 26.

⁹⁷ N.H. Laws of 2008, Chapter 302, Section 33, subsections III-V.

II. CHAPTER 274 (HOUSE BILL 679), AMENDING THE STATE’S JUVENILE JUSTICE STATUTES

On June 27, 2008, the Governor signed House Bill 679, which thereupon became N.H. Laws of 2008, Chapter 274. All provisions became effective on July 1, 2008.⁹⁸

Most of Chapter 274 amends the juvenile justice statutes, RSA 169-B (governing delinquency cases), RSA 169-C (governing abuse and neglect cases), and RSA 169-D (governing CHINS cases).

Since 1983, RSA 169-B, C and D have provided as follows:

- A juvenile court may join the “legally liable school district” at “any point during the proceedings” for two “limited purposes”:
 - (1) to order the school district to “determine” whether the juvenile qualifies for special education; and
 - (2) if the juvenile qualifies for special education, to order the school district to “review the services offered or provided under RSA 186-C.”⁹⁹
- Once joined, a school district “shall have full access to all records maintained by the . . . court . . . and shall make a recommendation to the court as to where the child’s educational needs can . . . be met.”¹⁰⁰

Those provisions remain unchanged. Much of Chapter 274 builds upon those long-standing statutes.

House Bill 766, as introduced in 2007, proposed to give juvenile courts the power to overrule school district decisions. The legislature rejected that approach. Much of Chapter 274 consists of compromise language drafted by representatives from the New Hampshire Association of Special Education Administrators and the New Hampshire Disabilities Rights Center in consultation with representatives from the state court system.

⁹⁸ N.H. Laws of 2008, Chapter 274, Section 38.

⁹⁹ RSA 169-B:22, 169-C:20, 169-D:18.

¹⁰⁰ RSA 169-B:22, 169-C:20, 169-D:18.

1. New deadline for school districts to file court reports in delinquency cases.

The juvenile statutes previously required that “[a]ll reports, evaluations and other records” from DHHS (including DCYF), counselors, and guardians ad litem “shall be filed with the court and all other parties at least 5 days prior to any hearing.”¹⁰¹

Chapter 274 amends RSA 169-B:5-a, governing delinquency cases, by adding reports from school districts. However, the amended statute applies only to reports requested by the court and allows the court to set a longer or shorter deadline. The statute now reads as follows:

“All reports, evaluations and other records *requested by the court* from the department of health and human services, *school districts*, counselors, and guardians ad litem . . . shall be filed with the court and all other parties at least 5 days prior to any hearing, *unless the court sets a different deadline upon the request of any party or agency providing the information.*”¹⁰²

Oddly, Chapter 274 does not amend the parallel provisions of RSA 169-C:12-b (governing abuse and neglect cases) and RSA 169-D:4-a (governing CHINS cases). However, it is still best practice for school districts to file reports in all cases at least five days before the hearing. Moreover, whenever a school district files anything with the court, it should simultaneously furnish copies to all parties.

2. Prosecuting agencies in delinquency and CHINS cases may ask a school district to refer a child for special education.

Chapter 274 allows “an arresting or prosecuting agency, or juvenile probation and parole officer” who “suspects that a minor has a disability” to “notif[y]” an “administrator at the responsible school district.”¹⁰³ This amendment applies to delinquency and CHINS cases, not abuse and neglect cases.

Upon receipt of such notification, “If appropriate, the school district shall refer the minor for evaluation to determine if the child is in need of special education and related services.”¹⁰⁴

Significantly, the statute does not compel the school district to conduct an evaluation. The statute does not even compel the school district to refer the child for an evaluation. In practice, the statute envisions that upon receipt of such notification the school district will decide

¹⁰¹ RSA 169-B:5-a, 169-C:12-b, and 169-D:4-a.

¹⁰² RSA 169-B:5-a, as amended by N.H. Laws of 2008, Chapter 274, Section 1 (emphasis added).

¹⁰³ RSA 169-B:10, II, 169-D:9, I, as amended by N.H. Laws of 2008, Chapter 274, Sections 2, 12.

¹⁰⁴ Id.

whether to refer the child for a special education evaluation.

The statute is thereby consistent with federal law, which allows only the following to formally refer children for special education evaluations – parents, school districts, and other public educational agencies.¹⁰⁵

Once a formal referral is made, the New Hampshire Board of Education’s rules require that the school district: 1) notify the student’s parents in writing of the referral; and 2) conduct an IEP team meeting within 15 days to act on the referral. At this meeting, the team must either determine the student’s eligibility for special education or initiate an evaluation as a prelude to making that determination.¹⁰⁶

3. Time for the court to join a legally liable school district.

Juvenile court cases typically have four steps:

- (1) an arraignment or preliminary hearing;
- (2) an *adjudicatory* hearing (to determine whether the juvenile is delinquent, abuse/neglected, or CHINS);
- (3) a *dispositional* hearing (to select a placement, court-ordered services, and conditions that the juvenile and parents must obey); and
- (4) periodic review hearings.

Although the juvenile laws allow a court to join a school district “at any point during the proceedings,”¹⁰⁷ Chapter 274 inserts triggers for the court to consider that issue. In delinquency cases, Chapter 274 requires that the court determine after arraignment, and again after the adjudicatory hearing, whether to join a school district.¹⁰⁸ Chapter 274 also requires that the court make that determination after finding that a child has been abused or neglected.¹⁰⁹

4. Time for the court to consider the school district’s recommendations.

¹⁰⁵ 34 C.F.R. § 300.301(b), as interpreted in the US DOE’s Analysis and Comments, Federal Register, Vol. 71, No. 156 (August 14, 2006), p. 46636.

¹⁰⁶ N.H. Code of Administrative Rules, Ed 1106.01(c)-(e) (as amended June 2008).

¹⁰⁷ RSA 169-B:22, 169-C:20, 169-D:18.

¹⁰⁸ RSA 169-B:14, II-a, 169-B:16, III(b), as amended by N.H. Laws of 2008, Chapter 274, Sections 5, 6.

¹⁰⁹ RSA 169-C:18, V, as amended by N.H. Laws of 2008, Chapter 274, Section 9.

Chapter 274 adds that in delinquency cases and abuse/neglect cases, where the district has been joined, the court shall not issue a dispositional order “until it reviews . . . the school district recommendations.”¹¹⁰

5. When a court orders a school district to “determine” whether a juvenile qualifies for special education, the school district must treat that as a referral by a parent (i.e., the IEP team must meet to determine whether to test the student).

Until 2008, the juvenile justice statutes allowed a court to order a school district to “determine” whether a student qualifies for special education, but did not specify the process for the school district to make such a determination.¹¹¹

This created tension between school districts and courts. Some school districts made the determination without any team meeting or parent involvement, by assigning an administrator to review the file and report to the court. Some judges expected school districts, once joined, to always conduct “full evaluations.” Some districts followed a middle course, treating a joinder order as the equivalent of a referral for special education, whereupon the district conducted a team meeting with parents present and determined whether testing was warranted.

Chapter 274 adopts that middle course for all three categories of juvenile cases – delinquency, abuse and neglect, and CHINS. It amends RSA 169-B:22, 169-C:20 and 169-D:18 by adding the following.

“If the court orders the school district to determine whether the minor is a child with a disability, the school district shall make this determination *by treating the order as the equivalent of a referral by the child’s parent for special education*, and shall conduct any team meetings or evaluations that are required under law when a school district receives a referral by a child’s parent.”¹¹²

As noted above, when a school district receives a referral it must: 1) notify the student’s parents in writing of the referral; and 2) conduct an IEP team meeting within 15 days to determine the student’s eligibility for special education or to commission evaluations as a prelude to making that determination.¹¹³

After reaching an eligibility decision in response to a joinder order,

¹¹⁰ RSA 169-B:16, III(b), 169-C:18, V, as amended by N.H. Laws of 2008, Chapter 274, Sections 6, 9.

¹¹¹ RSA 169-B:22, 169-C:20, 169-D:18.

¹¹² RSA 169-B:22, I, 169-C, 20, I, 169-D:18, I, as amended by N.H. Laws of 2008, Chapter 274, Sections 8, 10, 15 (emphasis added).

¹¹³ N.H. Code of Administrative Rules, Ed 1106.01(c)-(e) (as amended June 2008).

“The school district shall . . . report to the court its determination of whether the minor is a child with a disability, and the basis for such determination.”¹¹⁴

The school district should file that report in writing, with copies to all parties.

Since the determination is a decision of the IEP team, the school district should also give parents written prior notice of the team’s decision, along with a copy of their procedural rights. Parents may then appeal the team’s decision by seeking a due process hearing with the NH DOE.

The legislature declined to give juvenile courts jurisdiction to overrule school district decisions, because it was persuaded that the procedural due process guaranteed by the IDEA adequately protects parents’ rights. It is important that school districts respect those parental rights by following the procedures set forth in the special education laws.

6. What sort of placement recommendation must a school district make to the court?

Until 2008, if the child qualified for special education, the joined school district was required to “make a recommendation to the court as to where the child’s educational needs can *best* be met.”¹¹⁵

The word “best” was anomalous. The special education laws require that school districts offer every educationally disabled child “an” appropriate special education program, not the “best” program or one that might enable the child to reach his or her full potential.¹¹⁶

Chapter 274 eliminates the requirement that school districts recommend the “best” program. It amends the delinquency, abuse and neglect, and CHINS statutes to provide as follows. Once joined, if the school district has determined that the child qualifies for special education, the school district,

“Shall make a recommendation to the court as to where the child’s educational needs can be met in accordance with state and federal education laws.”¹¹⁷

This presumably requires that the district notify the court of the IEP and placement selected by

¹¹⁴ RSA 169-B:22, II, 169-C, 20, II, 169-D:18, II, as amended by N.H. Laws of 2008, Chapter 274, Sections 8, 10, 15 (emphasis added).

¹¹⁵ RSA 169-B:22, 169-C:20, 169-D:18 (emphasis added).

¹¹⁶ Board of Education of Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982); Lenn v. Portland School Committee, 998 F.2d 1083, 1086 (1st Cir. 1993).

¹¹⁷ RSA 169-B:22, II, 169-C:20, II, 169-D:18, II, as amended by N.H. Laws of 2008, Chapter 274, Sections 8, 10, 15.

the student's IEP team.

The statutes still provide that, “where the court does not follow the school district’s recommendation, the court shall issue written findings explaining why the recommendation was not followed.”¹¹⁸

Note: The provisions discussed above apply only if the school district determined that the child qualifies for special education. Other amendments to the juvenile laws, enacted in 2007, apply to all students involved with juvenile courts, regardless of whether they qualify for special education.¹¹⁹

- The 2007 amendments provide that, when a juvenile court contemplates a placement that will require educational services outside the juvenile’s “home school district,” the court shall notify that district and give it an “opportunity” to send a representative to the placement hearing. This implies that a school district has the option, but is not compelled, to make a recommendation.¹²⁰
- In many such cases, school districts are not joined as parties. RSA 169-B:22, 169-C:20, and 169-D:18 allow a court to join a school district only if the child is eligible for special education or the court orders a school district to determine eligibility.
- As noted above, if the student qualifies for special education and the court joined the school district as a party, the school district “*shall* make a recommendation to the court as to where the child’s educational needs can be met.”¹²¹

7. Disclosing juvenile court records to NH DOE hearing officers

Once a school district is joined as a party in a juvenile court case, the school district is entitled to “have full access to all records maintained by the district court under this chapter.”¹²² However, the statutes have long barred parties from disclosing juvenile court records to

¹¹⁸ RSA 169-B:22, II, 169-C:20, II, 169-D:18, II, as amended by N.H. Laws of 2008, Chapter 274, Sections 8, 10, 15.

¹¹⁹ RSA 169-B:16, VI, 169-C:18, VIII, 169-D:14, VI.

¹²⁰ The special education statute similarly provides that, when a juvenile court plans to “place” a student who qualifies for special education, but has not joined the school district that bears ultimate financial liability under RSA 193:29 for special education costs, the court shall notify that school district. The school district may then “submit recommendations to the court concerning the financial impact of the placement on the . . . district and the appropriateness of the placement.” RSA 186-C:13, III. The phrase “appropriateness of the placement” was inserted in 2008. N.H. Laws of 2008, Chapter 302, Section 45.

¹²¹ RSA 169-B:22, 169-C:20, and 169-D:18 (emphasis added).

¹²² RSA 169-B:22, 169-C:20, 169-D:18.

nonparties without prior permission from the court.¹²³

Chapter 274 establishes special procedures for school districts to disclose juvenile court records to NH DOE hearing officers and to courts reviewing hearing officer decisions. These amendments establish one procedure for records in delinquency cases and CHINS cases and a somewhat stricter procedure for disclosing records in abuse and neglect cases. The rationale is that court records in abuse and neglect cases are more likely to include embarrassing and/or uncorroborated information about the minor's parents, information that is of little or no relevance at NH DOE hearings involving the student's special education. Freely allowing school districts to share such information with hearing officers might discourage parents from exercising their right to an administrative hearing.

Chapter 274 allows a school district to disclose to the hearing officer court records from *delinquency and CHINS cases*, provided the district furnishes advance *notice* to the court and to parties in the court case. Specifically:

- At least 20 days before the school district discloses court records to the hearing officer, the district must file a notice of its intention to do so with the court and all parties in the court case. The statute specifies the exact language that must be included in the notice, language which notifies the parties of their right to object.
- If no party objects within 10 days, the district is free to disclose the court records to the hearing officer, unless: 1) the court extends the 10-day deadline for good cause; or 2) the court raises concerns on its own initiative within 13 days after the school district filed the notice.
- If a party objects or the court raises concerns:
 - The court shall schedule an expedited hearing to determine whether the requested records may be released (unless the school district and the minor's parent or legal guardian waive a hearing).
 - The school district may file a reply explaining why the information should be disclosed to the hearing officer.
 - The court must decide whether the school district may disclose court records to the hearing officer, by balancing "the importance of disclosure of the records to a fair and accurate determination of the merits against the privacy interests of the parties to the proceedings."¹²⁴

In *abuse or neglect cases*, Chapter 274 allows a school district to disclose court records to a hearing officer *only with prior permission* from the court. Specifically:

¹²³ RSA 169-B:35, 169-C:25, 169-D:25-26.

¹²⁴ RSA 169-B:22, IV, V, and 169-D:18, IV, V, as amended by N.H. Laws of 2008, Chapter 274, Sections 8, 15.

- A school district seeking such permission must file a motion with the court describing the need for disclosure. The school district must simultaneously deliver copies of the motion to all parties in the court case. The statute specifies the exact language that must be included in the motion, language that notifies the parties of their right to object.
- Any party may file an objection with the court within 10 days after the district files its motion, unless the court extends that deadline for good cause.
- The court shall schedule an expedited hearing to determine whether the information may be released to the hearing officer. (The court may rule on the motion without a hearing if no objection is filed or the school district and the juvenile’s parent or legal guardian waive a hearing.)
- When determining whether to grant the school district’s motion, the court “shall balance the importance of disclosure of the records to a fair and accurate determination of the merits against the privacy interests of the parties to the proceedings.”¹²⁵

8. Amendments to school attendance laws.

Chapter 274 makes several small amendments to the school attendance statute, RSA 193:12.

RSA 193:12, as amended in 1997, is written in the negative. It establishes where a student may attend school by dictating where a student may *not* attend school.

“[N]o person shall attend school, or send a pupil to the school, in any district of which the pupil *is not a legal resident*, without the consent of the district or of the school board except as otherwise provided in this section or in RSA 193:28.”¹²⁶

RSA 193:12, II and III set forth detailed formulas for determining where a student is a “legal resident.”

The general rule is that a minor student is a legal resident of the district in which his or her parents are domiciled.¹²⁷ RSA 193:12, IV through V-a and RSA 193:28 create some exceptions to that general rule – such as allowing children living in group homes and foster homes to attend public school in the district where they physically dwell regardless of their legal

¹²⁵ RSA 169-C:20, IV, V, as amended by N.H. Laws of 2008, Chapter 274, Section 10.

¹²⁶ RSA 193:12, I (emphasis added).

¹²⁷ RSA 193:12, II, III.

residence.

Chapter 274 amends RSA 193:12 in the following ways.

First, Chapter 274 amends RSA 193:12, II(a)(2), which addresses where children of divorced parents are deemed to be legal residents. Chapter 274 adds the following language to that statute:

“If a 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.”¹²⁸

RSA 169-B, C and D are the juvenile justice statutes, RSA 170-C governs proceedings to terminate parental rights, and RSA 463 governs the appointment of legal guardians for minors.

The problem with this amendment is that it is utter nonsense. It refers the reader to RSA 193:27. However, RSA 193:27 does not address where a student resides. RSA 193:27 merely defines the terms used in RSA 193:28 and 193:29, which have little or nothing to do with residence.¹²⁹

Second, Chapter 274 amends RSA 193:12, V and 193:28 (which give certain children living apart from their parents a right to attend school in the district where they dwell), along with RSA 193:27, IV (which defines the “sending district” that must reimburse a “receiving district” for special education costs under RSA 193:29).

- Section 18 of Chapter 274 amends RSA 193:12, V by stating that nothing in RSA 193:12 “shall limit or abridge the right” of children placed in the home of a relative or friend *by court order pursuant to RSA 170-C* to attend public schools “as provided in RSA 193:28.”
- Section 21 of Chapter 274 amends RSA 193:28 by allowing children placed in the home of a relative or friend *by the New Hampshire Department of Health and Human Services* pursuant to RSA 170-C to attend local public schools.
- Section 20 of Chapter 274 amends RSA 193:27, IV, the definition of “sending district,” by exempting the district in which a child lived in the home of a relative or friend, if the child was placed there *by the Department of Health and Human Services or a court* pursuant to RSA 170-C.

¹²⁸ N.H. Laws of 2008, Chapter 274, Section 16.

¹²⁹ RSA 193:28 allows certain students (such as those in foster homes and group homes) to attend school where they physically dwell, regardless of their legal residence. RSA 193:29 allows such districts to seek reimbursement for special education costs.

The flaw is that Sections 18 and 21 of Chapter 274 are inconsistent, another example of poor legislative craftsmanship. Section 18, amending RSA 193:12, V, assumes that RSA 193:28 addresses children placed with relatives and friends *by court order*. In fact, RSA 193:28, as amended by Section 21, addresses children placed with relatives or friends *by the New Hampshire Department of Health and Human Services*, not children placed with relatives or friends by court order.¹³⁰

In most cases, that inconsistency will make no difference, because the Department of Health and Human Services usually places a child pursuant only to a court order and court-ordered placements usually involve the Department of Health and Human Services. However, there may be instances where this subtle conflict between Sections 18 and 21 does matter.

¹³⁰ To be fair, this inconsistency between RSA 193:12, V and RSA 193:28 was introduced years ago. Chapter 274 merely adds to the categories of children covered by those statutes, by adding references to RSA 170-C. On the other hand, the legislature could have corrected the problem, but failed to do so, when it revisited RSA 193:12, V and RSA 193:28 in 2008.