Bill as Introduced

SB 168 – AS INTRODUCED

2003 SESSION

03-1136
04/01

SENATE BILL ***168***

AN ACT allowing school boards to adjourn to nonpublic session to consider pupil disciplinary matters.

SPONSORS: Sen. Estabrook, Dist 21

COMMITTEE: Judiciary

ANALYSIS

This bill allows school boards to adjourn to nonpublic session to consider pupil disciplinary matters.

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Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

SB 168 – AS INTRODUCED

03-1136
04/01

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Three

AN ACT allowing school boards to adjourn to nonpublic session to consider pupil disciplinary matters.

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

1 New Subparagraph; Nonpublic Sessions; Pupil Discipline. Amend RSA 91-A:3, II by inserting after subparagraph (i) the following new subparagraph:

(j) Public elementary and secondary school pupil disciplinary matters.

2 Effective Date. This act shall take effect 60 days after its passage.

Amendments

If this amendment is adopted by the Committee please deliver to the House Clerk (Room 317) or Senate Clerk (Senate Chamber) the 2 originals and 2 copies.

Senate Judiciary
April 1, 2003
2003-1078s
04/01

Amendment to SB 168

Amend the bill by replacing all after the enacting clause with the following:

1 New Subparagraph; Access to Public Records and Meetings; Nonpublic Sessions. Amend RSA 91-A:3, II by inserting after subparagraph (i) the following new subparagraph:

(j) Consideration by a school board of any matters that would reveal the content of education records maintained by the school district or disclose personally identifiable information about a student, contrary to 20 United States Code section 1232g.

2 Access to Public Records and Meetings; Nonpublic Sessions. Amend RSA 91-A:3, III to read as follows:

III. Minutes of proceedings in nonpublic session shall be kept and the record of all actions shall be promptly made available for public inspection, except as provided in this section. Minutes and decisions reached in nonpublic session shall be publicly disclosed within 72 hours of the meeting, unless, by recorded vote of 2/3 of the members present, it is determined that divulgence of the information likely would affect adversely the reputation of any person other than a member of the body or agency itself, or render the proposed action ineffective, or pertain to terrorism, more specifically, to matters relating to the preparation for and the carrying out of all emergency functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life. This shall include training to carry out such functions. In the event of such circumstances, information may be withheld until, in the opinion of a majority of members, the aforesaid circumstances no longer apply. ***Minutes of proceedings that would reveal the content of education records maintained by the school district or disclose personally identifiable information about a student shall not be publicly disclosed at any time, except as permitted by 20 United States Code section 1232g.***

3 Effective Date. This act shall take effect January 1, 2004.

Committee Minutes

Gail

Judiciary Committee

Hearing Report

To: Members of the Senate

From: Susan Duncan
Senior Legislative Aide

Re: **SB 168** – *AN ACT allowing school boards to adjourn to nonpublic session to consider pupil disciplinary matters.*

Hearing date: March 18, 2003

Members present: Senators Peterson, Foster, Clegg, Roberge and Sapareto

Members absent: None

Sponsor(s): Senator Estabrook

What the bill does: This bill allows school boards to adjourn to nonpublic session to consider pupil disciplinary matters.

Who supports the bill: Senator Estabrook; Raymond Yagley, Superintendent, Rochester SAU; Attorney Dan Harkensen, Rochester School Board Member

Who opposes the bill: No one spoke in opposition

Summary of testimony received:

- This legislation was filed because of a conflict between federal and state law.
- Amendment number 2003-0730s was filed in order to correct the misunderstanding when the bill was drafted.
- FERPA (the Federal Family Education Rights and Privacy Act) requires the parent's permission to share any and all information on a student. This clashes with RSA 91-A, New Hampshire's right-to-know statute.
- If a school board complies with FERPA, they are open to a legal challenge under 91-A.
- The other issue that needs to be addressed is to allow the minutes of a private session to be permanently sealed.

- This legislation does not relate to Teen Court because it is not a public body subject to right-to-know (and complete privacy and confidentiality is provided for those appearing before Teen Court).
- Currently a student who deals drugs and attacks another student with a knife is entitled to a private hearing before a school board but a student who wants to challenge their class ranking has to do so in an open meeting. This is poor public policy.

Funding: No financial impact

Future action: The committee took the bill under advisement.

sfd
[file: SB 168 report]
Date: March 19, 2003

RYB

Date: March 18, 2003
Time: 11:40 a.m.
Room: State House, Room 105-A

The Senate Committee on Judiciary held a hearing on the following:

SB 168 allowing school boards to adjourn to nonpublic session to consider pupil disciplinary matters

Members of Committee present:
Senator Peterson
Senator Foster
Senator Clegg
Senator Roberge
Senator Sapareto

The Chair, Senator Andrew R. Peterson, opened the hearing on SB 168 by calling on Senator Estabrook, prime sponsor of the bill, to introduce the bill.

Senator Iris Estabrook, D. 21: Thank you, Mr. Chairman. For the record, my name is Senator Iris Estabrook, representing District 21.

I passed around an amendment and I apologize that the original bill was not in keeping with the original intent. So, the amendment is necessary. **Please see Senator Estabrooks' Amendment #2003-0730s, attached hereto and referred to as Attachment #1.**

Others brought this issue to my attention and it did seem to be an issue that required a legislative solution. So, I agreed to bring it forward. But, I am going to let them speak largely to the particular issues.

At first, this had been described to me as an issue regarding pupil discipline and the ability of school boards to go into non-public session to hear matters related to pupil discipline, which I know, as a former school board member, we did, and it seemed to me to be quite necessary. It seems though that there are other student issues which are left clearly exceptions to 91-A that this bill is trying to take care of, especially conflicts between state and federal law

with regard to the ability of school boards to deliberate student issues in non-public session.

So, with that brief introduction, I think I will yield to those who are here to explain how the issue came up on a local level and why there is a need for legislative solution, unless the Chair would like me to answer any questions.

Senator Andrew R. Peterson, D. 11: Are there questions for the sponsor? Seeing none, thank you.

Senator Iris Estabrook, D. 21: Thank you, Mr. Chair.

Senator Andrew R. Peterson, D. 11: Would you like to begin? Please identify yourself for the record. Welcome.

Raymond Yeagley: Thank you, Senator. I am Raymond Yeagley, Superintendent of Rochester School Department. My testimony is changing significantly with the submission of the amendment, so I will be skipping some things and changing some things.

During nearly the fifteen years in this position I have, on several occasions, expressed to the school attorneys and a few legislators about a glaring omission in New Hampshire's Right to Know Law, and I am grateful to Senator Estabrook for sponsoring the bill.

The disclosure of student education records is governed by a federal law, the Family Educational Rights and Privacy Act known as FERPA. This law defines education records as those records that are directly related to a student and are maintained by an educational agency or by a party acting for the agency or institution. With a handful of exceptions specifically enumerated in that law, this includes virtually every piece of information we have about a student.

FERPA requires the express consent of the parent or of the student if the student is over eighteen, if any education records are to be disclosed to a third party. Disclosure involves not only the documents themselves, but verbal, electronic or other disclosure of the information contained in those documents.

An example of a situation that needs to be addressed by this bill that is related to student discipline is a dialogue that was held between the Rochester School Board and a couple of parents. What I tried to do was give you some background on where the conflict arises between the two laws.

LWB

We had changed our policy governing the calculation of class rank at Spaulding High School. Wisely, the Board implemented this change over the course of four years so that students would graduate under the algorithm that was in place when they entered. In spite of this, at least one student came in knowing how her brother had been dealt with before and somehow missed the word about what it was. The student felt that the new formula unfairly disadvantaged her and the parents came to the Board to appeal that. Now, the effect of this on the student was that she had moved, I believe, from second place in her class to fifth place in the class. Certainly, a fifth place ranking out of 300 students would not qualify as something detrimental to the student's reputation, so it wasn't covered by anything in RSA 91-A:3.

Our Board was facing a catch 22 situation, as there was no provision in that RSA that fit the facts and FERPA would not allow the Board to discuss this in public session. We didn't want to make the situation worse by asking the parents to do it in public session. I'm sure they would not have given their permission. So, the Board did what seemed the only thing open to it, which was to enter the non-public session and hope that FERPA would be judged as the controlling law if we were challenged in anything.

The problem with that approach is that it leaves boards in the state vulnerable for legal challenge and the reason for that is that FERPA and RSA 91-A:, while not in harmony, are not in direct conflict. That is, there is a way to comply with both, which is not to have any discussion. FERPA doesn't require the Board to discuss the issues. RSA 91-A:3 doesn't permit it. But, that would be very poor public policy to deny parents and students that access.

Although I haven't conducted a formal state survey, a few days ago, I asked my colleagues in the southeast region if they bought into this. All of them said they have. When I asked what their solutions were, none of those solutions complied with both of the laws.

So, with regard to the meeting, it needs to be adjusted so that school boards can legally discuss those matters in non-public session.

The second item that is also addressed in the amendment, which is the minutes, which need to be sealed automatically after the non-public session and need to be sealed forever.

There is one other item that I would bring to your attention and then I will be done. This is not included in the amendment. That is that FERPA applies to post-secondary institutions as well. So, I would recommend that the

Committee have somebody contact the boards of trustees of post-secondary institutions to see if they on occasions also have to discuss student records.

I will skip the rest of my testimony. I know you are under a time constraint and if there are questions, I would be happy to answer then.

Please see "Testimony Given before the Senate Judiciary Committee on March 18, 2003 by Raymond Yeagley", attached hereto and referred to as Attachment #2.

Senator Andrew R. Peterson, D. 11: Senator Sapareto?

Senator Frank V. Sapareto, D. 19: Thank you, Mr. Chairman. In your opinion, does this amendment address the concerns and take the liability off the school boards?

Superintendent Yeagley: It absolutely does.

Senator Andrew R. Peterson, D. 11: Further questions? How does this relate to teen court?

Superintendent Yeagley: Teen court is not conducted by a public body like a school board, so they don't have any requirements to have public meetings that are posted.

Senator Andrew R. Peterson, D. 11: And, as you are aware, they are under strict confidentiality rules. Thank you. Further questions from the Committee? Hearing none, thank you for your testimony. Daniel Harkinson, Rochester School Board member. Welcome.

Daniel Harkinson: Thank you, Mr. Chairman and members of the Committee. Number one, I appreciate the consideration.

Senator Andrew R. Peterson, D. 11: If you could identify yourself for the record.

Mr. Harkinson: Sure. I am Dan Harkinson from Rochester.

Senator Andrew R. Peterson, D. 11: Thank you.

Mr. Harkinson: Like Dr. Yeagley, I appreciate your consideration in taking us before you go into executive session. Number two, I will be brief.

Number three, in an attempt to take Senator Estabrook off the hook, I am the source of the confusion, not her. I mentioned this problem to her several months ago and, in my haste, I described it as a discipline issue, which you have already heard from Dr. Yeagley it is not.

Dr. Yeagley's testimony, both written and oral to you today identifies the problem that we are trying to solve here. For whatever weight you might choose to give it, you should know that Dr. Yeagley is one of the longest serving superintendents currently serving in New Hampshire, superintendent of the year, and a former national finalist for superintendent of the year. So, he comes before you with a lot of background and experience and I believe he knows what he is talking about.

Let me just say that, as a public school board member, an elected official not like yourself. I know you are as well. This is not contrary to the spirit of 91-A. This is not seeking to do in private what government should do in public. Right now you have the anomaly that, if you have a drug-dealing weapon wielding student who is facing expulsion, they can get a private hearing at their local school board. But, if you have a student like we have had who seeks to challenge their class rank or seeks to challenge their school assignment or we have students from surrounding communities who seek to come to our school, they have to come before us. Any of them having to present their personal matter can't get legally a private hearing. I will say up front that, since I have been on the board, which is now three years, we have attempted to give them a private hearing and we have done this. But, in my opinion as a lawyer, we're not doing it legally and that's what troubled me enough to speak to Senator Estabrook about it.

My final point is just to emphasize one thing Dr. Yeagley said. If we don't clear this up, the school boards will face the choices, as we have done, to ignore the state law or simply stopping private discussions with parents and students about students' individual issues. Dr. Yeagley said that would be poor public relations. I think it is poor policy and I think it is contrary to everything those of us involved in the public education system are trying to do to get people involved, to hear their individual concerns and try to address them.

So, I would encourage you to consider and recommend adoption of the amended statute that Senator Estabrook has presented. Thank you.

Senator Andrew R. Peterson, D. 11: Thank you for your testimony. Are there questions from the Committee? Hearing none, having no further persons wishing to testify on SB 168, I will at this time close the hearing on SB 168.

Hearing concluded at 11:50 a.m.

Respectfully submitted,

L. Gail Brown
Senate Secretary
3/20/03

2 Attachments

ATTACHMENT #1

Sen. Estabrook, Dist. 21
March 14, 2003
2003-0730s
04/10

Amendment to SB 168

Amend the bill by replacing all after the enacting clause with the following:

1 New Subparagraph; Access to Public Records and Meetings; Nonpublic Sessions. Amend RSA 91-A:3, II by inserting after subparagraph (i) the following new subparagraph:

(j) Consideration by a school board of any matters that would reveal the content of education records maintained by the school district or disclose personally identifiable information about a student, contrary to 20 United States Code section 1232g.

2 Access to Public Records and Meetings; Nonpublic Sessions. Amend RSA 91-A:3, III to read as follows:

III. Minutes of proceedings in nonpublic session shall be kept and the record of all actions shall be promptly made available for public inspection, except as provided in this section. Minutes and decisions reached in nonpublic session shall be publicly disclosed within 72 hours of the meeting, unless, by recorded vote of 2/3 of the members present, it is determined that divulgence of the information likely would affect adversely the reputation of any person other than a member of the body or agency itself, or render the proposed action ineffective, or pertain to terrorism, more specifically, to matters relating to the preparation for and the carrying out of all emergency functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life. This shall include training to carry out such functions. In the event of such circumstances, information may be withheld until, in the opinion of a majority of members, the aforesaid circumstances no longer apply. ***Minutes of proceedings that would reveal the content of education records maintained by the school district or disclose personally identifiable information about a student shall not be publicly disclosed at any time, except as permitted by 20 United States Code section 1232g.***

3 Effective Date. This act shall take effect January 1, 2004.

ATTACHMENT #2

Testimony

Given before the Senate Judiciary Committee
on March 18, 2003 by Raymond Yeagley

Ladies and Gentlemen:

I am Raymond Yeagley, Superintendent of the Rochester School Department. During nearly fifteen years in this position I have, on several occasions, expressed concern to school attorneys and a few legislators about a glaring omission in the nonpublic session provisions of New Hampshire's Right to Know Law, RSA 91-A:3.

I am grateful to Senator Estabrook for sponsoring this Bill, which attempts to correct the situation. Having expressed that gratitude, however, I must advise the Committee that the language as presently proposed will not adequately address the problem, and I must recommend some significant changes to the Bill. Before addressing the specific recommendations, please allow me to provide some background into the source of the problem and its manifestations for school boards.

The disclosure of student education records is governed by a federal law, the Family Educational Rights and Privacy Act (FERPA) found at 20 U.S.C. §1232g (codified at 34 CFR Part 99). This law defines education records as those records that are directly related to a student, and are maintained by an educational agency or by a party acting for the agency or institution. With a handful of exceptions specifically enumerated in the law, this includes virtually every piece of information we have about a student.

FERPA requires the express consent of the parent, or of the student if he/she has reached the age of 18, if any education records are to be disclosed to a third party. Disclosure involves not only the documents themselves, but verbal, electronic or other disclosure of the information contained in those documents.

The proposed language in SB 168 has touched on education records by its inclusion of student disciplinary matters. However, discipline is a tiny piece of the educational information that schools maintain for students and is not the only information that school boards must discuss. In fact there is no need for a reference to disciplinary matters in the law as such discussions could arguably be characterized as likely to "affect adversely the reputation" of the student, which is already covered under RSA 91-A:3, II (c).

An example of a situation that *does* need to be addressed by this Bill is a dialog held between the Rochester School Board and a couple of parents. We had changed our policy governing the calculation of class rank at Spaulding High School. Wisely, the Board implemented the change over the course of four years so that students would graduate under the algorithm that was in place when they entered as freshmen. In spite of this, a few students felt that the new formula unfairly disadvantaged them. One such student entered as a freshman under the new formula. This student probably would have graduated second in her class under the old formula, but was in fifth place in the new calculation.

The parents of this student requested an audience with our school board. The board found itself facing a Catch 22 situation. There was no provision in RSA 91-A:3 that fit the facts. Certainly a rank of fifth in a class of more than 300 could not be considered adverse to the student's reputation. Under FERPA, the issue could not be discussed in public session because it involved the disclosure of grades, course schedules, course difficulty levels, and a host of other personally identifiable educational data about the student. We didn't want to make the situation worse by annoying the parents with a request for public discussion, but I am very doubtful that they would have signed a release for it had we asked.

Our board took the only route available, which was to enter the nonpublic session and hope that FERPA would be judged the controlling law in any legal decision, should we be challenged. The problem with that approach, and what may leave school boards throughout the state vulnerable to legal challenge, is that FERPA and RSA 91-A may not be in direct conflict, except with regard to public disclosure of minutes. That is, there is a way to comply with both statutes. Specifically, while FERPA does not permit public disclosure of the educational information about specific students, it also does not require school boards to discuss the information. Likewise, RSA 91-A:3 does not permit the board to convene a nonpublic session for any purpose that is not enumerated in Paragraph II, which does not include personally identifiable student information unless it would harm a student's reputation. However, it also does not require a public discussion of such information. Thus, to avoid the situation, school boards would simply have to avoid all discussion of personally identifiable student information, except for disciplinary matters. While this might comply with the letter of the law, it certainly is bad public policy to deny parents access to an appeal process and other discussions with the school board.

Although I haven't conducted a formal survey of superintendents throughout the state, a few days ago I asked my colleagues in the southeast region if they have experienced similar situations. The response was unanimous and affirmative. When asked how they handled it, there was no answer, in my opinion, that was in compliance with both statutes.

School boards throughout the state frequently face similar situations. In Rochester, we receive requests from local parents to transfer their children to schools that are outside of their attendance zones. We entertain requests from parents in other districts for admission of their children as tuition students. We hear appeals from students whose absences have resulted in grade reductions. In most cases, there is nothing in the discussion that could be considered adverse to the reputation of the student. However, personal, and often sensitive, information about the students and their families is revealed to our school board, including grades, problems in adjusting to new schools and classes, health and medical issues, difficult family situations, family income, and a multitude of other conditions and situations.

With regard to the public disclosure of minutes, there is a direct conflict between the two laws. The Right to Know law requires that, unless the minutes of a nonpublic session are sealed by a 2/3 vote of the school board, they must be disclosed to the public within 72 hours of the meeting. FERPA, on the other hand prohibits release of education records at any time without the express consent of a parent or student. School boards could, after each nonpublic session involving student information, vote to indefinitely seal any minutes protected under FERPA. However, there is no guarantee that this will occur. Without the required 2/3 vote, the two laws would be in conflict, with one requiring public disclosure and the other prohibiting it. In such a case, the federal law would control, but there is no reason for those laws not to be in harmony.

While no New Hampshire district has yet been challenged on this basis, it seems almost inevitable to me that the argument will appear in a case at sometime. At best, it will be a distraction and expense to the taxpayers of that district; at worst, the basis for a legal sanction against the school board and a greater expense to taxpayers.

There is a second area that is not addressed by the proposed language. Although this is not my primary concern, I call your attention to the reference in SB 168 to "elementary and secondary school pupils". You need to be aware that FERPA applies to postsecondary institutions as well. I cannot testify as to whether the Trustees of our state's colleges and universities discuss individual students, but I would not be surprised to learn that they must do so on occasion.

With this background information, I make three recommendations to this Committee regarding its consideration of SB 168:

1. Replace the reference to "pupil disciplinary matters" with language that would include discussion of any and all education records protected by federal law. This language should restrict the requirement for nonpublic session to that information that is protected as confidential under FERPA, recognizing that some items known as directory information can be discussed publicly (e.g. awards given to students and information related to contests involving student athletes).

2. Insert language that will automatically seal any minutes that are protected under FERPA.

3. Make specific inquiries concerning postsecondary institutions to determine whether this Bill should represent the interests of their governing bodies and students as well. If necessary, simply remove reference to elementary and secondary schools to make the language inclusive for governing bodies of postsecondary institutions.

I respectfully submit the following language as a possible starting point for amendment of this Bill:

1 New Subparagraph; Nonpublic Sessions; [~~Pupil Discipline~~]Educational Records. Amend RSA 91-A:3, II by inserting after subparagraph (i) the following new subparagraph:

(j) [~~Public elementary and secondary school pupil disciplinary matters~~]Confidential educational records containing personally identifiable student information.

2 Amend RSA 91-A:3, III by inserting the following at the end of said paragraph:

Minutes of a nonpublic session called under Paragraph II (j) shall not be publicly disclosed without the written consent of the parent or guardian of a student, or without the written consent of the student if said student has reached the age of 18 or is an emancipated minor.

~~2~~ 3 Effective Date. This act shall take effect 60 days after its passage.

I thank you for your attention and for permitting me to speak. I hope that my testimony has been helpful.

Respectfully Submitted,

Raymond Yeagley

Raymond Yeagley, Superintendent
Rochester School Department

Speakers

SENATE JUDICIARY COMMITTEE

Date 3/18/03 Time 11:15 a.m. Public Hearing on **SB 168**

SB 168 - adding a county commissioner member to the New Hampshire retirement system board of trustees

Please check box(es) that apply.

SPEAKING	FAVOR	OPPOSED	NAME (Please print)	REPRESENTING
☒	☒	☐	Raymond Yeagley	Rochester Schools
☒	☒	☐	DANIEL J. HARKINSON	SELF-AS ROCHESTER SCHOOL BOARD MEMB
☒	☐	☐	Sen Estabrook	
☐	☒ non speak	☐	Sarah L. Browning	Department of Education
☐	☐	☐		
☐	☐	☐		
☐	☐	☐		
☐	☐	☐		
☐	☐	☐		
☐	☐	☐		
☐	☐	☐		
☐	☐	☐		
☐	☐	☐		
☐	☐	☐		
☐	☐	☐		
☐	☐	☐		
☐	☐	☐		
☐	☐	☐		
☐	☐	☐		
☐	☐	☐		
☐	☐	☐		

Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE

Date:

THE COMMITTEE ON Judiciary

to which was referred Senate Bill 168

AN ACT allowing school boards to adjourn to nonpublic session to consider pupil disciplinary matters.

VOTE: 3-0

2003-1078s

Having considered the same, report the same with the following amendment and recommend that the bill: **AS AMENDED OUGHT TO PASS.**

Senator Robert Clegg, Jr.
For the Committee

SB168 Docket

Next|Prev|Results List|Main|Bill Status

Bill Title: allowing school boards to adjourn to nonpublic session to consider pupil disciplinary matters.

Date	Body	Description
1/30/2003	S	Introduced and Ref. to Judiciary; SJ 3, Pg.39
2/14/2003	S	Hearing; March 18, 2003, Room 105-A, SH, 11:15 a.m.; SC10
4/4/2003	S	Committee Report; Ought to Pass with Amendment{1078}, [04/10/03]; SC17, Pg.13-14
4/10/2003	S	Committee Amendment{1078}, AA, VV; SJ 12, Pg.302-303
4/10/2003	S	Ought to Pass with Amendment{1078}, MA, VV; OT3rdg; SJ 12, Pg.303
4/10/2003	S	Passed by 3rd Reading Resolution; SJ 12, Pg.310
4/10/2003	H	Introduced and ref to Judiciary; HJ 34, p1145
4/15/2003	H	Hearing Apr 22 10:00 RM208,LOB
4/22/2003	H	Continued hearing May 6 9:30 RM208,LOB
5/6/2003	H	Subcom Work Session May 13 9:00 RM208,LOB
5/13/2003	H	Maj Report ITL for May 29 (Vote 13-0;CC)
5/29/2003	H	ITL Report Adopted; HJ 45, p1457

Next|Prev|Results List|Main|Bill Status

Docket Abbreviations