

SB 1503
Senate Education Committee
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Chair Schaible and members of the Senate Education Committee: My name is Donna Smith and I serve as the Director of Equal Opportunity & Title IX and Title IX Coordinator at the University of North Dakota. I am here on behalf of the North Dakota University System to provide testimony in opposition to SB 1503.

My department is charged with overseeing UND's compliance with state and federal laws related to discrimination and harassment based upon protected characteristics such as race, sex, national origin, color, disability, and others. Our department takes the lead in drafting UND's policies prohibiting discrimination and harassment. We receive and resolve reports of employee-on-employee and employee-on-student harassment and collaborate with UND's Office of Student Rights & Responsibilities to receive and resolve reports of student-on-student harassment. I was asked to provide testimony from the perspective of a university practitioner whose work is directly related to free speech on our campus.

My concerns regarding SB 1503 fall into two categories. First, the bill is not necessary because most of the bill's provisions are already addressed by SBHE and institutional policies. Second, the narrower definitions contained in the bill conflict with other federal regulations, would impair institutions' ability to react swiftly to any changes in federal law, and would prevent institutions from taking action to address some criminal activity.

Many of the amendments contained in SB 1503 are already addressed by SBHE 503.1 and recent proposed changes to that policy. I will not discuss those specifically here, as other representatives of the NDUS will address the specifics of SBHE 503.1. However, because the concerns sought to be addressed by SB 1503 are already addressed by SBHE 503.1, the proposed legislation is redundant and not necessary.

In addition, NDUS and its institutions do not have a history of violating or infringing upon student or employee free expression rights. NDUS found no formal complaints of free speech violations at NDUS institutions in at least 12 years. NDUS and its institutions have demonstrated that we take these issues seriously and manage them appropriately and lawfully. We can be trusted to continue doing that in the future.

If there are particular concerns to be addressed, NDUS and its campuses are capable of responding to those concerns through the structure of our already existing policies. No additional legislation is required.

UND has worked with the Foundation for Individual Rights in Education (FIRE) to review its policies and has held a "green light" rating for several years. See <https://www.thefire.org/>. FIRE initially reviewed our Code of Student Life, discrimination and harassment policy, and websites

before giving the green light rating. Following the 2020 changes to Title IX regulations, we worked with FIRE again as we amended our harassment and Title IX-related policies. We have found FIRE easy to work with and responsive to any questions. FIRE's Azhar Majeed recently wrote in an email to me:

Also, you may be aware that there are legislative discussions taking place in ND regarding campus free speech, and my colleagues in FIRE's legislative department, to the extent they are involved, have been extolling the virtues of UND's green light rating (which is a good model for other schools in the state to follow).

NDUS has also worked with FIRE recently and passed FIRE's resources along to other campuses. These efforts should demonstrate the commitment of NDUS and its campuses to protect free speech. While not all schools have a green light rating, the framework and partnerships are present to build upon the work that has already begun. The policies are in place. SB 1503 is unnecessary.

Second, the definition of harassment contained in proposed section 4(a) of SB1503 is quite narrow and could actually prevent our universities from responding to some criminal activity or place us in conflict with federal law.

Limiting actionable conduct to that which is severe and pervasive conflicts with a school's obligations under Title VI of the Civil Rights Act of 1964. The Department of Education Office for Civil Rights (OCR), which enforces civil rights in educational institutions, requires institutions receiving federal funding to respond to racial and national origin harassment that is "sufficiently serious to deny or limit a student's ability to participate in or benefit from the [school's] education programs and activities (i.e., creates a hostile environment)." [OCR Race and National Origin Discrimination](#)). Complying with SB 1503 and its narrow definition of harassment would mean an institution would not be able to respond to behavior as required by OCR under its broader definition. The university would then have to choose between complying with state law or federal law.

The proposed definition is identical to the definition of sexual harassment found in the recently revised Title IX regulations. However, the Title IX definition is not required to be applied to other forms of harassment. The Title IX regulations make it clear that schools are permitted to enact other policies to respond to conduct that does not meet the narrower Title IX definition. There is no prohibition against utilizing a broader definition outside the scope of Title IX.

In addition, SB 1503's proposed definition of actionable speech does not allow for a campus to respond to incidents of criminal harassment, criminal menacing, or stalking, which have different definitions under North Dakota law. This would leave universities unable to sanction a student for such dangerous conduct.

Finally, SB 1503 may negatively impact NDUS' and campuses' ability to respond to changes in federal law in the next two years. It is likely that federal harassment laws may change before the next legislative session, leaving universities with a choice between violating federal law and state law. On March 8, 2021, President Biden issued an Executive Order directing the Secretary

of Education to review Title IX regulations, issue new guidance, and consider changes to the regulations. The Biden administration is also expected to make changes to religious and other civil rights protections. NDUS and its institutions need to have the flexibility to adjust and amend our policies in response to federal statutory or case law changes between legislative sessions. The proposed legislation would make that difficult or impossible and could result in a conflict between state and federal law.

I am fortunate to work with colleagues who are passionate about students and our universities. We support freedom of speech and expression for everyone on our campuses. We work hard every day not only to protect the rights of our students and employees but also to ensure that our universities remain in compliance with the myriad state and federal laws that govern us. This bill is not necessary and would make our work much more difficult. If there are concerns to be addressed, I am confident that NDUS and its institutions can partner with this Committee, and others, to find a resolution.

I respectfully encourage a “do not pass” on SB 1503.