

Representing the Diocese of Fargo
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October 25, 2021

Jennifer Rogers
Policy Officer
University of North Dakota
Twamley Hall Room 314
264 Centennial Dr Stop 8378
Grand Forks, ND 58202-8378

Dear Ms. Rogers:

On behalf of the North Dakota Catholic Conference, I am submitting these concerns about the proposed Gender Inclusion policy for the University of North Dakota (UND). The conference represents the Roman Catholic bishops of North Dakota on public policy matters. As such, we seek engagement in public policy matters that are not only a concern for the Catholic Church, but also for its adherents, all people of faith, and the common good of the state.

Although the official deadline for submitting comments by the university community passed on October 22, 2021, we hope that you give serious consideration to these concerns and others that you may receive from outside the immediate university community after that date. The proposed policy raises serious questions, many of them with legal implications. We hope the university acknowledges that it does not operate in isolation and that the people of North Dakota, state legislators, and community and faith organizations around the state have a legitimate voice in this matter.

The proposed policy raises a number of issues, but this letter focuses primarily on its infringement upon the speech, religious, and association rights of students and student organizations.

At its core, the proposed policy requires the use of preferred pronouns, acceptance of expressed gender identity, and the rejection of any assumption of a binary, or biological-based gender. The scope of the proposal is quite expansive, covering not only faculty and staff, but students, student organizations, and even campus visitors. Failure to adhere to the policy would be considered a violation of the UND's Discrimination and Harassment policy, with corresponding penalties.

We recognize that everyone should be treated with respect and that the university has a role in facilitating a respectful learning environment. However, this proposal goes beyond setting mere rules for administrative tasks. Indeed, it embraces and demands acceptance of a particular ideology about gender and language that infringes upon free speech and religious rights.

We are particularly concerned about the proposal's lack of any exemption for student organizations. Fraternities and sororities are provided a limited exemption, but not student organizations. This means that UND would require student organizations to use preferred pronouns, accept expressed genders, and reject binary understandings of gender *even if doing so conflicted with their sincerely held religious beliefs*.

Students and faculty do not lose their First Amendment rights when they enter the doors of a state university. This is well-established constitutional law. The proposed policy by UND amounts to unconstitutionally compelling speech and a particular viewpoint.

The case of *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021) is particularly instructive in this regard. In that case, the court found that a very similar policy violated a professor's free speech and religious rights under the First Amendment. Notably, it rejected the notion that pronoun policies, as applied to the speech of faculty, are mere administrative practices. It stated: "[T]itles and pronouns carry a message. The university recognizes that and wants its professors to use pronouns to communicate a message: People can have a gender identity inconsistent with their sex at birth." *Id.* at 507.

The proposed policy for UND compels the same message. It mandates faculty, students, student organizations, and even campus visitors to accept and convey a particular message. As the court in *Meriwether* noted, this violates a persons' free speech and religious freedom rights under the First Amendment.

It is also important to note that the First Amendment rights of faculty at a public university are not as expansive as those belonging to the students. If a substantially similar policy violated a professor's rights in *Meriwether*, we can safely conclude that UND's proposal would violate the rights of its students and student organizations.

The proposed policy also appears to violate House Bill 1503 from the recent legislative session. The expressed purpose — and requirement — of HB 1503, now codified as North Dakota Century Code chapter 15-10.4, is to "protect students' rights to free speech, assembly, and expression" and only limit those rights through "reasonable and constitutional time, place, and manner restrictions."

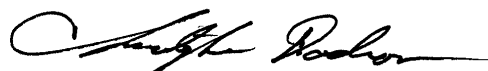
The proposed policy goes beyond those permitted limitations. Indeed, it reaches even into the speech and expression of students acting within their religious student organizations. Although the potential penalties of the proposed policy are not clear, we note that N.D.C.C. 15-10.4-02(5)(c) states: "An institution may not deny student activity fee funding to a student organization based on the viewpoints the student organization advocates."

Pursuant to HB 1503, the State Board of Higher Education (SBHE) adopted Policy 503.1 – Student Free Speech and Expression on June 29 of this year. The proposed UND policy appears to conflict with the SBHE policy in several respects, including sections 2(b), (d), (e) and (g), and section 4(a).

The common thread of all these violations, from the First Amendment to SBHE's own policies, is the proposal's failure to recognize that the mandates are more than managerial tasks internal to the university system's administration. Instead, they compel the use of preferred pronouns, mandate acceptance of expressed genders, and suppress any view of gender other than the university's. As such the proposal poses serious constitutional violations, violates HB 1503, and contradicts the SBHE's own policies. We respectfully request that UND reject the proposed Gender Inclusion policy.

Thank you for your consideration.

Sincerely,



Christopher Dodson
Executive Director
General Counsel
North Dakota Catholic Conference

cc:

Donna Smith
Jed Shivers
Andrew Armacost
Mark R. Hagerott
State Board of Higher Education