

WRITTEN TESTIMONY IN OPPOSITION TO HB 1522

House Human Services Committee on House Bill 1522

Date of Hearing: January 24, 2023 9:45 a.m.

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This written testimony is presented in opposition to HB 1522, which outright discriminates against the transgender and non-binary communities, violates the rights of students to a free and appropriate education, and is a violation of every North Dakotans' right to free speech. It is an overreach of government authority into the private matters of its citizens.

This proposed legislation denies children their right to a free and appropriate education as it would make being mis-gendered a condition of their education, which is discriminatory, harmful, and intolerable. Article VII, Section 1 of the North Dakota Constitution declares that a free education is necessary for all children of the State of North Dakota and must be "free from sectarian control."

This bill violates several federal and state constitutional rights of its citizenry. The US and the State Constitutions take precedent over any legislative actions.

North Dakota Constitution Article I, Section 1 states: "All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

North Dakota law and federal law prohibit discrimination based upon sex. The North Dakota Human Rights Act prohibits discrimination based upon sex. Title VII of the Civil Rights Act prohibits discrimination based upon sex, this includes gender identity. President Biden issued an executive order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation which states "all persons should receive equal treatment under the law, no matter their gender identity or sexual orientation." This law requires individuals to violate federal law.

The right to free speech belongs to every citizen of the State of North Dakota. Our Constitution states: "Every man may freely write, speak and publish his opinions on all subjects, being responsible for the abuse of that privilege." The First Amendment prohibits the abrogation of free speech. Everyone has the right to speak freely, without repercussions, absent the language falling under hate speech, obscenity, child pornography, defamation, or incitement to violence and true threats of violence. Any restriction of free speech must be reasonable, content-neutral, viewpoint-neutral, and narrowly tailored to satisfy a significant institutional interest.

This proposal also violates the privileges and immunities clause. North Dakota Constitution. Article I, Section 21 states: No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens." This proposed legislation allows straight and binary individuals privileges, which transgender and non-binary individuals are not allowed – participation in North Dakota's education system.

There are already free speech laws on the books in North Dakota that would conflict with this proposed legislation. The State Board of Higher education has a policy that allows students and faculty free speech. Students cannot be sanctioned for speech unless "the speech or expression is unwelcome, targets the victim on a basis protected under federal, state, or local law, and is so severe, pervasive, and objectively offensive that a student effectively is denied equal access to educational opportunities or benefits provided by the

institution.” Higher education institutions are to promote “a welcoming, inclusive environment.” This legislation flies in this legislation allowing students and faculty to have free speech at institutions of higher education, which of course receive state funding. It will require these institutions and their faculties to potentially violate other state laws. It also makes the jobs of teachers everywhere more difficult. Teachers need support, not more legislation on what they can and cannot teach.

Furhtermore, North Dakota Administrative Code 75.5-02-06.1 prevents social workers, many of whom are school counselors, or therapists from engaging in conversion therapy. This law could very well cause social workers to violate their ethical duties as outlined in the administrative code.

Use of preferred pronouns improves the mental health of transgender and non-binary individuals. A supportive and affirmative educational environment lowers suicide attempts.

This proposed legislation also includes a private right of action by other parents in the school who attends school with a transgender or non-binary student. There is no purpose in a private right of action by a parent against their child’s classmate for the simple reason that they are transgender or non-binary. This engenders hatred and sows contempt in the school. It teaches intolerance, not love for your fellow mankind. There is no harm to other parties when you address someone with their preferred pronouns. The only harm involved in this proposed legislation is the prohibition of providing gender-affirming support to the transgender and non-binary community.

This proposed private right of action also includes exemplary damages up to \$500,000. This is excessive and an egregious use of power to target an at-risk community and does not comply with North Dakota law in regard to exemplary damages. It appears to be an attempt to silence a community. Under North Dakota law, exemplary damages are awarded in order to punish an individual (or entity).¹ It reserved for those extreme situations where there is a breach of an obligation, and it must be proved by “clear and convincing evidence of oppression, fraud, or actual malice.”² Exemplary damages are not automatic and allowed only if there are compensatory damages.³ Exemplary damages are limited by North Dakota law to “two times the amount of compensatory damages or two hundred fifty thousand dollars, whichever is greater.”⁴ Also, when determining exemplary damages, the following items must be considered:

- a. Whether there is a reasonable relationship between the exemplary damage award claimed and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred;
- b. The degree of reprehensibility of the defendant's conduct and the duration of that conduct; and
- c. Any of the following factors as to which evidence is presented:
 - (1) The defendant's awareness of and any concealment of the conduct;
 - (2) The profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; and
 - (3) Criminal sanctions imposed on the defendant for the same conduct that is the basis for the exemplary damage claim, these to be taken into account if offered in mitigation of the exemplary damage award.⁵

¹ N.D.C.C. § 32-03.2-11(1)

² N.D.C.C. §§ 32-03.2-11(1), (5)

³ N.D.C.C. §§ 32-03.2-11(2), (4)

⁴ N.D.C.C. § 32-03.2-11 (4)

⁵ N.D.C.C. § 32-03.2-11(5)

This proposed legislation will put this section at odds with the longstanding exemplary damages standards already on the books in North Dakota. The legislation does not meet the standards for exemplary damages on its own so it cannot stand.

There is no clear purpose for this legislation, other than to harass and further terrorize the transgender and non-binary community in North Dakota, a community that already suffers from higher rates of suicide and harassment. Affirming individual's preferred pronouns lowers the risk of suicide and self-harming. This legislation will further marginalize transgender and non-binary individuals, putting their mental health at risk.

Transgender and non-binary individuals need compassion and inclusion, not hatred and exclusion. You cannot erase the existence of transgender and non-binary individuals via legislation. They have and will always exist. All people within the State of North Dakota deserve dignity and respect and to have their constitutional rights intact.

Please oppose HB 1522.

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