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May 9, 2024

Director David Alukonis
Office of Legislative Services
Administrative Rules
25 Capitol Street
State House Annex, Room 219
Concord, New Hampshire 03301-6312

RE: Notice Number FP 2023-236

Dear Mr. Alukonis:

Enclosed is a Conditional Approval Request for 2023-236, Ed 501, Ed 510.05, and Ed 511. The conditional approval request makes changes in response to comments from the office of legislative services (OLS) staff attorneys.

The Department of Education, on behalf of the State Board of Education, submits this rule for review and approval by the Joint Legislative Committee on Administrative Rules at its next regular meeting on May 17, 2024.

Thank you for your cooperation and assistance with this process.

Sincerely,

A handwritten signature in cursive script that reads "Julie Shea".

Julie Shea
Administrative Rules Coordinator
Department of Education

Readopt with amendment Ed 501.01, effective 10-5-20 (Document # 13100), cited and to read as follows:

PART Ed 501 PURPOSE AND DEFINITIONS

Ed 501.01 Purpose. The rules of this part implement the statutory responsibilities of the New Hampshire board of education to:

- (a) Develop and administer credential standards for educational personnel;
- (b) Develop continuing professional education requirements and prerequisites for the renewal or reinstatement of educator licenses;
- (c) Develop and administer a code of conduct for all credential holders and to inform members of the public of the code of conduct applicable to credential holders;
- (d) Specify unprofessional conduct which justifies disciplinary sanctions against credential holders;
- (e) Set forth the department's procedures and processes as it pertains to reviewing and assessing complaints, cases, and investigations; and
- (f) Provide oversight of adjudicatory proceedings required for discipline of credential holders while providing such with fair hearing practices and rights of appeal.

Readopt with amendment Ed 501.02, effective 7-1-23 (Document #13655), and renumber as Ed 501.02 and Ed 501.03, to read as follows:

Ed 501.02 Definitions A - H. Except where the context makes another meaning manifest, the following words shall have the meanings indicated when used in this chapter:

- (a) "Authorization" means permission for a person to serve in the role of a licensed educator prior to completing the licensure endorsement requirements for that role, or for a temporary period of time established by the document;
- (b) "Board" means the state board of education created by RSA 21-N:10;
- (c) "Bureau" means the bureau of credentialing, division of educator support and higher education, department of education;
- (d) "Case" means a complaint or report has been reviewed by the department and determined that the allegation within the complaint involves a ~~licensed~~ credential holder and a possible violation of the educator code of conduct and might warrant an investigation;
- (e) "Clearance" means a document issued to bus drivers and candidates enrolled in a professional educator preparation program (PEPP) which reflects that the criminal history record check was completed pursuant to RSA 189:13-b and RSA 189:13-c, and none of the violations in RSA 189:13-a, V were found;
- (f) "Certificate" means the electronic or paper form of any type of credential issued by the board;
- (g) "Code of conduct" means the code of conduct for ~~credential holders licensed or certified educational personnel~~ as outlined in Ed 510.01-Ed 510.05 ~~and is applicable on or off duty~~;
- (h) "College-level course" means a course of at least 3 credit hours from an institution of higher education accredited by a regional accrediting body approved by the U.S. Department of Education;
- (i) "Commissioner" means the commissioner, department of education;

(j) “Complaint” means information that has come to the attention of the department either through direct reporting or other means and alleges possible educator misconduct as defined by the educator code of conduct. The term also includes “report”;

(k) “Credential” means any authorization, statement, or license issued by the state board including, but not limited to, beginning educator license (BEL), experienced educator license (EEL), in process of licensure authorization (IPLA), intern authorization (IA), statement of eligibility (SOE), educational interpreter and transliterator license (EITL), paraeducator I ~~and~~ II license (PARA I & PARA II), school nurse I, II, ~~and~~ III license (SN I, SN II, ~~and~~ SN III), and master teacher license (MTL);

(l) “Credential holder” means any individual who holds a credential, as defined in Ed 501.02(k);

(m) “Credential verification request” means a request from a credential holder to fulfill a request for verification of a New Hampshire credential;

(n) “Career and technical education principal” means the individual who serves as the administrative and instructional leader of a career and technical education school;

(o) “Curriculum administrator” means the individual, other than the superintendent, who is responsible for the oversight of the entire curriculum, instruction, and assessment program of a school district or school administrative unit (SAU);

(p) “Degree” means a degree from an institution accredited by a regional accrediting body approved by the U.S. Department of Education;

(q) “Denial” means the refusal to grant a credential to an applicant;

(r) “Department” means the New Hampshire department of education;

(s) “Director” means the director, division of educator support and higher education, department of education;

(t) “District administrator” means the senior educational official of a school district or SAU with 400 or fewer total school-age enrollments and with no more than 2 public schools who provides the superintendent services identified in RSA 194-C:4 and Ed 302;

(u) “Division” means the division of educator support and higher education, department of education;

(v) “Education administrator” means a person who provides building-, district-, or SAU-level administrative services at the pre-K, elementary, or secondary level including a superintendent, assistant superintendent, principal, assistant principal, special education administrator, curriculum administrator, career and technical education principal, and district administrator, as outlined in Ed 506;

(w) “Educational interpreter and transliterator” means a person licensed by the board who facilitates communication between individuals who are deaf or hard of hearing, or who use signed language as a primary mode of communication, and individuals who are hearing;

(x) “Educational organization” means a public school, an SAU, a school district, a chartered public school, public academy, or a nonpublic school;

(y) “Educational specialist” means a person who provides non-instructional services, or provides specialized instructional services outside of the classroom, to students at the pre-K, elementary, or secondary level including a library media specialist, school counselor, school counseling director, school nurse, school psychologist, school social worker, and specialist in assessment of intellectual functioning;

(z) “Educator” means education administrators, educational specialists, instructional specialists, teachers, paraeducators, educational interpreter and transliterator, and school nurses;

(aa) “Endorsement” means the area specified on a credential that indicates the role for which the credential holder is authorized for employment; and

(ab) “Experience” means full-time employment in a specific educator role, or equivalent to full-time, and does not include time in a role requiring a credential if the educator did not hold the required credential.

Ed 501.03 Definitions I - Z. Except where the context makes another meaning manifest, the following words shall have the meanings indicated when used in this chapter:

(a) “Instructional specialist” means a person who provides specialized instructional support to teachers and others who provide direct instruction to children at the pre-K, elementary, or secondary level, including reading and writing specialist, digital learning specialist, and elementary mathematics specialist for grades ~~k~~K-6;

(b) “In process of licensure authorization (IPLA)” means the authorization issued by the bureau to a school district or SAU to employ a non-credentialed educator who is in the process of licensure to fill a vacancy as specified in Ed 504.05;

(c) “Intern authorization” means the authorization granted to an applicant pursuant to Ed 504.03 to perform educational services while working under a bureau approved development plan as outlined in Ed 505.06;

(d) “Investigation” means that the department has credible evidence to support and is conducting an official inquiry to determine whether a violation of the educator code of conduct has occurred;

(e) “License” means the document issued when an applicant meets full licensure requirements;

(f) “Licensure” means the official recognition by the board that an individual has met all requirements and is approved to practice in an endorsement area(s);

(g) “Nonrenewal” means the department has prohibited an educator whose credential has expired from renewing any credentials or applying for any new credentials, to satisfy or complete a disciplinary action;

~~(h)~~ “Paraeducator” means a person who works under the supervision of a teacher or other appropriate licensed education professional to provide specialized or concentrated non-initial instructional support to students at the ~~pre-~~ elementary, or secondary level and may be licensed by the board;

Edit: "pre-K"

~~(i)~~ (h) “Principal” means the individual who serves as the administrative and instructional leader of a school;

~~(i) “Professional conduct” means a set of established professional norms and behaviors as defined in Ed 510.01 through Ed 510.04 which extend beyond the workplace;~~

(j) “Reprimand” means a note related to conduct in the file of a credential holder ~~for his or her conduct~~, which does not rise to the level of a suspension or revocation of a credential, which can be used in the event of a subsequent investigation;

~~(j)~~ “Revocation” means the department has permanently rescinded a credential from a credential holder or clearance holder;

~~(k)~~ (m) “School nurse” means a ~~person~~ licensed nurse holding a board-issued credential ~~by the board~~ to provide health services in accordance with RSA 200:29;

(ln) “Senior educational official” means the top executive in an educational organization who makes the key decisions on spending, staffing, and other education policies;

(me) “Special education administrator” means the individual who is responsible for oversight of the entire special education staff and program at the district or SAU level;

(np) “State” means any state of the U.S., the District of Columbia, the Commonwealth of Puerto Rico, a Trust Territory of the Pacific Islands, ~~the Department of Defense Education Activity~~, or any territory or possession of the U.S. The term also includes the US. Department of Defense Education Activity (DODEA);

(oe) “Statement of eligibility (SOE)” means a credential issued by the department that indicates that an individual has successfully met the entry requirements to seek employment and begin the site-based licensing plan described in Ed 505.06;

(pf) “Superintendent” means the individual serving in the role of executive officer of the local school district(s) within the SAU and providing superintendent services as outlined in RSA 194-C:4 and Ed 302;

(qs) “Surrender” means when a credential holder offers to voluntarily give up the possession of a credential;

(rt) “Suspension” means the department has rescinded a credential from a credential holder for a specified period of time;

(ru) “Student” means an individual who is enrolled or participating in any class or program from preschool through grade 12, or any “adult student” as specified in Ed 1102.01(f), at any school or education institution except as otherwise noted in these rules; and

(sv) “Teacher” means a person who plans, provides, and assesses direct instruction to children at the pre-K, elementary, or secondary level in a content area specified in Ed 507. “Teacher” does not include paraeducator.

Readopt with amendment Ed 510.05, effective 11-9-18 (Document #12661), cited and to read as follows:

PART Ed 510 CODE OF CONDUCT

Ed 510.05 Duty to Report.

(a) Any credential holder shall report any suspected violation of the code of conduct following the school, school district, or SAU reporting procedures.

(b) If a principal has been notified of, or is personally aware that a credential holder might have violated the code of conduct, the principal shall report to the superintendent of the school district or SAU of employment.

(c) The superintendent, chief executive officer of a chartered public school or public academy, or headmaster of a nonpublic school, shall report any of the following to the department:

(1) When a superintendent has knowledge that a credential holder, as defined in Ed 501.02(l), has been arrested and charged with an offense enumerated in RSA 189:13-a, V; and

(2) When a superintendent has knowledge that a credential holder might have violated the code of conduct.

(d) If a credential holder suspects that a superintendent has violated the code of conduct or if a credential holder has made a report or complaint and believes the local reporting procedures have not been followed, the reporting credential holder shall notify the department directly.

(e) Credential holders who have reason to suspect that a student has been, or is being, abused or neglected, shall report the same to:

- (1) The credential holder's immediate supervisor, superintendent, or both; and
- (2) The department of health and human services, pursuant to RSA 169-C:29.

(f) If the department has reason to suspect that any violation of the code of conduct was known by a credential holder and not reported as required by (a), (b), or (c) above, the department shall undertake an investigation, as enumerated in Ed 511.01, ~~against that credential holder as required by (a), (b), or (c) above.~~

(g) The department shall review the report or complaint of possible misconduct in accordance with Ed 511.01.

Readopt with amendment Ed 511, effective 11-9-18 (Document #12661), to read as follows:

PART Ed 511 INVESTIGATIONS AND DISCIPLINARY PROCEEDINGS

Ed 511.01 Complaints, Cases, and Investigations.

(a) All complaints which allege possible educator misconduct or could involve possible educator misconduct shall be reviewed by the department.

(b) After the complaint is reviewed, if the department determines that a possible violation of the code of conduct has occurred, the department shall open a case with an assigned number.

(c) In reviewing the case, if the department determines by preponderance of the evidence that a violation of the code of conduct has occurred, the case shall become an investigation at which point the credential holder shall be placed under investigation, with the following conditions:

- (1) Credential holders who are placed under investigation shall be notified in writing, via certified mail, that an investigation has been opened, the nature of the allegation, and a summation of the facts within 15 days of the initiation of the investigation;
- (2) Once under investigation, a credential holder who surrenders their credential shall be deemed to be revoked;
- (3) The credential status of credential holders who are placed under investigation shall be valid, except for credential holders who are subject to immediate suspension pursuant to Ed 511.05; and
- (4) A case that has not become an investigation within 90 days shall be closed.

(d) The credential holder's current superintendent shall be notified in writing by the department that an investigation has been opened, and when it is closed, unless the department determines that the notification might compromise the investigation.

(e) Evaluations of complaints, cases, and investigations into allegations of educator misconduct, as defined in the code of conduct, shall not constitute a disciplinary hearing and shall not constitute a finding of misconduct against a credential holder.

(f) Investigations shall be conducted by department personnel, except if the department determines that there is a need to contract with an independent investigator or needs to conduct the investigation in cooperation with another state or federal agency.

(g) The department shall make every attempt to:

- (1) Obtain any and all documentation which might be relevant to the investigation; and
- (2) Interview all individuals who may have relevant information which pertains to the investigation including, but not limited to:

- a. Parents or guardians;
- b. Students, with permission from the parent or guardian if they are under 18;
- c. The credential holder;
- d. Administration; and
- e. Other educational personnel, to include uncredentialed staff.

(h) Once the investigation is complete, the ~~department following procedures~~ shall produce a report to inform the credential holder of the findings in one of the following manners apply:

- (1) The department ~~shall~~ may create a report which documents the results of the investigation; or
- (2) The department ~~shall~~ may adopt the factual basis of the school district's independent investigative report or law enforcement's investigative report to fulfill the requirement of this subsection.

(i) If the department adopts the factual basis in (h)(2) above, it shall provide a summary statement to the credential holder informing the individual that it has adopted the factual basis of the independent report, and how those facts substantiate a violation of the code of conduct.

(j) If the investigation finds that the credential holder did not violate the code of conduct, the credential holder shall be notified in writing and the investigation closed within 15 days of the termination of the investigation.

Ed 511.02 Post Investigation Procedures.

(a) If the investigation supports a finding that the credential holder violated the code of conduct, the department shall issue a written notice to the credential holder containing:

- (1) A summation of the findings of the investigation, which may include incorporation of other reports as necessary; and
- (2) How they support the proposed sanction, and propose a form of discipline as follows:
 - a. No discipline warranted;
 - b. Reprimand, which ~~shall~~ may include a provision to petition allowing the reprimand to be removed from the credential holder's file after a specified period of time;
 - c. Suspension;
 - d. Nonrenewal; or
 - e. Revocation.

(b) The department shall determine the sanctions to be imposed after considering the presence of aggravating or mitigating circumstances as specified in (d) and (e) below.

(c) The following shall be considered aggravating circumstances:

- (1) The seriousness of the offense;
- (2) The credential holder’s prior disciplinary record;
- (3) Potential risk of harm to children, public health, and safety; and
- (4) The purpose of the rule violated.

(d) The following shall be considered mitigating circumstances:

- (1) Absence of a prior disciplinary record;
- (2) The credential holder’s acknowledgment of wrongdoing; and
- (3) The purpose of the rule or statute violated.

(e) If no disciplinary sanction is proposed, the department shall notify the credential holder in writing that there was a finding but no disciplinary sanction, and the investigation shall be closed.

(f) Cases and investigations, inclusive of the department’s investigatory reports, school district reports, law enforcement reports, and all other information gathered during the course of reviewing a case and an investigation shall be confidential, with the following exceptions:

(1) The report shall be made available to the credential holder and their attorney in any adjudicatory proceedings resulting from this section; and

(2) If the department determines it is appropriate after consultation with the AG’s office, the department shall provide information gathered in the disciplinary investigation to the following:

- a. Pursuant to a subpoena or warrant from a law enforcement agency when the agency is conducting a criminal investigation of the credential holder;
- b. The state board if the matter is appealed to the state board; and
- c. A certifying agency of another jurisdiction for:
 1. Purposes of certification of the credential holder in the other jurisdiction; or
 2. An investigation of the credential holder by the other jurisdiction when:
 - (i) The credential holder was the subject of an investigation under Ed 511; or
 - (ii) Disciplinary action was taken against the credential holder by the board pursuant to Ed 511.

Ed 511.03 Reprimand, Suspension, **Nonrenewal**, or Revocation.

(a) At any time, the credential holder and the department may agree to a proposed disciplinary finding in which case no disciplinary hearing shall be held.

(b) The credential holder and the department shall reduce their agreement to a writing which sets out the terms of the discipline and the section of the code of conduct relevant to the discipline.

(c) The credential holder shall receive a copy of the agreement in (b) above, and a copy shall be placed in the credential holder’s electronic credentialing file at the department once signed.

(d) The department shall notify the credential holder's superintendent of the discipline that was imposed.

(e) Any credential holder whose credential is revoked, nonrenewed due to disciplinary reasons, or who voluntarily agrees to a revocation shall be prohibited from applying or reapplying for any other credential issued by the state board.

(f) Any suspension or revocation shall be included in the department's "revoked or suspended educator list", which is available on the department's website and provided to school districts.

(g) Any suspension, nonrenewal due to disciplinary reasons, or revocation shall be entered into the National Association of State Director of Teacher Education and Certification (NASDTEC).

(h) Once the suspension period has been served, the credential holder's name shall be removed from the "revoked or suspended educator list", but the record of said suspension shall remain in the credential holder's electronic credentialing file at the department.

Ed 511.04 Disciplinary Hearings.

(a) A credential holder shall have 15 days from the receipt of the written proposed discipline to do one of the following:

(1) Accept the proposed discipline by signing and returning to the department the proposed discipline letter; or

(2) If the credential holder does not agree with the proposed disciplinary finding, request in writing to the department an adjudicatory hearing, which shall commence pursuant to Ed 200.

(b) If after 15 days the credential holder has not completed one of the actions in (a) above, the department shall impose the proposed discipline.

(c) The credential holder may file for an appeal pursuant to Ed 213.

Ed 511.05 Status of a Credential Pending Completion of Disciplinary Proceeding.

(a) When the department receives information indicating that a credential holder has been arrested for one of the offenses enumerated in RSA 189:13-a, V, the credential holder's credential and any and all endorsements ~~may shall, at the commissioner's discretion after reviewing the considerations enumerated in Ed 511.02(e)-(d),~~ be immediately suspended pursuant to RSA 541-A:30, III, unless the commissioner determines otherwise after reviewing the considerations enumerated in Ed 511.02(c)-(d).

(b) The department shall notify the credential holder and the employing school district that the credential holder's credential has been suspended pending an investigation by the department.

(c) An adjudicatory hearing shall commence within 10 working days after the suspension of the credential in accordance with RSA 541-A:30, III, unless expressly waived by the credential holder.

Ed 511.06 Grounds for Reinstatement After Suspension. A credential which has been suspended shall be reinstated if:

(a) The period of the suspension has passed and any and all terms and conditions regarding possible reinstatement have been satisfied; or

(b) A credential holder whose credential has been suspended demonstrates by clear and convincing evidence that the credential holder has corrected the deficiencies or conduct which led to the original suspension.

Ed 511.07 Request for Early Reinstatement.

(a) A credential holder who seeks early reinstatement of their teaching credential, prior to the terms of the imposed discipline, shall submit a written request to the state board for review, with consideration for such a request occurring at the next regularly scheduled meeting. The credential holder may appear in front of the state board in support of their request.

(b) Such written request shall include evidence that the credential holder has corrected the deficiencies or conduct which led to the original disciplinary action.

(c) The state board’s determination shall be subject to the appeal process for state board decisions pursuant to Ed 200.

Appendix I

Rule	Statute
Ed 501	RSA 186:8, II; RSA 189:39
Ed 510.05	RSA 186:11, X(e); RSA 21-N:9, II(cc)
Ed 511	RSA 186:11, X(a); RSA 189:13-a; RSA 189:13-b; RSA 189-13-c; RSA 541-A:30, II-III

From: [Brian Hawkins](#)
To: [Christina Muniz](#)
Subject: additional analysis on upcoming Ed 501,510.08, 511 Final Proposal
Date: Wednesday, April 17, 2024 4:18:11 PM

Caution! This message was sent from outside your organization.

Hello Attorney Muniz,

In advance of the April 19 JLCAR meeting, NEA-NH writes to provide additional analysis regarding the problematic language and effect of the Department of Education's proposed amendments to the Ed 511 administrative rules. As you probably have already seen from the record, we did offer suggested comments and revisions during the State Board of Education public hearing phase of the process. In speaking with some of the JLCAR committee members about our concerns it was recommended that we send along our viewpoints to you as well.

In short, our view is that the Department's proposed amendments in Ed 511 are contrary to the intent of the legislature and are contrary to the public interest because the rules conflict with the Administrative Procedures Act and due process principles afforded to citizens of this State in any administrative action. The Administrative Procedures Act, RSA 541-A, mandates that "an agency shall not revoke, suspend, modify, annul, withdraw, or amend a license unless the agency first gives notice to the licensee of the facts upon which the agency intends to base its action, and gives the licensee an opportunity, through an adjudicative proceeding, to show compliance with all lawful requirements for the retention of the license." See RSA 541-A:30. The Act contemplates adjudicative proceedings (A:31), and sets out examination for a "full and true disclosure of the facts" may occur, and an opportunity to contest certain material with notice of the same will be offered. See RSA 541-A:33.

In addition to the Act's guarantee of due process in administrative license disputes consistent with RSA 541-A:30, under the Due Process Clause of the Fourteenth Amendment of the New Hampshire State Constitution, the government is prohibited from taking adverse actions against employees without providing due process. See N.H. Const. Part 1, Article 14 ("[e]very subject of this State is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.") At its most basic level, the requirement to afford due process forbids the government from denying or thwarting claims of statutory entitlement by a procedure that is fundamentally unfair. *Appeal of Eno*, 126 N.H. 650, 653 (1985) (a plaintiff's claim of "entitlement to unemployment compensation benefits is a claim to a property interest that is itself subject to protection under the due process guarantees of part 1, article 15 of the Constitution of New Hampshire"); see also *Saviano v. Director, N.H. Div. of Motor Vehicles*, 151 N.H. 315, 320 (2004) (assuming a New Hampshire license holder had due process rights during Department of Safety administrative license suspension action).

The New Hampshire Supreme Court has held that the revocation of a license necessary for one's occupation is a legally protected property right that may not be denied without affording due process. *Appeal of Plantier*, 126 N.H. 500, 506 (1985) (in the context of a physician's license to

practice medicine); *see also Union Fidelity Life Ins. Co v. Whaland*, 144 N.H. 832 (1974). According to the Supreme Court, “[T]he right to engage in one’s occupation is a privilege of fundamental significance.” *Appeal of Plantier*, 126 N.H. at 507.

<!--[if !supportLists]-->I. <!--[endif]-->***The Department of Education’s proposed amendments to Ed. 511 exceed its authority, violate due process principles and are contrary to public interest.***

As currently written, the process, codified in Ed 511, assumes procedural safeguards and requirements for investigations and disciplinary action to be taken by the Department which impact a teaching certification. Ed 511.01 governs Complaints, Cases, and Investigations, which can lead to disciplinary action against a credential holder’s license. This implicates a property interest under a due process analysis. The issue here is the Department’s effort to streamline the process in the proposed Ed 511 rules needs to be evaluated in the context of an employee’s due process rights. The Department’s proposed rule amendments effectively weaken the Department’s responsibility to provide the credential holder with due process notice and are contrary to the legislative intent and plain language of the Act and rules.

a. The Department’s proposed amendments to 511.01 (c) (1) do not provide due process notice to a credential holder.

The Department suggests that Ed 511.01 should permit the Department to provide “a summation of the facts within 15 days of the initiation of the investigation.” A “summation of the facts” does not provide due process notification to a credential holder such that it would provide them the “opportunity to discern the facts or conduct upon which the agency intends to base its action” in opening an investigation. *See RSA 541-A:30*. Consistent with the Act, and other agencies, the credential holder must receive notification of the facts *as applied to a code of conduct provision* that would explain to a credential holder the basis for the initiation of the investigation. This is vital so that the credential holder is on notice of what facts he or she may possess to assist in defense of the investigation. The Department will often initiate an investigation with a vague and conclusory statement that does little to assist the educator with notice of the facts supporting an investigation. For example, a letter of investigation will give the following “notification” of an investigation: “[T]he Department of Education has become aware of actions, which, if substantiated, would be a violation of Ed. 510.02-Responsibility to Students-of the aforementioned Code of Conduct. Namely, the allegation is that you failed to provide appropriate supervision of students, who were under your control and direction, by engaging in unprofessional communication.” The notification does not indicate the name of the complainants (or initials if they are still minors) or the time frame of the incidents (except that they occurred while the individual was employed by the named SAU) so as to assist the credential holder with assisting their counsel in their defense. The burden to afford due process notice is on the agency seeking to impact a license holder’s property right; it is not the obligation of the credential holder. *See RSA 541-A:30* (“an agency shall not revoke, suspend, modify, annul, withdraw, or amend...unless the agency first gives notice...”) Notably currently the Department will also send out discipline letters on the same date as the letter of investigation notifying the credential holder of the investigation with an equally vague conclusion regarding the alleged conduct that necessitated discipline such as, “based upon that investigation, the Department

has now concluded that you violated Ed 510.01-Responsibility to the Education Profession and Educational Professionals-by engaging in unprofessional conduct, in that you failed to abide by professional boundaries and engaged in improper communications with students under your control and direction.”

b. The Department’s amendments to 511.01 (h) (i) and (j) are contrary to legislative intent, and do not afford a license holder an opportunity to discern the facts or conduct upon which the agency intends to base its action.

When examining the language of a statute, the Court ascribes the plain and ordinary meaning to the words used and interprets the legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. *In re Farmington Teachers Ass’n, NEA-NH*, 158 N.H. 453, 456 (2009). The Court interprets a statute in the context of the overall statutory scheme and not in isolation. *Id.* The same rules of statutory construction apply to the Department of Education, “[i]n construing rules, as in construing statutes, where possible, we ascribe the plain and ordinary meaning to the words used.” *Appeal of Murdock*, 156 N.H. 732, 735 (2008). As currently written, the Department’s rules in Ed 511.01, (a-i), mandate that when a matter is opened it is investigated by the Department. Ed. 511.01(f), “[i]nvestigations shall be handled by the department”. Ed 511.01(g), “[t]he department shall make every attempt to interview all people, including the credential holder, who might have information which might be relevant to the investigation”. Ed 511.01(i), “[t]he department shall make every attempt to obtain any and all documentation which might be relevant to the investigation”. Accordingly, the rules and due process clearly require the Department to engage in an investigation and prepare a report independent from the employment investigation.

Now, contrary to the plain language of the rules and the procedural safeguards contemplated in both the Ed 511 rules and the Act, the Department suggests that their obligation to create a report, which serves as notification to the credential holder of the Department’s analysis and facts it intends to use to support a decision on the license holder’s credential, may be delegated. The amendments to Ed 511 suggest the Department is no longer required to generate a report but “may” create one or “may adopt the factual basis of the school district’s independent investigative report or law enforcement’s investigative report” to fulfill its obligations of due process notice to the credential holder. This is fundamentally violative of the due process provisions in the Act and contrary to the protections afforded to citizens under the Constitution. To permit the Department to pick either to create their own report, or rely on the employment report, does not provide the employee with a clear process nor does it require the Department to handle its own investigation and issue its own findings and Code of Conduct sanctions recommendations based on those findings, independent of the employment matter. Furthermore, it does not provide a consistent standard on which to make those decisions if the Department has unfettered discretion to rely on different types of investigations on a case-by-case basis.

The rules do and should require the Department to investigate an allegation, by interviewing, collecting documents, and writing a report summarizing its own investigation based upon the Code of Conduct. Employment and criminal investigators are analyzing the facts of any given case under a specific lens that may deviate substantially from the Code of Conduct. For example, employment

investigators are looking at whether the employee violated any school board or related policies or whether there is just cause for termination. Police officers are evaluating whether the facts rise to the level to support a criminal conviction beyond a reasonable doubt. It is problematic that the DOE fails to investigate in its own capacity, and apply it to the Code of Conduct, outside the facts gathered and supplied by either the local school District or another agency. The due process safeguards implicated here are the credential holder must guess or rely on legal counsel's assumptions about what specific facts the Department is relying upon to formulate its conclusion. The Department's proposed amendments to Ed 511 permit the Department to effectively skirt the Act's requirement of due process notice to a credential holder by removing any requirement for independent analysis (a report), and by permitting the Department to provide no specific information to the credential holder regarding the basis of the Department's conclusions. It is imperative to protect procedural due process safeguards within the rules and ensure that the Department, "shall create a report which documents the results of the investigation." See Ed. 511.01(j). The Department's proposed rules eliminate this step by permitting adoption of a local level investigation, as its own report. As the Court has found when examining procedural due process in the context of a termination, "the principal reason for requiring procedural due process is to ensure that the facts upon which the SAU Board relied in terminating McGann were correctly determined, and that its decision was otherwise reasonable." *Duffley v. N.H. Interschol. Ath. Assoc.*, 122 N.H. 484, 493 (1982). There is no procedural process provided where an educator is deprived of any impartial investigation. Further, an educator has no ability to ascertain whether they should accept or challenge the Department's proposed discipline if the Department fails to provide a report and/or the specific facts the Department relied upon in reaching a conclusion that a violation of the Code of Conduct occurred.

In contested cases, the Act clearly contemplates an opportunity for all parties to "respond and present evidence and argument on all issues involved." RSA 541-A:31 (IV). The Act also contemplates presentation of exhibits and cross-examination. Under the Department's current insufficient practice, and its attempt to codify that practice in the proposed rules amendments, a credential holder has no ability to prepare for, respond to and present arguments "on all issues involved." This is because or she has insufficient notice of the Department's application of the facts in its report to the Code of Conduct. Indeed, the credential holder is the only person authorized to request an adjudicatory hearing under the rules. It is hard to imagine how a credential holder would make that decision without information about the case the Department will present and what information about the facts substantiating a Code of Conduct violation that the Department alleges.

In sum, The Administrative Procedures Act and State Constitution govern the due process rights of license holders in New Hampshire. An agency cannot enact rules that circumvent the due process rights of citizens in this State or the plain meaning of the Act or rules. To do so, would be contrary to public interest, legislative intent, and exceed the administrative authority of the Department of Education. The legislature has vested authority within the Department of Education to investigate code of conduct violations. It must do so in accordance with the Act and due process requirements. The proposed amendments are contrary to the Department's statutory due process obligations and the public's interest in enforcing the due process protections of the State Constitution within administrative agencies.

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