



FIRE

Foundation for Individual
Rights and Expression

March 10, 2023

Senate Education Committee
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

RE: FIRE's concerns regarding HB 1446

Dear Chairman Elkin and Members of the Senate Education Committee,

My name is Joe Cohn and I am the Legislative and Policy Director for the Foundation for Individual Rights and Expression (FIRE), a nonpartisan, nonprofit organization dedicated to protecting the free speech and due process rights of students and faculty at our nation's institutions of higher education. You may remember FIRE from our previous work with the North Dakota legislature on the state's [campus free speech](#) and [campus due process](#) legislation — two bills that have made North Dakota a national leader in campus civil liberties.

FIRE does not take a position on specific tenure policies or on whether it should be guaranteed under state law. However, we recognize that tenure has historically played a central role in protecting the academic freedom of faculty members across our nation.

Earlier this session, my colleague Greg Gonzalez wrote members of the House of Representatives' Government and Veterans Affairs Committee to express concerns FIRE had regarding the original language of [HB 1446](#). And while we are grateful to the bill sponsor and to the committee for amending the bill in response to most of our concerns, at least one of our concerns remains unaddressed. Moreover, we were persuaded by others testifying in opposition that the bill presented additional constitutional problems that we did not initially raise.

As we wrote to the Committee:

FIRE understands the desire to ensure that public dollars spent on higher education are utilized wisely to the benefit of the students enrolled and the state. However, it is important to remember that higher education loses its value when faculty do not have the academic freedom necessary to teach and conduct research that enriches our understanding of the world, free from political interference. Similarly, American society as a whole suffers when faculty do not enjoy the First Amendment right to criticize campus bureaucracies.

One unaddressed concern is that the tenure review in the proposal would change that process from one of shared governance and faculty participation to a process entirely controlled by the president of each institution. When we wrote the committee, we noted that this revision runs the risk of injecting politics into the tenure review process because the presidents of the institutions are appointed by the State Board of Higher Education – who are themselves political appointees of the governor.

An additional problem that was highlighted by others during opponent testimony was that this new procedure is entirely lacking in due process. There are no procedural protections set forth in this legislation – aside from an appeal, which was added on our request. Removing the existing procedural protections violates faculty due process rights, invites violations of academic freedom, and will predictably lead to costly litigation. Therefore, the bill should set forth that during any post tenure review, faculty will retain the procedural protections currently in place, or the bill should explicitly codify those protections.

Another problem is that Section 1(2)(a) obligates tenured faculty to “[c]omply with the policies, procedures, and directives of the institution, the institution’s president and other administrators, the state board of higher education, and the North Dakota university system.” While it is perfectly appropriate to require faculty to comply with policies and procedures, requiring compliance with unspecified “directives” introduces potential free speech problems. The term “directives” is broad and could conceivably encompass unlawful or unconstitutional demands. For instance, FIRE has seen administrators unlawfully order faculty to eliminate disfavored but protected speech from class discussions. This provision should be amended to make clear that faculty are only obligated to follow “lawful directives.”

A final problem remaining in the bill is that several of the criteria used to evaluate whether a faculty member's tenure may be revoked cover factors outside of the faculty member's control or involve variables that are nearly impossible to attribute to the faculty member. For example, Section 1(2)(b) requires faculty members to be evaluated on whether they "[e]ffectively teach and advise a number of students approximately equal to the average campus faculty teaching and advising load." Of course, faculty are oftentimes not in control of their teaching schedules, so they cannot control whether they have an average teaching load. This language must be cut to avoid due process problems.

If there is concern amongst the Legislative Assembly that the academy is lacking in viewpoint diversity, weakening tenure will not solve this problem and may even exacerbate it. After all, it is those who hold minority or dissenting viewpoints who often most need tenure's protections.

FIRE's archives and our [Scholars Under FIRE database](#) demonstrate that threats to faculty rights are a persistent problem affecting faculty of every political persuasion. **Because tenure has proven instrumental to protecting the rights of faculty with dissenting positions, we urge the Committee to reject language that would reduce its effectiveness in safeguarding academic freedom.**

The bill's current language is a vast improvement over the introduced version, but it will still fail to pass constitutional muster until the revisions described above are made. We urge you to amend the bill or vote it down outright. Thank you for your attention to our concerns.

Many thanks,



Joe Cohn
Legislative and Policy Director