

Senate Judiciary Committee

Sonja Caldwell 271-2117

HB 83, prohibiting non-disparagement clauses in settlement agreements involving a governmental unit.

Hearing Date: April 14, 2021

Members of the Committee Present: Senators Carson, Gannon, French, Whitley and Kahn

Members of the Committee Absent : None

Bill Analysis: This bill prohibits and renders unenforceable the inclusion of a non-disparagement clause in a settlement agreement involving a governmental unit.

Sponsors:

Rep. Berch	Rep. Schultz	Rep. M. Smith
Rep. Sylvia	Rep. Meuse	Rep. McGuire
Rep. Amanda Bouldin	Rep. Stevens	Rep. DiLorenzo

Who supports the bill: Rep. Paul Berch, Rep. Marjorie Smith, Eric Pauer, Nicholas Thomas, Dan McGuire, Alexandra Mennella, Rep. Wendy Chase

Who opposes the bill: Barrett Christina (NH School Boards Assoc.), Cordell Johnston (NH Municipal Assoc.), DianeBessey, Elizabeth Sargent (NH Assoc. of Chiefs of Police), Brian Hawkins (NEA-NH), Elizabeth Fox, Vinnie Baiocchetti

Who is neutral on the bill: No one

Summary of testimony presented in support:

Rep. Paul Berch

- This bill would prohibit non-disparagement clauses in settlement agreements involving a governmental unit.
- This means that when someone settles a case involving a governmental body, that settlement cannot include a clause that prohibits the parties from discussing the facts of the claim or speaking negatively about each other.
- This bill does not apply to private suits that do not involve government actors. For example, if he was involved in a motor vehicle accident with his neighbor and they settled between the two of them and he paid them and agreed they would not talk about it anymore, that is fine, this bill would not affect that.
- In a suit that involves a governmental entity or employee, the public has a right to know.
- He stated that a reporter tried to check in on a large settlement for misconduct involving a county jail and went to a plaintiff who settled for a large sum and was told they could not

talk about it or they would lose their settlement money. This is a problem that happens in NH and that is what got him interested in this.

- Sometimes a law enforcement officer is determined to have violated the rights of a citizen and a secret settlement is reached and an officer is able to be hired in another town.
- Civil trials are disappearing in the US. Parties are turning to private settlements.
- Systemic discrimination has been obscured through sealed settlements and non-disparagement provisions.
- One of the core values of the first amendment is to promote public understanding through free speech of the workings of our government.
- The objection the committee will hear is that this will increase the cost of litigation. This claim has been widely discredited. Courts and scholarly studies have rejected it.
- He was a career public defender. Most of his work was negotiation. Criminal cases get settled every day without anti disparagement clauses.
- NH has a statute that requires the fact of settlement be recorded at the town clerk's office. It is of little use if the parties cannot talk about what happened.

Sen. French asked if this bill would prohibit an individual from negotiating with a county and prohibit them from being able to say anything.

Rep. Berch said an individual will still be able to settle a suit with a county; the bill just stipulates that the settlement cannot contain a clause that bars the individual from being able to talk about what happened to them.

Sen. French asked him to clarify that this bill doesn't prohibit an individual from negotiating that the state cannot say anything. He thought there would be times when the public wouldn't want the state to be able to say anything.

Rep. Berch said the public has an independent right to know what happened by actions of the government and government employees. People may find it convenient not to have that known but it is the public's right to know. This bill would not affect statutes that might pertain to the protection of the name of a juvenile.

Sen. Gannon said Rep. Berch is putting the public good ahead of his. Rep. Berch is giving them standing in a case, which could interfere with Sen. Gannon's personal interests.

Rep. Berch said the principle is right but would not use that language.

Sen. Kahn said in a settlement agreement, sometimes it involves money and sometimes it does not. For example, there might be a mutual agreement for an employee to separate from an organization. He asked if that would be considered a settlement.

Rep. Berch said yes. Settlements can be nonmonetary.

Sen. Kahn asked if the term "non-disparagement" is defined.

Rep. Berch said it is not defined in statute but there are legal definitions.

Sen. Kahn asked what the side effect of a non-disparagement clause might be. For example, he said there could be an agreed upon statement and asked if that would be considered a non-disparagement clause.

Rep. Berch said this bill keeps the state from barring the plaintiff from talking about it afterward. If the agreement is there is a statement of fact and no one can say otherwise, that becomes a non-disparaging statement.

Sen. Carson said Senate Judiciary has seen versions of this issue before. One concern is that when you have a disparagement clause in there, it puts an end to the issue. Without it, you will have individuals that will keep going at each other. The disparagement clause is meant to put an end to that. She asked if banning these prevent people from moving on from an issue

Rep. Berch said they are competing values. Yes, there are people who carry torches about cases, but the point is that democracy can be messy. Just because there is finality now about an incident that happened does not mean it will not become relevant in a few years. There could be a pattern of incidents and if they are covered with non-disparagement clauses, how can you effect change. Sen. Carson asked if getting rid of it would be unfair to government. They are often prohibited from disclosing information about the privacy of an individual.

Rep. Berch said it is less of a problem than you might think because of the concept of waiver of privacy. If you are talking about something in public, you have waived your right to privacy and the government can respond. That does not cover legally confidential material and this bill doesn't address that.

Lisa Marie Mulkern

- She is in favor of the bill. She is the former programs information officer at the NH veterans' home from 2002-2006.
- 7 years ago, she testified about her experience at the home before a senate committee. She has a settlement agreement that she was forced into. She was not given the opportunity to go before the personnel appeals board. She settled for nothing more than monetarily what she would have been given if she had been allowed to go before the personnel appeals board and win her job back. The only thing she wanted out of her agreement was a non-disparagement.
- She knew about the management and financial issues going on at the home. It was difficult to get the agreement so that she could speak about it. She raised concerns and showed evidence of what was going on.
- This bill is important. Very few people would go to the lengths she did to not be silenced.

Summary of testimony presented in opposition:

Barrett Christina – NH School Board Association

- The NHSBA is opposed to the bill.
- There are certain statutes already indicate or present that public employees have privacy rights. RSA91A:3 paragraphs 2, a, b, and c all allow public bodies to go into nonpublic session to discuss employment matters. RSA189:67 paragraphs 3 and 4 talk about school staff private information that cannot be disclosed by the Dept. of Education.
- NHSBA has concerns related to student privacy if non-disparagement agreements were prohibited. In a school context, it would be difficult to bifurcate facts if a student was involved.
- Non-disparagement agreements are more efficient and cost effective for public entities.
- On line 11 it says a non-disparagement clause that prevents parties from discussing the facts of an underlying claim, however facts are often in dispute.
- Non-disparagement clauses also protect the employee from embarrassing facts from coming out that might prohibit that person from gaining further employment or protecting their reputation.
- The person filing a lawsuit against a governmental entity should be free to negotiate and settle as they see fit.

Sen. Carson asked if he believes that often times settlements are larger than they normally would be because of the disparagement clause in order to compensate one side.

Mr. Christina said he could not answer that.

Sen. Kahn asked if under RSA198, if there is a separation agreement reached between a school employee and a school board and there was a sequence of evaluations that occurred prior, would all of those evaluations become part of public record and is that an issue he believes is in conflict with this legislation.

Mr. Christina said that is going to be one of the confusing aspects of this bill. Certain employee records of public employees are confidential under RSA91A:5. Those would become public records. Non-disparagement agreements protect the employee as well as the employer.

Sen. Kahn said there may be facts that ought to be known to future employees and that public interest trumps personal interest. He asked how you reconcile that.

Mr. Christina said that was a good question that school districts are challenged with. If there was alleged wrongdoing and that employee is certified by DOE, there would be an investigation to determine if they should still be working in a school with children. Whether or not a previous employer would write a letter of recommendation could be part of a settlement agreement.

Cordell Johnston – NH Municipal Association

- The NHMA is strongly opposed to the bill.
- It has been mentioned that there has been similar legislation in the past. The Senate killed an identical bill, HB154, two years ago. It was a bipartisan vote.
- The state should not be dictating to local governments what they can or cannot include in their contracts. Parties have a right to settle disputes as they see fit. In almost all cases, parties are represented by legal counsel and they enter into agreements voluntarily.
- A town might have a claim against a vendor and there could be a commercial claim. It is an important settlement tool. It defies common sense that taking a settlement tool away from the parties would not make it harder to settle cases. If they cannot do this, it will prolong litigation. It may not lead to higher settlements but will lead to higher attorney fees and longer litigation.
- Under NH statute, any information that would constitute invasion of privacy, that a town official learns in the course of official duties or in nonpublic session, they are prohibited from talking about publicly. If you do not allow a non-disparagement clause, then the town officials are prohibited from talking about it under RSA42:1A, but the individual on the other side would have no restriction whatsoever, which is unfair.
- He believes the public does not have a right to hear an individual talk if they voluntarily signed an agreement that says they would not talk.