SLF
SOUTHEASTERN LEGAL FOUNDATION

560 W. Crossville Rd., Ste. 104
Roswell, Georgia 30075
www.SLFLiberty.org

May 8, 2025

VIA EMAIL

Michael P. Shannon
President
University of North Georgia
president@ung.edu

Re: Title IX and Gender Discrimination Policies: Impact on Free Speech

Dear Dr. Shannon:

Southeastern Legal Foundation (SLF), founded in 1976, is an Atlanta-based national, nonprofit legal organization that works to Rebuild the American Republic through litigation and public education. Through its 1A Project, SLF educates students about First Amendment rights on college campuses and advocates for free speech on college campuses. SLF also drafts legislative models and educates the public on key policy issues. SLF appears frequently before the Supreme Court and regularly represents college students and student organizations challenging university policies that infringe on First Amendment rights. We have also testified before the Georgia General Assembly regarding college students' First Amendment rights.

We write to you today on behalf of SLF and our client, Young America's Foundation (YAF), regarding University of North Georgia's (UNG) Title IX and Gender Discrimination policies that define "sex" to include gender identity and sexual orientation. YAF is the premiere organization for young conservative activists with chapters across the nation, including at UNG. UNG's policies directly conflict with the Constitution, America's civil rights laws, and President Trump's recent executive orders that prohibit men from playing in women's sports and reinforce statutory Title IX protections, and they put students—YAF members or not—at risk of unfair discipline.

While one may expect to see policies that punish individuals for their belief in biological sex out of colleges in states like California, Maine, and even Colorado, the continued existence of policies which adopt and promote concepts of radical gender ideology in the state of Georgia is shocking, especially after Governor Kemp signed into law the widely supported Riley Gaines Act.

UNG's policies raise serious First Amendment concerns and leave students who believe in the biological reality that only two sexes exist wondering when and how they will punished for speaking the truth. Will they be punished for speaking up when a man who "identifies" as a woman undresses in the women's locker room? Or for using biologically correct pronouns? Or for simply stating that men shouldn't compete in women's sports? UNG's policies are both vague and

overbroad, causing students to remain silent. Chilling speech is unconstitutional. So is compelling speech, which is exactly what happens every day when students are faced with punishment should they refuse to use incorrect pronouns or names. A college campus should be a "marketplace of ideas" where students are exposed "to th[e] robust exchange of ideas which discovers truth"[1]—not a place where students must conform to falsehoods about transgenderism.

We recognize that many educational institutions are currently reviewing their policies following (1) recent litigation resulting in the vacatur of the Biden Title IX Re-Write entitled *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33474 (Apr. 29, 2024),[2] (2) executive orders and presidential actions issued by President Donald J. Trump;[3] and (3) a "Dear Colleague" letter issued by the United States Department of Education.[4] SLF is also aware that UNG is covered by a preliminary injunction issued by the District of Kansas that blocks the Department of Education from enforcing the Biden-era Final Rule.[5]

SLF and YAF write this letter to seek reassurance that UNG will protect and promote the First Amendment free speech and freedom of expression rights of students at UNG. We trust that UNG was unaware that these policies remain, that this letter provides UNG some guidance in its reexamination of its policies, and that UNG will swiftly work to repeal its Gender Discrimination policy and to bring its Title IX policy in line with current law and constitutional principles.

Factual Background

In April 2024, the Department of Education, under the Biden Administration, enacted a Final Rule entitled *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*. This Rule defined "sex" for purposes of Title IX to include gender identity and transgender status.[6] It also amended the definitions governing "sexual harassment." Before the Final Rule, Department of Education regulations defined sexual harassment to include "conduct that is so severe, pervasive, *and* objectively offensive that it *effectively denies* a person equal access to education."[7] The Final Rule employed a less-demanding standard and defined sexual harassment to include "conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe *or* pervasive this it *limits or denies* a person's ability to participate in or benefit from the recipient's education program or

[1] *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).
[2] *See Tennessee v. Cardona*, No. 2:24-072-DCR, 2025 U.S. Dist. LEXIS 6197 (E.D. Ky. Jan. 9, 2025); *see also Caroll Indep. Sch. Dist. v. U.S. Dep't of Educ.*, Civil Action No. 4:24-cv-00461-O, Order (N.D. Tex. Feb. 19, 2025), ECF No. 86.
[3] *See* Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, Executive Order 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025); *see also* Keeping Men Out of Women's Sports, Executive Order 14201, 90 Fed. Reg. 9279 (Feb. 5, 2025).
[4] Dear Colleague Letter, United States Department of Education Office for Civil Rights (Feb. 4, 2025) (available at: https://www.ed.gov/media/document/title-ix-enforcement-directive-dcl-109477.pdf).
[5] *See Kansas v. United States Dep't of Educ.*, 739 F. Supp. 3d 902 (D. Kan. 2024).
[6] *See* 89 Fed. Reg. at 33476, 33886–87.
[7] *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026, 30030, 30036 (May 19, 2020) (emphasis added).

activity."[8] Commentary to the Final Rule cited non-precedential legal authority for the proposition that using biological pronouns when identifying a transgender individual could qualify as a form of sexual harassment.[9]

In July 2024, following publication of the Final Rule, UNG approved the currently-effective version of its Title IX, "Sexual Misconduct Policy."[10] Similar to the Final Rule, the Sexual Misconduct Policy defines "sex" to include "gender stereotypes," while also extending discrimination protection to individuals based on their "sexual orientation" and "gender-related identity."[11] A page on UNG's website under its Title IX umbrella and entitled "Gender Discrimination" defines gender discrimination to "include[] harassment and discrimination based on sex, gender identity, or gender expression."[12] The page goes on to provide examples of speech that qualifies as gender discrimination, including (1) "[u]sing crude and harmful language based on their gender or gender expression," (2) "hearing hostile remarks about people of a certain gender identity"; and (3) "[b]eing intentionally or repeatedly called by a name or referred to as a different gender that you don't identify with – such as when a transgender man is called by his dead name, or referred to as 'Miss.'"[13] The second of these examples suggests that one is the victim of gender discrimination based on gender-related identity without being the target of comments and without necessarily even identifying as transgender. The gender discrimination page also has a dropdown tab entitled "All Gender Restrooms," which states "UNG is a gender diverse community and invites individuals to choose the restroom they find welcoming and safe."[14]

Analysis

The examples of gender discrimination provided by UNG create an end-run around the "severe, pervasive, and objectively offensive" standard and de facto adopt a standard at or below the "severe or pervasive" standard from the Final Rule, which courts have unanimously enjoined and vacated. Equally problematic, the examples encompass speech that is clearly protected by the First Amendment.

A college campus is the "marketplace of ideas" where students are exposed "to that robust exchange of ideas which discovers truth."[15] Indeed, freedom of speech and academic inquiry are "vital" on college campuses, because only through thoughtful debate and discourse can real education occur.[16] This peculiar environment is why the Supreme Court has often likened students' free speech rights on their campuses to the most firmly guaranteed right of every person to speak

[8] 89 Fed. Reg. at 33884 (emphasis added).
[9] 89 Fed. Reg. at 33516.
[10] Sexual Misconduct Policy, University of North Georgia (July 2024) (available at: https://northgeorgia.policystat.com/policy/15921150/latest/).
[11] *Id.* at §§ II.P, II.Q, III.A.
[12] Gender Discrimination, University of North Georgia (available at: https://ung.edu/title-ix/gender-discrimination.php).
[13] *Id.*
[14] *Id.*
[15] *Keyishian*, 385 U.S. at 603.
[16] *Healy v. James*, 408 U.S. 169, 180 (1972).

their mind on public streets and in public parks.[17] For three reasons, the examples of gender discrimination do not comport with these principles.

1. "Crude" and "hostile" remarks

Examples of gender discrimination and harassment provided on UNG's Title IX webspace include "[u]sing crude and harmful language based on their gender or gender expression," and "hearing hostile remarks about people of a certain gender identity."[18] These examples suffer from vagueness and overbreadth issues. In so doing, they sweep in many forms of protected speech based on the speech offending listeners.

The First and Fourteenth Amendments prohibit unconstitutionally vague restrictions.[19] A restriction is unconstitutionally vague if it "either forbids or requires the doing of an act in terms so vague that [individuals] of common intelligence must necessarily guess at its meaning and differ as to its application."[20] Vague regulations on speech chill not only speech targeted by the regulation but also protected speech in grey zones outside the regulation's intended edges.

The terms used in the gender discrimination examples provided by UNG are vague and sweep in protected speech. "Crude," for instance, is defined as "rude and offensive."[21] "Hostile," meanwhile, is defined as "showing strong dislike; unfriendly."[22] But legal precedent is clear that speech which is offensive and expresses dislike for a position or group, including name-calling, is protected under the First Amendment.[23]

Even in the K-12 setting, where courts have said First Amendment interests may be weaker than the university setting, "[t]here is . . . no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs."[24] For this reason, Title IX does not prohibit "simple acts of teasing and name-calling among school children, even where these comments target difference in gender."[25]

Controlling precedent from the United States Court of Appeals for the Eleventh Circuit is equally clear. In *Speech First, Inc. v. Cartwright*, the Eleventh Circuit confronted a university

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[17] *See Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802–03 (1985); *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981).
[18] Gender Discrimination, University of North Georgia (available at: https://ung.edu/title-ix/gender-discrimination.php).
[19] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.").
[20] *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1925).
[21] Cambridge Dictionary, "Crude," available at: CRUDE | English meaning - Cambridge Dictionary
[22] Cambridge Dictionary, "Hostile," available at: HOSTILE | English meaning - Cambridge Dictionary
[23] *Papish v. Board of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973) ("We think *Healy* [*v. James*, 408 U.S. 169 (1972),] makes it clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name along of 'conventions of decency.'"); *see also Speech First Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022) (discussed below).
[24] *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (Alito, J., authoring).
[25] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 652 (1999).

discriminatory-harassment policy that provided protection based on "gender identity or expression" and prohibited "name-calling" and "conduct that may be humiliating."[26] The court held that the policy "objectively chills speech because its operation would cause a reasonable student to fear expressing potentially unpopular beliefs."[27] Likewise, because of the "policy's astonishing breadth . . . and slipperiness" the court indicated that it was "clear that a reasonable student could fear that his speech would get him crossways with the University, and that he'd be better off just keeping his mouth shut."[28] Included among the protected speech the court concluded was swept up by the policy was the statement that "a man cannot become a woman because he 'feels' like one."[29] Yet it is these very same statements that UNG sweeps into its definition of gender discrimination by prohibiting "crude" and "hostile" remarks.

2. "Hearing hostile remarks about people of a certain gender identity"

UNG's Gender Discrimination webpage's third example of discrimination states "[b]eing insulted, called derogatory names or slurs because of your gender identity, or hearing hostile remarks about people of a certain gender identity."[30] Aside from this example violating the First Amendment because it restricts speech which is merely "hostile," it is not at all apparent how hearing an unfriendly remark or a remark expressing dislike for a group would ever effectively deny a person equal access to education. This is particularly true where the example encompasses not only hearing such a remark about the gender identity to which the listener belongs but is also written so broadly as to reach remarks about gender identities to which the listener does not belong. Thus, this example at least gives the impression to speakers that it restricts any and every opposing comment one might make about gender identity and transgenderism. For instance, where UNG has a restroom-of-choice policy, a female student likely shows strong dislike and expresses an "unfriendly" opinion by voicing privacy and safety concerns about having to share bathroom facilities with a biological male. This likelihood, and the possibility of university action enforcing the Gender Discrimination policy flowing therefrom, stifles debate and chills speech.

3. Referring to an individual by a gender other than the one with which they identify

The final example describes gender discrimination to include "[b]eing intentionally or repeatedly called by a name or referred to as a different gender that you don't identify with – such as when a transgender man is called by his dead name, or referred to as "Miss."[31] This example suffers from two problems.

First, by using "intentionally" and the disjunctive "or," the example advises a student that he violates UNG's gender discrimination policy if he ever knowingly uses a biologically accurate pronoun to identify a transgender individual. This dubiously suggests that a single intentional

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[26] 32 F.4th at 1114 (quoting University of Central Florida policy).
[27] *Id.* at 1121.
[28] *Id.* at 1122.
[29] *Id.* at 1125.
[30] Gender Discrimination, University of North Georgia (available at: https://ung.edu/title-ix/gender-discrimination.php).
[31] *Id.*

instance of a fellow student refusing to use a "preferred pronoun" effectively denies a transgender individual equal access to education. Such was never the intent of Title IX and does not comport with any legal understanding of discrimination. Rather, UNG's approach turns trivial incidents into investigations that chill speech.

Second, and more importantly, "pronouns can and do convey a powerful message implicating a sensitive topic of public concern" and are part of a "passionate political and social debate."[32] The use of "preferred pronouns" is an acknowledgment that individuals can change their sex.[33] Therefore, "the premise that gender identity is an idea 'embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view."[34] Notably, a review of Eleventh Circuit opinions on transgender matters reveals that that court has avoided using "preferred pronouns" in its opinions, save when quoting material from the record.[35] And while a court with the luxury of time and a pen may issue an opinion without using pronouns, it is unreasonable and implausible to expect individuals in everyday conversation to always avoid the use of pronouns. As a result, UNG's gender discrimination policy has the effect of compelling a student to speak on a political topic by using "preferred pronouns" at the threat of investigation, and the reputational and academic consequences that may flow therefrom. But compelling speech on a topic of political and social debate violates the First Amendment.[36]

Conclusion

Clarifications and revisions to UNG's current policies addressing Title IX and Gender Discrimination are necessary so students can freely exercise their First Amendment rights to the fullest extent. As UNG engages in this process, SLF recognizes that First Amendment jurisprudence is certainly complex. SLF's attorneys stand ready to assist UNG as it navigates these laws. Please do not hesitate to contact us for further guidance.

Sincerely,

Kimberly S. Hermann

Kimberly S. Hermann
Executive Director
Southeastern Legal Foundation

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[32] *Vlaming v. W. Point Sch. Bd.*, 302 Va. 504, 527 (Va. 2023) (quoting *Meriwether v. Hartop*, 992 F.3d 492, 508 (6th Cir. 2021)).
[33] *Meriwether*, 992 F.3d at 510.
[34] *Id.* (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000)); *see also Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658, 667 (8th Cir. 2023).
[35] *See, e.g.*, *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022).
[36] *See 303 Creative, LLC v. Elenis*, 600 U.S. 570, 586 (2023) ("[T]he government may not compel a person to speak its own preferred message." (citing *Tinker v. Des Moines Indp. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969)); *Janus v. AFSCME, Council 31*, 585 U.S. 878, 892 (2018) ("Compelling individuals to mouth support for views they find objectionable violates th[e] cardinal constitutional command [that the freedom of expression includes the right to refrain from speaking], and in most contexts, any such effort would be universally condemned.").