

Senate Education Committee

Pete Mulvey 271-4063

HB 1305-FN, relative to freedom of speech and association at public institutions of higher education.

Hearing Date: April 9, 2024

Time Opened: 10:09 a.m.

Time Closed: 11:00 a.m.

Members of the Committee Present: Senators Ward, Gendreau, Lang and Fenton

Members of the Committee Absent : Senator Prentiss

Bill Analysis: This bill establishes procedures governing freedom of speech and association at public institutions of higher education.

Sponsors:

Rep. Popovici-Muller

Rep. McDonnell

Rep. Lynn

Rep. Read

Rep. Wheeler

Rep. Alexander Jr.

Rep. L. Turcotte

Rep. Cordelli

Sen. Lang

Sen. Murphy

Sen. Birdsell

Who supports the bill: 11 individuals signed in support of HB 1305. Contact committee aide Pete Mulvey for details (peter.mulvey@leg.state.nh.us).

Who opposes the bill: Rep. Hope Damon, Chad Pimentel, Janet Lucas, and Tod Davis.

Who is neutral on the bill: Kathy Provencher.

Summary of testimony:

Representative Bob Lynn

Rockingham – District 17

- Rep. Lynn supported HB 1305-FN as a cosponsor.
- First amendment rights were under attack according to Rep. Lynn, particularly in academia.
- HB 1305-FN dealt with free speech rights, free association rights, and provided remedies for aggrieved individuals.
 - State Colleges and Universities cannot create ‘free speech zones. Public areas of campus must allow free speech, with reasonable time-place-manner restrictions being permitted under particularized reasons.
 - HB 1305-FN would prevent colleges from uninviting speakers on the basis that they may incur protests.

- HB 1305-FN prohibits discrimination against religious, political, or ideological organizations.
- Aggrieved individuals subjected to a violation of HB 1305-FN may pursue injunctive relief, and monetary damages are capped at \$20k.
- HB 1305-FN also provided a cost-of-living clause and conditional coverage of attorney's fees.
- Sen. Fenton asked if religious groups may deny individuals from membership under HB 1305-FN.
 - Rep. Lynn clarified that a hypothetical catholic club may require prospects to be catholic.
- Sen. Fenton suggested religions were open to anyone regardless of affiliation and was concerned that HB 1305-FN would permit discriminatory membership.
 - Rep. Lynn clarified that an interested non- catholic should be allowed to join a hypothetical catholic club and suggested that the intent of HB 1305-FN was to prevent someone explicitly oppositional from joining an organization to undermine it.
- Sen. Lang asked if section III(b) ensured that anyone may apply for an event permits so long as it isn't disruptive to another event scheduled.
 - Rep. Lynn agreed with Sen. Lang's analysis and added that minor protests and short protests were permissible, but large-scale disruptions or competitive events would be a violation.

Lance Kinzer

First Amendment Partnership

- Mr. Kinzer indicated his expertise was regarding HB 1305's provisions regarding association.
- Mr. Kinzer referred to letters from First Liberty and the Christian Legal Society, regarding issues on New Hampshire campuses involving their organizations.
- Both First Liberty and the Christian Legal Society had to retain legal counsel to mitigate their circumstances according to Mr. Kinzer.
- While recent litigation efforts had been won largely by conservative groups, the case law utilized was established in the wake of left-wing anti-war protests.
- Mr. Kinzer referred to the 1972 SCOTUS decision *Healy v. James* and cited it as the precedent prohibiting non-recognition of a student group on a purely ideological basis.
- Mr. Kinzer referred to the 1981 SCOTUS decision *Widmar v. Vincent* and cited it as the precedent establishing parity regarding accessibility and benefits between student organizations.
- Mr. Kinzer referred to the 1995 SCOTUS decision *Rosenberger v. University of Virginia* and cited it as the precedent prohibiting the withholding of student activity fees from a student group manifesting a particular belief system.
- Mr. Kinzer referred to the 2010 SCOTUS decision, *Christian Legal Society v. Martinez*, and cited it as the impetus for nation-wide initiatives reflective of HB 1305.
- Mr. Kinzer elaborated that if a university adopted an 'all-comers' policy, then it was constitutional for them to prohibit membership or leadership qualifications.
- The lack of an all-comers policy would justify non-recognition of student groups according to Mr. Kinzer.
- All-comers policies were rare and were generally unworkable given the implications of the policy; hypothetically, an equality group would be prohibited from barring an avowed homophobe.
- Generally, litigation would not emanate from personal disputes but rather a university's contention with a group's charter or organizational compact and constitution.
- There needed to be language providing license to student groups regarding their own standards to ensure their integrity and purpose.

- Mr. Kinzer believed the solution for contentious or unpopular groups was vigorous protections to enable dialogue and to maintain pluralism.

Tyler Coward

Lead Counsel, Foundation for Individual Rights and Expression (FIRE)

- Mr. Coward maintained that HB 1305 was rooted in constitutional law.
- HB 1305 did not change the legal obligations of state institutions, rather it reiterated and codified SCOTUS decisions.
- FIRE rated Universities on free speech; UNH was positioned well, in third place.
- Mr. Coward believed it was necessary to codify these decisions despite New Hampshire's success as turnover, time, and retirements can change institutions quickly.
- Many states had passed legislation reflective of HB 1305 without an increased litigation threat because universities adopt policies compliant with the law.
- Mr. Coward clarified that the \$20k damage cap was comparatively low, and added that students may still bring uncapped, federal cases forward.
- Sen. Fenton asked if student free speech would remain in the absence of HB 1305.
 - Mr. Coward said public universities were bound to the first amendment with HB 1305 or not.
 - Universities sometimes maintained policies or standards which violated student's rights. Speech codes may be facially unconstitutional, in addition to being unconstitutional in their enforcement as well.
 - HB 1305 stated rights and standards clearly for students, and institutions.

Aubrey Freedman

Bridgewater resident

- Mr. Freedman supported HB 1305 and found the state of free speech on college campuses to be disastrous.
- Mr. Freedman referred to past incidents in which speakers were heckled, disrupted, and contested, which Mr. Freedman maintained was disrespectful to the first amendment.
- Mr. Freedman said UNH should be top of FIREs list, invoking the state motto, 'live free or die'.
- Sweezy v. New Hampshire was referred to by Mr. Freedman.
- The case regarded a Marxist professor targeted by the State attorney general, and the SCOTUS determined that the attorney general was out of order.

Chad Pimentel

General Counsel, University System of New Hampshire (USNH).

- USNH sought to share their concerns regarding HB 1305 and offered various suggestions to the Senate Education Committee.
- Mr. Pimentel provided a letter from Paul Dean, Chief of Campus Police, in addition to a version of HB 1305 to the specifications of the University System.
- USNHs commitment to free speech was reiterated.
- The constitution is directly cited in the USNH policy for outside speakers.
- Mr. Pimentel suggested that the rating is not necessarily an indication of policy, but an indication of student comfortability with speaking. New Hampshire's good standing would imply that an adjustment may act as a detriment.
- Mr. Pimentel characterized HB 1305 as a solution in search of a problem; Free Speech Zones and all-comers policies as referred to by Rep. Lynn were completely irrelevant.

- HB 1305 did not restate the first amendment; a court would question the bill's verbiage and length given its supposed purpose of simply codifying and reiterating the first amendment as it relates to college campuses.
- Mr. Pimentel suggested amending line 11 of the first page; the definition of campus community included invited guests, which would include, and bolster individuals completely divorced from students.
- Section III presented a challenge; the language was consistent with case law, however, the definition used in HB 1305 for material and substantial disruption was unusually specific to hecklers vetoes.
 - The narrower definition for a disruption could implicate a school's ability to regulate other disruptions.
 - Mr. Pimentel suggested insertion of 'permitted expressive activity, or the actual functioning of the university' to line 35 of page two.
- HB 1305 has a unique definition for harassment on line 7 of page three, which was inconsistent with state and federal definitions.
- Mr. Pimentel suggested the effective date be adjusted to August 2025, as opposed to January, to align with the academic calendar.
- Sen. Fenton asked if Mr. Pimentel would support HB 1305 with the aforementioned changes.
 - Mr. Pimentel suggested it would be difficult for the USNH to support HB 1305 given their fundamental concerns.
 - Unforeseen consequences were unjustified for a problem which the university system was not known to face.
- Sen. Fenton asked if Mr. Pimentel believed the USNH already satisfied the objectives sought after by HB 1305.
- Mr. Pimentel maintained that the USNH was consistent with the first amendment and the wishes of those who testified in support of HB 1305.

Representative Daniel Popovici-Muller

Rockingham – District 17

- HB 1305 was meant to combat constitutional neglect of first amendment rights.
- Rep. Popovici-Muller maintained that HB 1305 received largely bipartisan support in the House of Representatives and only faced oppositional testimony from USNH regarding language.
- HB 1305 provided equal protection and was supported by FIRE and the ACLU of NH.
- The University of Pennsylvania and UC Berkley's FIRE rankings fluctuated, necessitating HB 1305.
- Rep. Popovici-Muller believed that restrictive admissions, and athletic try-outs were prevalent examples of denying membership at universities. There were some necessary, and legal forms of selection for ideal functioning of associations.
- Rep. Popovici-Muller found that all-comers policies may negate association rights. Although the USNH had maintained it has no intent to pursue such a policy, turnover, and political pressure were variables which justified HB 1305.
- Rep. Popovici-Muller clarified that disruptions to operations were addressed in section III of HB 1305.
- Senator Gendreau asked Mr. Coward and Mr. Kinzer to share their thoughts on the University System's Testimony.
- Mr. Kinzer said USNHs recommended changes do not impact student association provisions in HB 1305.
- Mr. Coward reiterated that disruptions and invited guests were addressed in section III.
- Mr. Coward contested USNH's understanding of section III.

- Mr. Coward clarified that the definition of harassment utilized by HB 1305 as amended was the product of a compromise and added that Universities may maintain harassment policies consistent with state or federal law.
- Mr. Coward did not see a reason to adjust the effective date and found many of the suggested changes unnecessary.

Kathy Provencher

Chief Administrative Officer, Vice Chancellor of Finance, University System of New Hampshire.

- A gathering of fewer than 25 individuals did not require a permit, however time and place restrictions still applied for gatherings. Invited guests, namely members of the public seeking to protest or distribute literature, were indeed required to seek a permit.
- In 2023, UNH approved 201/202 permits. Ms. Provencher clarified that the last permit was rejected because the petitioner sought to hang a flag in the Whittemore Arena.

PM

Date Hearing Report completed: April 12, 2024