

The Case for Lived Equality in the Classroom

Why N.H. School Districts Should Adopt Trans Student Policies

A Report by The American Civil Liberties Union Of New Hampshire



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New Hampshire School Boards Association

Sample Policy JBAB

TRANSGENDER AND GENDER NON-CONFORMING STUDENTS

Category: Optional

I. PURPOSE

District policy requires that all programs, activities, and employment practices be free from discrimination based on sex, sexual orientation, or gender identity. This policy is designed in keeping with these mandates to create a safe learning environment for all students and to ensure that every student has equal access to all school programs and activities.

This policy sets out guidelines for schools and district staff to address the needs of transgender and gender nonconforming students and clarifies how state law should be implemented in situations where questions may arise about how to protect the legal rights or safety of such students. This policy does not anticipate every situation that might occur with respect to transgender or gender nonconforming students, and the needs of each transgender or gender nonconforming student must be assessed on a case-by-case basis. In all cases, the goal is to ensure the safety, comfort, and healthy development of the transgender or gender nonconforming student while maximizing the student's social integration and minimizing stigmatization of the student.

II. DEFINITIONS

The definitions provided here are not intended to label students but rather are intended to assist in understanding this policy and the legal obligations of District staff. Students might or might not use these terms to describe themselves.

"Gender identity" is a person's deeply held sense or psychological knowledge of their own gender, regardless of the gender they were assigned at birth. Everyone has a gender identity.

"Transgender" describes people whose gender identity is different from their gender assigned at birth.

"Gender expression" refers to the way a person expresses gender, such as clothing, hairstyles, activities, or mannerisms.

"Gender nonconforming" describes people whose gender expression differs from stereotypical expectations, such as "feminine" boys, "masculine" girls, and those who are perceived as androgynous.

Introduction



New Hampshire has done much to advance lived equality for transgender and gender non-conforming (TGNC) identities over the past decade, most centrally becoming the 18th state to enact comprehensive gender identity non-discrimination protections in 2018. However, that victory was preceded and followed by many equally important changes, particularly to policies and guidance around transgender students in public schools across the state. For example, just over a year after the passage of the 2018 legislation, New Hampshire successfully extended gender identity non-discrimination protections to public schools in 2019.

Despite this progress (which has been replicated in a number of other states), individual school districts continue to be a sticking point when it comes to trans equality.

New Hampshire likely has about 1,000 TGNC students in high schools alone.

The most comprehensive nationwide study of students with a measure of transgender identity was completed by the Centers for Disease Control (CDC) in 2017¹ with data from ten states and nine major cities, including neighboring Vermont, Maine, and Massachusetts. The survey found that 1.8% of high school students nationwide identify as transgender.² Applied to our state's 55,261 public high school enrollments in the 2019-2020 school year³, the rate of 1.8% suggests New Hampshire likely has about 1,000 TGNC students in high schools alone. If this percentage of 1.8% of students identifying as TGNC held true across all 176,168 New Hampshire public school enrollees, there would have been somewhere around 3,193 openly TGNC students across New Hampshire public school districts that same school year.

The TGNC student is no longer a hypothetical for most New Hampshire school districts, and yet, without policies in place, those students are left to advocate for themselves as they seek respect and understanding throughout the school day. GLSEN estimates that half of trans students across New Hampshire still face some kind of discrimination at school,⁴ and with an organized national effort underway to enshrine discrimination

against trans students into law, the importance of every school district adopting a TGNC student policy is imperative.

When a school administration does not stand strong with transgender students, those students are at a heightened risk for harassment - but it doesn't have to be that way.

In the five years since the New Hampshire School Board Association (NHSBA) introduced its model trans student policy, known as JBAB, 48 of New Hampshire's 196 active school districts and charter schools have adopted a TGNC student policy, covering just one-in-three (57,728) public school students. Moving forward, if just the ten largest districts without trans student policies⁵ adopted one, New Hampshire would move from just under 33% to over 60% of public school students enrolled in a school district with a trans policy.

The NHSBA model policy also provides critical guidance on intramural and interscholastic athletic participation. Trans students participate in sports for the same reasons other young people do: to challenge themselves, improve fitness, and be part of a team. The NHSBA and New Hampshire Interscholastic Athletics Association (NHIAA) policies, issued in 2010 and 2015 respectively, agree that excluding trans students from participation deprives them of opportunities available to their peers and sends the message they are not worthy of a full and social life. When a trans athlete succeeds, their success is often overly publicized and politicized, to the point of suggesting that all trans athletes are inherently better than all cisgender athletes and the only reason for the athlete's success is the fact that the person is trans. Neither is true, and the fact that an occasional trans person succeeds in sports should not be used to exclude all trans athletes.

This report examines the history of trans rights in the Granite State, challenges still posed to transgender students, and proposes solutions for moving forward. The report also identifies next steps for this work, including calling upon a number of large school districts in New Hampshire without a policy to adopt one.

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New Hampshire's Trend Toward Equality



New Hampshire has a long history of legally affirming LGB (lesbian, gay, and bisexual) rights, including the passage of sexual orientation non-discrimination protections in 1998 and marriage equality in 2009 - or even as far back as the repeal of anti-sodomy laws in 1975, 27 years before a U.S. Supreme Court ruling did so nationwide. In fact, these rights have been around for so long and are so widely accepted that we no longer see organized efforts to reverse them in New Hampshire.

But the fight for the “T” in LGBT only began in 2009, and progress towards lived equality for transgender people continues to be strongly contested, with anti-trans rights legislation routinely introduced in the state legislature.

The first
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The first step towards progress came with the introduction of House Bill 415 (HB415), legislation filed by State Representative Ed Butler in 2009. The bill aimed to provide comprehensive gender identity non-discrimination protections in employment, housing, and public accommodations, as well as 18 other areas of law with non-discrimination statutes. It defined gender identity and expression as “gender-related identity, appearance, expression, or behavior of an individual, regardless of the individual’s assigned sex at birth.” ⁶

There were very few transgender people speaking openly about their experience at the time. One of those few was Gerri Cannon, who is now a State Representative.

Cannon said, “I did a lot of talking. I set up an office for myself, essentially, on a table at the cafeteria in the statehouse. And I scheduled time for representatives to come and talk with me.”

HB415 arrived out of committee with an “Inexpedient To Legislate” (ITL) recommendation, but when voted on by the full House, that ITL motion failed, 189-182.

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Even our citizen legislature repeatedly tried to find any reason to not treat a trans person with respect in certain situations.

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Opponents of the bill then proceeded to offer 13 separate floor amendments: to provide exemptions for religious organizations, private single sex educational institutions, occupational qualifications, religious beliefs of employer and landlord, the state commission for human rights, public accommodations, employers with less than six employees (three times), private institutions, when prosecuting a misdemeanor or felony defense, and two attempts to redefine gender identity to be blatantly discriminatory. While all 13 amendments were voted down by the House, legislators' insistence on offering them illustrated the very need for the protections in HB415.

The repeated efforts by legislators to deny a trans person equal treatment in certain situations is indicative of the discrimination that trans people face across our state. The bill eventually passed the House by a single vote: 188-187.

Unfortunately, the bill did not last long in the Senate. HB415 came out of the Senate Judiciary Committee with a unanimous Inexpedient to Legislate recommendation and was voted down unanimously by the full Senate (24-0).

Gerri explained, "[the Senate] was listening to same sex marriage and transgender rights [legislation], and they decided it was probably easier to pass the same sex marriage."

Legislation to enact transgender non-discrimination protections was not filed again in the New Hampshire General Court until 2017, when Representative Butler again introduced a new trans non-discrimination bill, House Bill 478 (HB478).

In the eight years since gender identity non-discrimination legislation had been attempted last, several municipalities and two dozen school districts across New Hampshire had adopted gender identity non-discrimination policies of their own.⁷ Organizations like the New Hampshire School Board Association (NHSBA) and New Hampshire Interscholastic Athletics Association (NHIAA) had also publicly committed to affirming trans students' gender identity in 2015 and 2010, respectively.

To give it a better chance at passage, HB478 was slimmed down to only include employment, housing, and public accommodation. Also unlike its predecessor bill, HB478 included a much more substantial definition of gender identity.

"Gender identity" means a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth. Gender-related identity may be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity,

*consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held as part of a person's core identity provided, however, that gender-related identity shall not be asserted for any improper purpose.*⁸

This narrower application and broader definition, paired with the growing support for and visibility of New Hampshire's trans community, allowed the bill a more bipartisan appeal, including three republican state senators as co-sponsors.

The bill received a strong 15-2 recommendation from the House Health and Human Services Committee, but was tabled by the full House in a vote of 187-179.^{9 10}

Representative Butler filed the bill for a third time in 2018, and aided by a larger-than-ever coalition of visible trans and allied Granite Staters,¹¹ House Bill 1319 (HB1319) made it through both chambers of the legislature with strong bipartisan votes of 195-129 in the House and 14-10 in the Senate. The bill was signed into law by Governor Chris Sununu in June 2018,¹² making New Hampshire the 18th state to enact transgender non-discrimination protections and the only such state to have enacted these protections with a Republican-controlled House and Senate, and a Republican governor.

Note that in the same year that HB1319 passed, the legislature also banned conversion therapy with bipartisan votes of 179-171 in the House and 14-10 in the Senate.¹³

As monumental as the passage of HB1319 seemed at the time, it was only the beginning of legislative reform to advance trans lived equality in the Granite State. The 2019 legislative session continued this trend with three equally historic bills regarding the rights of trans and gender non-conforming people.

House Bill 608 (HB608) went back to the other areas of non-discrimination law outside of employment, housing, and public accommodation previously identified in 2009's HB415, but left out of 2018's HB1319, including health insurance, mental health providers, and 19 other areas of law.¹⁴ This legislation was again sponsored by Representative Butler, but this time, it was also backed by a recommendation from Governor Sununu's Advisory Council on Diversity and Inclusion.¹⁵

HB608 was signed into law by Governor Sununu in August 2019. What was once a one vote difference in 2009, then a 66 vote difference in 2018, became a 92 vote difference (230-122) in 2019 when HB608 passed the House floor vote. Similarly, the 2019 bill had grown its support in the Senate (16-8) since the previous year by two votes.

Prior to explicit health insurance non-discrimination, insurers were already

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prohibited from discriminating between individuals of the same class and hazard in the amount of premium, policy fees, or rates charged, but the new language explicitly prohibits discrimination on the basis of gender identity as well.

In a memo issued on June 2020, the New Hampshire Department of Insurance clarified:

In light of the foregoing, insurers are prohibited from denying, excluding, or otherwise limiting coverage for medically necessary services, based on an individual's gender identity. Any offered services, medications, supplies, or durable medical equipment in a health insurance policy or contract must be provided to all individuals for whom a medical provider, in consultation with the individual patient, has determined that the services are medically necessary, consistent with RSA 420-J. Insurers should base coverage decisions on medical necessity rather than a person's gender identity. The Department considers any blanket policy exclusions for health care services related to gender transition or any other form of gender dysphoria treatment as a violation of RSA 417:4, VIII(b) and RSA 415:15 in that such exclusions discriminate on the basis of gender identity.¹⁶

Senate Bill 263 (SB263), another bill with an official recommendation from the Governor's Council on Diversity and Inclusion, called for providing a universal set of non-discrimination protections for students at New Hampshire public schools, including all protected statuses from RSA 354-A: age, sex, gender identity, sexual orientation, race, color, marital status, familial status, disability, religion, and national origin.¹⁷ The bill also called for each school district and chartered public school to develop policies that address and prevent discrimination, as well as creating explicit paths forward for civil action when discrimination does occur.

These protections passed with even-stronger bipartisan support in the Senate (20-3) and House (211-141). SB263 was signed into law by Governor Sununu in July 2019, taking effect 60 days later.

The third bill, House Bill 669, enacted in July 2019, added a non-binary gender marker, X, in addition to F and M on N.H. state identification documents, including driver's licenses. The bill passed by unanimous voice vote in both the NH House and Senate, meaning no representatives or senators challenged the motion of Ought To Pass on the floor. The bill passed into law without a signature from the Governor.

At the senate floor vote for HB669, Senator David Watters remarked:

"What, then, is the appropriate role of the state? What are we "licensing" when it comes to gender categories on a N.H. driver's license. Think about the implications of forms of identification, and how they make us visible and able to exercise our rights and identity.

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“Let us consider that the state’s designation of gender has always been a civil and political process, and the policing of those boundaries, and the attempts to collapse distinctions between biological markers of sex, ambiguous as they may be in some cases, with gender designations, has a fraught history.”

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The success of these three bills in a single year, on the heels of HB1319, suggest a groundswell of bipartisan support for trans lived equality. While such support has and still is growing, the 2018 and 2019 legislative sessions also saw multiple bills aimed at restricting trans rights or even denying the existence of transgender people. For example, there have been repeated attempts to ban affirmative medical care for trans youth. Most recently, in 2020, there were two proposed bans on participation in sports by transgender student-athletes that would have subjected any female athlete perceived to have an advantage in athletics - trans and cisgender alike - to invasive genetic testing, blood work, and an analysis of the student’s reproductive system.

Trans and Gender Non-Conforming Students



On the day of our interview, Estée says her second-born son wore a sparkly unicorn shirt, his older brother's oversized joggers, and pink galoshes to school. He is five years old and has always gravitated toward dresses and playing with the girls. Estée says her kindergartener's classmates don't think much of her son's feminine-leaning gender expression, citing students often complimenting his dresses and girls willingness to take him in as a playmate.

"There was no reason for us to push any gender standards on him. He's such a free spirit, period."

For now, Estée sends her kids to a private school, but plans to eventually allow her children to go to public school if they wish. Her biggest concern about eventually doing so is how her gender non-conforming son will cope with other's judgement.

"Even if your kid is average AF¹⁸, you're worried about how people are going to treat them."

And she has reason to worry about how her gender non-conforming son will be treated.

The last comprehensive assessment of transgender students in New Hampshire, conducted by the organization GLSEN in 2017, found that 69% of LGBTQ students in New Hampshire could recall hearing negative comments about transgender people at school. The 2015 U.S. Transgender Survey backs this narrative, reporting that 74% of those who were out as transgender at some point while receiving a K-12 education in New Hampshire experienced some form of mistreatment, with 12% of trans students statewide ultimately leaving a school because the mistreatment was so bad.¹⁹

Eli, a transgender teenager, is one of those students. He transferred school districts after harassment made it difficult to attend school, and

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recalled constantly worrying about how his day would go, a hypervigilance that diminished his learning experience.

His mother, Kelley, recalled the school administration's inability to understand the microaggressions her child was constantly facing.

"It's not the one huge event where someone gets beat up or hurt really bad, it's all of those little snickers and the laughs every single class."

Amidst the harassment her son experienced, she noticed another troubling pattern occurring.

"[Teachers] didn't discipline the kids that were laughing and bullying. They would send my child out of the room and designated the library as an area for my child to remove himself to."

Another transgender teenager that we spoke with, Samuel, had a very similar experience coming from a school district that was not very affirming of his gender identity.

"When administrations stay neutral, that leaves students to deal with evaluating their own safety. That grey area is never a good place to be especially with how at-risk transgender students are to bullying."

The aforementioned 2017 GLSEN survey revealed that in addition to a heightened risk of bullying, half of students polled in New Hampshire were prevented from using their chosen name or pronouns in school or were unable to use the school restroom in alignment with their gender identity²⁰ - two basic accommodations that are foundational to a student's ability to learn with equal opportunity.

When asked how many bathrooms there were at the beginning of his freshman year of high school, his first out as a trans person, Samuel replied "zero." Sam was told that using a male or female restroom may even result in suspension, but with only one gender neutral restroom available in the nurse's office, the only restroom he was allowed to use was out of walking range during most classes.

"I would basically wait all day and walk downtown to Burrito Me, who had a gender neutral bathroom, and use those. It was not a great experience."

In schools without TGNC student policies, it is not uncommon to hear that TGNC students are required to use a nurse's restroom or one of few gender neutral restrooms in a school. One third of the respondents to the National Center for Transgender Equality's 2015 U.S. Transgender Survey responded that they limited the amount that they ate and drank to avoid using the restroom in the past year. Eight percent reported having a urinary tract infection, kidney infection, or another kidney-related problem in the past year as a result of avoiding restrooms.²¹

The school developed a number of gender neutral restrooms later in

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the year, but these single stall restrooms with lockable doors were immediately abused by students for vaping, drug use, and sexual activity. The gender neutral restrooms were also the first to be cleaned and locked, so for a student involved in after school activities like GSA, business club, and theater, Samuel often had to wait an additional hour to use another restroom outside of school.

Fortunately, Samuel and Eli are now attending New Hampshire public schools with a level of in-school support that their respective previous districts did not provide. They have each had a legal name change and no longer experience the constant threat of being outed.

Part of attending a school with a comprehensive trans policy is the ability to accommodate a preferred name. At his previous school, Samuel was left to explain his name to teachers individually and found his deadname (a deadname is a former/legal name no longer used) printed in many places throughout school.

“SAT lists. Schedules. Yearbooks are definitely an issue, I got deadnamed in my yearbook. Oh, and substitutes.”

Substitute teachers would often call Samuel’s dead name during attendance, and Sam would allow himself to be marked absent.

Shrugging it off with a laugh, Samuel said, “I’d be like, who is that? Never seen that person in class before.”

For TGNC youth, including the thousands right here in New Hampshire, social transition is often the primary component of affirming gender identity. A more substantial ability to document a lived identity over a legal one would greatly enhance access to education without discrimination for TGNC students. Forcing transgender people to disclose their transgender status and be outed by inaccurate identification can also violate their constitutional right to privacy,²² but too many public schools do not have a system for accommodating a preferred name or gender marker unless it is a legal one.

Grey, a nonbinary sophomore, explains further, “The school is like, ‘you haven’t gotten surgery, you haven’t gotten your name changed, so you’re still this’. There are so many kids that are not fully transitioned but are fully valid. Most of my teachers still called me my dead name because of what the attendance list said.”

There’s an additional problem that impacts non-binary students like Grey, which is that the New Hampshire Department of Education (NHDoE) currently only allows for binary gender options and legal names on student recordkeeping systems. Although name and sex may have legal value for enrollment purposes, requiring school districts to collect data on preferred names and expand their binary gender set to include a third, non-binary marker (X) are clear next steps to improving

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treatment of transgender students and resolving problems that arise from documentation incongruencies.

House Bill 1163 (HB1163) was legislation introduced in 2020 to require the NHDoE to expand their gender marker set to include a non-binary gender marker. Despite a largely positive hearing before the House Education Committee, the Department of Education came in with a last minute price estimate of \$20,000 - a very low amount all things considered - but enough to force an Interim Study vote (15-3) on HB1163.

Updates to recordkeeping standards would also allow for Individual Education Plans (IEPs) created within the New Hampshire Special Education Information System (NHSEIS) to have a preferred name field and a third, non-binary gender option. There is currently no ability to note a preferred name, nickname, or non-binary gender marker on the cover sheet of student IEPs. Preferred name and pronouns end up being introduced in text on the second page of the IEP - if at all.

The NHSBA Model Policy



The New Hampshire School Board Association (NHSBA) introduced their model TGNC student policy, JBAB, in April 2015 at the request of several districts seeking guidance in developing a policy of their own during the previous year.²³

The model policy is broken out into three sections, including Purpose, Definitions, and Guidance. The Purpose is a simple statement of intent, which is to provide a discrimination-free learning and social environment for students of all gender identities, and the Definitions section provide a common understanding around TGNC identities. When included, a Procedure section provides a chain of command, and plans to address documents like IEPs. The real substance of the NHSBA policy is the Guidance portion, of which JBAB suggests ten pieces of guidance.

The first guidance, Privacy, runs central to the struggle of many TGNC students:

The Board recognizes a student's right to keep private one's transgender status or gender nonconforming presentation at school. Information about a student's transgender status, legal name, or gender assigned at birth also may constitute confidential information. School personnel should not disclose information that may reveal a student's transgender status or gender nonconforming presentation to others, including parents and other school personnel, unless legally required to do so or unless the student has authorized such disclosure. Transgender and gender nonconforming students have the right to discuss and express their gender identity and expression openly and to decide when, with whom, and how much to share private information.

The following guidance on official records and name/pronouns commit districts to affirming a student's lived identity and doing their best to shield private information about the student in cases where legal names

Privacy runs central to the struggle of many TGNC students.

may be required. The guidance also affirms TGNC students in gender segregated activities, access to restrooms and locker rooms, as well as intramural sports and interscholastic athletics. The policy concludes with a commitment to anti-harassment:

It is the responsibility of each school and the District to ensure that transgender and gender nonconforming students have a safe school environment. This includes ensuring that any incident of discrimination, harassment, or violence is given immediate attention, including investigating the incident, taking appropriate corrective action, and providing students and staff with appropriate resources. Complaints alleging discrimination or harassment based on a person's actual or perceived transgender status or gender nonconformity are to be handled in the same manner as other discrimination or harassment complaints.

Although the NHSBA created this policy, it is classified as optional and has been up to each of our state's school districts and charter schools to decide if they would like to adopt their own version of JBAB or go without a policy, as many have done. In light of the passage of 2019's SB263 and the high likelihood that even smaller school districts end up having a transgender enrollee, it is in the best interest of all school districts to adopt a TGNC student policy.²⁴

Only one in three students attending a public school in New Hampshire currently attends a school with a trans student policy.

In the five years since the model policy was introduced, 48²⁵ of the 196 public school districts and charter schools in New Hampshire have adopted a TGNC student policy. New Hampshire's average of 32.77% is well above the national average of 10.9%,²⁶ and a great start after only five years, but it also means that only one in three students attending a public school in New Hampshire currently attends a school with a trans student policy. Twenty-six of the 48 districts to adopt a trans student policy adopted their policy nearly verbatim from the NHSBA policy. The other 22 districts fall somewhere between omitting a couple guidances to being a pretty meaningless policy.

The Monroe School District²⁷ and Epping School District²⁸ became the first school districts to adopt the JBAB policy on June 15, 2015. Six districts adopted a version of JBAB in 2015, followed closely by 19 districts in 2016, and an additional 23 districts since 2017. One school district, Candia, repealed their policy less than a year after adoption in 2017.²⁹

The largest school district to have adopted a TGNC student policy is Nashua School District, whose district enrollment topped 11,000 students in the 2019-2020 school year and adopted a version of JBAB in late 2019. However, Nashua's policy is one of those five policies lacking any substance other than a lone guidance on anti-harassment.³⁰ Policies adopted by Rochester,³¹ Hampton,³² Coe-Brown,³³ and Kearsarge Regional³⁴ school boards function similarly, committing to working with transgender students on a case-by-case basis but not spelling out any details. Although one in three New Hampshire public school students live

Of the ten New Hampshire school districts with the highest enrollment, only three - Nashua, Rochester, and Dover - have a trans student policy.

in a district with a policy, far fewer students attend a public school with the explicit guidances recommended by the NHSBA model policy, like name usage (22.62%) and bathroom access (20.04%).³⁵

Of the ten New Hampshire school districts with the highest enrollment, only three - Nashua, Rochester, and Dover - have a trans student policy. Rochester's and Nashua's policies both lack much guidance, making Dover School District the largest district to adopt a truly comprehensive trans student policy.

The absence of a policy does not mean that trans students are not accommodated properly in the other two out of three school districts, but it may very well mean that TGNC students end up treated differently and given different levels of accommodation based on the internal bias of their school administration.

The ten largest school districts without a trans student policy entirely are Manchester, Concord, Bedford, Londonderry, Merrimack, Salem, Timberlane, Derry Cooperative, Hudson, and Pinkerton Academy.³⁶³⁷

These districts served 46,604 students in the 2019-2020 school year, and if even just these districts adopted a trans student policy, New Hampshire would move from a third to well over half of New Hampshire students (59.22%) attending a school with a trans student policy. *Update to report 2/2/21: The Manchester School District adopted a comprehensive trans student policy on January 25, 2021.*

To produce these numbers, all 196 active public school districts in New Hampshire's 2019-2020 school year, including 164 public school districts and 32 charter school districts, were searched for a TGNC student policy (most typically filed as JBAB under Section J: Student Policies). The 45 public school districts and 3 charter schools that did have a TGNC student policy were documented in relation to the provisions of the NHSBA model policy, date adopted, and any additional notes. District enrollment numbers were based on the most recent year of statewide enrollment data (2019-2020), for which the state of New Hampshire had 176,168 students enrolled in public schools statewide.

(Last update September 30, 2020.)

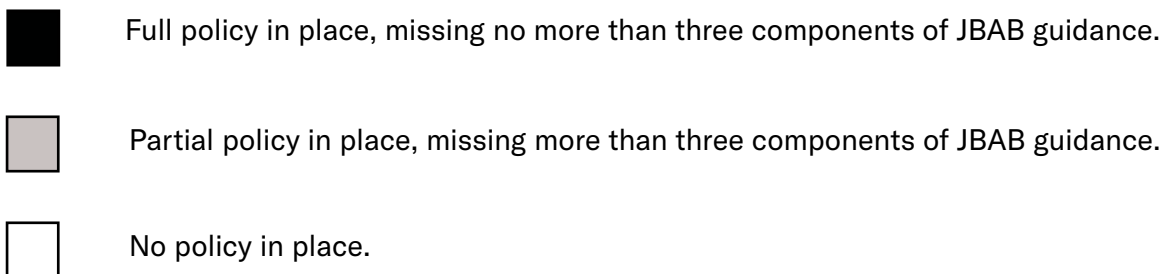


Figure 1

Adoption of trans student policies across New Hampshire school districts

	Number of school districts with guidance	Number of NH public school students in districts with guidance	Percent of NH public school students in district with guidance
Trans Student Policy	48	57,728	32.77%
Definitions	41	38,160	21.66%
Privacy	41	38,160	21.66%
Official Records	41	38,160	21.66%
Name & Pronouns	42	39,856	22.62%
Gender Segregated Activities	37	34,132	19.37%
Dress Code	40	37,811	21.46%
Bathroom Access	36	35,310	20.04%
Locker Rooms	32	35,719	20.29%
Intramural Sports and Physical Education	34	33,719	19.14%
Interscholastic Athletics	31	35,010	19.87%
Anti-Harassment	33	43,241	24.55%
Inclusivity Training	7	8,954	5.08%
Safety Plan	9	10,260	5.82%
Procedure	19	17,543	9.96%

Figure 2

Trans Student Policies across 13 New Hampshire school districts with highest enrollment (2019-2020).

School District	Students	Trans Student Policy
Manchester School District	13,218	No
Nashua School District	11,024	Yes
Concord School District	4308	No
Bedford School District	4432	No
Londonderry School District	44227	No
Rochester School District	4252	Yes
Dover School District	3983	Yes
Merrimack School District	3784	No
Salem School District	3548	No
Timberlane Regional School District	3456	No
Derry Cooperative School District	3295	No
Keene School District	3284	Yes
Hudson School District	3195	No
Pinkerton Academy	3141	No
Windham School District	3003	Yes
Goffstown School District	2855	No
Exeter Region Cooperative School District	2759	Yes
Portsmouth School District	2631	Yes
Merrimack Valley School District	2356	No

Gorham's Gender Support Plan



When Gorham Randolph Shelburne Cooperative School District student Grimmie Jones came out as transgender during her junior year of high school, she sent an email to her school's administration asking for accommodation of her transgender identity. The school informed teachers of the change, but left it up to each teacher to implement the change in their respective classrooms. Grimmie encountered several teachers and students who would not call her by her preferred name or pronouns.

“I was specifically told [I would] get in some form of trouble if you use the girls bathroom.”

Grimmie was also told by her school administration that she would frighten younger students if she used the women's restroom. She would use a single stall restroom located in the nurse's office until she graduated.

“I was specifically told [I would] get in some form of trouble if you use the girls bathroom.”

She almost didn't go on her senior trip because the administration was worried about Grimmie rooming with other girls.

So when faced with developing a senior project, which is supposed to be something that reflects what students plan to do post-primary education, her interest in social work, social justice, and advocacy led her to proposing a policy to the Gorham School Board.

“I was initially just going to repurpose the JBAB style of the policy, but then I was thinking and talking to friends outside of school who had done similar advocacy projects. We came to discussing how a policy isn't enough. A policy might be a safety net, but there also needs to be in-place supports for trans kids.”

The policy she began to develop was titled the Gender Support Plan. The plan covers similar areas as JBAB including privacy, name, pronouns, official records, restroom access, and athletics - but rather than an

The Gender Support Plan creates shared understandings about the ways in which a student's authentic gender will be accounted for and supported at school.

explicit guidance like JBAB provides, the Gender Support Plan is a comprehensive 88-point support plan to be completed by the student and school staff.

Grimmie explained, "I wanted it to make sense to people who don't know about trans issues."

The document creates shared understandings about the ways in which a student's authentic gender will be accounted for and supported at school and spells out the nuances rarely considered in case-by-case accommodations. These include nine considerations for student safety, thirty-three considerations for student records, and a commitment to continually check in with TGNC students.

The school board adopted the policy as JICK-R3 in a 7-1 vote on 10/1/2019.

"I hope that when a trans kid needs it, it will be there for them."

Oyster River's Success Story



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Instead of creating an ad-hoc policy for one transgender student, they would take the opportunity to craft a comprehensive, district-wide policy for all transgender students, current and future.

.....

Like many school districts in New Hampshire and across the country, Durham's Oyster River School District did not have a transgender-inclusive non-discrimination policy until confronted with the reality that a transgender student would be enrolling.

Staff and administrators at Oyster River looked at the situation and decided that, instead of creating an ad-hoc policy for one transgender student, they would take the opportunity to craft a comprehensive, district-wide policy for all transgender students, current and future.

Jason Baker is a school counselor at Oyster River High School. It was the winter of 2014-2015 when a student told Jason he would be transitioning. From there, Jason knew the school district had no choice but to take action. But Jason did not think the school district's response should be purely reactionary. Instead, he wanted the district to think long-term.

Jason knew this specific student would be just the first of many transgender students to come through the Oyster River school system. So he took the lead on crafting an official policy aimed at ensuring transgender students are fully integrated into the school and have the opportunity to fairly and equally participate in all school-related activities.

"Really the writing was on the wall after talking to that student," Jason said. "I knew we would be faced with this again at some point, and I needed to know: What is our official stance on restrooms, locker rooms, using pronouns, things like that? I told my superintendent and my principal, 'We need to have an official policy on this.'"

The superintendent at Oyster River, James Morse, was more than receptive to the idea—he was already familiar with the issue and wanted to get out ahead of it.

So James and Jason pulled together a team of people, including principals

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and the district’s lead counselor, and together they put together a draft policy—the first district-wide policy in New Hampshire regarding transgender students.

“This is a civil rights issue, and we dealt with it like any other case,” Jason said. “You can’t deny one person their civil liberties because something else might happen. That’s hard for some to wrap their heads around, but we went full steam ahead.”

He took the lead on community outreach and shepherded the policy as it evolved through many, many conversations with parents, students, and other members of the Oyster River community. In the end, James and Jason said the policy received no serious pushback.

“We’re in a unique community. We’re a pocket that is pretty forward-thinking and open-minded,” Jason said.

When James and Jason eventually presented the policy to the school board, it passed unanimously on the initial vote. James said he didn’t get a single negative email, letter, or phone call after that. On the second read, it again passed unanimously and became district policy.

At that point, Jason and James started receiving messages from other school districts, expressing interest in Oyster River’s transgender-inclusive policies and seeking advice on how to pass such policies in other communities, including ones that might be less receptive.

For Jason’s part, he is happy to be a part of a community that shared in his belief that transgender students deserve to be treated fairly and equally, and should have access to the same quality education as all other students.

“I know there are pockets that have faced backlash on whether to have a policy or not. But fortunately that hasn’t been an issue here. People ask me, ‘How did you deal with parents? How did you deal with the community?’ and I don’t know what to say, because our community just embraced this.”

Trans Student Athletes



After years of focusing on restrooms and locker rooms as an entry point for excluding trans people from public life, opponents of LGBTQ equality have shifted strategy to focus on excluding trans people, particularly students, from participating in athletics consistent with their gender identity. We saw this arise in the context of the Equality Act hearings before the U.S. Congress in May 2019, where the so-called threat to women's sports emerged as the core reason to oppose LGBTQ non-discrimination protections in the workplace, housing, and in critical areas of public accommodation.

Fortunately, nearly every public and private high school in New Hampshire with an athletic program is a member of the New Hampshire Interscholastic Athletic Association (NHIAA). The NHIAA is a statewide organization founded in 1947 to establish state athletic programs as an integral part of the entire school curriculum³⁸ and develop formulated standards to ensure that competition is equalized across the state.

The NHIAA adopted their trans athlete policy in 2010 - the first statewide organization to do so - as part of their Eligibility By-Laws, which define the criteria for student athletic participation. In its policy, the NHIAA explains that it would be unjust to preclude a student from participation on a gender specific sports team that is consistent with the public gender identity of that student for all other purposes. It ultimately leaves each school district to make the decision if a student meets that criteria, but makes a strong case and provides a fair process for the inclusion of transgender athletes.

The policy was revised to eliminate a period of mandatory hormone replacement therapy (HRT) as a pre-qualifier for athletic participation in 2014,³⁹ instead listing a variety of ways that gender identity can be proven, including the attestation of family, friends, teachers, and medical professionals. This reflects the growing understanding that gender transition is not a one-size-fits-all approach. Some folks pursue medical

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.....

transition, and some do not. Some pursue surgeries related to their gender transition, and some do not. Some folks have a binary transition - from female to male or male to female - and some exist between or entirely outside of this binary.

Medical transition is a personal choice that can be impacted by one's personal comfort level, existing support systems, financial ability, and age. The primary treatment for trans youth is social transition. Medications other than puberty blockers are not administered to children under a certain age - and that's only if they are out and supported at that age - and genital surgeries are almost never completed on patients under the age of 18.

The NHIAA policy also clarifies that gender identity shall not be used for any improper purpose or to unfairly gain athletic advantage over other students. Students are not permitted to change gendered teams mid-season, participate in gender specific sports teams that are different from their publicly identified gender identity at that time, or to try out simultaneously for NHIAA sports teams of both genders. Trans students are required to notify school districts of their gender identity in writing before the start of a sports season.⁴⁰

It is impossible to know how our bodies and abilities would develop given different opportunities, or to separate out the influence of biological processes from physiological characteristics from socialization.⁴¹ Moreover, each sport and activity differently advantages a variety of body types - what it takes to be great at gymnastics is different from sprinting is different from swimming - so it is impossible to generalize about competitive advantage on the basis of assigned sex alone. Athletic success is based on many disparate factors that vary sport to sport and being transgender does not give girls who are trans an inherent advantage over girls who are cisgender.⁴²

The notion that women and girls who are transgender have a competitive advantage in athletic activities is based on two false premises. The first is that transgender women and girls are really males, which is not true,⁴³ and the second is that testosterone gives people a competitive advantage in sports. Despite the fact that trans people of all ages have been participating in sports consistent with their gender at all levels for years, we simply have not seen any categorical dominance by trans athletes.⁴⁴ There is also a long history of policing the participation of women in sports,⁴⁵ and it emerges as part of larger structural exclusion and discrimination.

Two identical pieces of legislation filed in New Hampshire during the 2020 legislative session - House Bill 1251 (HB1251) and Senate Bill 480 (SB480) - would have subjected any female athlete perceived to have an advantage in athletics to invasive genetic testing, blood work, and an analysis of the student's reproductive system. Both pieces of legislation not only aimed to solve a problem that simply does not exist in New Hampshire, but

“I participated in sports for the same reasons other girls do. For the pure love of it, for one thing – the joy and exhilaration of skiing, or running cross-country.”

would have created a system in which any person could initiate a claim that any student, trans or cisgender, deviates from their gender and sex stereotypes and should be tested for athletic eligibility.

As introduced in New Hampshire, the two bills called upon doctors to participate in government-ordered discrimination by subjecting select students to invasive, traumatic, and expensive medical testing. Compounding this issue, the bill’s language would allow anyone who “disputes” a student’s sex to force that student to be subjected to such testing.

In written testimony submitted to the House Education Committee, trans teen athlete Sarah Rose Huckman recounted her supportive principal, athletic director, coaches, and teammates, on cross country skiing and track teams over her high school athletics career.

“I participated in sports for the same reasons other girls do. For the pure love of it, for one thing – the joy and exhilaration of skiing, or running cross-country.”

“As a girl who happens to be transgender, sports meant something else too – they were lifesaving. I wouldn’t be who I am today – a happy, healthy, college freshman – if it weren’t for those teams.”

Fortunately, this particular argument did little to hide it’s obvious transphobia and sexism, and the New Hampshire Legislature voted these two bills down with ease. HB1251 was voted ITL with a vote of 13-6 by the House Education Committee and a vote of 184-131⁴⁶ at its floor vote. HB1251’s counterpart bill, SB480, was voted down by the Senate Education Committee unanimously (5-0) in March 2020, including by one of its three co-sponsors, but was not given a full floor vote due to COVID-19 time limitations.

At the House Education Committee’s executive session for HB1251, State Representative Stephen Woodcock commented, “This really is a wolf in sheep’s clothing. This is not about transgender youngsters playing on another gender team. This is about not allowing transgender youth to participate.”⁴⁷

House Education Chairman Mel Myler further shared his support for trans students, specifically bringing up the testimony of Lane Joslin, a high school sophomore who plays on her school’s soccer team. Lane enjoys challenging herself and being part of a team. She also happens to be transgender. For students in general, having the opportunity to participate in sports results in positive outcomes: better grades, greater homework completion, higher educational and occupational aspirations, and improved self-esteem. Excluding trans students from participation deprives them of opportunities available to their peers and sends the message they are not worthy of a full and social life.

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Sweeping bills that purport to determine a person's sex by documenting the person's chromosomes and reproductive anatomy raise serious privacy and administrability concerns.

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Identical bills also showed up in other states' legislatures in 2020 - one even briefly becoming law in Idaho. The Idaho law has been temporarily blocked with an injunction by federal judges while a case that the ACLU filed on behalf of two Idaho students against the state is being litigated, citing that categorical exclusion of trans athletes does not ensure equality and opportunity for female athletes.

Sweeping bills that purport to determine a person's sex by documenting the person's chromosomes and reproductive anatomy raise serious privacy and administrability concerns. The overwhelming majority of courts that have considered the question of whether transgender students are protected by either Title IX, the U.S. Constitution, or both, have answered that question in the affirmative. That means that discrimination against transgender students, as this bill would do, violates the law and leaves school districts vulnerable to expensive litigation.

The few examples where trans athletes have gained some level of success are regularly blown out of proportion and the actual field of competitive parity is obscured. For example, the recent success of two runners, who are Black, transgender, young women in Connecticut has been used as evidence that transgender girls have an unfair advantage across the board. In a state meet, two transgender girls came in first and second,⁴⁸ and the media immediately capitalized on their hard-won success to claim a threat to cisgender girls.

Of course, when it came time for nationals, one of the two girls did not even compete because of the shame triggered by the media coverage, and the other came in 30th and 31st in her two events. There was no dominance on the national stage - just discrimination and humiliation. Adding injury to insult, three cisgender female students from Connecticut later filed a lawsuit seeking to block all transgender athletes in Connecticut from participating in girls' sports - just two days before one of those cisgender students defeated the transgender athletes in question in a race.⁴⁹

The Rise and Fall of the Bathroom Bill



Before focusing in on trans athletes, the “bathroom bill” was a brief nationwide trend that pushed back against growing LGBTQ acceptance and gender identity non-discrimination measures by attempting to outright ban trans folks from using restrooms in alignment with their gender identity. It first emerged in 2013 but incurred a massive boost in popularity from rising resentment to nationwide marriage equality in 2015, and it was considered by dozens of states between 2013 and 2018.⁵⁰

Perhaps the best known case of a trans person fighting against bathroom discrimination—and winning, many times—is that of Virginia teenager Gavin Grimm.

Perhaps the best known case of a trans person fighting against bathroom discrimination - and winning, many times - is that of Virginia teenager Gavin Grimm. When Grimm notified his school that he would be returning for his sophomore year of high school as a male in 2014, he was initially granted permission to use the boys’ restroom and did so without incident for two months. After receiving complaints from some parents and residents of Gloucester County about Grimm’s bathroom accommodations, the school board quickly adopted a policy that effectively expelled trans students from communal restrooms and required them to use private facilities.

Represented by the ACLU, Grimm argued that the school district’s new bathroom policy was unconstitutional under the Fourteenth Amendment’s Equal Protection Clause and also violated Title IX of the U.S. Education Amendments of 1972 - a federal law prohibiting sex discrimination by schools⁵¹. The district court denied the injunction and dismissed Gavin’s claim under a different interpretation of Title IX.

However, when Gavin appealed his case, the U.S. Court of Appeals for the Fourth Circuit overturned the district court’s ruling, deferring to recently issued guidance on trans students by the U.S. Department of Education. The Department of Education’s 2016 memo explicitly affirmed students access to restrooms and locker rooms in alignment with a student’s gender identity⁵² and clarified that barring students from bathrooms, locker rooms, and other facilities that matched their gender identities amounted to sex discrimination, violating the Title IX federal anti-

discrimination law.⁵³

At the request of the Gloucester School District, the U.S. Supreme Court announced that it would review the Fourth Circuit's decision, but only a few weeks before the Supreme Court could hear the case, the Trump Administration rescinded the Department of Education's previous guidance regarding transgender students. The Supreme Court sent Gavin's case back to the Fourth Circuit Court of Appeals.

When Gavin graduated high school in 2017, still unable to use the same restroom as other boys after three years of legal battles, he filed an amended complaint with the district court for nominal damages and a declaration that the school board violated his rights under Title IX and the Equal Protection Clause. The U.S. District Court for the Eastern District of Virginia granted Gavin's motion for summary judgement in 2019, ruling that the school violated Gavin's rights under Title IX and the 14th Amendment - a victory that was affirmed in August 2020 by the 4th U.S. Circuit Court of Appeals, and again in September 2020, when the entire Court of Appeals denied a request for a rehearing.⁵⁴

Judge Henry Floyd, writing for the 4th Circuit, said the school board's actions constituted "a special kind of discrimination against a child that he will no doubt carry with him for life."⁵⁵

While Gavin's case illustrated the negative impact on a person and a municipality incurring excessive legal fees stubbornly defending trans intimidation, we can look to North Carolina to see the impact on a state's economy for passing a bathroom bill.

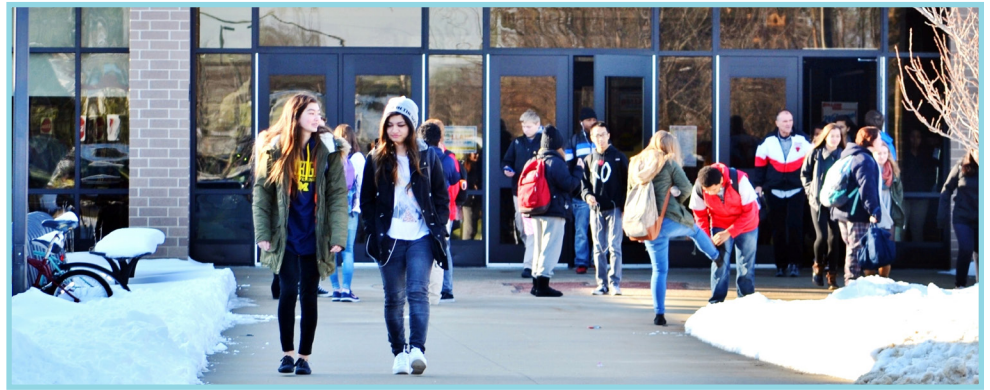
North Carolina passed House Bill 2, The Public Facilities Privacy & Security Act, in 2016, which amended North Carolina's state law to encourage public facilities and schools to allow people to only use the restroom of their sex as designated on birth record.

As predicted, several major companies backed out of plans to bring an estimated 2,900 jobs to North Carolina immediately after the bill became law. PayPal's presence alone would have contributed nearly \$200 million to North Carolina's annual GDP. Artists like Bruce Springsteen and Cirque Du Soleil canceled shows, which left about 700 workers at Raleigh's PNC Arena with \$130,000 less in their pockets.⁵⁶ Even major investment firms like John Hancock and Morgan Stanley urged the state to repeal the law as they found clients uninterested in bonds originating from North Carolina institutions.

The public accommodations measure of HB 2 was repealed a year after its enactment, but the damage had been done. North Carolina's single year with an anti-trans statewide bathroom bill on the books is projected to have cost the state nearly \$3.75 billion over a ten year period.⁵⁷

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Recommendations



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It is in schools' best legal interest, and in the best interest of all of their students, to adopt a trans student policy that clearly lays out the rights of trans students.

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TRANS STUDENT POLICIES

Since the N.H. School Board Association created its model policy over five years ago, the N.H. Legislature and Governor have enacted comprehensive student non-discrimination protections, which include protection from discrimination on the basis of gender identity. It is not enough, however, for school districts to rest on the state law alone. It is imperative that school districts adopt comprehensive trans student policies that clearly lay out the rights of trans students. To do so is in a school district's best legal interest and in the best interest of their students.

As noted previously in the report, if just the ten largest districts without such policies - Manchester, Concord, Bedford, Londonderry, Merrimack, Salem, Timberlane, Hudson, and Derry, as well as Pinkerton Academy - adopted a trans student policy, just under 60% of students across New Hampshire would be attending schools with trans policies. Additionally, the school districts that adopted JBAB policies without any actual guidance - including Nashua, Rochester, Hampton, Coe-Brown, and Kearsarge Regional - should revisit their policies and add explicit guidance on the areas laid out in the NHSBA or GLSEN model policies, to ensure that all trans student policies are of substance.

There is also value in the 'Gender Support Plan' as passed by the GRS Cooperative School District. While it does not afford outright protections and standards, it does create a substantial dialogue around a student's gender identity in ways that even with a policy, an administration may be neglecting to address.

LEGISLATIVE RECOMMENDATIONS

Good school board policies protect students, but there are several steps that are critical to fully affirming and integrating TGNC students, and not just accommodating them. There is also additional legislation that could better benefit all trans folk, particularly younger trans people.

The N.H. Department of Education (N.H. DoE) collects data on students, including name and gender. The N.H. DoE's data collection system should include a preferred name field and expand its binary gender set to include a third, non-binary gender marker, X, as is now allowed on NH state driver's licenses. This move would also allow for Individual Education Plans (IEPs) created within the New Hampshire Special Education Information System (NHSEIS) to have a preferred name field and a third, non-binary gender option. There is currently no ability to note a preferred name, nickname, or non-binary gender marker on the cover sheet of student IEPs. Preferred name and pronouns end up being introduced in text on the second page of the IEP - if at all.

Birth records, a process of the N.H. Office of Vital Records, are the basis for our legal existence in the world, and for most youth, the primary form of legal identification held until they obtain a state ID. Birth records are also required to enroll in public school.

The easiest way for our legislature to make sure students have the legal identification, and an added level of privacy, is to allow for birth records to be more easily amended.

The easiest way for the N.H. Legislature to make sure students have accurate legal identification, and an added level of privacy, is to allow for birth records to be more easily amended, identical to the process by which N.H. state identification can be amended to reflect someone's gender identity. Transgender status, legal name, and gender assigned at birth are all confidential information, and an amended birth record allows a trans student to move forward with equal opportunity to education.

New Hampshire is on the more restrictive side of birth record amendments. Ten states and New York City allow for change of birth record by self-attestation, meaning the person does not need to have their gender identity confirmed by a medical provider or a judge, but is instead taken at their word. Thirteen states carry non-surgical standards, 15 states require proof of surgery, and New Hampshire is one of 9 states with a less clear policy.⁵⁸ New Hampshire currently requires someone to go through a judicial procedure called a "court ordered sex change" in order to correct their birth record. Two states, Tennessee and Ohio, do not allow for birth record amendments under any circumstance.

In 2019, State Representative Gerri Cannon filed legislation (House Bill 446) to create a medical-attestation option on birth records. This would have allowed medical professionals to attest to the patient's transition, the standard currently used for New Hampshire state ID and U.S. Passports; however, the bill was vetoed by Governor Sununu, citing our state's existing procedure as adequate. Representative Cannon's bill

18 states currently allow for self-attestation while updating sex designation on state ID. And there are many signs that our own state is ready for this change.

would have retained an original sealed copy of the birth record for town records. The bill was filed again in 2020 (House Bill 1577), but was tabled in response to COVID-19.

Eighteen states currently allow for self-attestation when updating sex designation on state ID, the same process by which New Hampshire already attests to eye color, hair color, height, and weight. And there are many signs that New Hampshire is ready for this change.

Our state's comprehensive gender identity non-discrimination law, passed two years ago, defines gender identity in a way that prohibits abuse of that identity for improper purpose. A self-attested administrative change of gender does not exempt a person from any legal responsibilities, including for fraud.

Some folks receive mental health care for their gender identity, and some do not. Some folks pursue physical transition through medical providers, and some do not. Some transitions are binary, and some are something other than exclusively male or female. And none are less valid or less deserving of accurate state identification than others.

Credits

The ACLU-NH is solely responsible for the contents of this report. The American Civil Liberties Union of New Hampshire (ACLU-NH) is a nonprofit, nonpartisan membership organization dedicated to preserving the individual rights and liberties guaranteed in the Bill of Rights and the Constitution.

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Endnotes

- 1 States included in study were Colorado, Delaware, Hawaii, Maine, Maryland, Massachusetts, Michigan, Rhode Island, Vermont, and Wisconsin. Cities included in study were Boston, Massachusetts; Broward County, Florida; Cleveland, Ohio; Detroit, Michigan; District of Columbia; Los Angeles, California; New York City, New York; San Diego, California; and San Francisco, California.
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- suspect class triggering heightened equal protection scrutiny); *Love v. Johnson*, 146 F. Supp. 3d 848, 852 (E.D. Mich. 2015)(denying government motion to dismiss lawsuit challenging Michigan surgical requirements for update to gender on state driver's license and identification).
- 23 Phillips, William J. 08/25/2020. E-mail. Staff Attorney & Director of Policy Services. New Hampshire School Board Association.
 - 24 It is not enough for a school district to include gender identity in a broad non-discrimination policy that lists all protected classes. A TGNC student policy, like JBAB, identifies specific procedures and policies, like those documented above.
 - 25 New Hampshire public school districts with trans student policy as of August 2020: Alton, Barnstead, Bath, Brentwood, Claremont, Dover, Dresden, East Kingston, Epping, Errol, Exeter Regional Cooperative, Exeter, Fremont, Gilford, Greenland, GRS Coop. Hampton, Haverhill Cooperative, Hopkinton, Kearsarge Regional, Keene, Kensington, Litchfield, Marlborough, Mascenic Regional, Milan Village, Monroe, Nashua, New Castle School District, Newfields, Newington, Northwood, Oyster River Cooperative, Pittsfield, Plainfield, Portsmouth, Rochester, Rye, Sanborn Regional, Shaker Regional, Somersworth, Stratham, Warren, Winchester, Windham. Public Charter schools include Coe-Brown Northwood Academy, Seacoast Charter School, and Virtual Learning Academy Charter School.
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