

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

No. _____

IDELL “DELLIE” CHAMPAGNE

243 South Main Street
Concord, NH 03301

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

18 Low Avenue, #12
Concord, NH 03301

THE CONCORD MONITOR

1 Monitor Drive
Concord, NH 03301

v.

CONCORD SCHOOL DISTRICT

38 Liberty Street
Concord, NH 03301

**PETITION FOR ACCESS TO PUBLIC RECORDS UNDER THE “RIGHT TO KNOW
LAW,” RSA CHAPTER 91-A, AND PART I, ARTICLE 8 OF THE NEW HAMPSHIRE
CONSTITUTION**

Gilles R. Bissonnette, Esq. (N.H. Bar No. 265393)
Henry R. Klementowicz (N.H. Bar No. 21177)
American Civil Liberties Union of New Hampshire
18 Low Ave. # 12
Concord, NH 03301
Tel. (603) 227-6678
gilles@aclu-nh.org
henry@aclu-nh.org

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INTRODUCTION

NOW COME Petitioners Dellie Champagne, the American Civil Liberties Union of New Hampshire, and the *Concord Monitor* and respectfully petition this Honorable Court for relief pursuant to RSA Chapter 91-A and Part I, Article 8 of the New Hampshire Constitution against Respondent Concord School District.

This lawsuit asks the Court to order the Concord School District to release to the public, the taxpayers and parents of Concord, and the Petitioners the over 100-page report submitted to the Concord School Board on September 23, 2019 authored by independent investigator Djuna Perkins. She was hired by the District to investigate the District's response to complaints of inappropriate behavior by former teacher Primo "Howie" Leung in December 2014 and December 2018 and whether School Board policies were followed. There is reason to believe that the report documents a failure in how the District responded to allegations that Leung was abusing children, as the Board terminated the District's Superintendent and High School Principal within days after receiving the report.¹ The District has given no public explanation for these terminations.

A second October 30, 2019 report by Investigator Perkins proposing "recommendations" for the District also suggests that there may have been failures with respect to how and whether District administrators reported Leung's boundary violations and potential sexual misconduct. But this second report sheds no light on what administrators did or did not do following students' reports of misconduct against Leung.² Nor has the District. What the District did or failed to do is likely extensively documented in the September 23, 2019 report at issue in this case. The public

¹ See Alyssa Dandrea, "Forsten Out as Concord School District Superintendent," *Concord Monitor* (Nov. 1, 2019), <https://www.concordmonitor.com/Concord-School-Board-meeting-interim-superintendent-29946305>; Leah Willingham, "Tom Sica Resigns as Concord High Principal Following Investigation," *Concord Monitor* (Nov. 4, 2019), <https://www.concordmonitor.com/School-board-meeting-after-superintendent-s-resignation-30031978>.

² See Alyssa Dandrea and Jonathan Van Fleet, "Recommendations Reveal Leung's Actions Should Have Been Clear Warning to Administrators," *Concord Monitor* (Oct. 31, 2019), <https://www.concordmonitor.com/School-District-second-report-released-to-the-community-29914821>; see also *Exhibit A* (Oct. 30, 2019 Perkins Report, at p.7).

also has had no ability to meaningfully vet the adequacy of the recommendations proposed in the October 30, 2019 report without knowing how the District responded to allegations that Leung was abusing students. Concord School Board Member Pam Wicks even acknowledged at an October 29, 2019 candidate forum that “mistakes were made.” But, despite these “mistakes” and the strong suspicion of possible negligence by District administrators, the District has kept its citizens in the dark as to what the District knew and did.

To be clear, this lawsuit specifically excludes information in the September 23, 2019 report that would lead to the identification of victims and their families, as well as witnesses who are/were not employed by the District. Petitioners do not object to such information being redacted; in fact, Petitioners believe that such information should be redacted to protect the privacy of these minors, families, and non-governmental actors. But the remaining information concerning how District officials responded to possible sexual abuse by Leung—including the report’s formal conclusions—belongs to the public and must be disclosed under RSA Chapter 91-A and Part I, Article 8 of the New Hampshire Constitution.

As the New Hampshire Supreme Court has explained, instead of a document being withheld in its entirety, the least restrictive approach is for a document to be forensically examined, sentence by sentence, with exempt information redacted while the remaining information is shared with the public. *See In re Keene Sentinel*, 136 N.H. 121, 131 (1992) (“instead of sealing an entire document because it has been determined that parts of it should not be accessible to the public, the court should consider if redaction of those parts is the appropriate least restrictive means”). For example, consistent with this forensic approach, the Rockingham County Superior Court recently—and appropriately—reviewed line-by-line an unredacted audit report that was heavily critical of the Salem Police Department’s culture and internal affairs practices to determine

whether the Town’s redactions accurately constituted exempt “internal personnel practice” information. Many of the redactions, the Court ruled, did not pertain to “internal personnel practices” and thus were ordered released to the public. *See Union Leader Corporation et al v. Town of Salem*, No. 218-2018-cv-01406 (Rockingham Cty. Super. Ct. Apr. 5, 2019) (Schulman, J.), attached as Exhibit B.³

Here, however, the Concord School District appears to have made little effort to forensically examine the September 23, 2019 report to determine which portions would be identifying (and therefore should be redacted) and which portions would not be exempt (and therefore should be produced). Indeed, the District appears to have taken the position that the entire report would identify students and their families, which would presumably even include any conclusions the independent investigator may have made as to whether District officials acted appropriately in how they handled allegations that Leung was sexually abusing students. This highlights the overbreadth of the District’s position. Such conclusions by the investigator that do not reference the identity of specific victims, family members, and private citizen witnesses are of significant public import, as they would shed light on whether District officials acted appropriately and in the best interests of their students. In fact, the District has confirmed that this report does not use students’ names. To withhold this information in the report—which was funded by Concord taxpayers at a rate of \$245 per hour—is deeply damaging to government accountability, undermines the public’s confidence in the District as a whole, and creates the impression that the District is attempting to protect itself by withholding evidence of improper conduct or a failure to act. Even assuming significant portions of the September 23, 2019 report would reasonably

³ The petitioners in that case have appealed to the New Hampshire Supreme Court the redactions that the Superior Court sustained based on the “internal personnel practices” exemption. *See Union Leader Corporation et al v. Town of Salem*, N.H. Supreme Court Case No. 2019-0206. This case will be argued on November 20, 2019.

identify students, their families, or non-governmental witness, it is implausible to believe the District's position that every sentence in every page of the report's over 100 pages contains such identifying information. Non-identifying information in the report, including its conclusions, must be disclosed so the public will know "what the District was up to."

In support of this Petition, Petitioners further state as follows:

THE PARTIES

1. Idell "Dellie" Champagne is a Concord resident living at 243 South Main Street, Concord, NH. She has a son who attended Rundlett Middle School in Concord while Howie Leung worked there. While her son was at Rundlett Middle School, Ms. Champagne was the head of the parent-teacher organization. Ms. Champagne has been active in advocating for greater transparency by the District with respect to how it has handled the Leung matter. For example, Ms. Champagne told the *Concord Monitor* that she was "disappointed by what she saw as a lack of outreach by the district" and that "she would like the district to encourage anyone who thinks their child might have been targeted by Leung to come forward."⁴ On November 11, 2019, the undersigned counsel, on behalf of Ms. Champagne, sent a Chapter 91-A request to the Concord School District seeking: "The complete report submitted to the Concord School Board on September 23, 2019 by an investigator hired to examine the District's response to complaints of inappropriate behavior by former teacher Howie Leung. This request specifically excludes any identifying information concerning (i) victims and (ii) witnesses who are/were not employed by the District." See Exhibit C. On November 13, 2019, the District responded, stating in part: "The report constitutes '[r]ecords pertaining to internal personnel practices' and is exempt from

⁴ See Caitlin Andrews, "Concord School Board revisits harassment policies following teacher's arrest," *Concord Monitor* (May 23, 2019), <https://www.concordmonitor.com/Concord-NH-school-board-review-sexual-assault-policies-community-frustration-grows-25754518>.

disclosure. RSA 91-A:5, IV; *see Union Leader Corp. v. Fenniman*, 136 N.H. 624, 626 (1993); *Hounsell v. North Conway Water Precinct*, 154 N.H. 1, 4 (2006). Disclosure of this report would also violate the prohibitions against disclosure of personal school records (RSA 91-A:5, III) and student education records. Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g(b).” *Id.*

2. Petitioner American Civil Liberties Union of New Hampshire (“ACLU-NH”) is a non-profit organization with an address of 18 Low Avenue, #12, Concord, NH 03301. The ACLU-NH is the New Hampshire affiliate of the American Civil Liberties Union—a nationwide, nonpartisan, public-interest organization with approximately 1.75 million members (including over 9,000 New Hampshire members and supporters). The ACLU-NH engages in litigation, by direct representation and as amicus curiae, to encourage the protection of individual rights guaranteed under federal and state law, including the right to access to government records pursuant to Part 1, Article 8 of the New Hampshire Constitution and New Hampshire’s Right-to-Know Law. On September 30, 2019, the ACLU-NH sent a Chapter 91-A request to the Concord School District seeking: “The complete report submitted to the Concord School Board on September 23, 2019 by an investigator hired to examine the District’s response to complaints of inappropriate behavior by former teacher Howie Leung. This request specifically excludes any identifying information concerning (i) victims and [ii] witnesses who are/were not employed by the District.” *See Exhibit D.* On October 4, 2019, the District responded, stating in part: “The report constitutes ‘[r]ecords pertaining to internal personnel practices’ and is exempt from disclosure. RSA 91-A:5, IV; *see Union Leader Corp. v. Fenniman*, 136 N.H. 624, 626 (1993); *Hounsell v. North Conway Water Precinct*, 154 N.H. 1, 4 (2006). Disclosure of this report would also violate the prohibitions against disclosure of personal school records (RSA 91-A:5, III) and

student education records. Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g(b).” *Id.*

3. Petitioner *Concord Monitor* is the largest daily newspaper that serves the greater Concord area. It is owned by Newspapers of New England, Inc., a media corporation organized under the laws of Delaware that publishes nine daily and weekly newspapers in New Hampshire and Massachusetts. Sixty-five percent of adults in the greater Capital Region market area have read the *Concord Monitor* in the past week. In addition, the *Concord Monitor*’s primary website, www.concordmonitor.com, is the Capital Region’s top local online news destination, with more than 2 million page views in a typical month. Its address is 1 Monitor Drive, Concord, NH 03301. The *Concord Monitor* has written extensively on the Leung matter and the District’s response to his alleged sexual misconduct. Moreover, many readers of the *Concord Monitor* have encouraged the newspaper to seek the September 23, 2019 report in litigation. On November 12, 2019, the *Concord Monitor* sent a Chapter 91-A request to the Concord School District “requesting access to the first report completed by independent investigator Djuna Perkins, which was given to the school board on Sept. 23.” The *Monitor*’s request made clear that it was not seeking “portions of the report that include identifying student information.” See *Exhibit E*. On November 18, 2019, the District responded, stating in part: “The report constitutes ‘[r]ecords pertaining to internal personnel practices’ and is exempt from disclosure. RSA 91-A:5, IV; see *Union Leader Corp. v. Fenniman*, 136 N.H. 624, 626 (1993); *Hounsell v. North Conway Water Precinct*, 154 N.H. 1, 4 (2006). Disclosure of this report would also violate the prohibitions against disclosure of personal school records (RSA 91-A:5, III) and student education records. Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g(b).” *Id.*

4. Respondent Concord School District is a public agency of the State of New Hampshire and, as such, is subject to the Right-to-Know law under RSA 91-A:1-a, V.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this matter pursuant to RSA 91-A:7.

6. Venue is proper in this Court pursuant to RSA 507:9 because Respondent Concord School District is located in Merrimack County.

THE FACTS

7. Primo “Howie” Leung was a special education teacher in the Concord School District for nearly 13 years. He started working at Concord High School in 2016. Before that, he worked at Rundlett Middle School in Concord.⁵

8. On approximately December 10, 2018, the Concord School District commenced an internal investigation of Leung after three students reported observing, on December 7, 2018, Leung kissing the forehead of an 18-year-old high school senior while they were alone in a car. As part of the investigation, the District looked at other interactions between Leung and the student that included “friendly emails,” the “frequent” presence of the student in Leung’s classroom, Leung’s recruitment of the student to the Fessenden School summer program, and Leung giving rides home to the student and a \$200 gift to the student’s mother. The investigation raised concerns about a breach of the code of ethics for teachers, and Concord High School Principal Tom Sica apparently recommended professional development training for Leung. The discipline imposed also included (i) Leung having to step down as the school’s Save Our Cold Kids (SOCK) Club adviser and (ii) a performance improvement plan that involved training on healthy boundaries with

⁵ See Caitlin Andrews, “School district: Internal review found no ‘criminal’ behavior by arrested CHS teacher,” *Concord Monitor* (April 5, 2019), <https://www.concordmonitor.com/Concord-NH-school-district-Howie-Leung-allegations-not-criminal-when-first-reported-24656039>.

students. However, the District elected to not report these findings to the police because the District concluded that there was no evidence of criminal behavior. Though unclear, it also does not appear that the District’s investigation probed additional allegations, as explained below, raised against Leung in 2014 during his time at Rundlett Middle School.⁶

9. On January 31, 2019, the District forwarded the results of its investigation to the New Hampshire Department of Education (“DOE”) and informed the DOE of a possible violation of the DOE’s code of conduct.⁷

10. On February 8, 2019 and February 11, 2019, a Concord High School guidance counselor and art teacher—in their roles as Concord Education Association union representatives—wrote Principal Sica and District Superintendent Terri Forsten in an effort to disprove these three female students who reported seeing Leung kiss a fellow student in a car, suggesting that their eyewitness testimony could have been unreliable. The counselor and teacher also questioned the accounts of two other adult staff members who worked in Leung’s room and shared concerns about Leung’s regular hugging of students and hushed conversations with the student he reportedly kissed. They also disagreed with the District’s decision to send the

⁶ See Caitlin Andrews, “School district: Internal review found no ‘criminal’ behavior by arrested CHS teacher,” *Concord Monitor* (April 5, 2019), <https://www.concordmonitor.com/Concord-NH-school-district-Howie-Leung-allegations-not-criminal-when-first-reported-24656039>; “Timeline of investigation into Concord teacher Howie Leung,” *Concord Monitor* (April 19, 2019), <https://www.concordmonitor.com/Concord-teacher-sex-assault-case-timeline-24956478>; Alyssa Dandrea and Leah Willingham, “Questions surround Concord School Districts handling of Leung allegations,” *Concord Monitor* (May 11, 2019), <https://www.concordmonitor.com/Howie-Leung-investigation-sexual-assault-25446166>; Alyssa Dandrea and Jonathan Van Fleet, “Recommendations reveal Leung’s actions should have been clear warning to administrators,” *Concord Monitor* (October 31, 2019), <https://www.concordmonitor.com/School-District-second-report-released-to-the-community-29914821>.

⁷ See Caitlin Andrews, “Concord school board president addresses community questions surrounding teacher’s arrest,” *Concord Monitor* (May 18, 2019), <https://www.concordmonitor.com/Concord-NH-School-Board-statement-Primo-Howie-Leung-25644871>; Caitlin Andrews, “School district: Internal review found no ‘criminal’ behavior by arrested CHS teacher,” *Concord Monitor* (April 5, 2019), <https://www.concordmonitor.com/Concord-NH-school-district-Howie-Leung-allegations-not-criminal-when-first-reported-24656039>.

investigation report to the DOE for possible additional investigation and discipline. *See Exhibit F.*⁸

11. On February 14, 2019, the DOE, after receiving the result of the District's investigation, notified the Concord Police Department that Leung was allegedly having inappropriate contact with a female student. The Concord Police Department then began a criminal investigation.⁹

12. On March 18, 2019, as part of the Concord Police Department's criminal investigation, a different girl reported to one of the Department's officers that Leung touched her inappropriately and raped her in Concord and at the Fessenden School in West Newton, Massachusetts as part of its Summer English Program between 2015 and 2016. The student was then at Rundlett Middle School while Leung worked there; she is no longer a student in the Concord school system and is not the same student who was involved in the District's December 2018 investigation.

13. The Fessenden School's Summer English Program is a 5-week overnight boarding program for boys and girls ages 9 to 15. Leung started working with the program in 1998 and was its director. On March 19, 2019, the Concord Police Department contacted the Newton Police Department in Massachusetts, which opened a related investigation into sexual assault allegations against Leung.¹⁰

⁸ See also Caitlin Andrews, "Documents: Concord teachers' union reps tried to disprove Leung's student accusers," *Concord Monitor* (June 29, 2019), <https://www.concordmonitor.com/Concord-NH-high-school-teachers-union-representatives-objected-to-Leung-investigation-26407184>.

⁹ See "Timeline of investigation into Concord teacher Howie Leung," *Concord Monitor* (April 19, 2019), <https://www.concordmonitor.com/Concord-teacher-sex-assault-case-timeline-24956478>.

¹⁰ See "Caitlin Andrews, "School district: Internal review found no 'criminal' behavior by arrested CHS teacher," *Concord Monitor* (April 5, 2019), <https://www.concordmonitor.com/Concord-NH-school-district-Howie-Leung-allegations-not-criminal-when-first-reported-24656039>; "Timeline of investigation into Concord teacher Howie Leung," *Concord Monitor* (April 19, 2019), <https://www.concordmonitor.com/Concord-teacher-sex-assault-case-timeline-24956478>; Alyssa Dandrea and Leah Willingham, "Questions surround Concord School Districts handling

14. On March 27, 2019, the police executed search warrants and informed Leung that there was an ongoing criminal investigation of him. That same day, the Concord School District placed Leung on paid administrative leave. However, the only information it made public was that Leung was placed on leave for “personal reasons.”¹¹

15. On March 29, 2019, the Newton District Court in Massachusetts charged Leung with two counts of aggravated rape of a child, one count of aggravated indecent assault and battery on a child under 14, and one count of aggravated indecent assault and battery on a child over the age of 14. A grand jury indicted Leung on these charges, as well as another count of aggravated indecent assault and battery on a child under 14 and another count of aggravated indecent assault and battery on a child over the age of 14.¹²

16. Leung is criminally accused of sexually assaulting this female victim in 2015 and 2016 when she was 13 and 14 years old and a student at Rundlett Middle School. Leung’s alleged victim says that she was sexually assaulted by Leung many times over this period. Much of this abuse allegedly occurred while she was an unpaid helper at the Fessenden School. The victim alleges that Leung assaulted her repeatedly in his office, in the tunnels of the school buildings where the campers were playing tag, and in her own dorm room. Leung allegedly assaulted her approximately 20 times over the course of two summers. However, she also reported being inappropriately touched by Leung on several occasions at Rundlett Middle School while he was a

of Leung allegations,” *Concord Monitor* (May 11, 2019), <https://www.concordmonitor.com/Howie-Leung-investigation-sexual-assault-25446166>.

¹¹ See “Timeline of investigation into Concord teacher Howie Leung,” *Concord Monitor* (April 19, 2019), <https://www.concordmonitor.com/Concord-teacher-sex-assault-case-timeline-24956478>; Alyssa Dandrea and Leah Willingham, “Questions surround Concord School Districts handling of Leung allegations,” *Concord Monitor* (May 11, 2019), <https://www.concordmonitor.com/Howie-Leung-investigation-sexual-assault-25446166>.

¹² See Alyssa Dandrea, “Update: Concord High teacher accused of sexually assaulting local girl in Massachusetts,” *Concord Monitor* (April 4, 2019), <https://www.concordmonitor.com/Concord-NH-High-School-special-education-teacher-arrested-24601556>; Eileen O’Grady, “Howie Leung pleads not guilty to six sex assault charges in Massachusetts,” *Concord Monitor* (July 2, 2019), <https://www.concordmonitor.com/Leung-in-court-26710775>.

special education teacher there, both on school property and in his vehicle when he gave her rides home. The victim stated that the encounters with Leung made her feel “degraded” and “less than other people.”¹³

17. The Concord Police Department arrested Leung on April 3, 2019. Leung was extradited to Massachusetts in mid-April 2019.¹⁴

18. On May 17, 2019, Concord School Board president Jennifer Patterson sent a letter to the community after receiving public feedback from parents. She, in part, defended the District’s December 2018/January 2019 investigation, stating that the “process worked” to bring Leung’s behavior to light. See *Exhibit G*.

19. In June 2019, it became public that Ana Goble in 2014—who was then a seventh grade student at Rundlett Middle School—reported first to some fellow students and then to her parents that Leung was crossing boundaries with students. She reported that Leung was holding special lunches and field trips with a select group of girls. She felt boundaries were being crossed and said that Leung’s relationship with some students was inappropriate. However, rather than take Goble’s complaints seriously, then Rundlett Middle School principal Tom Sica suspended Goble for spreading “malicious and slanderous gossip.” Thereafter he became and was the principal of Concord High School during its December 2018/January 2019 investigation of Leung. It is unknown whether, after Goble raised her concerns in 2014, Rundlett Middle School administrators conducted any investigation or elevated these allegations to the District. The District’s treatment of Goble is concerning. Her suspension caused her tremendous guilt for trying

¹³ See Eileen O’Grady, “Concord High teacher facing sex assault charges held without bail in Massachusetts,” *Concord Monitor* (April 17, 2019), <https://www.concordmonitor.com/Howie-Leung-arraigned-in-Newton-Mass-on-sex-assault-charges-24929001>.

¹⁴ See “Timeline of investigation into Concord teacher Howie Leung,” *Concord Monitor* (April 19, 2019), <https://www.concordmonitor.com/Concord-teacher-sex-assault-case-timeline-24956478>.

to do the right thing. In June 2019, the District agreed to apologize to Ms. Goble face to face, eliminate the suspension from her record, pay a \$15,000 settlement, and conduct district-wide training on best practices in protecting students from educator misconduct and addressing complaints by students and educators regarding potential Title IX discrimination.¹⁵

20. In mid-June 2019, the District agreed to have an independent investigation conducted into how it handled reports of Leung’s inappropriate behavior, both in 2014 in response to Goble’s complaint and in December 2018/January 2019 following the report of three students that Leung kissed a student in a car. At the same time this independent investigation was announced, the District also announced that Concord High School Principal Tom Sica would be placed on voluntary paid administrative leave, presumably because his response to the multiple allegations concerning Leung would be examined as part of the investigation. These announcements came days after the District’s settlement with Ana Goble’s family became public.¹⁶

21. On July 1, 2019, the District commissioned Djuna Perkins—an attorney from Massachusetts who conducts investigations, training, advice and litigation for schools, businesses, and individuals—to complete an “independent investigation into how Board policies and procedures had been followed in December 2014 and December 2018.” See *Exhibit H*, July 1, 2019 Concord School Board Minutes, at p. 8 (Agenda Item 12). Investigator Perkins was formerly a prosecutor and chief of the Boston District Attorney’s Domestic Violence Unit and is the founder

¹⁵ See Caitlin Andrews, “CHS student says she was suspended after talking about arrested teacher’s behavior four years ago,” *Concord Monitor* (June 12, 2019), <https://www.concordmonitor.com/Concord-NH-student-suspended-after-alerting-school-district-to-Leung-behavior-26117347>.

¹⁶ See Alyssa Dandrea, “Concord School District will contract with an attorney to investigate reports of teacher misconduct,” *Concord Monitor* (June 13, 2019), <https://www.concordmonitor.com/Independent-investigation-Concord-School-District-Leung-26251874>; Caitlin Andrews, “CHS principal Tom Sica on paid leave while district conducts investigation,” *Concord Monitor* (June 21, 2019), <https://www.concordmonitor.com/Concord-High-School-principal-Tom-Sica-graduation-questions-26407464>.

of the Association of Sexual Misconduct and Discrimination Investigators of New England.¹⁷ At the same time, the District contracted with Attorney Stephen Bennett of Wadleigh, Starr & Peters, PLLC to (i) serve as a liaison between the School Board and Perkins (including “scheduling witnesses, obtaining documents, etc.”), and (ii) enter into an agreement with Investigator Perkins. *Id.*

22. On August 22, 2019, while Investigator Perkins’s investigation was pending—and in the wake of significant concerns raised by the public as to the District’s response to Leung’s behavior—Superintendent Forsten wrote a letter to District staff stating that it was time to move forward. This letter is stunning in that it acknowledges the District’s decision to neither be transparent nor respond to inquiries concerning how it handled the Leung investigation. It states, in part:

I know there are questions about why we have not offered a response – why we have not offered an alternative perspective to counteract this negativity. To participate in and respond to these stories would be a full-time job and very likely would garner an increased number of negative responses. We have chosen a different response – we have chosen to take a close look at policies and procedures that support a safe environment for teaching and learning and safe schools for Concord students. We have chosen to put energy into *moving forward*.

See *Exhibit I* (emphasis in original). In the letter, Forsten cited policy changes made over the summer intended to increase student safety and the district-wide staff training scheduled for the following week on sexual harassment prevention and the state’s mandatory reporting law. Forsten did not directly address Leung and his misconduct. However, she said recent newspaper articles and social media posts about the District in the wake of Leung’s arrest have “presented singular

¹⁷ See Caitlin Andrews, “Concord School Board hires investigator to examine its handling of Leung case,” *Concord Monitor* (July 1, 2019), <https://www.concordmonitor.com/Concord-NH-school-board-hires-investigators-into-district-handlings-of-Howie-Leung-reports-26698328>.

perspectives and have negatively impacted some of the community's viewpoint of our schools and work." *Id.*

23. The Superintendent's August 22, 2019 letter generated significant backlash from the Concord community because of its tone. Soon thereafter, approximately 3,000 individuals signed a petition seeking the removal of Superintendent Forsten and Principal Sica.¹⁸

24. On August 29, 2019, in a letter to parents and staff, Superintendent Forsten apologized for "poorly" choosing her words in her August 22, 2019 letter and for not properly conveying how seriously she is taking students' reports of sexual harassment and abuse. She wrote, in part: "As you know, last week I sent a letter to all district staff members. In that letter, I made a serious error when I unfairly labeled media and social media coverage of the recent and historical events that have occurred in our school district. It was not my intent to discount the news or the community's reaction to what has been reported. More importantly, I did not mean for my words to be in any way dismissive or discouraging of our students and their experiences."

See Exhibit J.

25. On September 23, 2019, Investigator Perkins submitted her report to the Concord School Board addressing the District's response to complaints of inappropriate behavior by Leung. It is this report that is at issue in this case.¹⁹ As part of her investigation, Investigator Perkins spoke with nearly 60 school employees and a dozen students and their parents.

¹⁸ See Leah Willingham, "Critical of media coverage, Concord superintendent says it's time to move on," *Concord Monitor* (August 23, 2019), <https://www.concordmonitor.com/Concord-Superintendent-addresses-teacher-training-in-letter-to-staff-27932978>; Leah Willingham, "Petition to remove Concord superintendent garners more than 1,400 signatures," *Concord Monitor* (August 25, 2019), <https://www.concordmonitor.com/Parents-petition-for-vote-of-no-confidence-for-Concord-High-principal-superintendent-27972948>.

¹⁹ See Leah Willingham, "Update: Concord board members surprised by news of district shakeup," *Concord Monitor* (September 29, 2019), <https://www.concordmonitor.com/Concord-School-Board-reviewing-report-from-independent-investigator-28830243>.

26. Four days later, on September 27, 2019, the Concord School Board announced that Superintendent Forsten had been placed on paid administrative leave. It was announced that Assistant Superintendent Donna Palley would take over as interim superintendent. In an interview with the *Concord Monitor*, School Board Chair Jennifer Patterson stated that the Board is beginning to consider whether to discipline or terminate any staff members after reviewing the report.²⁰

27. Days later, it was announced that the District's acting superintendent, Donna Palley, is not credentialed with the DOE to serve as a top administrator, and had not been credentialed for the 8 years she was in the role of assistant superintendent. Business administrator Jack Dunn was also not properly credentialed with the DOE.²¹

28. Since the announcement of the September 23, 2019 Perkins report, many members of the public residing in the District have demanded its release so that they can learn more about whether the District's response to the Leung allegations was appropriate. They did so at an October 7, 2019 School Board meeting. However, the Board refused through the District's lawyer. At this meeting, Attorney Stephen Bennett informed attendees on behalf of the District that the District would not release the report because, in its view, doing so could put students at risk and discourage members of the community from coming forward about misconduct in the future. He said: "Other disclosures of personnel reports have resulted in public embarrassment, humiliation, and even retaliation against individuals who are merely witnesses and not wrongdoers The

²⁰ *Id.*

²¹ See Leah Willingham, "Update: DOE says it's a 'problem' Concord's acting superintendent does not have proper credentials," *Concord Monitor* (September 29, 2019), <https://www.concordmonitor.com/Assistant-superintendent-not-credentialed-for-job-with-department-of-education-28912742>; Ethan DeWitt, "Concord's remaining top two administrators lack Department of Education credentials," *Concord Monitor* (October 3, 2019), <https://www.concordmonitor.com/Concord-school-district-business-administrator-also-lacks-Department-of-Education-credentials-29039966>.

board believes that ... such disclosures could be harmful to individuals who have done nothing wrong.”²²

29. On October 25, 2019, the *Concord Monitor* reported after a review of 300 pages of emails secured under Chapter 91-A that, despite a public announcement that Concord High School Principal Tom Sica was on a voluntary paid leave of absence between June and September, Sica was allowed to remain on the job throughout the summer and into the new school year outside of the public eye. This time frame coincided with the ongoing independent investigation. The District did not publicly acknowledge that Principal Sica was working in any capacity during this timeframe before this disclosure. Some Concord School Board members subsequently said that they were misled by Superintendent Forsten about the parameters of Principal Sica’s “leave of absence” while an investigation into his handling of student reports of misconduct took place.²³ One of the emails referenced in the *Concord Monitor*’s reporting was a June 29, 2019 email from Assistant Principal Steve Rothenberg telling school leaders, including other assistant principals, the following:

Despite the vagueness of the Monitor’s headlines, this was a voluntary decision [to go on paid leave] by [Sica] ... in conjunction with the superintendent. The goal is to allow the investigation to take place in a seamless manner Please feel free to communicate with him regarding regular school business without reservation. Big picture? Tom is in a very complicated situation. The district administrators are in 100% support of him – and his quality decision-making methods. The current news is sourced from one side at this time and therefore we are very much in support of the district contracting with the outside independent investigator to sort through this.

See id.

²² See Leah Willingham, “School board lawyer warns of ‘public embarrassment, humiliation and retaliation’ if Concord report is release,” *Concord Monitor* (October 7, 2019), <https://www.concordmonitor.com/Oct-7-school-board-meeting-29166122>.

²³ See Leah Willingham, “CHS principal continued to work despite leave, 300 pages of emails show,” *Concord Monitor* (October 25, 2019), <https://www.concordmonitor.com/Cost-of-report-investigations-29605252>; Leah Willingham, “School board members say they were misled by superintendent about principal’s leave,” *Concord Monitor* (October 30, 2019), <https://www.concordmonitor.com/Concord-school-board-members-did-not-know-the-extent-Sica-was-working-on-leave-29828659>.

30. On October 30, 2019, Investigator Perkins submitted her second report which only addressed, without mentioning Leung by name, policy recommendations with respect to the reporting of sexual misconduct. The District made this report available to the public. The October 30, 2019 report states, in part: “Failure to enforce ... policies [concerning staff social media, internet use, personal communications at school, and maintaining professional appearance] can enable boundary violations and sexual misconduct. Because sexual predators use ambiguity to perpetrate their crimes, even minor rule infractions can be indicators of potential boundary violations.” See *Exhibit A* (Oct. 30, 2019 Perkins Report, at p.7). This October 30, 2019 report sheds no new light on what administrators did or did not do following the two student reports concerning Leung.

31. On November 1, 2019, at a special meeting of the Concord School Board, the Board unanimously accepted the resignation of Superintendent Terri Forsten. Franklyn Bass of Manchester, who previously served as superintendent of the Pelham and Dresden school districts, was chosen by the Board to help lead the District until a permanent superintendent is chosen. It was revealed at or around this time that, during a nonpublic September 25, 2019 Board meeting, the Board voted to not renew Forsten’s employment and to terminate her employment with the District, presumably in response to the September 23, 2019 Perkins report.²⁴

32. Similarly, on November 4, 2019, it was announced that Concord High School principal Tom Sica had resigned, and that the School Board had unanimously accepted his resignation. It was revealed at or around this time that, during this same nonpublic September 25,

²⁴ See Alyssa Dandrea, “Forsten out as Concord School District superintendent,” *Concord Monitor* (November 1, 2019), <https://www.concordmonitor.com/Concord-School-Board-meeting-interim-superintendent-29946305>.

2019 Board meeting, the Board voted to terminate Sica's employment. This vote, again, occurred two days after the Board received the September 23, 2019 Perkins report.²⁵

33. On November 11, 2019, it was reported that former Superintendent Forsten and former Principal Tom Sica were paid a combined \$259,494 as part of their severance agreements following their departures from the Concord School District. These payouts were made in addition to the money Forsten and Sica received while on administrative leave. These taxpayer-funded payments were made without the public being informed of whether Forsten and Sica acted inappropriately in how they handled allegations that Leung was abusing students. The District has continued to refuse to explain why Forsten and Sica were removed from their roles in the District.²⁶

34. In sum, this case raises significant questions about the adequacy of the Concord School District's December 2018/January 2019 investigation, as well as how it handled student Ana Goble's 2014 report that Leung was violating student boundaries. After investigating the December 2018 report that Leung had engaged in inappropriate behavior with a student, the District never contacted the police, and Leung remained employed for over 3 months. Yet, based on the same information, the DOE notified the police, which then undertook the investigation that resulted in the charges against Leung. All the while the District has been far from transparent about its investigation and decision-making, citing "personnel reasons."²⁷

²⁵ See Leah Willingham, "Tom Sica resigns as Concord High Principal following investigation," *Concord Monitor* (November 4, 2019), <https://www.concordmonitor.com/School-board-meeting-after-superintendent-s-resignation-30031978>.

²⁶ Leah Willingham, "Payouts to Concord Superintendent, Principal Exceed \$250,000," *Concord Monitor* (Nov. 11, 2019), <https://www.concordmonitor.com/Payout-information-for-Terri-Forsten-Tom-Sica-30267789>.

²⁷ See Caitlin Andrews, "Concord school board president addresses community questions surrounding teacher's arrest," *Concord Monitor* (May 18, 2019), <https://www.concordmonitor.com/Concord-NH-School-Board-statement-Primo-Howie-Leung-25644871> ("However, she said it is 'difficult (or impossible) to answer many of the questions about the district's actions regarding Leung' without violating privacy protection laws for students and staff.").

ARGUMENT

35. Part I, Article 8 of the New Hampshire Constitution and the Right-to-Know law are the fundamental prerequisites for a self-governing people. As the legislature made clear in the preamble to the Right-to-Know law: “Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both *the greatest possible public access* to the actions, discussions and records of all public bodies, and their accountability to the people.” RSA 91-A:1 (emphasis added). The Right-to-Know Law “helps further our State Constitutional requirement that the public’s right of access to governmental proceedings and records shall not be unreasonably restricted.” *Goode v. N.H. Legis., Budget Assistant*, 148 N.H. 551, 553 (2002).

36. The Right-to-Know Law has a firm basis in the New Hampshire Constitution. In 1976, Part 1, Article 8 of the New Hampshire Constitution was amended to provide as follows: “Government . . . should be open, accessible, accountable and responsive. To that end, the public’s right of access to governmental proceedings and records shall not be unreasonably restricted.” New Hampshire is one of the few states that explicitly enshrines the right of public access in its Constitution. *Associated Press v. State*, 153 N.H. 120, 128 (2005). Article 8’s language was included upon the recommendation of the Bill of Rights Committee to the 1974 Constitutional Convention and adopted in 1976. While New Hampshire already had the Right-to-Know Law to address the public and the press’s right to access information, the Committee argued that the right was “extremely important and ought to be guaranteed by a constitutional provision.” LAWRENCE FRIEDMAN, *THE NEW HAMPSHIRE STATE CONSTITUTION* 53 (2d ed. 2015).

37. Consistent with these principles, courts resolve questions under the Right-to-Know Law “with a view to providing the utmost information in order to best effectuate the statutory and

constitutional objective of facilitating access to all public documents.” *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 546 (1997) (citation omitted). Courts, therefore, construe “provisions favoring disclosure broadly, while construing exemptions narrowly.” *Goode*, 148 N.H. at 554 (citation omitted).

I. The Non-Identifying Information in the September 23, 2019 Report is Not Protected by RSA 91-A:5, III Governing Student Education Records or the Family Educational Rights and Privacy Act (FERPA).

38. Neither FERPA nor RSA 91-A:5, III’s exemption for “[p]ersonal school records of pupils” apply here because Petitioners are only seeking non-identifying information in the September 23, 2019 report that would not lead to the identification of individual student victims or witnesses, as well as their families. In fact, the District has confirmed that this report does not use students’ names.

39. Records pertaining primarily to teachers and officials’ conduct are not “education records” prohibited from release within FERPA’s meaning because they do not contain information directly related to a student. 20 U.S.C.A. § 1232g; *Hampton Bays Union Free School Dist. v. Public Employment Relations Bd.*, 62 A.D.3d 1066, 1069 (N.Y. Sup. Ct., App. Div., 3d Dep’t 2009) (“In our view, teacher disciplinary records and/or records pertaining to allegations of teacher misconduct cannot be equated with student disciplinary records and do not contain ‘information directly related to a student’ such that disclosure is proscribed under this statutory scheme.”) (internal citations omitted). FERPA was only intended to protect students, not teachers and public officials. *See Klein Indep. Sch. Dist. v. Mattox*, 830 F.2d 576, 579 (5th Cir. 1987) (finding teachers do not fall within the class of people for whose benefit FERPA was created); *Brouillet v. Cowles Pub. Co.*, 791 P.2d 526, 533 (Wash. 1990) (holding that disclosure of records

specifying reasons for teacher certificate revocations as a result of sexual victimization of students was not prohibited under FERPA because the statute protects student records, not teacher records).

40. Here, the September 23, 2019 report's information concerning the District's administrators and teachers is not a protected "education record" under FERPA because the disclosure of this information would not identify students. Moreover, the tangential mention of students and their families as witnesses to teacher misconduct is not enough to render information in the report protected under FERPA. *See* 20 U.S.C.A § 1232g(a)(4)(A); *see also Easton Area School District v. Miller*, 191 A.3d 75, 82 (Pa. Commw. Ct. 2018) (holding video depicting teacher disciplining a student was not an "educational record" under FERPA because, although video captured images of bystander students, it was directly relevant to the teacher's performance, not the students).

41. Even if the sections of the report containing identifying student information are within FERPA's scope (and they are not), the District can release the report without violating FERPA if the report is presented in a way that minimizes intrusion on the student's privacy, such as redacting students' names and personally identifiable information. *See Brouillet v. Cowles Pub. Co.*, 114 Wash. 2d 788, 791 P.2d 526 (1990) (holding FERPA did not prohibit disclosure to third party publisher of records evaluating a teacher's sexual misconduct because it included redactions protecting the privacy of student victims). Here, the September 23, 2019 report already does not contain student names, and Petitioners have eliminated the risk of the District violating FERPA by specifically requesting that personally identifiable information concerning students, family members, and non-governmental actors be redacted from the September 23, 2019 report prior to its release.

II. The Non-Identifying Information in the September 23, 2019 Report Does Not Pertain to an “Internal Personnel Practice” Under RSA 91-A:5, IV.

42. The District’s reliance on the “internal personnel practices” exemption under RSA 91-A:5, IV is to no avail, especially given this Court’s obligation to construe Chapter 91-A exemptions narrowly. *See Goode*, 148 N.H. at 554. This is for two independent reasons.

43. *First*, consistent with FOIA Exemption 2 (5 U.S.C. § 552(b)(2)) governing records that are “related solely to the internal personnel rules and practices of an agency,” the “internal personnel practices” exemption does not apply here because this exemption deals only with “rules and practices governing employee relations or human resources,” *Milner v. Department of the Navy*, 562 U.S. 562, 570 (2011), not with individual employee information like that contained in the September 23, 2019 report. The New Hampshire Supreme Court’s application of this exemption to personnel information related to individual employees in *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993) and *Hounsell v. North Conway Water Precinct*, 154 N.H. 1 (2006) was in error and should be overruled. Indeed, in *Reid v. N.H. Attorney General*, 169 N.H. 509 (2016), the New Hampshire Supreme Court questioned the correctness of *Fenniman* and *Hounsell*. The *Reid* Court noted that, in *Fenniman*, it “did not examine whether a broad, categorical interpretation of ‘internal personnel practices’ might render the exemption [in RSA 91-A:5, IV] for ‘personnel ... files whose disclosure would constitute invasion of privacy’ in any way redundant or superfluous.” *Id.* at 520. The *Reid* Court further noted that, in *Fenniman*, it had failed to consult decisions from other jurisdictions with similar statutes addressing “internal personnel practices,” noting that the exemptions contained in the Federal Freedom of Information Act (“FOIA”) were similar to those contained in Chapter 91-A. *Id.* The *Reid* Court conceded that its interpretation of the “internal personnel practices” exemption in *Fenniman* and *Hounsell* had been “markedly broader” than the U.S. Supreme Court’s interpretation of its federal counterpart

in the FOIA's Exemption 2, while acknowledging that it had departed from its "customary Right-to-Know Law jurisprudence by declining to interpret the exemption narrowly and declining to employ a balancing test in determining whether to apply the exemption." *Id.* at 521, 520. Consequently, the *Reid* Court declined to extend *Fenniman* and *Hounsell* beyond their own factual contexts and returned to its "customary standards for construing the Right-to-Know Law." *Id.* at 522.

44. Petitioners make this argument for preservation purposes. The question of whether *Fenniman* should be overruled on this basis is currently before the New Hampshire Supreme Court in the following two cases that will be argued on November 20, 2019: (i) *Union Leader Corporation et al v. Town of Salem*, Case No. 2019-0206, brought by ACLU-NH and the Union Leader Corporation seeking access to an unredacted version of an audit report that was heavily critical of the Salem Police Department's culture and internal affairs practices; and (ii) *Seacoast Newspapers, Inc. v. City of Portsmouth*, Case No. 2019-0135, brought by Seacoast Newspapers, Inc., the publisher of the Portsmouth Herald and other area papers, seeking access to an arbitrator's report in an employment action filed by a former Portsmouth police officer who was terminated after receiving an inheritance in excess of \$2 million from an elderly woman with dementia.

45. *Second*, even if *Fenniman* is correct that the "internal personnel practices" exemption includes individual employee information like that in the September 23, 2019 report, these portions of the report are not "personnel" related. The question of whether a record is "personnel" related does not focus on whether any portion of its contents contains personnel information, but rather on whether the "nature and character" of the record itself is or was "generated in the course of an investigation of claimed employee misconduct." *See Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 58 Mass. App. Ct. 1, 10 (2003);

Hounsell, 154 N.H. at 4. The New Hampshire Supreme Court, following the United States Supreme Court decision in *Milner v. Dep't of the Navy*, 562 U.S. 562 (2011) interpreting the FOIA, has defined “personnel” in the context of RSA 91-A:5, IV’s “internal personnel practices” exemption and explained: “[T]h[e] term refers to human resources matters. ‘Personnel,’ in this common parlance, means ‘the selection, placement, and training of employees and ... the formulation of policies, procedures, and relations with [or involving] employees or their representatives.’” *Reid*, 169 N.H. at 522 (quoting *Milner*, 562 U.S. at 570) (emphasis added). The Court added: “In general, then, the term ‘personnel’ relates to employment.” *Id.*

46. As the *Worcester Telegram* Court held, information may confidentially exist in a personnel file for employment purposes, but that same information may exist elsewhere in a separate document that has no employment purpose and therefore is a public record. *Worcester Telegram*, 58 Mass. App. Ct. at 10. The Court explained:

[T]he memorandum from the chief to Officer Tarckini constitutes exempt “personnel [file] or information,” while documents from the internal affairs investigation proper, including the interviews, the reports, the conclusions and recommendations, and the documenting of its results to the complainant are not so exempt. However, when considered in light of the purpose of the public records law, it is not at all illogical that the Legislature would intend the bricks and mortar of the investigation and the documenting of its results to the complainant to fall outside the exemption for “personnel [file] or information,” but would intend the actual order and notice of disciplinary action issued as a personnel matter from the chief to the target of the disciplinary investigation to be exempt.

Id. (emphasis added).

47. Here, as in *Worcester Telegram*, the September 23, 2019 report was not generated for disciplinary reasons, but rather for a broader purpose—namely, to ascertain how the District responded to Leung’s alleged misconduct. Indeed, the District’s July 1, 2019 Board minutes make that clear, explaining that Investigator Perkins was retained to complete an “independent investigation into how Board policies and procedures had been followed in December 2014 and

December 2018.” See *Exhibit H*, July 1, 2019 Concord School Board Minutes, at p. 8 (Agenda Item 12). Moreover, the September 23, 2019 report might touch upon conduct and/or policies that apply to School Board members who had oversight of District administrators. None of these Board members are employed by the District; thus, any such parts of the report would not meet the definition of “internal” as defined in *Reid*. See *Reid*, 169 N.H. at 523 (noting that the investigation “must take place within the limits of an employment relationship”).

III. If the Non-Identifying Information in the September 23, 2019 Report Pertains to an “Internal Personnel Practice” Because it Contains Individual Employee Information, Then Applying this Exemption Categorically Without a Public Interest/Privacy Interest Balancing Test Runs Contrary to RSA 91-A:5, IV.

48. If the non-identifying information in the September 23, 2019 report constitutes “internal personnel practice” information because it contains individual employee information, then Petitioners contend that *Fenniman/Hounsell’s* categorical application of this exemption—without a public interest balancing analysis—was incorrect as a matter of statutory interpretation. These decisions, which *Reid* appropriately criticized, should be reconsidered and overruled on this independent basis. See, e.g., *Bolm v. Custodian of Records of the Tuscon Police Department*, 969 P.2d 200 (Ariz. Ct. App. 1998) (refusing to fashion a blanket rule protecting police personnel and internal affairs records from a public records request, and finding that a balancing test should be applied to determine whether a particular record should be released).

49. Requiring a balancing analysis is consistent with RSA 91-A:5, IV’s text. This provision exempts: “Records pertaining to *internal personnel practices; confidential, commercial, or financial information*; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files *whose disclosure*

would constitute invasion of privacy.” RSA 91-A:5, IV (emphasis added). As the Court explained in *Union Leader Corp. v. City of Nashua*, 141 N.H. 473 (1996):

When we review exemptions from the Right-to-Know Law, we balance the public interest in disclosure of the requested information against the government interest in nondisclosure, and in privacy exemption cases, the individual’s privacy interest in nondisclosure. *See, e.g., Chambers v. Gregg*, 135 N.H. 478, 481 (1992); *Mans v. Lebanon School Bd.*, 112 N.H. 160, 162 (1972).

Id. at 475-76.

50. Consistent with this textual interpretation, this Court has repeatedly found that this balancing test is required for “confidential, commercial, or financial information” in RSA 91-A:5, IV. *See Union Leader Corp.*, 142 N.H. at 552-553 (public interest balancing applies to “confidential, commercial, or financial information” in RSA 91-A:5, IV; “We have interpreted our statute ... as requiring analysis of both whether the information sought is ‘confidential, commercial, or financial information,’ and whether disclosure would constitute an invasion of privacy.”) (emphasis in original); *Union Leader Corp. v. N.H. Ret. Sys.*, 162 N.H. 673, 679 (2011) (same); *Mans v. Lebanon School Board*, 112 N.H. 160, 162 (1972) (same). It would be internally inconsistent for New Hampshire courts to reject such a balancing analysis with respect to “internal personnel practices,” while requiring such a balancing analysis as to “confidential, commercial, or financial information” which are listed in the same sentence of RSA 91-A:5, IV. The statute provides no basis to treat these exemptions differently.

51. Viewing the “internal personnel practices” exemption as categorical, while subjecting the “personnel file” exemption in RSA 91-A:5, IV to a balancing test, would also run the risk of rendering the “personnel file” exemption a nullity. This is because—especially if these two exemptions encompass the same type of individual employee information—a government agency could skirt the public interest balancing analysis required for “personnel file” information

by simply asserting the categorical “internal personnel practices” exemption, thus leaving the “personnel file” exemption without effect. *Reid* highlighted this problematic reality. *See Shapiro v. United States DOJ*, 153 F. Supp. 3d 253, 280 (D.D.C. 2016) (noting in the FOIA context that Exemption 2 must contain a public interest test because, otherwise, Exemption 6 “would have little purpose [since] agencies could simply invoke Exemption 2 to protect any records that are used only for ‘personnel’-related purposes”); *Reid*, 169 N.H. at 520 (quoting *Shapiro*).

52. Petitioners make this argument for preservation purposes. This argument is also currently before the New Hampshire Supreme Court in the following two pending cases: (i) *Union Leader Corporation et al v. Town of Salem*, Case No. 2019-0206; and (ii) *Seacoast Newspapers, Inc. v. City of Portsmouth*, Case No. 2019-013.²⁸

²⁸ As the Supreme Court has explained: “[W]e will overturn a decision only after considering: (1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.” *Ford v. N.H. Dep’t of Transp.*, 163 N.H. 284, 290 (2012). *First*, the failure of the Supreme Court in *Fenniman* and *Hounsell* to apply a public interest/privacy interest balancing analysis to “internal personnel practices” is unworkable and incomprehensible because, as *Reid* explained, all the other exemptions in the same sentence of RSA 91-A:5, IV textually require courts to engage in such balancing. As *Reid* suggested, all these exemptions should be read “in the context of the remainder of the statutory language — in particular, the language exempting “personnel ... and other files whose disclosure would constitute invasion of privacy.” *Reid*, 169 N.H. at 519. It makes no sense for Right-to-Know law jurisprudence to reject such balancing with respect to “internal personnel practices,” while requiring a balancing analysis as to the remaining exemptions covered by the same language in the same sentence. *Second*, given *Reid*’s forewarning, reliance should be given little, if any, weight. Whatever reliance government employees might have concerning their privacy can be assessed as part of the balancing analysis required under Chapter 91-A. Referring to the third factor, as *Reid* makes clear, the law has developed so as to have narrowed the prior holdings of *Fenniman* and *Hounsell* to their facts. Those decisions’ holdings to create a categorical exemption were incorrect then, and they are incorrect now. A balancing analysis must be employed. Otherwise, information meeting the definition of “internal personnel practices” that is in the public interest will never see the light of day. As to the fourth factor, here too *Reid*’s forewarning states why *Fenniman* and *Hounsell* were poorly reasoned and cannot be squared with the text of the exemption. They must be overruled. *See also Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018) (holding that the provision of the Illinois Public Labor Relations Act which forced public employees to subsidize a union, even if they chose not to join and strongly objected to the positions the union took in collective bargaining and related activities, violated the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern; holding that the Court’s decision in *Abood v. Detroit Bd. of Ed.*, 431 U. S. 209 (1977), was poorly reasoned, had led to practical problems and abuse, was inconsistent with other First Amendment cases and had been undermined by more recent decisions, and was overruled).

IV. If the Non-Identifying Information in the September 23, 2019 Report Pertains to an “Internal Personnel Practice,” Then the Public Interest/Privacy Interest Balancing Test Nonetheless Requires Disclosure.

53. The Supreme Court has explained this public interest balancing test as follows under RSA 91-A:5, IV:

When we review exemptions from the Right-to-Know Law, we balance the public interest in disclosure of the requested information against the government interest in nondisclosure, and in privacy exemption cases, the individual’s privacy interest in nondisclosure. *See, e.g., Chambers v. Gregg*, 135 N.H. 478, 481 (1992); *Mans v. Lebanon School Bd.*, 112 N.H. 160, 162 (1972).

Union Leader Corp., 141 N.H. at 475-76; *see also Prof’l Firefighters of N.H. v. Local Gov’t Ctr.*, 159 N.H. 699, 707 (2010) (citations and internal quotations omitted); *Union Leader Corp.*, 162 N.H. at 679 (same).

54. As explained below, when engaging in this analysis, the September 23, 2019 report must be produced, excluding information that would identify students, families, and non-governmental witnesses.

A. The District and Its Employees/Officials Have No Privacy or Confidentiality Interest With Respect to Their Official Duties That Would Be Invaded By Disclosure.

55. Petitioners are not seeking information about private individuals that courts have frequently protected; rather, Petitioners are seeking information in the September 23, 2019 report concerning the official conduct of District officials. In examining the exemptions in RSA 91-A:5, IV, the New Hampshire Supreme Court has been careful to distinguish between information concerning private individuals interacting with the government—which often has been withheld on privacy grounds depending on the circumstances—and information concerning official actions of government officers and employees—which it generally has ordered to be disclosed. *Compare, e.g., Lamy v. New Hampshire Public Utilities Com’n*, 152 N.H. 106, 111 (2005) (the names and

addresses of private utilities customers can be withheld on privacy grounds under RSA 91-A:5, IV; “The public interest that the Right-to-Know Law was intended to serve concerns “informing the citizenry about the activities of their government ... The central purpose of the Right-to-Know Law ‘is to ensure that the *Government*’s activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed.””) (emphasis in original); *Brent v. Paquette*, 132 N.H. 415 (1989) (government not required to produce records kept by school superintendent containing private students’ names and addresses); *New Hampshire Right to Life v. Director, New Hampshire Charitable Trusts Unit*, 169 N.H. 95 (2016) (protecting identities of private patients at a women’s health clinic); *with Union Leader Corp.*, 162 N.H. at 684 (holding that the government must disclose the names of retired public employees receiving retirement funds and the amounts notwithstanding RSA 91-A:5, IV); *Professional Firefighters of N.H.*, 159 N.H. at 709 (holding that the government must disclose specific salary information of Local Government Center notwithstanding RSA 91-A:5, IV); *Mans*, 112 N.H. at 164 (government must disclose the names and salaries of each individual public schoolteacher in the district).

56. Courts outside of New Hampshire have also roundly rejected the concept of government officials having a privacy interest with respect to their official conduct. *See City of Baton Rouge/Parish of East Baton Rouge v. Capital City Press, L.L.C.*, 4 So.3d 807, 809-10, 821 (La. Ct. App. 1st Cir. 2008) (holding the public interest in records of investigation into police officers’ use of excessive force trumps officers’ privacy interest; “[t]hese investigations were not related to private facts; the investigations concerned public employees’ alleged improper activities in the workplace”); *Rutland Herald v. City of Rutland*, 84 A.3d 821, 825 (Vt. 2013) (ordering disclosure of records concerning several Rutland Police Department employees who were

investigated and disciplined for viewing and sending pornography on work computers while on duty; noting that “one cannot reasonably expect a high level of privacy in viewing and sending pornography on work computers while on duty at a public law enforcement agency”); *Burton v. York County Sheriff’s Dep’t.*, 594 S.E.2d 888, 895 (S.C. Ct. App. 2004) (sheriff’s department records regarding investigation of employee misconduct were subject to disclosure, in part, because the requested documents did not concern “the off-duty sexual activities of the deputies involved”). These cases are instructive here. See *Union Leader Corp.*, 142 N.H. at 546 (noting that “[w]e also look to the decisions of other jurisdictions” in interpreting Chapter 91-A).

57. In short, there is no privacy interest in protecting a public employee or official from “embarrassment” stemming from possible misconduct or negligence done in an official capacity. The information sought in this case simply does not constitute information about officials’ private lives, “*intimate details* ... the disclosure of which might harm the individual,” see *Mans*, 112 N.H. at 164 (emphasis added), or the “kinds of facts [that] are *regarded as personal* because their public disclosure could subject the person to whom they pertain to embarrassment, harassment, disgrace, loss of employment or friends.” See *Reid*, 169 N.H. at 530 (emphasis added).

B. The Public Interest in Disclosure is Compelling.

58. The public interest in disclosing the non-identifying information in the September 23, 2019 report is compelling.

59. The District’s response to allegations that Leung committed sexual misconduct against students have generated significant public concern among the Concord community. There is reason to believe that the secret September 23, 2019 report documents a failure in how the District responded to allegations that Leung was abusing children, as the Board effectively terminated the District’s Superintendent and High School Principal two days after it received the

report. However, the District has given no reason to the public for its effective termination of these high-ranking officials.

60. Moreover, a second October 30, 2019 report by Investigator Perkins proposing “recommendations” for the District suggests that there may have been failures with respect to how and whether District administrators reported Leung’s boundary violations and potential sexual misconduct, but sheds no light on what administrators did or did not do following students’ reports of misconduct against Leung. *See Exhibit A* (Oct. 30, 2019 Perkins Report). This October 30, 2019 report appears to acknowledge that the District made mistakes with respect to how it handled the Leung matter, but the District refuses to explain to the public what these mistakes were—mistakes that are presumably extensively documented in the September 23, 2019 report at issue in this case.

61. The public also has had no ability to meaningfully vet the adequacy of the recommendations proposed in the subsequent October 30, 2019 report without knowing how the District responded to allegations that Leung was abusing students. Put another way, how can the public evaluate whether the investigator’s proposed new recommendations are adequate if the public does not know specifically what the District may have done incorrectly as part of its investigation into Leung and his alleged misconduct? Concord School Board Member Pam Wicks even acknowledged at an October 29, 2019 candidate forum that “mistakes were made.” *See* <https://www.youtube.com/watch?v=AQJ5Jrjo9x0> (at 10:40). In short, despite these “mistakes” and the strong suspicion of possible negligence by District administrators, the District has decided to keep its citizens in the dark as to what the District knew and when it knew it.

62. But, as the New Hampshire Supreme Court has repeatedly explained, the public interest in disclosure is great when it will potentially expose government misconduct or

negligence. *See, e.g., Union Leader Corp.*, 162 N.H. at 684 (noting that a public interest existed in disclosure where the “Union Leader seeks to use the information to uncover potential governmental error or corruption”); *Professional Firefighters of N.H.*, 159 N.H. at 709 (“Public scrutiny can expose corruption, incompetence, inefficiency, prejudice and favoritism.”); *Reid*, 169 N.H. at 532 (“The public has a significant interest in knowing that a government investigation is comprehensive and accurate. We also note that the rank of the official being investigated and the seriousness of the alleged misconduct will bear upon the strength of the public interest.”) (internal quotations and citation omitted). If it is important enough for the District to use taxpayer dollars at an hourly rate of \$245 to pay for an investigation into how the District responded to allegations that a teacher engaged in sexual misconduct, then surely it is important enough for the public and the taxpayers of Concord to learn the results of this investigation.

C. There is No Governmental Interest in Nondisclosure.

63. There is no governmental interest here that disclosure will chill internal investigations or deter witnesses from reporting sexual misconduct. This is for several reasons.

64. *First*, this interest is not served by secrecy because Petitioners are specifically not seeking identifiable information concerning non-governmental witnesses or students who may have reported sexual misconduct.

65. *Second*, the Supreme Court has rejected a nearly identical argument. *See Goode*, 148 N.H. at 555-56 (rejecting LBA argument that disclosing the interview materials will harm the audit process because (i) auditors are regulated by statute and have an obligation to perform audits and report their findings to the proper governmental entities to which they are accountable, and (ii) there is no evidence establishing the likelihood that auditors will refrain from being candid and forthcoming when reporting if such information is subject to public scrutiny). And even if the

District’s fear was somehow credible (which it is not), Chapter 91-A and Part I, Article 8 of the New Hampshire Constitution have already dictated where the balance tips when government misconduct is implicated—transparency. The presumption under these provisions is that the public is not harmed by transparency, but rather is aided by it because it gives the public the tools to hold the government accountable. See *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476 (1996) (“The legislature has provided the weight to be given one side of the balance . . .”).

66. *Third*, any concern that disclosure will chill internal investigations is speculative. The New Hampshire Supreme Court has emphasized that, in Chapter 91-A disputes, courts must reject such speculative assertions without evidence. See, e.g., *Union Leader Corp.*, 162 N.H. at 681. This Court cannot credit speculative concerns not borne out by evidence, especially where the District “has the burden of demonstrating that the designated information is exempt from disclosure under the Right-to-Know Law.” *CaremarkPCS Health, LLC v. N.H. Dep’t of Admin. Servs.*, 167 N.H. 583, 587 (2015); see also *Nash v. Whitman*, 05-cv-4500, 2005 WL 5168322 (Dist. Ct. of Colo., City of Denver, Denver Cty. Dec. 2005) (ordering that the bulk of internal affairs police files be produced, in part, because the department’s concern that disclosure would chill cooperation of civilian and officer witnesses “did not find significant support in the evidence”); *Soto v. City of Concord*, 162 F.R.D. 603, 614 (N.D. Cal. 1995) (in declining to apply the self-critical analysis privilege, noting that the City’s “general claim that disclosure would harm their internal investigatory system is not sufficient”).

67. Disclosure of the September 23, 2019 report will improve the District, not hinder it. Disclosing will help restore the public’s faith and confidence in the District. See *Rutland Herald*, 84 A.3d at 826 (“redacting the employees’ names would cast suspicion over the whole department and minimize the hard work and dedication shown by the vast majority of the police

department”). If the report and its conclusions become public, the District will be *more* likely to meaningfully investigate incidents of sexual assault in the future. This is because the District will know that its response to such allegations will be subject to public scrutiny. This is precisely how open and transparent government is supposed to work. But, as it now stands, the District is leaving the public in the dark.

D. The Compelling Public Interest in Disclosure Trumps Nonexistent Privacy Interests.

68. Once the private and governmental interests in nondisclosure and public interest in disclosure have been assessed, courts “balance the public interest in disclosure against the government interest in nondisclosure and the individual’s privacy interest in nondisclosure.” *Union Leader Corp.*, 162 N.H. at 679. In performing this balancing test with respect to the September 23, 2019 report, any privacy/confidentiality interest is dwarfed by the compelling public interest in disclosure.

69. Here, the substantial public interest in disclosure is the public’s right to know the complete findings and recommendations contained in the September 23, 2019 report that was paid for by Concord taxpayers. On the other side of the equation, public officials have no expectation of privacy with respect to their official actions.

70. The New Hampshire Supreme Court has consistently stated that this balancing test should be heavily weighted in favor of disclosure, even where the public and privacy interests appear equal. *See, e.g., Reid*, 169 N.H. at 532 (“When a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure.”) (citations omitted); *Union Leader Corp.*, 141 N.H. at 476 (“The legislature has provided the weight to be given one side of the balance”).

V. **If the Non-Identifying Information in the Report Pertains to an “Internal Personnel Practice,” Then Applying this Exemption Categorically under RSA 91-A:5, IV Without a Public Interest/Privacy Interest Balancing Test Would Violate Part I, Article 8 of the New Hampshire Constitution.**

71. The application of RSA 91-A:5, IV’s purported *per se* exemption in this case—without a public interest balancing test—would constitute an “unreasonable restriction” on the public’s right of access in violation of Part I, Article 8 to the New Hampshire Constitution. Part I, Article 8 requires such a public interest balancing analysis. “To determine whether restrictions are reasonable [under Part I, Article 8], we balance the public’s right of access against the competing constitutional interests in the context of the facts of each case. The reasonableness of any restriction on the public’s right of access to any governmental proceeding or record must be examined in light of the ability of the public to hold government accountable absent such access.” *Sumner v. N.H. Sec’y of State*, 168 N.H. 667, 669-70 (2016) (internal quotations and citations omitted); *see also Hughes v. Speaker of the N.H. House of Representatives*, 152 N.H. 276, 290 (2005) (same). As *Sumner* explains, there must be a “constitutional interest” justifying the legislature’s desire to withhold information from the public; a mere policy desire is insufficient. Whether Part I, Article 8 requires a balancing test is also at issue in *Union Leader Corporation et al v. Town of Salem*, Case No. 2019-0206, which is pending at the New Hampshire Supreme Court and will be argued on November 20, 2019.

72. Applying the *Sumner* balancing analysis to the information at issue in this case, the public’s right of access is great for the reasons explained in Section IV.B *supra*.

73. On the other side of the Article 8 equation, the District can raise no interest of “constitutional” dimension that justifies RSA 91-A:5, IV’s purported categorical override of the public’s right of access to this information concerning the official actions of government officials within the District. Government officials do not have privacy interests with respect to their

conduct performed in their official capacity as explained in Section IV.A *supra*. Fear of embarrassment for being held accountable for official actions, of course, is not a cognizable interest. This is because the New Hampshire and United States Constitutions require that the public be informed of how the government officials perform their duties so the government can be held accountable. This is the tradeoff we make as a democratic society. The public interest in knowing about the activities of government officials and employees is even greater when these activities public safety and may implicate misconduct.

74. Demonstrating the overbreadth of *Fenniman*'s creation of a categorical exemption for "internal personnel practices" under RSA 91-A:5, IV, documents are barred from public disclosure under this exemption even where the public interest in disclosure is high and where no privacy interest is implicated. The District apparently views RSA 91-A:5, IV's "internal personnel practices" exemption as even barring the disclosure of information concerning an official or employee who may have engaged in wrongdoing. This is an extraordinary position that hides the bad actions of government officials at the expense of governmental accountability.

75. Rather than effectuate the District's responsibility to create a safe educational environment founded on trust between parents and administrators, the District's policy of secrecy undermines this responsibility. Secrecy damages public confidence in the administration of a school system. On the other hand, disclosing this information will help restore public confidence in the District and help the public better evaluate how the District handled its investigation into Leung. Unfortunately, the District's position appears to be that the public must simply trust that Investigator Perkins's proposed recommendations in her October 30, 2019 report will address any deficiencies—whatever they may be—that may have occurred as part of the District's investigation into Leung. But Article 8 rejects "trust us" accountability in favor of "transparency

accountability,” thereby requiring a public interest balancing test for information that meets the “internal personnel practice” definition under RSA 91-A:5, IV.

CONCLUSION

WHEREFORE, Petitioners respectfully pray that this Honorable Court:

A. Rule that the report submitted to the Concord School Board on September 23, 2019 by an investigator hired to examine the School District’s response to complaints of inappropriate behavior by former teacher Howie Leung—excluding any identifying information concerning victims and their families, as well as witnesses who are/were not employed by the District—are public records that must be made public under RSA Chapter 91-A and Part I, Article 8 of the New Hampshire Constitution;

B. Pursuant to RSA 91-A:8, I, grant Petitioners reasonable attorneys’ fees and costs as this lawsuit was necessary in order to enforce compliance with the provisions of RSA Chapter 91-A or to address a purposeful violation of Chapter 91-A. Fees are appropriate because Respondent knew or should have known that the conduct engaged in was in violation of RSA Chapter 91-A; and

C. Award such other relief as may be equitable.

Respectfully submitted,

DELLIE CHAMPAGNE, THE AMERICAN CIVIL
LIBERTIES UNION OF NEW HAMPSHIRE
FOUNDATION, AND THE CONCORD
MONITOR,

By their attorneys,

/s/ Gilles R. Bissonnette

Gilles R. Bissonnette, Esq. (N.H. Bar No. 265393)

Henry R. Klementowicz (N.H. Bar No. 21177)

American Civil Liberties Union of New Hampshire

18 Low Ave. # 12

Concord, NH 03301

Tel. (603) 227-6678

gilles@aclu-nh.org

henry@aclu-nh.org

Date: November 18, 2019

Certificate of Service

I hereby certify that a copy of the foregoing was sent to counsel for the Concord School District, Attorney Stephen M. Bennett, Esq., Wadleigh, Starr & Peters, PLLC, 95 Market Street, Manchester, NH 03101.

/s/ Gilles Bissonnette
Gilles Bissonnette

November 18, 2019

EXHIBIT A



619 High Street, Ste. 103 Dedham, MA 02026
781.326.6320

REPORT TO THE CONCORD SCHOOL DISTRICT

TO: Stephen Bennett, Esq.

FROM: Djuna Perkins, Esq.

DATE: October 30, 2019

RE: Recommendations following investigation of sexual misconduct of Howie Leung

Few events are as devastating to a community as the revelation that a sexual predator may have lived among them and preyed upon their children undetected for years, all the while receiving accolades for his dedication to his students and the community. The betrayal felt by the City of Concord as a result of teacher Howie Leung's alleged sexual misconduct, as expressed by citizen participation at School Board meetings and in statements given to news media, is palpable and deep. The community has understandably asked how such a terrible thing could happen in a supportive, caring community like Concord.

In the wake of the investigation, the Board asked me to make recommendations to its policies and infrastructure that will help prevent similar violations from recurring in its schools. The recommendations below were based on interviews of dozens of witnesses including teachers, administrators, staff, parents and students; and a review of hundreds of pages of documents including the District's current policies, Employee and Student Handbooks, emails, personnel files, training records, correspondence, text messages, internal school records, yearbooks, and Facebook pages.

I. **Accept that Sexual Abuse Can and Does Occur in Public Schools; and that Non-Sexual Boundary Violations Are Often Precursors to Sexual Abuse.**

For the sexual predator, schools are a hunting ground. Based on my investigation, my overriding recommendation to the Board, District staff and administrators, and the Concord community, is to accept that sexual misconduct can and does occur everywhere, including in public schools, regardless of how supportive, caring or wholesome a community may be; regardless of whether a staff member has no prior criminal history, has been credentialed by the Department of Education, or is a popular or charismatic teacher; and regardless of whether a District has policies prohibiting misconduct and mandating reporting of suspected sexual abuse. Wherever there is a vulnerable person (or population) subject to the authority of another person (or population), sexual misconduct can occur, and a sexual predator will use any tools at his or her disposal, including ambiguity of rules, a lack of enforcement of rules, or a charismatic personality, to accomplish it.

II. The District Should Conduct a Climate Survey of Staff, Students and Families.

Creating a school environment that is safe for students begins with establishing a culture in which all community members feel comfortable reporting concerns and are confident that the concerns will be addressed. In the wake of significant incidents of sexual predation, many communities conduct climate surveys to better assess current perceptions about school culture, and identify strengths and weaknesses in the school environment with respect to sexual misconduct.

I recommend that Concord conduct a climate survey of staff, parents and students to gain insight into the current understanding of each constituency about sexual misconduct and their perceptions of how the District has responded to complaints of sexual misconduct. Since strengths and weaknesses in responding to any type of complaint may also impact the District's responses to sexual misconduct, the District should also consider including general questions related to the District's management and leadership of the schools, in addition to those specific to all types of sexual misconduct and other types of discrimination. A climate survey will help the District to design a comprehensive program of trainings, initiatives, policy and response protocols customized to meet the specific needs of the community that will help establish a new culture in which all community members feel safe and respected. It can also allow participants who have not already been heard in some other forum a mechanism to air any complaints or concerns so that the District maximizes the information it has and can respond appropriately.

III. Establish a Comprehensive Protocol for Responding to Concerns Related to Sexual Misconduct

In general, District policies meet statutory requirements, but establishing a comprehensive, coordinated protocol for responding to all concerns about sexual misconduct will ensure consistency and accountability. For clarity, many institutions use a unified complaint process that applies to both staff and students. The complete protocol (including definitions of prohibited conduct, how to report concerns, and a detailed description of the complaint process) should be published in all student and staff handbooks and on public bulletin boards visible to students and staff.

A. All Allegations of Boundary Violations and Sexual Misconduct Should be Reported to the Title IX Coordinator.

The Concord School District must abide by numerous state laws governing sexual misconduct, and it must also comply with Title IX of the Educational Rights Act of 1972, the federal law that prohibits gender discrimination in educational opportunities, because sexual misconduct is a form of gender discrimination. As discussed below, although the OCR has since withdrawn the 2014 guidance, schools in New England continue to rely on it.

In 2014, the United States Department of Education’s Office for Civil Rights (“OCR”) promulgated “Questions and Answers on Title IX and Sexual Violence,” which provided comprehensive guidance applicable to all schools receiving federal funding.¹ The 2014 Q&A provides:

A Title IX coordinator’s core responsibilities include overseeing the school’s response to Title IX reports and complaints and identifying and addressing any patterns or systemic problems revealed by such reports and complaints. This means that the Title IX coordinator must have knowledge of the requirements of Title IX, of the school’s own policies and procedures on sex discrimination, and of all complaints raising Title IX issues throughout the school. To accomplish this ... the Title IX coordinator must be informed of all reports and complaints raising Title IX issues.... The school should ensure that the Title IX coordinator is given the training, authority, and visibility necessary to fulfill these responsibilities.

Current District protocol requires anyone with a concern of sexual misconduct to report it to a designated administrator. In practice, these administrators are the principals of each school. The principals then report to the superintendent, who is the ultimate decision-maker. I recommend the District change the current protocol to require that any community member (including staff, students and families) report potential Title IX violations—including any concerns about non-sexual boundary violations—directly to the District’s Title IX Coordinator, who would coordinate the District’s response and any investigation. Authority to make disciplinary decisions would remain with the principals and Superintendent. Reporting all complaints to the Title IX Coordinator will:

- Ensure consistent responses that comply with District policies
- Enhance impartiality by removing oversight of investigations from the person ultimately responsible for discipline
- Instill confidence in the community that complaints will be heard and thoroughly investigated; and
- Promote the reporting of sexual misconduct.

Reporting all concerns to the Title IX Coordinator would also serve another critical function: ensuring institutional knowledge of concerns about sexual misconduct related to any particular staff member, student or trend. Since the Title IX Coordinator does not have disciplinary authority, peers could report concerns about non-sexual boundary violations to the Title IX Coordinator without fear of unfairly jeopardizing a colleague’s career, but confident that someone with the necessary expertise and authority is aware of the issue and can respond appropriately. With a complete clearinghouse of information, the Title IX Coordinator would be in the best position to evaluate when to simply keep a watchful eye, when to take preventive measures before behavior escalates, when to ensure that behavior of concern is monitored, and

¹ Although the 2014 Q&A, promulgated during the Obama administration, was withdrawn in September 2018, most schools continue to rely on its guidance.

when to initiate a formal investigation. The Title IX Coordinator could also receive anonymous reports or those in which the complainant requests confidentiality and act on those complaints to the extent possible.² Tracking trends and patterns will also allow the Title IX Coordinator to determine whether and when training is needed for staff, students or even families in a particular area.

B. Administrators Tasked with Investigating and Responding to Sexual Misconduct Must Be Impartial and Have Specialized Training or Experience.

As any professional in the field will attest, sexual misconduct investigations are complex and require specialized skills in evidence-gathering and analysis compared to other types of misconduct.³ They also can take considerable time and effort. For this reason, the 2014 Q&A advised that sexual misconduct investigations should be “adequate, reliable, impartial and prompt,” and conducted by investigators with “training or experience handling complaints of sexual violence.” Professionals in the field also widely recognize that investigators should be “trauma-informed,” i.e., they should be aware of the impacts of trauma as well as the signs and symptoms of trauma, integrate that knowledge into the investigation, and avoid re-traumatization of victims of sexual misconduct. Trauma-informed investigations also attempt to ensure victim safety and autonomy to the extent possible.

Some schools have trained investigators on staff who investigate complaints, sometimes in addition to other responsibilities. Others utilize outside investigators. Still others use a combination of internal and external investigators, referring investigations to outside investigators when internal investigators are overburdened or as an extra precaution to avoid the appearance of bias in a particular case. Whatever model the District chooses can be successful, as long as the investigator has adequate training and time to conduct a thorough and impartial investigation. In school settings, because of the compressed calendar and academic requirements, there is often tension between completing an investigation quickly and being thorough. The District must be careful to use child safety as its overriding guide in balancing these sometimes, competing concerns.

In addition, I strongly recommend that the District conduct all sexual misconduct investigations—even those between students and those between staff—at the District, rather than the school level to avoid the appearance of bias, reduce the risk of retaliation, and minimize re-traumatization and embarrassment among individuals who will have ongoing contact unrelated to the investigation.

² In some instances, based on the egregiousness of a particular act or a pattern of behaviors that jeopardizes the safety of all students, the Title IX Coordinator may determine that an investigation should proceed even if the alleged victim does not want to initiate a disciplinary process. In these instances, the District should continue to engage with, and support, the alleged victim as appropriate.

³ While the resources available to law enforcement can be helpful, alternative sources of information often provide equally convincing evidence; and a referral to law enforcement does not relieve a school of its obligation to conduct an internal investigation.

C. The District Should Impose Interim Measures to Ensure Student Safety.

In matters involving student safety, it is standard practice in schools (and workplaces) to place an employee on paid leave upon receipt of a credible allegation of sexual misconduct, and to take any other reasonable measures necessary to ensure the safety of all students, such as issuing a “No Contact” or “No Trespass” order. See OCR Q&A at 32-33. Such measures prevent retaliation against the reporting student, and they protect all students who might be at risk of harm, without depriving the staff member of a livelihood without due process. It is also standard practice to provide support to an alleged victim to the extent possible, such as by providing referrals to counseling services and offering academic accommodations. OCR Q&A at 32-22.

Since all school employees are mandated reporters, the District should also refer students who are--or are suspected to be--alleged victims of sexual misconduct to a survivors’ advocacy organization in the community, and they can help empower students to come forward and to pursue other rights available to them. The District should also inform alleged victims of sexual misconduct of the other legal rights available to them, including to pursue criminal prosecution, to obtain restraining orders against perpetrators in court if appropriate, to file complaints at other agencies such as the New Hampshire Department of Education and the Office for Civil Rights, and to file a civil lawsuit.

To encourage reporting and accountability for sexual misconduct, the District should also adopt an “amnesty” policy, i.e., a policy to refrain from disciplining students who report sexual misconduct for minor violations of school rules occurring during the sexual misconduct.

D. The District Should Inform Involved Parties of the Outcome of the Investigation.

The District should inform victims of sexual misconduct (and/or their families, if the student is a minor, or with the student’s permission if the student is 18 years of age or older) of the general conclusion of the investigation (e.g., that the investigation concluded that the alleged misconduct did or did not occur) as well as any sanctions that impact the victim directly, such as the issuance of a No Contact order or removal from school—even if the victim is not the party bringing the complaint.

E. Sanctions Should Be Proportionate to the Conduct and Consistent with Other Discipline

In all instances in which a sexual misconduct investigation concludes that misconduct occurred, the sanction should be proportionate to the conduct, consider all mitigating and aggravating factors, and be consistent with discipline meted out in similar situations.

F. The District Should Provide an Appeals Process

Similar to the right of appeal provided in suspension and termination matters (for both staff and students), the School should provide an appeal process on the grounds of procedural error, previously unavailable evidence, or where a sanction is substantially disproportionate to the findings.

IV. Train Staff and Administrators to Recognize “Red Flags” of Sexual Misconduct and to Report and Respond Appropriately.

Sexual misconduct against children can be especially challenging to detect. Many adults have difficulty recognizing and articulating abuse when it happens to them, and delayed reporting of sexual misconduct is a well-known phenomenon among all age groups and populations. Identifying sexual abuse in children is even more difficult because of children’s varying developmental abilities to recognize abuse and advocate for themselves against the adults they are taught to trust and obey.

A child of twelve or thirteen who does complain of inappropriate behavior will not necessarily express themselves in language that would clearly suggest a violation of a school’s sexual misconduct or discrimination policy. A child who is directly asked about sexually inappropriate behavior may deny it because of fear of repercussion to themselves, to their family or even to their abuser, or because they do not understand that what is happening is sexual misconduct. Even students who do recognize that what is happening is abuse may be unable to disclose it until they feel safe to do so. Adolescents, even if they have reached the age of sexual consent or the age of legal majority, are not developmentally adults and may still have difficulty distinguishing between a healthy sexual relationship and one that exploits them. Even parents may not have adequate training in recognizing the signs that their child may be the subject of sexual misconduct.

Because sexual acts generally take place outside of public view and without video recording, the greatest chance of detection of sexual abuse results from careful observation of any behaviors that violate policies, social norms or physical boundaries, whether the behavior is overtly sexual or not. It is also critical to be alert to behaviors of a student that may be indicators of sexual abuse, including depression and its symptoms, anxiety, declining academic performance, substance abuse, aggression and other discipline problems, risky sexual behavior, eating disorders, and self-harm.

For these reasons, the burden is on educators, who are trained in child development, experienced in working with children, and collectively spend more time with children than any

family member, to be alert to potential signs of sexual misconduct, even subtle or vague ones, regardless of the age or gender of the student, and to report all signs of it when it arises.

Both students and staff should receive annual training in identifying and reporting sexual misconduct that goes beyond mere recitation of policies. The training should specifically address concerns about reporting peers; and should also address “grooming,” i.e., the non-sexual boundary violations that often precede sexual abuse. Administrators should receive separate training in creating a culture in which students, staff, faculty and community members feel comfortable reporting concerns without fear of repercussion; and in identifying and reporting sexual misconduct and grooming behaviors.

V. The District Should Enhance Supervision of Staff and Students

A school’s greatest value is in the critical relationships that develop between educators and students, the best of which instill a lifelong love of learning and can result in significant mentoring. Yet the line between guiding students and exploiting them is fine. Maintaining such a delicate balance requires adherence to clear boundaries between teacher and student.

A. Staff

1. General

Administrators should document any concern that results in verbal counseling of a staff member for conduct issues and use progressive discipline for any behavior warranting discipline. Administrators should also walk the halls regularly to be aware of the general comings and goings and activities of students and staff so that they will be able to identify unusual activity that may warrant further inspection.

2. Social Media, Internet Use, Personal Communications, Professional Appearance

The District has standard policies for staff about social media, internet use, personal communications at school, and maintaining professional appearance. The social media policy specifically discourages teachers from communicating with students on Instagram, Snapchat and Facebook, and forbids teachers from using personal social networking sites during school. Failure to enforce such policies can enable boundary violations and sexual misconduct. Because sexual predators use ambiguity to perpetrate their crimes, even minor rule infractions can be indicators of potential boundary violations.

3. The District should not permit students to spend significant time in the classrooms of a teacher to whom they are not assigned; nor to request information about a student who is not assigned to them.

Staff should not be permitted to work with their students in the presence of unassigned students because it violates FERPA and makes supervision of the unassigned students challenging. Moreover, the District should not permit teachers to disclose information about students to teachers who are not assigned to them without express permission of the student's parents and consultation with the student's guidance counselor. Teachers should report receiving any such requests to the Title IX Coordinator.

4. Schedule changes

Changes to a student's schedule should not be permitted without express written permission from the student's parent.

5. Transportation

The District should adopt a policy clearly outlining situations in which a staff member may provide transportation to students and vice versa. The policy should include the requirement that the school administration and students' parents receive prior notice of the transportation arrangements and give consent.

6. Communication with students

The District should adopt a policy clearly outlining when and how teachers may communicate with students both inside and outside of school above and beyond the current policy discouraging communication via social media and in compliance with the New Hampshire Department of Education's Code of Ethics.

7. Gifts

In accordance with the Code of Ethics adopted by the Department of Education in 2019, and in addition to the prohibition against students giving teachers gifts, the District should adopt a policy forbidding staff from giving anything of value to students (except rewards/awards authorized by the administration) in compliance with the New Hampshire Department of Education's Code of Ethics.

8. Fraternization with students

The District should consider adopting a policy discouraging staff from socializing with students outside of school and requiring staff to disclose any relationships with students that require in-person contact outside of school or school sanctioned events, such as employment or family relationships.

9. Physical contact with students

The District should consider adopting a policy forbidding staff from hugging students or engaging in any physical contact with a student other than as a momentary hand on a shoulder or arm, or a handshake/fist bump. But see RSA 126-U: 1 which defines child restraints, but permits “brief touching or holding to calm, comfort, encourage, or guide a child.”

B. Students

1. Lockdown Panels

Most doors in the high school and middle school have small windows that staff are instructed to cover with “lockdown panels” during active shooter drills to discourage shooters from entering a classroom. These panels should be removed at the end of the drill so that any activity in the classroom may be observed from the hallway.

2. Lunch Time

Students at the middle school and high school should be required to eat lunch in the cafeteria or other specific areas designated by the administration. Any area in which a student is permitted to have lunch or spend free time should be supervised. This ensures that administrators know the location of students in case of emergencies and that all students are appropriately supervised.

3. Cell Phone Policy

In 2014, RMS forbid students from using their cell phones during the school day, even during lunch or free periods. Administrators should question any teacher’s failure to enforce reasonable restrictions on student behavior.

4. Nomenclature

The District requires students to address teachers by their last names, with the appropriate title. This formality reminds both staff and students that their relationship is that of teacher and pupil and not one based upon friendship. As discussed above, administrators should question any teacher’s failure to enforce District standards of behavior because it could be an indication of other boundary violations.

VI. The District Should Err on the Side of Notification to Authorities and Parents/Guardians of Minor Children

New Hampshire law provides immunity to those who make good faith reports of *suspected* abuse to DCYF and law enforcement. For this reason, most schools take the conservative approach of notifying DCYF, local police and parents/guardians of:

- any allegation involving a possible sexual relationship between a teacher and student (because of the New Hampshire law forbidding sexual penetration of a person between the ages of 13 and 18 by a person with authority over that person who uses that authority to coerce the victim to submit);⁴
- any allegation of sexual misconduct by one student on another student who is under the age of 18⁵; and
- consensual sexual conduct between students when one or both parties is under the age of sexual consent.

If the allegation is unfounded or outside the agency’s jurisdiction, the authorities so determine and close the case with no negative consequence to the District. The District should also notify parents/guardians of minor children—whether current or former students--of any evidence suggestive of a relationship between a teacher and student that exceeds appropriate boundaries.

VII. The District Should Conduct Regular Evaluations of Administrators

Because administrators set the culture of a school with respect to reporting and responding to sexual misconduct, the District should conduct regular evaluations of administrators using a “360-degree” analysis that includes the perspectives of supervisors, subordinates, peers and families.

VIII. The District Should Ensure Enhanced Supervision of Staff Without Requisite Certification

Administrators should ensure enhanced supervision of individuals without the certification for their assigned roles.

Conclusion

Recovery from these recent events will require considerable time, resources and reflection, but this process also presents the Concord School District with the opportunity to heal and move forward as a stronger community by creating robust response mechanisms, and more importantly, a culture that recognizes and understands the realities of sexual misconduct and the harm it causes, encourages reporting, and holds offenders accountable.

⁴ If a student is age 18 or older at the time of the report, schools report to DCYF if they have reason to believe reportable conduct may have occurred prior to the student’s 18th birthday.

⁵ Schools typically inform alleged victims of sexual misconduct who are 18 years of age or older of their right to inform law enforcement, provide the student with referrals to support services, and request the student’s permission to notify parents/guardians.

EXHIBIT B

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss

UNION LEADER CORPORATION et al.

v.

TOWN OF SALEM

218-2018-CV-01406

FINAL ORDER

I. Introduction

The plaintiffs brought this case under the Right To Know Act, RSA Ch. 91-A, to obtain an unredacted copy of an audit report that is highly critical of the Salem Police Department. The audit was performed by a nationally recognized consulting firm retained by the Town of Salem's outside counsel at the Town's request. The audit looked at only two aspects of the police department's operations, i.e., its internal affairs investigative practices and its employee time and attendance practices. The audit report also includes an addendum that is critical of the culture within the police department and the role that senior police department managers have played in promoting that culture.

The Town has already released a redacted copy of the audit report to the public. The Town admits that the audit report is a governmental record that must be made available to the public in its entirety absent a specific statutory exemption. RSA 91-A:1-a,III; RSA 91-A:4,I and RSA 91-A:5. The Town argues that the redacted portions of the audit report fall within two such exemptions, namely those for "[r]ecords pertaining to internal personnel practices" and "personnel . . . and other files whose disclosure would

constitute invasion of privacy.” RSA 91-A:5. The Town has not cited any other statutory exemptions.

The plaintiffs do not merely dispute the applicability of these exemptions, they also argue that the exemptions cannot be applied without violating their State constitutional right to access public records. N.H. Constitution, Part 1, Article 8. The Town disagrees, arguing that it honored its constitutional obligation by releasing the redacted report.

II. The Court’s Review

The court reviewed the unredacted audit report *in camera* and compared it, line by line, to the redacted version that was released to the public. What this laborious process proved was that—with a few glaring exceptions—the Town’s redactions were limited to:

(A) names, gender based pronouns, specific dates, and a few other incidental references that would identify the participants in internal affairs proceedings;

(B) names, dates and other identifying information relating to specific instances in which employees were paid for details they worked while they were also simultaneously paid for their shifts; and

(C) the name and specific instances in which a very senior police manager worked paid outside details during his regular working hours and purportedly, but without documentation, did so through the use of flex time rather than vacation or other leave time, contrary to Town policy.

III. Governing Law

To paraphrase the famous quote, you apply the law that you have, not the law you might want.¹ A balance of the public interest in disclosure against the legitimate privacy interests of the individual officers and higher-ups strongly favors disclosure of all but small and isolated portions of the Internal Affairs Practices section of the audit report. Yet, New Hampshire law construing the “internal personnel practices” exemption forbids the court from making this balance and requires the court to uphold most of the Town’s redactions in this section of the audit. Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993); see also Hounsell v. North Conway Water Precinct, 154 N.H. 1 (2006); Clay v. City of Dover, 169 N.H. 681 (2017).

The holdings in Fenniman, Hounsell and Clay, construing and applying the “internal personnel practices” exemption in RSA 91-A:5,IV, allow a municipality to keep police department internal affairs investigations out of the public eye. Indeed, Fenniman was grounded in part on legislative history suggesting that confidentiality (i.e. secrecy) would “encourage thorough investigation and discipline of dishonest or abusive police officers.” Fenniman, 136 N.H. at 627.

Notwithstanding that sentiment, the audit report proves that bad things happen in the dark when the ultimate watchdogs of accountability—i.e. the voters and taxpayers—are viewed as alien rather than integral to the process of policing the police. Reasonable judges—including all five justices of the New Hampshire Supreme Court, joining together in a published opinion—have criticized the Fenniman line of cases.

¹“You go to war with the army you have, not the army you might want[.],” Donald Rumsfeld, December 8, 2004, (*Troops Put Rumsfeld In The Hot Seat*, available at www.cnn.com/2004/US/12/08/rumsfeld.kuwait/index.html).

Reid v. New Hampshire Attorney General, 169 N.H. 509 (2016) (severely criticizing, but conspicuously not overruling Fenniman and Hounsell). Consistent with this criticism, reasonable judges in other states have read nearly identical statutory language 180 degrees opposite from the way Fenniman construed RSA 91-A:5,IV. See, e.g., Worcester Telegram & Gazette Corporation v. Chief of Police of Worcester, 787 N.E.2d 602, 607 (Mass. Ct. App. 2003).

However, this court is bound by the Fenniman line of cases and must, therefore, uphold the Town's decision to redact the auditor's descriptions of specific internal affairs investigations. That said, as recounted below, while the Town's redactions may prove nettlesome to the taxpayers and voters, for the most part the publicly available, redacted version of the audit report provides the reader with a good description of both the individual investigations that the auditors reviewed and the bases for the auditor's conclusions.

The Time and Attendance audit is a more classical "internal personnel practices" record. To be sure, the Time and Attendance section of the audit report reveals operational concerns and suggests remedial policies. However, the publicly available version of the audit report describes those concerns, provides the underlying evidence supporting those concerns (with names, dates and places redacted), and includes all of the proposed changes in policy. Accordingly, the court must uphold most, but not all, of the Town's redactions in this section of the audit report.

With respect to plaintiff's constitutional argument concerning the "internal personnel practices" exemption, the New Hampshire Supreme Court has never suggested that the right of public access established by Part 1, Article 8 is any broader

than that established by the Legislature. See generally, Sumner v. New Hampshire Secretary of State, 168 N.H. 667, 669 (2016) (finding that a statutory exemption to Chapter 91-A for cast ballots is constitutional, and noting that such statutory exemptions are presumed to be constitutional and will not be held otherwise absent “a clear and substantial conflict” with the constitution).

With respect to plaintiff’s constitutional argument concerning the “invasion of privacy” exemption, the court finds that the constitution requires no more than what the statute demands.

IV. Specific Rulings With Respect To The Internal Affairs Practices Section Of The Audit Report (i.e., Complaint Ex. A)

Arguably, the entire Internal Affairs Practices section of the audit report could be squeezed into the “internal personnel practices” exemption. However, because the Town released a redacted version of the report, the court looked at each specific redact in light of what has already been disclosed. The court then determined which redactions could be justified under the “internal personnel practices” exemption or the “invasion of privacy” exemption.

The court’s rulings are set forth in page order. Although the terminology does not fit exactly, for the sake of clarity the court either “sustained” (i.e. approved) or “overruled” (i.e. disapproved) each redaction as follows:

A. The redactions on **page 7** are overruled. These redactions do not fall within either claimed exemption. The relevant paragraph describes a conversation between the Town director of recreation and a police supervisor. It was not part of an internal affairs investigation or disciplinary proceeding. The audit report does not even name

the supervisor. It just refers to him or her as "a supervisor." The Town apparently redacted the reference to "a supervisor" to avoid embarrassment: The gist of the passage was that a police supervisor condoned the use of force as form of street justice, contrary to both civil and criminal law. The supervisor told the auditor, "Well, if you are going to make us run, you are going to pay the price." The public has a right to know that a *supervisor* believes that it is appropriate for police officers to use force as a form of extra-judicial punishment.

B. The redactions on **page 36** are overruled. These redactions do not fall within either exception. They simply refer to the facts that (a) a lieutenant was caught drunk driving, (b) an officer left a rifle in a car and (c) there was an event at an ice center. There is no reference to any named individual or to anything specific about any investigation. In today's parlance, the discussion on page 36 is just too meta to fall within either exemption.

C. The redactions on **Page 38** are sustained because they fall within the "internal personnel practices" exemption. They reference the pseudonym of the involved officer and provide the date of the investigation.

D. With the exceptions set forth below, all of the redactions in **Section 5 (pp. 39-91)** are sustained because they fall within the "internal personnel practices" exemption. The audit report does not identify the subject of any internal affairs investigation. Instead it uses pseudonyms such as "Officer A," "Lieutenant B," "Supervisor C," etc. The Town redacted (a) the names of the internal affairs investigators, (b) the names of the individuals who assigned the investigators to each case, (c) in some cases the gender of one or more persons (i.e. the pronouns "he," "she," "his," "her" etc.), (d) the

dates of the alleged incidents of misconduct, (e) the dates of the investigations. All of this was done to protect the identity of the participants in specific internal affairs investigations. This is permissible. The Town also redacted a few locations, as well as other specific facts that might identify a participant. For example, the Town redacted the fact that one individual was a K9 handler, presumably because the Town had specific reasons for believing that information would unmask one or more of the participants. The court finds that this was permissible.

That said, a few of the redactions in Section 5 cannot withstand scrutiny, and are, therefore, overruled, i.e.

- **Page 46-47** was over-redacted. The supervisor should be identified as a supervisor. The employee should be identified as such. Doing so would not intrude upon their anonymity. To this extent the redactions are overruled.

-**Page 58** was over-redacted. It should be made clear that the individual did not take a photograph of the injury. The redaction changes the substantive meaning of the sentence. To this extent the redactions are overruled.

-The term "supervisor" on **page 66** should not have been redacted. The term "supervisor" was redacted from a sentence describing Kroll's (i.e. the outsider auditor's) "grave concern that a Salem PD **supervisor** expressed contempt towards complainants, ignored the policy requiring fair and thorough investigations and has an attitude that this department is not under any obligation to make efforts to prove or disprove complaints against his officers, especially one involving alleged physical abuse while in custody." Why should that "grave concern" not be shared with the public? This redaction is overruled.

-The reference to Red Roof Inn on **pages 67 and 72**, as a place that has seen its share of illicit activity, should not have been redacted. This reference does nothing to identify any participant in an investigation. Public disclosure of the reference might be deemed impolitic, but there is no exemption for impolitic opinions. This redaction is overruled.

-The entirety of **pages 75 through the top portion of page 89**, relating to a December 2, 2017 incident at a hockey rink was already made public. Those pages were originally heavily redacted. However, the unredacted pages were provided to a criminal defendant as discovery and the Town responded by making those pages public.

E. The redactions on **pages 93-94** are sustained because they fall within the "invasion of privacy exemption." These redactions do not relate to an internal affairs investigation. Essentially, a police supervisor spoke gruffly to his daughter's would-be prom date because he disapproved of him as a prospective boyfriend. The supervisor's comments did not relate or refer to his position. The supervisor's comments had nothing to do with the Salem Police Department. The prom date's mother was dissuaded from filing a formal complaint over the gruff comments. The redactions protect the privacy of the supervisor's (presumably) teenage daughter and her young friend. The public interest in the redacted passages is minimal, and is made even more minimal by the fact that most of the audit report has been made public already.

F. The redactions on **Page 99** are overruled. An individual contacted Kroll to explain that he spoke with Deputy Chief Morin and Chief Dolan about a complaint that he had. The individual was pleased with Morin's and Dolan's professionalism. He

decided not to file a complaint. The Town redacted Moran's and Dolan's names and ranks. These redactions do not relate to an internal affairs investigation because there was none. The redactions do not further any privacy interest.

G. The redactions on **page 100** are overruled because they do not fall within either exemption. The redactions do not relate to an internal affairs investigation. Rather, a resident contacted Kroll to complain that the Salem PD allegedly failed to enforce a restraining order. The phrase "restraining order" was redacted, for no apparent reason. No individual officer is identified, even by pseudonym.

H. The redactions on **page 101, item 6** are overruled because they do not fall within either exemption. Kroll was contacted by somebody who opined that complaints against supervisors were not taken seriously. No specific complaint or supervisor was discussed. The Town redacted the fact that the person who contacted Kroll was a former member of the Salem PD. The redaction serves no purpose and does not fall within either of the claimed exemptions.

I. The redactions on **page 101, item 7** are overruled. Kroll was contacted by a person who claimed that the Salem PD arrested a family member without probable cause. The Town redacted the portion of the passage that states the family member believed that the alleged victim in the case had a relationship with a supervisor. There was no internal affairs investigation. No individual is mentioned by name. The redaction does not fall within either of the claimed exceptions.

J. The redactions on **page 101-106, Item 8** are overruled. The redactions relate to statements that a town resident made to Kroll. These are not "internal personnel

practices” and there is no “invasion of privacy.” An investigation was performed by the Attorney General’s office, but this was an “*internal personnel practice.*” See Reid.

K. The redactions on **pages 107 and 108** are all overruled because they do not fall within either claimed exemption. The Town redacted the names of individuals who called Kroll. These calls were not part of an “internal personnel practice.” The callers did not ask for anonymity. They were coming forward. There is no invasion of privacy. Additionally, the redacted reference to the Red Roof Inn has nothing to do with personnel practices or personal privacy.

L. The redaction on **Page 109** is sustained. The pertinent paragraph refers to an internal affairs investigation described at pages 40-41. The same information is the subject of an earlier redaction.

M. The redactions on **Page 110** are overruled. They do not fall within either claimed exemption. The redactions related to Deputy Chief Morin’s dual roles as (a) a senior manager and (b) a union president responsible.

N. The redactions on **Page 118, first full paragraph** are overruled. They do not relate to an internal affairs investigation or any other sort of personnel practice.

O. The redactions on **Page 118-119**, carryover paragraph are sustained. These relate to an individual employee’s scheduling of outside details and time off. Those are classic “internal personnel practices” concerns. Although there is no indication as to whether the same facts are reflected in a formal personnel file, the audit report is itself an investigation into internal personnel practices. Therefore, under Fenniman, the court cannot engage in a balancing analysis but must instead sustain the redaction.

V. Specific Rulings With Respect To The Addendum To The Audit Report (i.e., Complaint Ex. B, "Culture Within The Salem Police Department")

A. The redactions on the **first two sentences of the third paragraph on Page 1²** of the Addendum are overruled. Essentially, the redacted material explains that it was the Chief who took "an extended absence" and "the rest of the week off. This is just a fact, not an "internal personnel practice," or a matter of personal privacy.

B. The remaining redactions in the **third paragraph on Page 1** of the addendum are sustained. Those redactions relate to the manner in which an employee arranged to take vacation leave and other time off from work. This is a classic internal personnel matter.

C. The redactions on the **carryover paragraph on Pages 1 – 2** are sustained for the same reason.

D. The **remainder of the redactions on Page 2** (i.e. those below the carryover paragraph) are overruled. Those redactions relate to operational concerns rather than "internal personnel practices." To be sure, the Chief is identified by name as being personally responsible for the Police Department's lack of cooperation with the Town Manager and Board of Selectmen. However, this was a Departmental policy or practice and the Chief was necessarily essential to the implementation of this policy or practice. The redactions do not fall within either of the claimed exemptions.

E. The redactions on **Page 4** are overruled. The redacted passages relate to comments made by Deputy Chief Morin concerning (a) his opinion of the Town

²The original document was not paginated. **The page numbers refers to the Bates stamped numbers at the bottom of each page of Exhibit B to the Complaint (i.e. the redacted, publicly available document).**

Manager's credibility and (b) his thoughts as to why the outside auditor was hired.

Morin makes reference to a citizen's complaint that the Town Manager referred to the Police Department. However, there is no reference to (a) the substance or nature of the complaint, (b) the year or month of the complaint, or (c) any subsequent investigation. There is no reference to an internal affairs investigation or any personnel proceeding. The redactions indicate that (a) Morin was a subject of the complaint and (b) the complaining party was female. The fact that a citizen made a complaint to the Town Manager is not, in and of itself, an "internal personnel practice." The redactions are not necessary to prevent an invasion of personal privacy.

F. The redactions on **Pages 5** are overruled. The Town redacted the outside auditor's opinions regarding statements that Deputy Chief Morin made on Facebook about the Town Manager. Those statements were disclosed in the publicly available, redacted copy of the report. The only thing that was kept from the public was the characterization of the statements by the auditors. Thus, the redactions do not relate to facts or to any sort of investigation, proceeding or personnel practice. Further, because Morin placed his comments on Facebook, (albeit in a closed group for Town residents), the auditor's opinions about those comments is not an invasion of Morin's personal privacy.

G. The redaction on **Page 6, on the carryover paragraph from Page 5**, is overruled. This redaction relates to post-hoc opinions that "human resources" gave to the auditors relating to Morin's statements on Facebook. However, there was no "internal personnel practice" or proceeding that flowed from Morin's statements. The

Town does not argue that any such practice or proceeding may be forthcoming. The made-for-the-audit opinion does not fall within either of the claimed exemptions.

H. The balance of the redactions on **Page 6** are overruled. Most of these redactions relate to comments about the workplace culture instilled by the Chief and Deputy Chief. Thus, they relate to operational issues, i.e. to the manner in which the department is operated and to the top executives' management style. To be sure, the comments are highly critical of the Chief and Deputy Chief, but not every alleged misstep or every problematic approach to managing a police department is an "internal personnel practice." The line between an operational critique and an "internal personnel practice" is sometimes blurry. In this case, there is no suggestion of a pending, impending or probable internal affairs investigation, disciplinary proceeding or informal rebuke. The information in the auditor's report does not come from a personnel file or from any document that should be in a personnel file. The court finds that the redactions do not fit within either of the claimed exemptions.

The other redactions on **Page 6** relate to the month and year that (a) an unidentified officer was cited for DUI and (b) an unidentified second officer left the scene of an accident without an alcohol concentration test. These facts are not "internal personnel practices." The officer's identities are not disclosed. The redactions do not fall within either claimed exemption and, therefore, they are overruled.

I. The redactions on **the first full paragraph of Page 7** are sustained. These redactions relate to "internal personnel practices." The redactions protect the identity of the participants in the investigation (i.e. the subject and the investigator).

J. The redactions in the **quoted remarks of Chief Donovan on Page 7** are sustained for the same reason. The redactions protect the identity of the witnesses in the internal affairs investigation.

K. The redactions on **the balance of Page 7 and on Pages 8-12** are sustained in part and overruled in part. These redactions relate to two internal affairs investigations involving the same police department employee. However, instead of simply redacting the names of the participants, the Town redacted six pages of facts and analysis. This is a marked departure from how the Town redacted virtually all of the other discussions of internal affairs matters. The court finds that:

1. The only IA participants who are referenced in the audit report are (a) the subject of the investigation and (b) a witness whose name appears on pp.10 and 11. Those individual's names were properly redacted.

2. The other named individuals were not involved in the IA investigation and, therefore, their names should not be redacted.

3. The tension between the Police Chief and the Town concerning the reporting of these matters to the Town authorities is an operational concern, not an "internal personnel practice."

4. The Chief's comments about the matters need not be redacted, except that the references to (a) the individual who was the subject of the investigation, (b) the witness in the investigation and (c) the dates of occurrences may be redacted.

VI. Specific Rulings With Respect To The Time And Attendance Section Of The Audit Report (Complaint Ex. B)

The redacted, publicly available version of the Time and Attendance section of the audit report indicates that a number of police employees (including twelve out of fifteen high ranking officers) were paid for outside details during hours for which they were also receiving their regular pay. To be fair, the audit report does not suggest chicanery or ill-motive. Apparently, the companies that paid for the details would pay for a set number of hours even when the details lasted for a shorter duration and even when the officers returned to work thereafter.

The publicly available version of the audit report also indicates that a very high ranking employee acted contrary to Town policy by working details during business hours and then making up the hours with flex time, rather than leave time.

The Time and Attendance audit was an archetypical workplace investigation into personnel issues. It is the very paradigm, the Platonic Ideal, of a record relating to "internal personnel practices." Nonetheless, the Town has made the bulk of this document public. The redactions in the publicly available report serve mainly to shield the identity of the affected employees.

A. Except to the limited extend described below, all of the redactions of employee names are sustained under the "internal personnel practices" exemption.

B. The dates of the outside work details and the identities of the outside parties that contracted for the details were unnecessarily redacted. Nobody could determine the identity of the affected employees from this information. Therefore, in light of what has already been released to the public, these redactions cannot be justified under

either of the claimed exemptions. The redactions of dates and outside contracting parties are overruled.

C. The court reluctantly sustains the redactions to the interviews of police department employees. These were investigative interviews that focused not only on operational issues but also on potential personnel infractions by the interviewees.

D. The court sustains the redactions to the interview of the former Town Manager for the same reason.

E. The reference to “higher-ranking” officers on **Page 15** of the report is overruled because the same information already appears elsewhere in the publicly available report.

F. The court overrules the redactions on **the last paragraph of Page 40** (relating to a finding with respect to the SPD detail assignment program). This paragraph discusses an operational concern and does not relate to any particular employee’s alleged conduct. Therefore, these redactions do not fall within either of the claimed exemptions.

G. The court overrules the redactions on **Page 42**. The redactions do not apply to any specific individual. The issue was presented as an operational concern going forward rather than a personnel matter. The redactions do not fall within either of the claimed exemptions.

VII. Order

Within 21 days, the Town shall provide the plaintiff’s with a copy of the audit report that contains only those redactions that have been sustained by this court. The

court will stay this order pending the filing of a notice of appeal upon motion by the
Town.

April 5, 2019



Andrew R. Schulman,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 04/05/2019

EXHIBIT C



November 11, 2019

VIA EMAIL (deggert@wadleighlaw.com; sbennett@wadleighlaw.com)

Dean B. Eggert
Stephen M. Bennett
Wadleigh, Starr & Peters, P.L.L.C.
95 Market St.
Manchester, NH 03101

Re: Right-to-Know Request Regarding September 23, 2019 Report

Dear Attorneys Eggert and Bennett:

I represent Concord resident Dellie Champagne. This is a Right-to-Know request on her behalf to the Concord School District (“the District”) pursuant to RSA 91-A and Part I, Article 8 of the New Hampshire Constitution. I understand that you represent the Concord School District. If you do not, please let me know immediately. I ask that your District waive fees associated with responding to this request. Please contact me to discuss the fee waiver in advance of preparing any copies.

Below is the specific request:

1. The complete report submitted to the Concord School Board on September 23, 2019 by an investigator hired to examine the District’s response to complaints of inappropriate behavior by former teacher Howie Leung. This request specifically excludes any identifying information concerning (i) victims and (ii) witnesses who are/were not employed by the District.

In responding to this request, please consider the time limits mandated by the Right-to-Know law. In discussing those limits in *ATV Watch v. N.H. Dep’t of Res. & Econ. Dev.*, 155 N.H. 434 (2007), the New Hampshire Supreme Court has stated that RSA 91-A:4, IV requires that a public body or agency, “within 5 business days of the request, make such records available, deny the request in writing with reasons, or to furnish written acknowledgement of the receipt of the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied.” *Id.* at 440.

If produced, these records must be produced irrespective of their storage format; that is, they must be produced whether they are kept in tangible (hard copy) form or in an electronically-stored format, including but not limited to e-mail communications. If any records are withheld, or any portion redacted, please specify the specific reasons and statutory exemption relied upon.

See RSA 91-A:4, IV (official must “make such record available” or “deny the request in writing *with reasons*”) (emphasis added).

Thank you for your anticipated cooperation. I look forward to hearing from you as soon as possible. Of course, if you have any questions or concerns, do not hesitate to contact me.

Very truly yours,

/s/ Gilles Bissonnette

Gilles Bissonnette
ACLU-NH Legal Director

WADLEIGH, STARR & PETERS, P.L.L.C.

WILLIAM C. TUCKER
EUGENE M. VAN LOAN III, Of Counsel
JOHN E. FRIBERG, Sr.
JAMES C. WHEAT
RONALD J. LAJOIE
JEFFREY H. KARLIN
MARC R. SCHEER
GREGORY G. PETERS
FRANK P. SPINELLA, Jr.
DEAN B. EGGERT
MICHAEL R. MORTIMER
KATHLEEN C. PEHL
RICHARD THORNER
CHARLES F. CLEARY
CHRISTINE GORDON
TODD J. HATHAWAY

Attorneys At Law
95 Market Street
Manchester, New Hampshire 03101
Telephone (603) 669-4140
Facsimile (603) 669-6018

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JOSEPH G. MATTSON
ROBIN D. MELONE
CRAIG S. DONAIS
CHRISTOPHER P. MCGOWN
ABBY TUCKER
STEPHEN M. BENNETT, Of Counsel
ALLISON M. FUSCO
STEPHEN N. ZAHARIAS
ALYSSA M. CASSOTIS
ELIZABETH E. EWING
WILLIAM P. REDDINGTON
MICHAEL G. EATON

Direct Dial: (603) 206-7283
sbennett@wadleighlaw.com

November 13, 2019

Gilles Bissonnette, Esq.
ACLU-NH, Legal Director
Via email: Gilles@aclu-nh.org

Re: Chapter RSA 91-A Request dated November 11, 2019

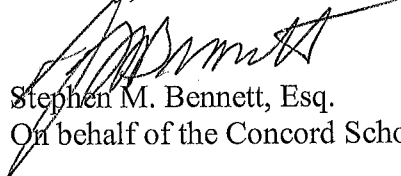
Dear Atty. Bissonnette:

Please accept this letter as the Concord School Board's response to your request pursuant to Chapter RSA 91-A, on behalf of Ms. Champagne, for a copy of an internal personnel investigative report prepared for the Concord School Board. The Concord School Board respectfully declines your request.

The report constitutes "[r]ecords pertaining to internal personnel practices" and is exempt from disclosure. RSA 91-A:5, IV; see *Union Leader Corp. v. Fenniman*, 136 N.H. 624, 626 (1993); *Hounsell v. North Conway Water Precinct*, 154 N.H. 1, 4 (2006). Disclosure of this report would also violate prohibitions against disclosure of personal school records (RSA 91-A:5, III) and student education records. Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g(b).

This internal personnel investigative report is separate and distinct from a second report by Attorney Perkins. That report addresses the adequacy of School District policies and practices regarding how incidents of sexual misconduct should be reported, investigated and resolved. The School Board has released the second report to the public.

Sincerely,



Stephen M. Bennett, Esq.
On behalf of the Concord School Board

SMB/pad
cc: Jennifer Patterson, President, Concord School Board

EXHIBIT D



September 30, 2019

VIA EMAIL (deggert@wadleighlaw.com; sbennett@wadleighlaw.com)

Dean B. Eggert
Stephen M. Bennett
Wadleigh, Starr & Peters, P.L.L.C.
95 Market St.
Manchester, NH 03101

Re: Right-to-Know Request Regarding Report

Dear Attorneys Eggert and Bennett:

This is a Right-to-Know request to the Concord School District (“the District”) pursuant to RSA 91-A and Part I, Article 8 of the New Hampshire Constitution by the American Civil Liberties Union of New Hampshire (“ACLU-NH”). I understand that you represent the Concord School District. If you do not, please let me know immediately.

The ACLU-NH defends and promotes the fundamental principles embodied in the Bill of Rights and the U.S. and New Hampshire Constitutions, including the right to free speech. In furtherance of that mission, the ACLU-NH regularly conducts research into government activities in New Hampshire. We ask that your District waive fees associated with responding to this request. Please contact me to discuss the fee waiver in advance of preparing any copies.

Below is the specific request:

1. The complete report submitted to the Concord School Board on September 23, 2019 by an investigator hired to examine the District’s response to complaints of inappropriate behavior by former teacher Howie Leung. This request specifically excludes any identifying information concerning (i) victims and (i) witnesses who are/were not employed by the District.

In responding to this request, please consider the time limits mandated by the Right-to-Know law. In discussing those limits in *ATV Watch v. N.H. Dep’t of Res. & Econ. Dev.*, 155 N.H. 434 (2007), the New Hampshire Supreme Court has stated that RSA 91-A:4, IV requires that a public body or agency, “within 5 business days of the request, make such records available, deny the request in writing with reasons, or to furnish written acknowledgement of the receipt of the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied.” *Id.* at 440.

If produced, these records must be produced irrespective of their storage format; that is, they must be produced whether they are kept in tangible (hard copy) form or in an electronically-stored format, including but not limited to e-mail communications. If any records are withheld, or any portion redacted, please specify the specific reasons and statutory exemption relied upon. *See* RSA 91-A:4, IV (official must “make such record available” or “deny the request in writing with reasons”) (emphasis added).

Thank you for your anticipated cooperation. I look forward to hearing from you as soon as possible. Of course, if you have any questions or concerns, do not hesitate to contact me.

Very truly yours,

/s/ Gilles Bissonnette

Gilles Bissonnette
ACLU-NH, Legal Director
Gilles@aclu-nh.org

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RICHARD THORNER
CHARLES F. CLEARY
CHRISTINE GORDON
TODD J. HATHAWAY

Attorneys At Law
95 Market Street
Manchester, New Hampshire 03101
Telephone (603) 669-4140
Facsimile (603) 669-6018

WWW.WADLEIGHLAW.COM

Serving New Hampshire since 1899

ALISON M. MINUTELLI
MICHAEL J. TIERNEY
PIERRE A. CHABOT
DONNA J. BROWN
JOSEPH G. MATTSON
ROBIN D. MELONE
CRAIG S. DONAIS
CHRISTOPHER P. MCGOWN
ABBY TUCKER
STEPHEN M. BENNETT, Of Counsel
ALLISON M. FUSCO
STEPHEN N. ZAHARIAS
ALYSIA M. CASSOTIS
ELIZABETH E. EWING
WILLIAM P. REDDINGTON
MICHAEL G. EATON

Direct Dial: (603) 206-7283
sbennett@wadleighlaw.com

October 4, 2019

Gilles Bissonnette, Esq.
ACLU-NH, Legal Director
Via email: Gilles@aclu-nh.org

Re: Chapter RSA 91-A Request dated September 30, 2019

Dear Atty. Bissonnette:

Please accept this letter as the Concord School Board's response to your request pursuant to Chapter RSA 91-A for a copy of an internal personnel investigative report prepared for the Concord School Board. The Concord School Board respectfully declines your request.

The report constitutes "[r]ecords pertaining to internal personnel practices" and is exempt from disclosure. RSA 91-A:5,IV; see *Union Leader Corp. v. Fenniman*, 136 N.H. 624, 626 (1993); *Hounsell v. North Conway Water Precinct*, 154 N.H. 1,4 (2006). Disclosure of this report would also violate the prohibitions against disclosure of personal school records (RSA 91-A:5, III) and student education records. Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g(b).

This internal personnel investigative report is separate and distinct from a forthcoming report which will address the adequacy of School District policies and practices regarding how incidents of sexual misconduct are reported, investigated and resolved. The School Board intends to release this second report to the public.

Sincerely,


Stephen M. Bennett, Esq.

On behalf of the Concord School Board

SMB/pad

cc: Jennifer Patterson, President, Concord School Board

EXHIBIT E

Stephen Bennett
Wadleigh, Starr & Peters
95 Market Street
Manchester, N.H.
03101

November 12, 2019

Dear Attorney Bennett,

Under the state's Right-to-Know Law RSA 91-A, I am requesting access to the first report completed by independent investigator Djuna Perkins, which was given to the school board on Sept. 23.

We anticipate you may consider denying this request on the basis that the report includes "records pertaining to internal personnel practices," which are exempt from disclosure. In addition, the report likely contains student education records, which are protected by the Family Educational Rights and Privacy Act.

It's true, the report likely contains both, but those exemptions and protections do not prevent disclosure of every word on every page of the 100+ page report. As New Hampshire courts have maintained, disclosure should be viewed broadly, and exemptions under RSA 91-A should be construed narrowly.

We request that you redact portions of the report that include identifying student information or internal personnel practices, and release the remaining unredacted portions. When faced with passages that may or may not be exempt, we ask that you give added weight to disclosure in order to provide the public with the "greatest possible access to the actions and records" of the Concord School Board and Concord School District, as required by law.

To be clear, it is not our goal to publish any private student information, and even if such information was included in the report, we will avoid using any identifying information in the newspaper.

In regards to the district's handling of former teacher Howie Leung, School board president Jennifer Patterson has said "mistakes were made."

Simply put, the community has a right to know what those mistakes were, learn from those mistakes, and make sure they are not repeated.

Parents have remarked at school board meetings they need to know the contents of the report to feel confident their children are safe. Multiple members of the public have asked this newspaper to obtain this report.

Given this report concerns matters of student safety, the argument for disclosure couldn't be stronger.

I am seeking access to these records in electronic form in order to avoid any copying fees.

Thank you for your attention to this request. Please contact me as soon as possible if I can clarify the information I am seeking. Otherwise, I look forward to hearing from you within five business days, as required by state law.

Thank you for your time.

Leah M. Willingham
Concord Monitor
lwillingham@cmonitor.com
(603) 369-3322

WADLEIGH, STARR & PETERS, P.L.L.C.

WILLIAM C. TUCKER
EUGENE M. VAN LOAN III, Of Counsel
JOHN E. FRIBERG, Sr.
JAMES C. WHEAT
RONALD J. LAJOIE
JEFFREY H. KARLIN
MARC R. SCHEER
GREGORY G. PETERS
FRANK P. SPINELLA, Jr.
DEAN B. EGGERT
MICHAEL R. MORTIMER
KATHLEEN C. PE AHL
RICHARD THORNER
CHARLES F. CLEARY
CHRISTINE GORDON
TODD J. HATHAWAY

Attorneys At Law
95 Market Street
Manchester, New Hampshire 03101
Telephone (603) 669-4140
Facsimile (603) 669-6018

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ALLISON M. FUSCO
STEPHEN N. ZAHARIAS
ALYSIA M. CASSOTIS
ELIZABETH E. EWING
WILLIAM P. REDDINGTON
MICHAEL G. EATON

Direct Dial: (603) 206-7283
sbennett@wadleighlaw.com

November 18, 2019

Ms. Leah Willingham
Concord Monitor
lwillingham@cmonitor.com

Re: Chapter RSA 91-A Request dated November 12, 2019


Dear Ms. Willingham:

Please accept this letter as the Concord School Board's response to your request pursuant to Chapter RSA 91-A for a copy of an internal personnel investigative report prepared for the Concord School Board. The Concord School Board respectfully declines your request.

The report constitutes "[r]ecords pertaining to internal personnel practices" and is exempt from disclosure. RSA 91-A:5,IV; see *Union Leader Corp. v. Fenniman*, 136 N.H. 624, 626 (1993); *Hounsell v. North Conway Water Precinct*, 154 N.H. 1,4 (2006). Disclosure of this report would also violate prohibitions against disclosure of personal school records (RSA 91-A:5, III) and student education records. Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g(b).

This internal personnel investigative report is separate and distinct from a second report prepared by Attorney Perkins which addresses the adequacy of School District policies and practices regarding how incidents of sexual misconduct should be reported, investigated and resolved. The School Board has released this second report to the public.

Sincerely



Stephen M. Bennett, Esq.

On behalf of the Concord School Board

SMB/pad

cc: Jennifer Patterson, President, Concord School Board

EXHIBIT F

Thomas Sica, Principal
Concord High School
170 Warren Street
Concord, NH 03301

February 8, 2019

Dear Tom,

This letter is in response to your Memorandum dated January 18, 2019 regarding Howie Leung. You have shared with us your concerns regarding Mr. Leung's judgment with respect to maintaining appropriate boundaries with students.

We have a number of serious concerns regarding your memorandum and the investigation that led to it. Principal among these concerns is your conclusion that Mr. Leung "more probably than not" engaged in improper contact with a student, which is not supported by the "facts" presented in the report of the investigation. Your conclusion amounts to little more than a personal opinion based on a flawed investigation.

You assigned the investigation of this matter to Assistant Principal Steve Rothenberg, who wrote a report that you reference as the basis for your memorandum. Mr. Rothenberg's report lacks a balanced presentation of the incidents in question and glosses over significant factors that are essential to understanding these events. Given the direction that administration has chosen to take this matter, we feel compelled to respond in some detail to the issues raised in your memorandum.

As you know, the investigation was prompted by an allegation of improper contact between Mr. Leung and a student in his car on December 7, 2018. This contact was allegedly observed by three students in a car in front of them and ultimately reported to a staff member, who subsequently brought the matter to your attention.

In making your assessment as to the probability of this contact, you cite a wide array of "evidence". In addition to the claims of the three girls, you also refer to friendly emails sent between the student and the teacher, the fact that Mr. Leung sometimes sends emails after 9 PM, the frequent presence of the student in Mr. Leung's classroom, the fact that the teacher recruited this student as a volunteer in a summer program he manages, and a number of other factors.

Aside from the statement of the three girls (and the statements of Mr. Leung and the student), none of the other factors cited speak to a determination of whether or not a specific contact occurred between the teacher and the student. The report either fails to mention or glosses over essential information needed to understand the girls' statements and what happened in that car on December 7, 2018.

According to Mr. Rothenberg's report, the three girls were not interviewed until December 10th - three days after the alleged incident. As the report itself notes, those girls were clearly disposed to discussing the incident (they apparently approached the student who was seen in Mr. Leung's car at least twice to discuss the matter). The notion that the three did not discuss the event extensively amongst themselves seems highly unlikely.

As you may know, eyewitness testimony is widely considered among the most unreliable sources of evidence in factual determinations of this sort. Recent research findings indicate that when witnesses have an opportunity to discuss their observations with each other prior to giving testimony, the likelihood of reporting factual errors rises dramatically.

A discrepancy that the report fails to clarify is what, if any, the relationship is between the three girls and the student in Mr. Leung's car. The report states that only one of the three could even recognize the student in Mr. Leung's car, yet curiously, one of them felt comfortable enough to approach the student twice to ask her how she had gotten home on the day in question.

Mr. Rothenberg's report carefully details how he separated the three girls and took separate statements from each on several occasions. It barely mentions the three intervening days the girls had to discuss their observations before they were ever questioned. It is also important to note that one of the three did not report observing some of the alleged contact between the teacher and the student.

Another key deficiency in the report is that it fails to mention what type of car the girls were in, or their respective position in that car when they allegedly observed the incident. This is essential information since the girls reported initially becoming aware of the incident from their rear-facing mirrors.

As we mentioned to you on several occasions, we have both independently attempted to observe the activity in the cars behind us at various intersections (and while driving several different cars). We found it to be extremely difficult to discern with any confidence or level of relevant detail, what the individuals were doing (or not doing) in the cars behind us. We also found that the type of car one was in, the position of mirrors and one's location within a car profoundly impact one's ability to observe what occurs in nearby cars.

It does not appear from the report that Mr. Rothenberg or any other administrator sat in the girl's car or determined from where in the car and through which mirror each of the girls claims to have made their observations.

It is also important to note that both Mr. Leung and the student deny that any such contact occurred. In fact, the student has evidently undergone repeated intensive interviews regarding the matter. She continues to deny any inappropriate contact. In addition, the student's mother was informed of the investigation and, from what we have been told, she has also not expressed concern about inappropriate conduct between Mr. Leung and her daughter.

When one weighs all of these factors, the allegation that an inappropriate contact "more probably than not" occurred is purely conjecture. We have two girls who say they saw Mr. Leung kiss the student on the forehead and we have three people who either did not observe that alleged kiss or who deny that it occurred. Given the three days of delay before the girls were interviewed and the uncertainties as to how these girls could have seen what they claim to have seen, the preponderance of evidence simply does not support a claim that the conduct "more probably than not" occurred. There is also a concern as to whether the District followed up on the potential harassment of the alleged victim by her classmates, and further subjected her to repeated questioning even after she provided her account of the incident.

In nearly every concern cited in your memorandum and in Mr. Rothenberg's report, one can interpret the conduct as nefarious or as relatively benign. Both documents reflect an apparent inclination to present Mr. Leung's actions in a highly negative light.

We understand that the totality of interactions between Mr. Leung and the student has given rise to concerns about maintaining healthy professional boundaries. Mr. Leung has repeatedly expressed his willingness to participate in further professional development to address these concerns and we support this as a strategy moving forward. That said, we question whether each of the specific instances of conduct listed in your memorandum reach the level of a serious disciplinary infraction. Additionally, we cannot find a violation of any specific policy or standard provided by the District which Mr. Leung should have been aware of.

Among the conduct you cite are sending friendly emails not specifically tied to an academic purpose and the fact that some of Mr. Leung's emails were sent well after the end of the school day. As you know, Mr. Leung is hardly the only teacher at Concord High School who has sent email outside of the school day, in the evening hours, or who engaged in an email exchange that was not strictly tied to an academic purpose.

Clearly Mr. Leung and this student had a close relationship. No doubt this is a factor in why the student chose to work with him in drafting her college essay and in navigating the application process. In fact, from what we understand, the student was editing her college essay and working on college applications during the conference time periods mentioned in your letter. You have not brought to our attention any content of any email or other written communication between Mr. Leung and this student that suggests an exploitative or physical relationship between the two.

Your memorandum cites the fact that Mr. Leung gave the student a ride home as evidence that he has a "distorted sense" of his role in that student's life. Given that the student club had a long scheduled event that night for which the student needed supplies, and that Mr. Leung would not be able to bring the supplies directly to the event as originally planned, Mr. Leung's actions do not justify your characterization. Again, as you know, Mr. Leung is hardly the only staff member at CHS who has given a student a ride home.

With respect to the student's presence in Mr. Leung's room, many students have teachers at CHS whose rooms they use as a home base. Many students use the Commons in the same way. As with the Commons, other adults were generally present in Mr. Leung's room when that student and others were there. Given the presence of all of those other individuals, this would seem an odd venue for pursuing an inappropriate relationship with that student.

In describing the gift Mr. Leung purchased for the student to give her mother, your memorandum fails to mention that Mr. Leung has a history of similar acts of giving to others in our school community. These gifts have ranged from many hours of volunteer time by Mr. Leung to the purchase of sporting equipment, headphones, and cash donations for those in need. His generosity in this regard has not been focused exclusively on this student, as your memorandum implies.

One of the most egregious elements in your memorandum pertains to the term "positive support mentor". You accuse Mr. Leung of having "appointed yourself as [the student's] 'positive support mentor' - a term that does not represent any sanctioned program at Concord High School." As you know, that term owes its origins more to Mr. Rothenberg than it does to Mr. Leung. To suggest that Mr. Leung was asserting "positive support mentor" as some sort of official program is grossly unfair. Mr. Leung only came up with that terminology after repeated questioning by Mr.

Rothenberg, who insisted that Mr. Leung come up with some sort of name for his role supporting a student who was not enrolled in his class or on his caseload. Yet again, Mr. Leung is by no means the only teacher at CHS who has worked to support a student who was not enrolled in his or her classes. We brought this objection to your attention when you first presented the memorandum to Mr. Leung, yet you have declined to remove this verbiage from your memorandum and instead use it repeatedly as a justification for your disciplinary actions.

We are also troubled by your reference to the statements of the two adults who work in Mr. Leung's prep room. You state that they shared concerns about Mr. Leung's "regular" hugging of students. Neither you nor they apparently provide a definition of the term "regular". It is not reasonable to include such an allegation in a disciplinary finding without affording Mr. Leung sufficient information as to the date, time or other relevant context of the alleged conduct. The only specific example you cite of such a hug was to a former student who had apparently come back to visit and who was experiencing hardship. If a hug in that circumstance warrants written disciplinary documentation, Mr. Leung should have plenty of company in receiving such a sanction.

You state that the same two adults accuse Mr. Leung of engaging in "hushed" conversations with the student. Once again, this conduct can be interpreted in a number of ways and, once again, your memorandum and Mr. Rothenberg's investigation glosses over the context of the relationship between Mr. Leung and these two adults. Given that one or both of these adults had complained to a supervisor earlier in the year about Mr. Leung's conduct and what they perceived as the occasionally disruptive atmosphere in Mr. Leung's classroom, any efforts on his part to keep his voice down when speaking to a student seem reasonable and prudent. It should also be noted that this behavior was allegedly reported earlier in the year and that Mr. Leung was not spoken to or given any corrective feedback. Also included in Mr. Rothenberg's report was an allegation that Mr. Leung uncomfortably spoke to an administrative assistant after she reported her concerns to administration. This allegation is unfounded and Mr. Leung denies doing so. Moreover, when visiting that classroom it is not uncommon to witness a number of "hushed" conversations by virtually all of the adults present in that room at a given time.

You also reference two conversations you had with Mr. Leung earlier in the fall. In one of them you addressed concerns about students climbing in a window and the room being a "hangout" for some students not on Mr. Leung's caseload. The second conversation was about the hug with the former student referenced above. You accuse Mr. Leung of ignoring your guidance and direction in those two meetings. This conclusion, once again, lacks a balanced presentation of the facts. From what we understand, there have not been any further instances of students climbing through the windows. It is also our understanding that students are not "hanging out" during the school day. When such students are present they are generally there to work on club related matters or, to quietly engage in their own academic work. In addition, Mr. Leung has been checking in regularly with the other Prep teacher in the room in an effort to ensure that she was comfortable with what was happening in the room. He also sought feedback from his immediate supervisor to ensure that he was handling his duties appropriately. It is our understanding that both individuals assured Mr. Leung that the situation in his classroom was acceptable. To characterize these improvements as 'ignoring' your guidance is unfair and inaccurate and has no bearing on the matter at hand. In fact, this serves as an example of how Mr. Leung appropriately responds to feedback and corrective guidance.


An additional concern is that the S.O.C.K club has not been assigned a new advisor, nor have they been allocated a new meeting location. This subjects Mr. Leung to potentially violating your directives and the superintendent's directives through no fault of his own.

We would like to conclude by reiterating that Mr. Leung has very willingly agreed to pursue professional development opportunities to address your concerns regarding healthy teacher-student boundaries and we support that as a strategy to prevent concerns in this domain from arising in the future. However, for the reasons stated above, we have significant concerns regarding your memorandum and the administration's investigation of these matters. There is a disparity in how Mr. Leung is being treated compared to other similarly situated employees in the District. Additionally, this circumstance, amongst other recent incidents, highlights the fact that there is a glaring absence of mandatory training, specific policies and consistent guidelines provided to guide the employees of the District in their interactions with students. Neither your letter, nor the Superintendent's subsequent response have given clarity to any objective standards to which Mr. Leung, or any other employee, can expect to be held accountable.

As you know, the contract requires that teachers be evaluated "in a fair, open and effective manner." There is a pattern throughout your memorandum and the underlying investigation of presenting Mr. Leung's conduct in a negative light without sufficient factual basis, and of omitting or understating the context necessary to understand Mr. Leung's actions in a more fair-minded and nuanced manner. These deficiencies in this disciplinary procedure fall short of the fairness standard required by the CBA. In addition, we are troubled that Mr. Leung was told that the disciplinary response for his actions would be handled at the school level (which is also indicated in your memorandum) and yet, after a delay of roughly eight weeks, the superintendent reported Mr. Leung to the NH Department of Education for possible additional investigation and discipline.

Given these concerns, we do not believe this disciplinary action is consistent with the CBA.

Sincerely,

A handwritten signature in black ink, appearing to read "Karen Slick". The signature is written in a cursive style and is positioned above the typed name.

Jeff Pullam and Karen Slick,
CEA Building Representatives

cc: T. Forsten
J. Faria

Terri Forsten, Superintendent
Concord School District
38 Liberty Street
Concord, NH 03301

February 11, 2019

Dear Ms. Forsten,

This letter is in response to your letter to Howie Leung dated January 31, 2019. We have a number of objections to your letter and to the way in which the investigation of Mr. Leung was carried out.

We have responded in a separate letter to Mr. Sica regarding his memorandum of January 18, 2019. That letter has been sent to you separately, and is incorporated herein by reference. Based on the deficiencies noted in Mr. Sica's memorandum and the lack of a fair and balanced presentation of the facts underlying the investigation, the handling of this disciplinary matter fails to meet the standard required under our Collective Bargaining Agreement (Section VI:B, F, and Appendix K).

At the time that Mr. Leung was presented with Mr. Sica's memorandum, he was told that the discipline for his conduct would be handled at the high school. It is evident from your subsequent actions that you are opening the possibility of further discipline.

Both your letter and Mr. Sica's memorandum make the claim that an inappropriate physical contact between Mr. Leung and a student "more probably than not" occurred on December 7, 2018. This claim is not supported by the facts. As has been a pattern throughout this investigation, the underlying events have been presented in an unfairly negative light. The relevant context that would enable one to view Mr. Leung's actions in a more reasonable and balanced fashion have been omitted on virtually every "concern" cited in Mr. Sica's memorandum.

In addressing the issue of the \$200 gift, your letter takes this bias even further. You omit a critical detail in stating that the gift was "to the student". That statement is misleading and prejudicial. It is a subtle but significant distinction to note that gift was intended for the student's mother. What is less subtle – and what is omitted from your letter and Mr. Sica's memorandum – is the fact that Mr. Leung has a long history of making generous contributions (both in time and money) to assist a range of students, staff members, and organizations in our community.

Despite a protracted, six-week-long investigation, the district has produced no communications between Mr. Leung and the student that involved attempts to solicit the student or that suggests the existence of or attempt to pursue a physical or romantic relationship. It is important to reiterate that both Mr. Leung and the student deny any improper physical contact and that the student's mother, who presumably has discussed this matter extensively with her daughter, also did not express concern about the nature of the relationship.

Your letter also seems to imply that it is Mr. Leung's responsibility to develop his Professional Improvement Plan and bring it to you by March 4. Requiring Mr. Leung to do so would be in violation of past practice and the CBA. While teachers and the CEA are involved in the process of developing a PIP, the onus for writing and presenting the document is ultimately the administrator's.

Your letter also directs Mr. Leung "to have no contact" with the student. It is unclear what specifically that directive means or how Mr. Leung can reasonably be expected to comply with it. The student in question is still enrolled at Concord High School. We do not know if the student has been advised not to contact or communicate with Mr. Leung. It is virtually certain that the two will pass each other in a hallway. If the student says hello, Mr. Leung is placed in an untenable situation.

Although we believe that Mr. Sica's memorandum and the report issued by Mr. Rothenberg contain material that we would have sought to remove from Mr. Leung's file, the outcome appeared to focus on providing Mr. Leung with professional development opportunities to address Mr. Sica's concerns around professional boundaries. That outcome allowed for a positive and collaborative process to move forward to ensure the proper handling of professional boundaries by Mr. Leung. Your letter appears to be disciplinary action beyond that taken by Mr. Sica's memorandum. Your letter created an unnecessary, adversarial tone and has placed further strain on the relationship between administration and staff.

Given the concerns expressed above, we are reviewing possible options to safeguard Mr. Leung's rights under the CBA and New Hampshire law. In the meantime we request that this letter and our response to Mr. Sica's letter be placed in Mr. Leung's personnel file.

Sincerely,

A handwritten signature in black ink that reads "Karen Slick". The signature is written in a cursive style and is positioned to the right of a vertical line that separates it from the typed name below.

Jeff Pullam and Karen Slick
CEA Building Representatives

cc: T. Sica
J. Faria

EXHIBIT G



Concord School District

100 School Street
Concord, NH 03301

Phone: 603.224.2000
Fax: 603.224.2001

May 17, 2019

Dear Concord School District Community:

I am writing as the President of the Concord School Board to provide an update to the community on Concord School District teacher Howie Leung. Members of the public and school community have reasonable and understandable questions about the District's actions regarding Mr. Leung - yet at the same time, it is difficult (or impossible) to answer many of these questions due to confidentiality protections that exist under law for staff and students. I hope that this letter will give enough information to enable all of you to have a better understanding of the conduct that the District investigated, and the District's subsequent actions regarding Mr. Leung.

On December 10, 2018, the District received an allegation that Mr. Leung had engaged in inappropriate conduct outside of school with an 18-year-old female student. In the following days, the District carried out an extensive investigation during which it questioned students, faculty members, and the parent of the student allegedly involved. Although this investigation revealed certain behaviors that needed to be (and were) addressed, it did not disclose any actions that were illegal under New Hampshire law nor did it disclose actions that met the standard for reporting a teacher to the Concord Police Department. As the investigation proceeded and steps were taken in response to the findings, the District Superintendent communicated regarding the matter with me as School Board President, as well as with the Vice President of the School Board. We were in agreement with those actions when taken and continue to support the decisions made and steps taken by the District Administration.

On January 31, once the investigation was complete and corrective actions had been taken, the District made the decision to provide the State Department of Education with its investigation so it could consider whether to take any additional action. Neither the Department of Education nor the Concord Police Department (which was later contacted by staff at the Department of Education) suggested to the District that its investigation or reporting was untimely, or that they should have been contacted earlier.

We all know now that Mr. Leung has been criminally charged with committing egregious acts. Those charges are based on information discovered through a police investigation that went well beyond the type of investigation that could be conducted by the Concord School District. Information was discovered by the police that was not known or suspected during the District investigation; indeed, the District's investigation revealed no information that would create a reasonable basis for suspecting the type of conduct with which Mr. Leung has been charged.

Throughout this difficult process, the District has focused on preventing any further harm to students while protecting the confidentiality of both students and faculty. Now, with the benefit of hindsight, it is understandable to question whether more could have been done sooner. The process worked, in the sense that the District's decision to turn to the Department of Education, and the Department's decision to turn to the Concord Police, were what revealed the need for further action which has been taken. The District is particularly proud of those members of the school community who brought forward their concerns. Nevertheless, we still have more questions to ask ourselves going forward about what more we can do to create and support a school culture where all members of our community will feel safe.

Thank you for your continued confidence and support during this challenging time.

Sincerely,



Jennifer Patterson,
Concord School Board President

EXHIBIT H



Board of Education, Concord School District
Regular meeting
August 5, 2019

1. CALL TO ORDER	
2. APPROVAL OF AGENDA	pp. 1-2
3. CHS Robotics	
4. PUBLIC COMMENT – agenda items only	
5. APPROVAL OF BOARD MINUTES	
a. Regular monthly meeting (<i>July 1</i>)	pp. 3-11
6. RECOGNITIONS / REPORTS	
a. Data governance – Pam McLeod	pp. 12-14
b. Superintendent’s report	
7. PERSONNEL	
a. Administrator confirmations	pp. 15-16
b. Staff confirmations	pp. 17-18
c. Coach confirmation	p. 19
8. COMMUNICATIONS & POLICY	
a. Report of July 8 meeting	pp. 20-26
b. Report of July 22 meeting	
• Policy #431 Professional Expectations (<i>1st reading</i>)	pp. 27-28
• Policy #432 Reporting Child Abuse and Neglect (<i>1st reading</i>)	pp. 29-31
• Policy #437 Employee – Student Relations (<i>NEW - 1st reading</i>)	pp. 32-33
• Policy #521 Sexual Harassment (<i>1st reading</i>)	pp. 34-40
• Policy #539 Student Safety and Violence (<i>1st reading</i>)	pp. 41-54
Prevention – Bullying (and report forms)	
• Policy #812 Communication of Complaints (<i>1st reading</i>)	pp. 55-56
about School District Employees	
• Memorandum of Understanding – Concord Police (<i>1st reading</i>)	pp. 57-63
Department and Concord School District	
9. CITY & COMMUNITY RELATIONS	
a. Report of July 24 meeting	pp. 65-66

10. OTHER BUSINESS

- Vote on revision of school year calendar 2019-2020 p. 67
- Vote to set a Public Hearing date for the elementary bond refunding

11. PROPOSED CALENDARS OF MEETINGS pp. 68-69

12. PUBLIC COMMENT – any subject, in accordance with Board Policy #132

13. ADJOURNMENT

Concord School District
Board of Education
Regular monthly meeting
July 1, 2019

Board members present: Tom Croteau, Chuck Crush, Barb Higgins, Nancy Kane, Jennifer Patterson, Liza Poinier, Jim Richards, Danielle Smith, Pam Wicks

Administrators: *Superintendent* Terri Forsten, *Assistant Superintendent* Donna Palley, *Director of Facilities* Matt Cashman

Agenda Item 1. Call to Order

Board President Jennifer Patterson called the meeting to order at 7:06 p.m.

Agenda Item 2. Approval of Agenda

Chuck Crush motioned to amend the agenda to allow public comment on any topic at the beginning of the meeting.

Ms. Patterson noted that, subject to Policy 132, she had planned to suggest amending the agenda to include a discussion of and vote on the proposed contracts with an independent investigator into how reports of concerning behavior on the part of a teacher had been handled in December 2014 and December 2018, and an attorney to act as liaison between the Board and the independent investigator. This amendment would allow public comment at the beginning of the meeting that would cover most of the items those in attendance were likely to speak to.

Mr. Crush tabled his motion.

Ms. Patterson motioned to amend the agenda to add an item of discussion at the end of the meeting following the second public comment session, whether the Board should enter into a contract with an independent investigator. Jim Richards seconded the motion.

The Board voted 9-0 to approve the amendment to the agenda made by Ms. Patterson to add the additional item described above (motioned by Ms. Patterson, seconded by Mr. Richards).

Mr. Crush withdrew his motion.

The Board voted 9-0 to approve the agenda as amended (motioned by Ms. Patterson, seconded by Ms. Higgins).

Ms. Patterson noted that public comment would not include discussion of any personnel by name. She drew attention to and read excerpts from Policy 136 Public Participation at Board Meetings and Policy 812 Communication of Concerns to School Officials, which describes the procedure to follow to bring concerns forward. She noted that the Communications Committee would be a more appropriate venue for some concerns. Mr. Richards said that although there is a 5-minute per-person limit on public comments, additional comments could always be submitted in writing.

Agenda Item 3. Public Comment – agenda items only

Concord resident Kate Frey stated that she and her husband, Quentin Goble, have two girls at Concord High School. They have always been supporters of the Concord public school system, and often volunteered when their schedules allowed. She said that her daughter Ana had Mr. Leung in 7th grade in 2014-2015. As reported in the media his behavior around a certain group of girls made her uncomfortable but, when she voiced her concerns to a few girls, she was immediately suspended for three days by Principal Tom Sica. The District settled the family's legal claim around this issue on June 5th. She said that they taught their kids to be respectful of their teachers and school administration, but now feel they need to make things right for their daughter and, now, for several other young women they've learned about recently in the media, who like her also reported concerns only to be marginalized and discredited by those in charge. She noted that she had hoped to say some of what she would say tonight in a private meeting promised to Ana and her family which would include an apology from the Principal and Superintendent. But nearly a month later, they have not had that meeting. She said she is glad that training on sexual misconduct and the proper way to address student complaints will be implemented for District teachers and administrators. She stated, however, that retaliation after reporting discrimination and sexual misconduct is also illegal under Title IX and after Ana spoke up and questioned her teacher, she was retaliated against in the months following, not just with a 3-day suspension. She detailed several of these acts: when "the predator" knew her daughter recognized his grooming tactics early in the school year, he demanded that she, an A and B student, undergo special education testing. She said that, in hindsight, they now believe he did this to discredit her as "behaviorally and emotionally troubled." Whether true or not, her concerns should not have been valued any less. After she was suspended, she was left in the predator's classroom even after the parents asked the Principal to move her, and endured six months of public degradation and humiliation by the predator in his classroom. She stated that other teachers, their daughter's school counselor and the Principal all closed ranks with the predator and ignored incidents of bullying and unfair treatment against their daughter. Ms. Frey stated these were acts of retaliation on a 13-year-old girl, noting that the District must implement strong policies and trainings to protect victims and witnesses from retaliation and protect and support these victims/witnesses. She also spoke to the lack of transparency by the administration during this process. She stated that the Board hired a criminal defense attorney who specializes in

defending perpetrators of sexual assault and works for the same firm that already represents them – as their independent investigator. She stated that missteps and mistakes will be made and bad things will happen but it is what is done to correct them that is important. She said that she and her husband did not push back as much as they should have by those in charge at Rundlett when their daughter was accused of spreading malicious and slanderous gossip while trying to protect her friends from a predator. She said they did not intervene as quickly when they should have when she was retaliated against and will always regret this; the first thing they did once they discovered all of this was to apologize to her, own their mistakes and promise her they would make things right going forward in order to earn back her trust. She urged the District to do the same: own its mistakes, apologize and earn back the trust of the kids and the community.

Concord resident Betsy McNamara thanked the volunteer Board for its work and expertise. Many people in this room have been champions of children for many years. She stated that Howie Leung was their son Sam's case manager for 3 years at RMS and almost 3 years at CHS, and that they had email/phone or text communication daily with him. She said they are still struggling to reconcile the man they knew with the monstrous acts he is accused of. She said she was horrified to learn that he continued teaching for months after the allegations were brought forward in December. She stated she believed Mr. Leung used special education students as a lure to young girls. She said that, while she has spent a great deal of time trying to determine signs of his intent, it was not her family's job to identify grooming strategies and predatory behavior. She said she believed District officials let his charisma and their friendship with Mr. Leung influence their reactions to reports of suspicious behavior. Ms. McNamara said she believes this administration could not lead this community out of the double crisis of sexual assault and of confidence in its own, and must seek professional guidance, or a citizen-led oversight committee.

Hopkinton resident Anne Mandh stated that she was 13 years old and had been a victim of sexual assault. She commented that the voices of the girls trying to report suspicious behavior had been muted, and that this was unacceptable. She stated that these girls were trying to get an education but might be falling behind because of these events. She commented about the story of a girl who reported being sexually assaulted while on a bus to CRTC.

Hopkinton resident Darlene Gildersleeve stated that she was on the Board of Directors of Disability Rights Center, and that a number of Hopkinton students attend CRTC. As a parent of two children with disabilities, she was upset to hear a report that sexual abuse happened on a bus. She said that not only did bus driver not call DCYF as a mandated reporter, but that no one called the police. She said how the then-RMS student was treated likely discouraged other teens (and children with disabilities) from coming forward. She said she worked for a mental health agency and that calling DCYF is mandatory. She also stated that the independent investigator should not be "someone who is protecting criminals." She stated she believed there were other victims of this predatory teacher who would be coming forward.

Concord resident Jennifer Pierson stated that she was the Program Director of the Crisis Center of New Hampshire. She noted that there is no exception to the mandatory reporting requirement and there should be no policy suggesting that one makes such report only to a supervisor. She stated that special needs children are a vulnerable population and that, as part of the "seven stages of grooming," victims almost always part of a vulnerable population. She stated that her agency has spent many years working with new generations to prevent sexual assault, as proved by Ms. Frey's daughter. She said she felt her agency may not have done a good job educating the adults, however: faculty, staff, and administration. She wondered why, if children know when something is wrong and have the ability to come forward and speak as teenagers, adults do not do the same. She encouraged the Board to bring in experts, noting that her agency's services are free of charge; its entire mission is to eradicate sexual and domestic violence.

Ms. Patterson described the planned July 8 meeting, noting that the Superintendent was planning to bring experts to this work. She stated that the Board wanted participation from the public in this work, and noted that further discussion of this topic would occur later on the agenda.

Concord resident Gina Cannon commented that as a community member, the way these internal investigations took place is disappointing. She stated that she was concerned that, even if her special needs child with communication issues was able to tell her something bad was happening, she would not be taken seriously. Ms. Cannon stated that people with disabilities were twice as likely, and children with disabilities were three times as likely, to be victims of sexual assault. Further, children with communication issues were 63 times more likely to be victims. She stated that the decision not to comply with the law mandating reporting, made on multiple occasions, was a misdemeanor, punishable with jail time. She asked the Board how she could send her daughter to CHS next year and know that she would be safe. She noted that education was compulsory but stated that, while she had to give her child into the care of school personnel, she did not think she would be safe.

There was no further public comment.

Agenda Item 4. Approval of Board Minutes

Ms. Patterson asked for a motion to approve the draft minutes of the regular Board meeting on June 3. Mr. Crush pointed out that, apropos the discussion of student safety reflected in those minutes, the Superintendent planned to meet with both DOE and the Concord Police Chief over the summer. Ms. Patterson noted that there was significant discussion about policy review at that meeting. She stated that the June 17 Special Board meeting was held to review and accept the sale of a bond to support the roofing projects.

The Board voted 9-0 to approve the minutes of the regular Board meeting on June 3 and the Special Board meeting on June 17 (moved by Mr. Crush, seconded by Ms. Higgins).

Agenda Item 5. Recognitions

Superintendent Forsten presented a number of summer highlights, including the roofing projects at CHS and BGS, which were on target for completion.

The Behavior Taskforce Leadership Team has been mapping current District resources by school, undertaking a preliminary data review using data-driven questions; establishing guiding questions for the Task Force; creating a schedule of meetings for the fall; developing opportunities for Board and community input.

Summer programs for students included Title I programs; special education programs; CHS credit recovery programs; ELL Programs; CRTC summer camp for middle schoolers

Summer Curriculum development for teachers included 62 teams of teachers (250 teachers in all); researching and developing curriculum from preschool to high school

Curriculum topics included: Preschool Social Emotional Learning; Professional Learning Communities; Kindergarten Curriculum; Elementary Computer Science; Elementary performance ensembles; Young Inventors Program; 6th Grade Digital Citizenship; Engineering - Middle School; Green Screen Studio - Middle School; High School Advisory Program; High School World Languages; Earth Science/Astronomy; Street Law Extended Learning Opportunity; Cognitive Behavioral Intervention for Trauma in Schools

Communications & Policy meeting on July 8 will focus on professional expectations; codes of conduct; sexual harassment; bullying, cyberbullying and harassment; and communication of concerns to school officials. She noted that student, staff and parent handbooks will be revised over the summer.

Superintendent Forsten also recognized teacher Adrienne Shoemaker, who was named distinguished educator by the National Federation of the Blind.

Agenda Item 6. Personnel

Superintendent Forsten presented one administrator confirmation for 2019-2020:

Timothy Herbert, Assistant Principal, Concord High School, \$123,734, Step III, M+30/CAGS. Tim replaces Chali Davis (step III, M+30/CAGS = \$123,734) – resignation. Budgeted at \$123,734

The Board voted 9-0 to approve the confirmation as presented (moved by Tom Croteau, seconded by Ms. Higgins).

Mr. Croteau noted that he served on the search committee for this position and was pleased with the candidate pool and this Mr. Herbert specifically, who had good knowledge about CRTC and would hit the ground running.

Superintendent Forsten presented several teacher confirmations for 2019-2020:

John Hatab, Art Teacher, Concord High School, \$25,177.80, 30% of M-14, one year only. John was a full-time Music Teacher at Beaver Meadow School until his retirement in June.

John had been employed by Concord School District since 1997. This is a new position funded through reallocation. Budgeted at \$25,971.60

Alyson Holt, Science Teacher, Concord High School, \$23,153.70. 30% of M-12, one year only. Alyson replaces Frank Harrison (20% of M-14 = \$16,785.20) – LOA and Lyn Vinkus (10% of M+30-14 = \$8,657.20) – LOA. Budgeted at \$25,442.40

Kathleen Allard, Music Teacher, Rundlett Middle School, \$68,711, M-9. Kathleen replaces Kevin Greene (M-14 = \$83,926) – retirement. Budgeted at \$58,612

Kara Gilson, Grade 6 Classroom Teacher, Rundlett Middle School, \$51,688, B-4. Kara replaces Susan Gamache (M-14 = \$83,926) – retirement. Budgeted at \$58,612

Leeanne Van Horn, Science Teacher, Rundlett Middle School, \$56,715, B-6, one year only. Leeanne replaces Jenifer O'Sullivan (M-14 = \$83,926) – LOA. Budgeted at \$83,926

Paige Belanger, Classroom Teacher, Abbot-Downing School, \$48,512, M-1. Paige replaces Sophia Ellis (M-14 = \$83,926) – retirement. Budgeted at \$83,926

Nicole LeCour, Classroom Teacher, Broken Ground School, \$48,512, M-1. Nicole replaces Lindsey Elefante (M-8 = \$66,197) – resignation. Budgeted at \$66,197

Chuck Crush – what about the RMS Special Education Coordinator? Terri – have re-opened the search. Also opened up RMS Assistant Principal search.

The Board voted 9-0 to approve the confirmations as presented (moved by Ms. Higgins, seconded by Nancy Kane).

Agenda Item 7. Capital Facilities

Mr. Richards reported that the Committee met on June 5 to discuss several aspects related to the future middle school project. The project history was reviewed, including the "visioning" sessions and the demographic study; grade configuration; and options to renovate the current building or to build new. The Committee recommended to the full Board that a new middle school be built, and renovation of the existing facility be removed from consideration. Business Administrator Jack Dunn presented three property options, along with their advantages and disadvantages: the existing site, a site on Curtisville Road, and One Monitor Drive. The Committee then recessed into non-public session under RSA 91-A:3 II (d) to consider "acquisition, sale or lease of real or personal property." Mr. Croteau noted that the Committee would not be proposing building a wing, but re-building the entire school. In doing otherwise, disruption to students for three years would be insurmountable. Mr. Richards pointed out that the existing building is out of code (both safety code and educational expectations) and would be gutted to essentially a cinder-block shell. Ms. Patterson asked whether Board members had heard from anyone with concerns about building new. Mr. Croteau noted the editorial in the *Concord Monitor* that did not speak favorably about the *Monitor* site, which had been an

option the Board looked into. He stated the Board would make the best decision possible based on the expertise of architects, builders and experts on middle schools.

The Board voted 9-0 that, regarding the middle school project, a new facility should be built and renovation of the existing facility be removed from consideration (moved by Mr. Richards, seconded by Mr. Crush).

Agenda Item 8. Communications & Policy

Ms. Patterson noted that the Committee met on June 10 to discuss existing policies and referenced state statutes related to student safety. The Committee discussed the development of a framework and process to review these policies over the course of the summer; create professional development for all employees; and review all student and parent handbooks. Public input had been offered with a focus on the special education population. Mr. Crush asked for clarification whether the Committee would engage community partnerships starting at the July 8 meeting. Superintendent Forsten said that experts would both be present, and contributing to the work at the meeting.

Agenda Item 9. City & Community Relations

Ms. Poinier reported that the Committee met with City administrators and City Council members on June 14. They discussed the City and District budgets, the upcoming middle school project, the Stable Building proposal, maintenance and financial issues related to Memorial Field, and the Committee's discussion with the City's Public Information Officer. Councilor Fred Keach expressed concern about the public's perception of recent communication from the District, and the safety of students.

Agenda Item 10. Proposed calendar of meetings

Superintendent Forsten presented draft Board calendars for July and August, highlighting the Communications & Policy Committee meetings on July 8 and July 22 to review policies related to student safety.

Jack Dunn said the District would start the process of refinancing the elementary school bond, which will be up in October 2020; he wanted the Board to be ready to tap the market if the time was right. He wanted to start the process at the August 5 Board meeting so the Board could take advantage of low interest rates.

Agenda Item 11. Public comment

Concord resident Kerrie Diers commented that the new middle school project has piqued her interest. She encouraged the Board to think about the value of a "walkable community school." She said that this was, to her, a very important consideration and asked that the

Board put a high priority on it. She said she hoped for many opportunities for public engagement on this project.

Concord resident Susan Lauze and Board member of the Concord Administrators Association (CAA) noted that she has served the District for four decades, the last 17 years as a building administrator, and said she was speaking on behalf of the CAA. Other members of the CAA executive board – Kris Gallo, Steve Rothenberg and Steve Mello – were also present. She noted that no input from CAA on this matter has yet been considered. She said the CAA welcomes an independent investigator to look into how the incidents related to concerns about Mr. Leung had been handled, with the expectation that all conclusions would be shared. She noted that due to privacy laws, the CAA is not able to comment on what has been reported in the news, or in the Board's proceedings, but that knowing the full story was essential. She stated that the investigator must have full access to all people and all records, to ensure a fair and just process. The CAA asked the Concord community as a whole to be patient, and allow the independent investigation to be conducted in a thorough and professional manner. She stated that the District cares for its students, their families and the greater good.

Concord resident Amy Girouard said she hoped the independent investigation would shed light on this issue. She said that children with special needs who are not able to communicate, like her daughter, are vulnerable. She said she wanted to trust that her child was safe and would get a good education, and that if something happened, the District respond quickly, appropriately, and with a trauma-appropriate specialist. She also asked several questions about the goal of the "Behavior Task Force;" whether it was to eradicate behaviors, or understand why behaviors are occurring. She invited the CSD Board and all staff, families and students to see the movie "The Kids We Lose" on September 26 and 28 at the Red River Theatre, about the trauma inflicted on children when in restraint and seclusion.

Agenda Item 12. Other Business

Ms. Patterson noted that the Board was contemplating hiring Attorney Steven Bennett as its liaison to the independent investigator, Attorney Djuna Perkins of Massachusetts. Ms. Perkins was an Assistant Attorney General and has extensive experience with sexual assault investigations.

The Board voted 9-0 to enter into an agreement with Attorney Bennett to act as a liaison (scheduling witnesses, obtaining documents, etc.) and to enter into an agreement with Attorney Djuna Perkins to conduct the independent investigation into how Board policies and procedures had been followed in December 2014 and December 2018 (motioned by Ms. Patterson, seconded by Mr. Croteau).

Mr. Crush noted that the investigator is from Massachusetts and had no connection with this story in New Hampshire. Ms. Patterson noted that Attorney Bennett would be a point person – a liaison to the Board.

Mr. Richards clarified that Attorney Bennett would keep the investigation at arm's length from the Board. Mr. Croteau noted that the Board wants what the community wants – collaborative community support and safety for students.

Agenda Item 13. Adjournment

The Board voted 9-0 to adjourn (motioned by Ms. Higgins, seconded by Mr. Crush).

The Board adjourned at 9:25 p.m.

Respectfully submitted,

Jim Richards, *Secretary*
Linden Jackett, *Recorder*

EXHIBIT I

August 22, 2019

Good day Concord School District Staff,

I hope that this letter finds you enjoying the final days of summer 2019.

As I reflect on the dedicated work to evaluate our school culture and climate that has occurred this summer in the District, I am impressed by the dedication of this professional school community. The local newspaper and social media have offered a continual dribble of articles and posts that have presented singular perspectives and have negatively impacted some of the community's viewpoint of our schools and work. I know there are questions about why we have not offered a response – why we have not offered an alternative perspective to counteract this negativity. To participate in and respond to these stories would be a full-time job and very likely would garner an increased number of negative responses. We have chosen a different response – we have chosen to take a close look at policies and procedures that support a safe environment for teaching and learning and safe schools for Concord students. We have chosen to put energy into *moving forward*.

On **Monday, August 26**, your day will begin in your school at 8:00 a.m. Administrators are developing schedules for the morning that will include a school “welcome back” meeting and two hours of preparation time for teachers. The District opening event will be in the Christa McAuliffe Auditorium at Concord High School from 12:45-3:00 p.m. We have a wonderful speaker, Steve Maguire, a high school teacher, who will share a message about positive relationships in schools.

We have reviewed, revised and developed a few policies with a focus on strengthening support for student safety in Concord schools. On **Tuesday, August 27**, staff will spend half the day learning about the mandatory child abuse and neglect reporting law in New Hampshire and the associated policy in the District. Staff will also spend time learning about trauma and its impacts and how, with deeper understanding, we can better support those in our community who have experienced trauma. A presentation on sexual harassment prevention will also strengthen our collective resolve toward zero tolerance for this behavior in the District. Tuesday's presentations are about empowering you as an employee of Concord School District. These presentations have been created to provide you with the tools to support this learning community – our *safe* learning community.

All employees are expected to attend the full day of training on August 27. As there are well over 800 employees, these trainings will take place in two locations. Please review the second page of this letter for the schedule and locations of these professional development sessions.

As a District employee, please join me in using your voice to tell our amazing stories about Concord teachers, about Concord students, about Concord staff, about Concord programs, about Concord's success. Let's begin to purposefully not engage in negative conversations. Let's focus time and energy on sharing what we are doing that is so impressive. Are you ready? See you on Monday!

My best,



OPENING DAYS: AUGUST 26-27, 2019

Monday, August 26, 2019

- ✓ 8:00-12:30
 - Staff will begin the day in their schools. The morning will include time for building-based meetings, two hours of teacher preparation time and lunch.
- ✓ 12:45 – 3:00
 - District Welcome Back, Christa McAuliffe Auditorium at Concord High School. The afternoon will include the Superintendent’s opening remarks and a presentation by Steve Maguire.

Tuesday, August 27, 2019

Please review the grid below to see where you will be for the day. All employees are expected to attend these trainings; we will be asking everyone to sign in for each session. If you are not able to attend, please send a message to your supervisor.

There will be busing available from the elementary schools to the Capital Center for the Arts. The bus is an option if you’d like to avoid the challenge of parking downtown. Please plan to catch the bus at 7:30 a.m. in front of your school. Buses will also return riders to the elementary schools at the end of the day.

Groups – Times	Concord High School McAuliffe Auditorium	Capital Center for the Arts Main Street
Employee Groups	CHS, CRTC, RMS, CO	ADS, BGS, BMS, CMS, MBS, Maintenance, COMF
8:00 am – 11:00 am	Linda Douglas Trauma Informed Specialist, NHCADSV <i>Knowledge of Trauma in Responding to Sexual Assault</i> Monica Panait, Senior Risk Management, Primex <i>Harassment in the Workplace</i> Q&A	Stephanie Arroyo Education Coordinator, GSCA <i>Know & Tell – educate, inform, protect</i>
11:00 am – noon	Lunch on your own	Lunch on your own
Noon – 3:00 pm	Stephanie Arroyo Education Coordinator, GSCA <i>Know & Tell – educate, inform, protect</i>	Linda Douglas Trauma Informed Specialist, NHCADSV <i>Knowledge of Trauma in Responding to Sexual Assault</i> Monica Panait, Senior Risk Management, Primex <i>Harassment in the Workplace</i> Q&A

EXHIBIT J

August 29, 2019

Dear Parents, Guardians and Staff;

As you know, last week I sent a letter to all district staff members. In that letter, I made a serious error when I unfairly labeled media and social media coverage of the recent and historical events that have occurred in our school district. It was not my intent to discount the news or the community's reaction to what has been reported. More importantly, I did not mean for my words to be in any way dismissive or discouraging of our students and their experiences.

My letter did not convey how seriously I take these events. I am deeply sorry that I chose my words so poorly.

This week our schools have been very busy. Our staff worked extremely hard to prepare for a successful first day of school. I am very proud of all of our teachers, administrative assistants, educational assistants, custodians, transportation workers, food service staff, and all branches of our employees. Their dedication and unwavering support of each other and our students is most impressive.

This past Tuesday, our employees engaged with professional learning on reporting child abuse and neglect, sexual harassment prevention and understanding how to support the impacts of traumatic experiences on our youth. We were supported by experts in the field who led these trainings for us.

As we opened our schools on Wednesday, our employees were knowledgeable in their efforts to support our students, to hear their stories and to promote safety in our schools. From the 49 new members of our staff to those who have dedicated their careers to supporting students in our schools, we are ready for this new school year.

We have revised our policies and we continue to review and update our practices to support and enhance student safety and security. As our high school administrators so eloquently wrote in a letter to high school parents and guardians earlier this week – “the events of the past do reflect on us, but do not define us.” I couldn't agree more, and I remain committed to helping our students and our community work through these challenging times together.

Sincerely,



Terri Forsten
Superintendent