8-10-2021

New Hampshire's 'divisive concepts' law and the big chill

John M. Greabe
University of New Hampshire Franklin Pierce School of Law, john.greabe@law.unh.edu

Commentary

Commentary: New Hampshire's 'divisive concepts' law and the big chill

John Greabe

August 10, 2021 6:00 am

"Supported decision-making" agreements allow a chosen supporter to help a person with basic life decisions. (Dave Cummings | New Hampshire Bulletin)

Much critical commentary on the so-called "divisive concepts" provisions in this year's budget legislation – the label comes from language in an earlier version of the bill – has focused on their content- and viewpoint-based restraints on speech. These speech restrictions prohibit state public employers, including public K-12 school teachers, from (among other things) instructing that persons are "inherently superior or inferior to [others]" "inherently racist or sexist," "should be discriminated against," or "should not attempt to treat others equally" because of their "age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin."

Criticism of these speech restrictions is deserved. The restrictions are, at the very least, antithetical to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." (*New York Times v. Sullivan*, U.S. Supreme Court, 1964). To take one of many possible examples, the question of whether affirmative action should be constitutional in the racial context might well return to the Supreme Court next term in *Students for Fair Admissions v. Harvard College*, a case that is pending on its docket. The case involves whether Harvard is unlawfully discriminating against Asian American applicants in how it conducts its admissions processes. What a wonderful contemporary issue to discuss and debate in a high school civics class, right?

Well, sadly, if I were asked to counsel a teacher who wished to avoid potential liability under the new law, my advice would be to avoid discussing affirmative action. For if, say, a teacher asked a student to articulate an argument in favor of affirmative action, that teacher would run the risk of being charged with violating the provision of the new statute, which says that "no pupil in any public school shall be instructed to express support for [the idea] that an individual should be discriminated against partly because of his or her race." And affirmative action, in the racial context, involves differential treatment of otherwise similarly situated individuals on account of their race.

Now, to be clear, I don't believe that it would be a statutory violation for a teacher to ask a student to argue in favor of the constitutionality of affirmative action on behalf of persons of color. I believe that the statute should be read to allow such an assignment. But my view on how the statute *should be* construed would not

affect my advice. For the statute plausibly *could be read* to bar such an assignment. That fact alone would lead me to recommend that my risk-averse client steer clear of the topic.

In First Amendment parlance, vague statutes that are likely to cause speakers to refrain from lawful speech are said to have "chilling effects." And chilling effects are a principal reason why vague statutes are constitutionally problematic. But the chilling effects likely to be caused by the vagueness of the speech restrictions in New Hampshire's divisive concepts law, as described above, pale in comparison to those that likely will be caused by other provisions that have thus far received less critical attention: the law's remedial provisions.

The divisive concepts law's remedial provisions are sweeping. They invite "[a]ny person aggrieved" by a perceived violation of the statute to sue the violator's school or school district for legal or equitable relief, including monetary damages. They also ominously raise the prospect of ending an offending teacher's career. For the law contains a provision stating that "[v]iolation of [the divisive concepts law] by an educator shall be considered a violation of the educator code of conduct that justifies disciplinary sanction by the State Board of Education."

Let's start with the fact that settled law ordinarily seeks to *shield* from lawsuits and liability public servants who are called upon to exercise discretion and judgment unless they act in a patently unreasonable manner. Police officers, for example, cannot be sued or held liable for merely violating the Constitution; they can be sued and held liable only if they have acted in such disregard of clearly established constitutional law that they are either plainly incompetent or knowing law-violators. The law provides police officers with this qualified immunity from suit and liability out of a desire to avoid chilling the police from performing their challenging duties.

The divisive concepts law flouts this tradition of providing public servants with room to breathe as they make judgment calls in fluid and challenging circumstances, as teachers often do. The law puts a target on the backs of teachers and declares open season. Frankly, it is difficult to conclude anything other than that chill is the goal – especially when one considers that earlier versions of the bill quite openly sought to prohibit many classroom discussions of the effects of racism and sexism. The clear message to teachers is "discuss discrimination in its various forms at your professional peril."

Moreover, the law ordinarily confines the availability of lawsuits to those who have suffered individualized, concrete, and palpable *injury* because of the conduct complained of, and not to persons merely "aggrieved" by some perceived law violation by a public servant. In cases featuring parallel statutory language, the New Hampshire Supreme Court has said that statutory provisions such as this do not invite suit by *anyone*; rather, an "aggrieved" person must have some sort of personal interest in the case. We can hope that the same limiting construction would apply to this law as well. But still, there is a considerable difference between having an interest in a dispute and suffering the sort of injury that typically gives rise to a legal claim.

Consider the following scenario. A public high school civics teacher observes, correctly, that the available social scientific literature shows that the death penalty is imposed in this country in a racially skewed manner that disadvantages African Americans. A student in the class misunderstands the teacher to have said that white jurors in capital cases tend to vote in ways that disadvantage African Americans because they are inherently racist – which the teacher did *not* say. The father of this student, an eager consumer of cable news, asks the student whether her teacher has ever suggested that white persons are inherently racist. The student answers yes and recounts her misunderstanding of what the teacher said. The father then files both a lawsuit against the school district and school, and a complaint about the teacher with the State Board of Education.

Even if the truth were to prevail in court and before the State Board of Education, serious harm would be caused by legal actions such as this. The school and school district would be forced to expend scarce resources defending against the claims. And the teacher would bear the additional psychic and practical burdens of being charged with unethical conduct. Also, consider the particulars of what such a lawsuit might entail. In trying to get to the bottom of what was said, the student would be pitted against her teacher (and vice versa), the student might well be pitted against other students in the class who heard the teacher differently, and faculty colleagues could well be pitted against one another.

What a mess!

We all should see the likely consequences of the divisive concepts law's remedial provisions. Districts, schools, and teachers wishing to sidestep trouble will give wide berth to controversial topics such as the legacy of slavery, contemporary racism, sexism, religious bigotry, and other forms of discrimination, notwithstanding assurances that the discussion of such topics is perfectly permissible, as it surely is. The problem is chill. Discussions of such controversial topics could lead to misunderstandings – a daily occurrence in classrooms across the state – especially by listeners motivated to find statutory violations. This in turn could ground charges of statutory violations brought by merely "aggrieved" (rather than "injured") persons. As a result, many such discussions likely will not happen.

New Hampshire's new divisive concepts law is very likely to chill important conversations from taking place in the state's classrooms. The law should be repealed.